

**MONITORING OF THE LAW  
ENFORCEMENT PRACTICE  
OF THE PREVIOUS YEARS  
IN THE FIELD OF PROTECTION  
OF CIVIL RIGHTS**



## FOREWORD

The monitoring of human rights observance is a long-established practice for Moscow Helsinki Group. This monitoring helps to give public expression to the flagrant abuse of justice and to constrain to a certain extent arbitrary decision making by authorities.

During the period of 2012 to 2013, certain laws concerning civil rights were enacted in Russia which caused deep concern for civil society about constitutional rights in general. For the first time, we as human rights defenders are facing a dilemma: on the one hand we must observe the law, and on the other we unable to such laws that, in particular, force us to get registered as foreign agents. Such law is contrary to all principles of rights.

In autumn 2012, at the All-Russia Conference of Civil Society Organizations, a common position was taken by participants to refuse to get registered as foreign agents. To tell the truth, I doubted whether all organizations involved in matters of civil society would be able to hold out. It is gratifying to know that only one small organization dealing with competition issues in the CIS ultimately got registered. We managed to hold out despite the barrage of prosecutor's investigations that hammered the existing organizations in 2013. The GOLOS Association was one organization whose operations were suspended because of their refusal to get registered.

It was during this dramatic situation that we launched our project "Monitoring of the law enforcement practice of previous years in the field of protection of civil rights". We decided to focus on five laws that had sparked a massive public outcry, namely:

- (a) Federal Law No.65-FZ "On the introduction of amendments to the Code of the Russian Federation of Administrative Violations and the Federal Law "On meetings, rallies, demonstrations, processions and picketing" dated June 8, 2012;
- (b) Federal Law No.121-FZ "On the introduction of amendments to certain legislative instruments of the Russian Federation to the extent of regulation of activities of non-profit organizations fulfilling the function of a foreign agency" dated July 20, 2012;
- (c) Federal Law No.139-FZ "On the introduction of amendments to the Federal Law "On protection of children from information impairing their health and development" and certain legislative instruments of the Russian Federation" dated July 28, 2012;
- (d) Federal Law No.141-FZ "On the introduction of amendments to the Criminal Code of the Russian Federation and certain legislative instruments of the Russian Federation" dated July 28, 2012; and
- (e) Federal Law No.135-FZ "On the introduction of amendments to Article 5 of the Federal Law "On protection of children from information impairing their health and development" and certain legislative instruments of the Russian Federation with the purpose of protection of children from the information promoting the negation of traditional family values" dated June 29, 2013; as well as regional acts against the so called propaganda of homosexuality.

We wanted not only to collect data but also draw the attention to the decision makers behind them.

Even the President has admitted that amendments to the laws concerning NGOs are required. Hopefully, this will happen as soon as possible and with the participation of representatives of those organisations working in the field of civil rights

*Lyudmila Alekseyeva,  
Head of the Moscow Helsinki Group*

## ABOUT THE PROJECT

In 2011—2013, a number of legislative instruments were enacted in the Russian Federation that fell under special notice on the part of the human rights defenders.

In November 2012, the Moscow Helsinki Group launched the project “Monitoring of the law enforcement practice of the previous years in the field of protection of civil rights”. The plan was to collect unbiased information about the quality of the enacted laws and their practical application. The monitoring was focused on: amendments to the legislation on public events; the law on the regulation of activities of non-profit organizations fulfilling the function of a foreign agent; amendments to the law on protection of children from information impairing their health and development; introduction of criminal liability for defamation; the federal law and regional laws against the “propaganda of homosexuality”.

In order to achieve the set goal MHG engaged experts who conducted the analysis of the laws and other regulatory instruments, as well as their practical implementation, drew certain conclusions and gave recommendations on the adjustment of the laws. In particular, the following persons participated in the project as authors of the expert opinions and reviews:

Damir Gainutdinov, Cand. Sc. (Law), legal analyst of the AGORA Association, experienced in the preparation of analytical reviews, specialist in the field of protection of freedom of the Internet in Russia;

Olga Gnezdilova, attorney, coordinator of the monitoring program of the Inter-regional Human Rights Advocacy Group;

Sergey Shimovolos, lawyer, Chairman of the Nizhny Novgorod Human Rights Society, expert in the field of freedom of assembly;

Valeriy Sozayev, Master of Religious Studies, cultural specialist, expert in the field of rights of sexual minorities;

Sergey Golubok, attorney, expert in the field of rights of sexual minorities;

Dmitriy Kolbasin, Head of Information Department of the AGORA Association, Editorial Director of the Open Information Agency;

Elena Lukyanova, Doctor of Law, professor of the national research university “Higher School of Economics”, Director of the Institute for Monitoring of Law Enforcement Effectiveness, member of the Public Chamber of the Russian Federation.

Within the framework of the project public discussions of the laws and the subordinate legislation took place with the participation of experts, representatives of the legal and human rights advocacy community, members of the Presidential Council for the Development of Civil Society and Human Rights, members of the Public Chamber of the Russian Federation, etc.

For the purpose of prompt informing of all persons concerned the website “Monitoring of the new Russian laws and their administration in the field of protection of human rights” (<http://mhg-monitoring.org>) was developed and launched, where newsletters, expert opinions, publications and reviews are posted now. Some well-known experts were video-interviewed expressly for the said website.

Based on the results of the work performed, this collected volume was prepared including expert opinions, legislation reviews, reviews of the law enforcement practice, as well as the conclusions and recommendations with regard to changes in the legislation and law enforcement.

# REGULATION OF ACTIVITIES OF NON-PROFIT ORGANIZATIONS FULFILLING THE FUNCTIONS OF A FOREIGN AGENT

## RUSSIAN AND INTERNATIONAL LEGISLATION REVIEW

### **1. Preamble**

In July 2012, without any public discussion the State Duma of the Russian Federation railroaded the adoption of amendments to a number of regulatory instruments introducing the term “non-profit organization fulfilling the functions of a foreign agent”, some additional obligations of such organizations, and the administrative and criminal liability, as well as broadened the powers of government authorities in relation to such non-profit organizations (NPOs) <sup>1</sup>. The law came into effect on November 21, and shortly thereafter the amendments to the Code of Administrative Violations (CAV) and the Criminal Code (CC) took effect.

You will find below the arguments as to why these provisions in themselves constitute interference with the freedom of association and contradict the Constitution and the international documents recognized by Russia.

The introduced requirements to NPOs do not pursue a legitimate objective. The quality of the provisions, the possibility of their violent construction and application do not allow to call the enacted act a law. The declared objective of the citizens’ oversight of the activities of NPOs in a democratic society can be achieved through other means, whereas this approach can be understood as nothing but a discriminatory one.

Finally, the right of NPOs to receive foreign funding and influence the national policy is not in any way limited in the international law and does not provide any grounds for such limitation in the Russian law.

### **2. Right to freedom of association**

The right to freedom of association is stipulated in the Russian Constitution, the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as in the International Covenant on Civil and Political Rights. This right may be limited in certain events.

Further on we are going to investigate whether the legislation “on foreign agents” limits the right to freedom of association and whether these limitations contradict the provisions of the Constitution of the Russian Federation and the international documents.

Article 30 of the Russian Constitution establishes: “Everyone shall have the right for association, including the right to establish trade unions for the purpose of protection of their own interests. The freedom of operation of non-governmental associations shall be guaranteed”. Article 55 contains the list of the conditions in which this right may be limited: “3. The rights and freedoms of a human being and citizen may be limited by the federal law solely to the extent required for the purpose of protection of the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other persons, and ensuring of national defense and national security”.

Article 11 of the Convention on the Protection of Human Rights and Fundamental Freedoms says <sup>2</sup>: “1. Everyone shall have the right to freedom of peaceful assembly and association with others, including the right to establish trade unions and join the same for the purpose of protection of their own interests. 2. The exercising of these rights shall not be subject to limitations, except for those provided for in the law and required in a democratic society to serve the interests of national security and public order, for the purpose of prevention of disturbances and crimes, protection of health and morals, or protection of rights and freedoms of other persons”.

Article 22 of the International Covenant on Civil and Political Rights<sup>3</sup> says: “1. Each person shall have the right to freedom of association with others, including the right to establish trade un-

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<sup>1</sup>Federal Law No.121-FZ “On the introduction of amendments to certain legislative instruments of the Russian Federation to the extent of regulation of activities of non-profit organizations fulfilling the functions of a foreign agent” dated 20 July 2012 (hereinafter referred to as FL No.121).

<sup>2</sup>Ratified by Federal Law No.54-FZ “On the ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms and Protocols thereto” dated 30 March 1998.

<sup>3</sup>The Covenant was ratified by Order No.4812-VIII of the Presidium of the Supreme Soviet of the USSR dated September 18, 1973, entered into effect for the USSR on March 23, 1976.

ions and join the same for the purpose of protection of own interests. 2. The exercising of this right shall not be subject to any limitation, except for those provided for in the law and required in a democratic society to serve the interests of national or public security, public order, protection of health and morals of the population, or protection of rights and freedoms of other persons”.

Article 15 of the Constitution of the Russian Federation establishes: “1. The Constitution of the Russian Federation shall take precedence, have direct effect and be applicable in the whole territory of the Russian Federation. Laws and other legal instruments enacted in the Russian Federation shall not contravene the Constitution of the Russian Federation... 4. The universally recognized principles and provisions of the international law and the international treaties of the Russian Federation shall constitute an integral part of its legal system. In the event when any international treaty of the Russian Federation establishes other rules than those provided for in the law the provisions of the said international treaty shall apply”.

The Plenum of the Supreme Court of the Russian Federation expressed its opinion on the priority of the international treaties: “The terms of an effective international treaty of the Russian Federation the consent to the binding effect of which was adopted in form of a federal law shall have priority over the laws of the Russian Federation”<sup>4</sup>.

The Plenum noted: “In accordance with Clause b Part 3 Article 31 of the Vienna Convention, in the interpretation of an international treaty the subsequent practice of application of the law establishing the agreement between the participants with regard to its interpretation shall be taken into consideration along with its context... The Russian Federation as a party to the Convention on the Protection of Human Rights and Fundamental Freedoms recognizes the jurisdiction of the European Court of Human Rights as obligatory in terms of interpretation and application of the Convention and the Protocols thereto in the event of an alleged violation by the Russian Federation of the provisions of these treaties....”

In Russia the activities of NPOs are regulated by the federal laws “On non-profit organizations” (hereinafter referred to as FL “On NPOs”), “On public associations” and other special laws.

Note that the European Court of Human Rights established in the resolution dated April 29, 1999 in the case of Chassagnou and others v. France: “The term “association” has an independent meaning: the qualification in the national law has only a relative value and represents only a simple starting point”. Therefore, it will be deemed that this analysis relates to all NPOs, even if they are established in a form other than public association.

### **3. A few words about FARA**

In the promotion of the laws “on foreign agents” the Russian politicians referred to the provisions of The Foreign Agents Registration Act (FARA)<sup>5</sup> (USA). It should be emphasized that the American legislation has no effect in the territory of Russia, and unlike Russia the USA are not party to the Convention on the Protection of Human Rights and Fundamental Freedoms which regulates in detail the possible limitations of the freedom of association. Thus, from the legal (but, of course, not propagandistic) viewpoint the referral to the American legislation is inconsistent. This argument could be used only if the Russian Federation withdrew from the Council of Europe.

Still, please note that FARA governs the activities of foreign entities as such and does not extend to associations established under the laws of the USA or managed and/or owned by US citizens, while the Russian legislation “on foreign agents” covers non-profit organizations established and registered by the authorities in accordance with the Russian laws and by Russian citizens.

The American law was enacted for the purpose of controlling “lobbyist contacts” on the part of foreigners, by which any oral or written communication is meant with the persons included in the list contained in the laws, including communication using electronic means, in particular telephone conversations, exchange of electronic messages, etc. The Russian law refers not so much to direct contacts with deputies (which is often complicated in our conditions), as to participation in campaigns and shaping of public opinion and, hence, addresses the field of freedom of assembly and the liberty of speech in the first place.

The American act declares a legitimate objective — the protection of national defence, national security and foreign policy, while the Russian law refers to the “intensification of public control”. FARA exempts foreign citizens from registration in the event when their annual income from lobbyist activities does not exceed \$5,000, and foreign entities in the event when their expenditure for lobbyist purposes does not exceed \$20,000 per annum. The Russian legislation is prepared to call a NPOs an agent just for 1 Rouble received from a foreign citizen.

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<sup>4</sup>Clause 8 of Judgment No.5 of the Plenum of the Supreme Court of the Russian Federation “On the application by courts of general jurisdiction of the universally recognized principles and provisions of the international law and the international treaties of the Russian Federation” dated October 10, 2003.

<sup>5</sup>The Foreign Agents Registration Act (FARA). URL: <http://www.fara.gov>.

The American act clearly declares its effect in the interest of a foreign state. The Russian law contains the stipulation “including for the benefit of” providing for a limitlessly extensive interpretation. Unlike the Russian law FARA does not introduce unexplainable exceptions for legal entities of certain legal forms or for certain sources of foreign funding.

Consequently, the quality of the US act is much higher than the one of the Russian law and, hence, the guarantee against arbitrary application is more reliable.

#### **4. Notion of a “foreign agent”**

Clause 6 in Article 2 of FL “On NPOs” takes the key place in the legislation “on foreign agents”. It introduces the notion of a “non-profit organization fulfilling the functions of a foreign agent”: “In the present Federal Law by non-profit organization fulfilling the functions of a foreign agent a Russian non-profit organization is meant which receives money funds and other property from foreign states, their government bodies, international and foreign entities, foreign nationals, persons destitute of nationality or persons authorized by them, and (or) from Russian legal entities receiving money funds and other property from the said sources (*except for open joint stock companies partially owned by the state and their subsidiaries*)<sup>6</sup> (hereinafter referred to as foreign sources), and which participates, *including* for the benefit of foreign sources, in the political activities carried out in the territory of the Russian Federation.

A non-profit organization, except for political parties, is deemed to participate in political activities carried out in the territory of the Russian Federation in the event when *irrespective of the goals and objectives* specified in its instruments of incorporation it takes part (including in form of financing) in arrangement and conduct of political campaigns with the view to influence the government's taking of decisions aimed at *modification of the national policy being implemented by them*, as well as in the *shaping of public opinion* for the specified purposes”.

Thus, a “foreign agent” has to exhibit two characteristic features: (1) receiving of foreign funding (with some exceptions), and (2) participation in political activities (the definition of which is given in this article for the first time ever in the history of the Russian legislation).

##### **4.1. Funding**

As it turned out in practice, foreign funding has the paramount importance for the authorities. On April 4, the First Deputy Prosecutor General of Russia A. Buksman in his commentaries regarding the checking of citizen advocacy organizations stated: “The situation is that [foreign] funds are being received, and no one is in effect registered [as a foreign agent]”.

According to Article 26 of FL “On NPOs” “the sources of formation of property of a non-profit organization in monetary and other forms are: periodic and one-time receipts from founders (participants, members); voluntary asset contributions and donations; revenue from the sales of goods, works, services; dividends (income, interest) received on shares, bonds, other securities and deposits; income received from property owned by such non-profit organization; other revenue not prohibited by the law”. Consequently, the law-makers do not emphasize separately the donations from a foreign source.

According to Article 46 of the Federal Law “On public associations”, “Russian public associations may in accordance with their charters join international public associations, acquire rights and bear liabilities corresponding to the status of the said international public organizations, maintain direct international contacts and connections, enter into agreements with foreign non-profit non-government organizations”.

The international law stipulates that the right for financial support constitutes an integral part of the freedom of assembly.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief<sup>7</sup> says: “The right to freedom of thought, conscience, religion or belief includes, in particular, [...] the freedom to request and receive from individuals and entities voluntary financial and other contributions”.

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter referred to as the Declaration on Human Rights Defenders)<sup>8</sup> establishes as follows: “Eve-

<sup>6</sup>Our italics here and elsewhere.— *MHG*. The terms in italics are of key importance and will be further discussed in more detail.

<sup>7</sup>Adopted by Resolution 36/55 of the UN General Assembly of November 25, 1981. URL: [http://www.un.org/ru/documents/decl\\_conv/declarations/relintol.shtml](http://www.un.org/ru/documents/decl_conv/declarations/relintol.shtml).

<sup>8</sup>Adopted by Resolution 53/144 of the UN General Assembly of December 9, 1998. URL: [http://www.un.org/ru/documents/decl\\_conv/declarations/defender.shtml](http://www.un.org/ru/documents/decl_conv/declarations/defender.shtml).

ryone shall have the right, individually and conjointly with others, to request, receive and use resources specifically intended for the purpose of promotion and protection of human rights and fundamental freedoms by peaceful means in accordance with Article 3 of this Declaration”.

In its report<sup>9</sup> the Observatory for the Protection of Human Rights Defenders states justly: “Notwithstanding that the Declaration on Human Rights Defenders protects the right to receive and use funds, it nevertheless does not impose limitations on the sources of funding (public/ private, local/ foreign). Hence, it by default grants to NPOs the right of access to international funding sources”<sup>10</sup>.

According to the Recommendation of the Committee of Ministers of the Council of Europe to the member states regarding the legal status of non-governmental organizations in Europe, “an NPO must have liberty to request financing and receive the same [...] not only from government authorities in their own country, but from organizations or private donators from other states, or from multilateral/ international institutions”<sup>11</sup>.

The European Court for Human Rights in its resolution dated February 1, 2007 in the case of Ramazanov and others v. Azerbaijan established that the imposition of additional conditions which resulted in the limitation of the normal activities of NPOs, including their right to receive grants or donations, constituted interference with the freedom of association.

It should be noted that not every foreign financing falls within the scope of the law “on foreign agents”. We could not find in the law, the explanatory note thereto or elsewhere any explanation as to the reasons for the inclusion of the stipulation “except for open joint stock companies partially owned by the state and their subsidiaries”. In other words, NPOs receiving contributions from a foreign government-owned OJSC and engaged in political activities in the Russian territory do not have to get registered as “foreign agents”.

## 4.2. Political activities

On March 30, the Ministry of Foreign Affairs of Russia noted in its formal statement that a prohibition had been introduced in Russia on the funding of political activities from abroad<sup>12</sup>.

However, let us discuss the term “political activities” given in the law.

Clause 6 Article 2 of FL “On NPOs” establishes that it is the actual activities that serve as a characteristic feature of a “foreign agent” and not the provisions of the charter documents or the legal form: “in the event when *irrespective of the goals and objectives specified in its instruments of incorporation it takes part in...*”.

### 4.2.1. “Changes in the national policy”

According to Article 3 of the Constitution of the Russian Federation “the holder of sovereignty and the sole source of authority in the Russian Federation is its multinational population. The people exercise their power directly, as well as through government authorities and local self-government bodies. The superior way of direct expression of the rule of the people is referendum and free election”.

In accordance with Article 27 of the Federal Law “On public associations”, “for the purpose of implementation of the statutory purposes a public association constituting a legal entity shall have the right to: freely disseminate information about its activities; participate in the elaboration of decisions of government authorities and local self-government bodies in accordance with the procedure and within the scope provided for in the present Federal Law and other laws; conduct meetings, rallies, demonstrations, processions and pickets; establish mass media and be engaged in publishing activities; declare and protect its rights, legitimate interests of its members and participants, as well as other citizens before government authorities, local self-government bodies and public associations; come forward with initiatives regarding various matters of social life, submit proposals to government authorities”.

Article 27 puts a limitation on the exercise of the abovementioned rights by “public associations established by foreign nationals and persons destitute of nationality or with their participation, which rights may be limited by the federal laws or the international treaties of the Russian Federation”.

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<sup>9</sup> Violations of the right of NGOs to funding: from harassment to criminalisation. Annual Report 2013. // Website of the International Federation for Human Rights. URL: [http://www.fidh.org/IMG/pdf/obs\\_2013\\_human\\_rights\\_defenders\\_russian.pdf](http://www.fidh.org/IMG/pdf/obs_2013_human_rights_defenders_russian.pdf).

<sup>10</sup> Ibidem.

<sup>11</sup> CM/Rec (2007)14, § 50.

<sup>12</sup> Commentary of the authorized representative of the Ministry of Foreign Affairs of Russia A.Lukashevich in connection with the reaction of the US Department of State on the checking of activities of NPOs in Russia // Website of the Ministry of Foreign Affairs of Russia. 30.03.2013. URL: [http://mid.ru/brp\\_4.nsf/newsline/1CCFC9D23A9E8B9E44257B3E0028D41C](http://mid.ru/brp_4.nsf/newsline/1CCFC9D23A9E8B9E44257B3E0028D41C).



However, the legislation “on foreign agents” covers in particular the NPOs established by Russian citizens without foreign ownership.

From the viewpoint of the legislation on non-profit organizations such purpose as “changes in the national policy” in some field is lawful for NPOs.

#### 4.2.2. “Shaping of public opinion”

By introducing the weighty responsibilities for NPOs wishing to influence the public opinion the authorities allow for interference with the freedom of expression of opinion guaranteed in Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

In the decision dated October 18, 2011 for the case of Stankov and the United Macedonian Organization Ilinden v. Bulgaria No.2 the European Court of Human Rights acknowledged that “the protection of opinions and liberty of expression of opinion in the meaning of Article 10 of the Convention is one of the purposes of the freedom of association. Such connection is especially important [...] where the interference of authorities with the activities of the association is, even if partially, a reaction on its views and statements”.

In the decision of June 21, 2007 for the case of Zhechev v. Bulgaria ECHR also emphasized that “an organization may advocate for changes in the legal and constitutional frameworks of a state when the methods used for this purpose are in all aspects lawful and democratic, and when the proposed change in itself corresponds to the fundamental principles of democracy”.

According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms “everyone shall have the right, individually and conjointly with others, to get real access on a non-discriminatory basis to the participation in the government of its country and management of state affairs. This includes, in particular, the right to submit, individually or conjointly with others, to government authorities and institutions, as well as to organizations engaged in the management of state affairs, critical remarks and proposals relating to the improvement of their activities and draw attention to any aspect of their operation which may impede or constrain the promotion, protection and exercise of human rights and fundamental freedoms”<sup>13</sup>.

According to § 76 of the Recommendation of the Committee of Ministers of the Council of Europe to the member states regarding the legal status of non-government organizations in Europe CM/Rec (2007)14, “government and quasi government mechanisms of all levels must ensure an efficient participation of NPOs without discrimination in the dialogue and consultations on the tasks and solutions in the sphere of national policy. Such participation must secure the freedom of expression by people of various opinions with regard to the functioning of the society”.

Notwithstanding that not only the obligatory but also the recommendatory provisions are quoted here it should be noted none of the international documents limits the right of participation in the shaping of the national policy in connection with the foreign funding of national NPOs.

#### 4.3. The notion of an “agent” in the Russian law

We can’t fail to agree with M.Fedotov, Head of the Russian President’s Council for the Development of the Civil Society and Human Rights, that the funding of NPOs is as a rule performed in form of donations, and until the donation agreement is recognized as a sham agreement we can not speak about agency relations because they are of a totally different nature. In addition, Mr. Fedotov notes: “In an agency agreement the agent undertakes to perform upon the request and in the interest of the principal legal or other acts for an agency fee. In contrast, in a donation agreement the donator delivers to the donee property or rights for the use for universally beneficial purposes. This is why the provision stating that an organization receiving property from “foreign sources” acts “in particular for the benefit of foreign sources” contained in Clause 6 Article 2 of the Federal Law “On non-profit organizations” is absolutely unacceptable. It is obvious that agency relations imply for the agent’s performance solely for the benefit of the principal”<sup>14</sup>.

Nowhere in the legislation, except for the new provisions “on foreign agents”, is it stated that an entity acting “in particular for the benefit of” must have special rights and obligations. This ambiguous wording can mean anything.

Obviously, the lawmakers did not pursue the goal to define agency relations. The term “agent” is used in the law not in the legal meaning but for propagandistic purposes. The experts of the Russian Academy of Sciences stated in their linguistic opinion: “This construction was used on multiple occasions by the authorities and investigation agencies as a standard charge against tens of thousands of our citizens during the time of political repressions in the 30s—40s; this construc-

<sup>13</sup>Adopted by Resolution 53/144 of the UN General Assembly of December 9, 1998.

<sup>14</sup>M.Fedotov. Anent the notion of a “foreign agent” in the Russian law // URL: <http://www.internet-law.ru/info/unesco/tom11.htm>.

tion was recorded in the accusatory speeches of Soviet prosecutors, in hundreds of judicial judgments and extrajudicial verdicts, on the pages of Soviet newspapers... this construction is engrained in the minds of Russian language speakers...»<sup>15</sup>

## **5. Interference with freedom of association**

The legislation “on foreign agents” in itself constitutes interference with the freedom of association as it puts at threat the existence of a legal entity, limits funding and introduces criminal liability of members of such association.

### **5.1. Status of a legal entity**

In the decision for the case of Gorzhelik and others v. Poland (February 17, 2004) the ECHR acknowledged as follows: “the most important aspect of the right for freedom of association is that citizens must have an opportunity to establish a legal entity for the purpose of acting collectively in the field of their mutual interest. In the absence thereof this right will have no sense”.

In the decision for the case of Sidiropoulos and others v. Greece (July 18, 1998) the ECHR emphasized that “the opportunity for citizens to establish a legal entity for the purpose of acting collectively in the field of protection of their interest constitutes one of the most important aspects of the right to freedom of association, in the absence of which this right will lose its sense. The way in which the national law secures this freedom and the application of the latter by the authorities in practice disclose the status of democracy in the country concerned”.

In this connection the risk of suspension of operation and liquidation of an NPO basing on the legislation “on foreign agents” (the bad quality and the possibility of violent interpretation of which will be discussed below) constitutes interference with the freedom of association.

#### **5.1.1. Suspension of operation of NPOs**

In accordance with Clause 6 Article 32 of FL “On NPOs” the Ministry of Justice of Russia has the right to “suspend on the basis of its decision for the period of not more than six months the operation of a non-profit organization fulfilling the functions of a foreign agent which fails to apply for the inclusion thereof in the [...] register of non-profit organizations fulfilling the functions of a foreign agent”.

The Ministry of Justice stated: “The activities of NPOs funded from abroad and refusing to get registered as a foreign agent will be suspended. In the event of a repeated refusal they will be subject to criminal liability”.

This being said, none of the regulatory instruments answers the question as to who and based on what the procedure establishes that such NPO which fails to get voluntarily registered with the register is still a foreign agent.

#### **5.1.2. Liquidation**

The provisions of the law “on foreign agents” do not directly provide for the liquidation of NPOs; however such measure can be applied on the basis of Article 44 of the Federal Law “On public associations”, Article 18 of FL “On NPOs” and Article 61 of the Civil Code of the Russian Federation in the event of repeated or gross violation of the law or other legal acts.

The deputy of the State Duma representing the United Russia Party V.Burmatov stated: “In the event when they [NPOs] refuse to comply with the federal law they will first be subject to fines, and thereafter to removal of legal registration with the Ministry of Justice”.

On March 15, on the website of the United Russia Party the following message of the Young Guard of the United Russia was published: “Our organization is against [...] funding of NPOs from abroad, and we are going to secure the assignment to such organizations of the status of a foreign agent and their subsequent closing”.

Thus, it is clear that the aim does not consist in the “informing of the society” but in the termination of foreign funding of NPOs under the threat of withdrawal of the status of a legal entity.

### **5.2. Criminal and administrative liability**

The amount of the fine for the non-compliance with the legislation “on foreign agents” stands out in the Code of Administrative Violations of the Russian Federation against the background of

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<sup>15</sup>Linguistic opinion of the Vinogradov Russian Language Institute of RAS dated November 13, 2012. Included in the complaint of the GOLOS Association and other NPOs against Russia. Please refer to the website of the Memorial Association. URL: <http://www.memo.ru/uploads/files/950.pdf>.

finer for other violations<sup>16</sup>.

In accordance with Article 3.5 of the Russian Code of Administrative Violations the administrative fine is a money sanction which is expressed in Roubles and applies to citizens in the amount not exceeding five thousand Roubles (except for two offences in the field of entrepreneurial activities and articles in connection with the exercise of the right for freedom of assembly and freedom of association). In accordance with Part 2 Article 46 of the Criminal Code of the Russian Federation the fine is established in the amount of five thousand to five million Roubles or in the amount of the wage or other income of the convicted offender for the period of two weeks to five years.

Thus, the fines established in the legislation "on foreign agents", although formally administrative, are in fact a criminal sanction as regards their amount and essence.

At the same time the procedure of consideration of cases of administrative violations provided for in the Code of Administrative Violations of the Russian Federation can not ensure the fairness of the court proceeding (no minutes are taken, no legal aid is provided, etc) which may result in the breach of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

## **6. Lawfulness of interference with freedom of association**

Interference with freedom of association contravenes Article 11 of the Convention on the Protection of Human Rights and Fundamental Freedoms, except for the events when interference concurrently: (1) is provided for in the law; (2) is conditional upon a "legally justified purpose" — one of the purposes specified in Part 2 Article 11 of the Convention; (3) is required in a democratic society. This being said, the notions "provided for in the law" and "is required in a democratic society" are not just void declarations but legal terms described in the practice of the ECHR. The Court also says that any interference must be "proportionate to the pursued legally justifiable purpose" too.

### **6.1. Provided for by law (condition 1)**

The legislation on "foreign agents" is certainly a law in its form. However, the quality of this law does not allow us to speak about its possible application in legal practice (and not only for propagandistic purposes).

The quality of law is a legal category used by the ECHR and the Constitutional Court of Russia. Bad quality of the law concerned means that its application will result in illegal interference with the exercise of the right for freedom of association.

The Constitutional Court of the Russian Federation stated on repeated occasions that "the uncertainty of the substance of a legal provision can not ensure its uniform understanding, impairs the strength of the guaranteed protection of the constitutional rights and freedoms, may lead to a violation of the principles of equality and supremacy of law; for which reason a violation alone of the requirement of certainty of a legal provision resulting in its violent interpretation by the executor of law is sufficient for the recognition of such provision as non-compliant with the Constitution of the Russian Federation"<sup>17</sup>. It also emphasized on repeated occasions the constitutional legal nature of the requirement of certainty of a legal provision: "A legal provision must meet the general legal criterion of formal certainty resulting from the principle of equality of citizens before the law and the court (Article 19, Parts 1 and 2, Constitution of the Russian Federation) because such equality can only be ensured in the event of clarity and unambiguousness of the provision, its uniform understanding and application by all executors of law; in contrast the uncertainty of a legal provision leads to its equivocal understanding and, therefore, the possibility of its arbitrary application, which means violation of the principle of equality of citizens before the law and the court"<sup>18</sup>.

<sup>16</sup>According to Articles 19.7.5-2 and 19.34 of the Russian Code of Administrative Violations in the event of non-submission or late submission by a non-profit organization fulfilling the functions of a foreign agent of required information to a government authority the fine applicable to officers amounts to 10 to 30 thousand Roubles, and for legal entities to 100 to 300 thousand Roubles. In the event when a non-profit organization publishing materials in a mass media or on the Internet fails to specify that the said materials have been published by a "foreign agent" the fine amounts to 100 to 300 thousand Roubles for officers and 300 to 500 thousand Roubles for legal entities.

<sup>17</sup>Please refer to Rulings of the RF Constitutional Court No.3-P dated April 25, 1995; No.11-P dated July 5, 2001; No.7-P dated April 6, 2004; No.29-P dated December 20, 2011.

<sup>18</sup>S.Nasonov. Scientific legal opinion with regard to the draft of the Federal Law "On the introduction of amendments to certain legislative instruments of the Russian Federation to the extent of regulation of activities of non-profit organizations fulfilling the functions of a foreign agent" // Independent Council of Legal Expertise. URL: <http://www.neps.ru/node/1893>.

In the decision dated April 3, 2008 for the case of *Koretsky and others v. Ukraine* the ECHR says: “The law must be [...] formulated with sufficient clarity in order to enable the affected parties [...] to foresee [...] the consequences that may be caused by particular acts. In order for the national legislation to meet these requirements it must provide for a method of legal protection from arbitrary interference on the part of government authorities with the rights guaranteed by the Convention. As for the matters concerning fundamental rights it would be a violation of the principle of supremacy of law — one of the basic principles of a democratic society set forth in the Convention — if the executive authorities are provided with legal discretion expressed in form of absolute power”.

In the decision for the case of *Zhechev v. Bulgaria* the ECHR established as follows: “Considering that this term is broad in its nature and can be interpreted totally differently it is quite possible that the courts in Bulgaria could have defined as political any activity relating to the normal functioning of the democratic society and, therefore, make the founders of legal entities register their organizations as political parties instead of regular associations.

The position of the Venice Commission is defined as follows: “Limitations [of the freedom of association] must be clear, easy to understand and equally applicable in order to secure that all persons and parties are able to comprehend the consequences of violation thereof. The limitations must be explained by needs of the democratic society, and the full protection of the rights must be implemented in all events of absence of particular limitations. To ensure that the limitations are not applied without grounds for them the legislation must be formulated carefully in order to be neither too detailed, nor too vague”<sup>19</sup>.

Further on, the law must comply with the criterion of “predictability”. In the decision dated April 24, 1990 for the case of *Kruslin v. France* the ECHR explained: “the wordings of the law must be sufficiently clear and easy to understand in order to provide citizens with the required information relating to the circumstances and conditions in which the public authority is vested with the powers to covertly ... interfere with the exercising of the rights of an individual”.

On January 16, 2013, the Minister of Justice A.Kononov speaking in the State Duma noted the uncertainty of the notion “political activities” in the law: “As far as political activities are concerned, I think they will be disputed and discussed as much as in the Constitutional Court”.

In February, T.Vagina, Deputy Head of the Department for NPOs of the Ministry of Justice of Russia said that she did not know what types of activities of NPOs would be recognized as political and suggested to wait and see how the judicial practice would develop.

Therefore, the bad quality of the law is evident. The absence of clear definitions provides unconstrained discretion to the executor of law.

In the decision for the case of *Tebieti Muhafize Cemiyeti and Israfilov v. Azerbaijan* (October 8, 2009) the ECHR established as follows: “The law on NPOs provided the Ministry of Justice with the right of extremely broad discretion with regard to the matter of interference with any activities of the association. Such situation created difficulties for the association in foreseeing exactly which of their activities could be interpreted by the Ministry of Justice as “not meeting the purposes” of the Law on NPOs”.

## 6.2. Legally justifiable purpose (condition 2)

The aim of the adoption of FL No.121 could seemingly be found in the explanatory note to the bill because the law itself does not state for what purpose the additional responsibilities and liability are introduced for a number of NPOs.

The explanatory note says that it “has been developed with the purpose of ensuring of *openness and publicity* of activities of non-profit organizations fulfilling the functions of a foreign agent, and is aimed at the organizing of *due public control* over the operation of non-profit organizations engaged in political activities in the territory of the Russian Federation and funded from foreign sources”. For a start, it should be noted that Article 55 of the Constitution of the Russian Federation and the international documents do not provide for any similar purpose.

In addition, it turns out that the legislation does not stipulate any possibilities for citizens to perform public control over the activities of NPOs fulfilling the functions of a foreign agent. At the same time, the powers granted to government authorities demonstrate that the control has been in fact tightened on the part of the government.

The confirmation of the sham nature of the declared purpose can be found in the answers of some territorial administration offices of the Ministry of Justice of Russia to the inquiries of members of Lawyers for Civil Society Non-profit Partnership which state that the law does not provide for the

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Please refer to Rulings of the RF Constitutional Court No.3-P dated April 25, 1995; No.11-P dated July 15, 1999; No.16-P dated November 11, 2003 and No.1-P dated January 21, 2010.

<sup>19</sup>Please also refer to CDL-AD (2010)024 — Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission, § 49.

responsibility of judicial authorities to inform citizens and organizations about the application of the legislation “on foreign agents”. The legislation<sup>20</sup> grants to citizens the right to only obtain information from the Ministry of Justice about the full name of an NPO, the name of the register, its account number, primary state registration number (PSRN), date of allocation of PSRN, address, legal form, region and status (operating or non-operating). No provisions on “public control” by way of obtaining from the Ministry of Justice of information about “foreign agents” have been adopted, and nothing is known about such projects.

The true purpose of adoption of FL No.121 becomes clear from the statements of the political figures involved in the enactment of the law.

Thus, V.Putin then as the Chairman of the Government stated in December 2011: “We have a law stating that in the event of financing of any domestic organizations that allegedly are our national organizations but in fact are financed with foreign money and do turns to music of a foreign state within the framework of the election process we *have to secure ourselves against such interference* with our internal affairs and protect our sovereignty”.

Consequently, the true goal of the authorities is to reduce the opportunities of NPOs to influence the situation in the country, which does not correspond to the Constitution of the Russian Federation and the provisions of the international law both on its face and in real substance.

As regards the inclusion in the Criminal Code of the Russian Federation of Article 330 providing for criminal liability for “malicious evasion of inclusion in the register of foreign agents” in form of as much as imprisonment for the period of up to two years, the Supreme Court of the Russian Federation stated that this article “does not provide for the arising of socially dangerous consequences as a feature to distinguish a criminal act from administrative violation”. In other words, even the Supreme Court does not see any socially dangerous consequences which could be caused by a refusal on the part of an NPO to get registered as a “foreign agent”.

### 6.3. Proportionality of interference and the need for it in a democratic society (condition 3)

The law does not provide for a minimum threshold of foreign funding which could bind an NPO to get registered as a “foreign agent”; hence, even 1 Rouble donated by a foreign national binds such NPO to call itself a “foreign agent” and mention this in all its publications, even if they are produced at the expense of Russian sources.

In accordance with FL “On NPOs” and “On public associations” any NPO was obliged even before the introduction of the term “foreign agent” to submit to tax authorities and judicial authorities a number of reports each year, make part thereof publicly available, as well as undergo scheduled and off-schedule checks of NPOs.

On April 5, 2013, Putin said to journalists: “Over four months alone following the adoption by us of the corresponding law these organizations received from abroad in their accounts... can you imagine how much? You can’t, and I did not know either: 28 billion 300 million Roubles — this is nearly a billion dollars. In particular, 855 million Roubles came through diplomatic representations. These are the organizations engaged in activities relating to domestic policy”. Then he asked a rhetorical question: “Don’t you think our society has to know who receives money and what for?” This amount caused surprise on the part of representatives of NPOs. Since 2006 NPOs have been reporting on an annual basis to the Ministry of Justice about the amounts of received funds and their spending, and since 2010 they must publish their reporting statements, including regarding the receipt and spending of foreign funds, on a special-purpose portal of the Ministry of Justice dedicated to the activities of NPOs<sup>21</sup>. Consequently, the data about the recipients of foreign funding are available on the Internet since 2010 and for judicial authorities since 2006.

In accordance with Article 17 of the Federal Law “On public associations”, “interference by government authorities and officers thereof with the activities of public associations, as well as interference by public associations with the activities of government authorities and officers thereof shall not be allowed, except in the events provided for in the present Federal Law”. The NPOs that had unlawfully interfered with the activities of government authorities had been held liable even prior to the introduction of the special status of “foreign agents”.

NPOs in Russia have special franchise, i.e. they are allowed to be engaged only in the types of activities that are provided for in their instruments of incorporation. Charters of NPOs are subject to a legal expert examination with the Ministry of Justice of the Russian Federation.

In the event of actual engagement by an NPO in the activities which are not stipulated in its

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<sup>20</sup>Administrative regulation on the rendering by the Ministry of Justice of the public service of provision of information to individuals and legal entities about registered organizations (approved by Order No.380 dated November 14, 2011).

<sup>21</sup>The amounts of foreign funding of NPOs and types of expenditures for the period since 2010 are available here: <http://unro.minjust.ru/NKOReports.aspx>.

charter the Ministry of Justice of the Russian Federation could rightfully issue a warning to such organization even prior to the enactment of the law, suspend its activities and even refer to a court with a lawsuit seeking liquidation (in the event of gross or repeated violation of this provision).

Based on the above the new interference with the activities of NPOs can not be found proportionate because both the government and the society had already been vested with exhaustive supervisory functions in relation to NPOs.

## **7. Discrimination**

In accordance with Part 4 Article 13 of the Russian Constitution, public associations are equal before the law. The legislation “on foreign agents” introduces an unjustified difference in the responsibilities of NPOs depending upon the source of their funding and types of their activities. A number of these responsibilities require significant financial expenses<sup>22</sup>. In the meantime the special treatment of activities of “foreign agents” has been introduced only for NPOs. At the same time commercial organizations, government and municipal entities may continue to receive foreign funding and be engaged in political activities without informing the society thereof or bearing additional responsibilities.

No reasons have been given for the exclusion of the NPOs engaged in political activities and receiving foreign funding from the scope of law, but only from open joint stock companies partially owned by the state and their subsidiaries.

From the scope of law also the following entities have been excluded: religious organizations, state-owned corporations, state-owned companies and non-profit organizations established by them, government and municipal (including budget-funded) institutions, associations of employers and chambers of trade and industry, government authorities, other state authorities, authorities managing state-owned non-budgetary funds, local self-government bodies, as well as autonomous institutions (Clauses 4, 6, 7 Article 1 of the Federal Law “On NPOs”).

In their joint statement, the UN special rapporteurs on the freedom of association, human rights defenders and liberty of speech rightfully made a point of the receiving of foreign funding by government entities and stated: “Organizations of the civil society must have the right for foreign funding to the same extent as governments have the right for international assistance”.

The law on “foreign agents” does not extend to a number of NPOs based on both their legal form, and types of activities.

According to Part 5 Article 13 of the Russian Constitution “it is prohibited to establish and operate public associations the goals or acts of which are aimed at the forcible modification of the foundations of the constitutional system, damaging of the integrity of the Russian Federation, disruption of national security, establishment of paramilitary groups, incitement of social, ethnic, national and religious hatred”.

“Therefore, the draft provides for discrimination of those public associations which are not prohibited and, hence, whose activities are not recognized as socially dangerous; still they will be deemed essentially hostile to Russia and practically get registered in this capacity”, says the opinion regarding the draft of the Federal Law “On the introduction of amendments to certain legal instruments of the Russian Federation to the extent of regulation of activities of non-profit organizations fulfilling the functions of a foreign agent” prepared by S.Nasonov, Cand.Sc. (Law), the expert of the Independent Council of Legal Expertise.

In accordance with Clause 2 Article 2 of the Federal Law “On NPOs”, “non-profit organizations may be established for the purpose of achievement of social, charitable, cultural, educational, scientific and management purposes, for the purpose of protection of public health, development of physical fitness and sports, meeting of spiritual and other non-financial requirements of citizens, protection of rights, legitimate interests of citizens and organizations, resolution of disputes and conflicts, provision of legal assistance, as well as for other purposes for public benefit”.

At the same time Clause 6 of this article says that “political activities do not include activities in the field of science, culture, art, healthcare, preventive healthcare and protection of public health, social support to and protection of citizens, protection of maternity and children, social support to the disabled, promotion of healthy living, physical fitness and sports, protection of flora and fauna, charitable activities, as well as activities in the sphere of facilitation of charity and voluntary work”.

This number of exceptions is not indicative of the willingness to regulate the activities of “foreign agents” which may operate not only in form of NPOs, but of the willingness to assign the

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<sup>22</sup>In accordance with Article 32 of the Federal Law “On NPOs” non-profit organizations fulfilling the functions of a foreign agent submit to the competent authority once per each six months documents containing a report on their activities, the membership of their management bodies; documents about the purposes of spending of funds and disposal of other property, including received from foreign sources – on a quarterly basis, an auditor’s report – on an annual basis.

name “foreign agents” to citizen advocacy NPOs established by Russian people under the Russian law.

## **8. Privilege against self-incrimination**

On the one hand the legislation on “foreign agents” secures the declarative principle of inclusion in the register, and on the other hand it provides for liability in form of as much as deprivation of liberty for a refusal to get registered as a “foreign agent”. It is assumed that under the threat of serious fines and criminal liability the management of NPOs will have to declare actually that the NPOs managed by them are engaged in activities for the benefit of foreign countries. This can result in some far-reaching implications.

On November 14, 2012, the amendments to the Criminal Code of the Russian Federation took effect extending the notion of treason. From now on this set of elements of crime includes the “disclosure to a foreign state, an international or foreign organization or representatives thereof of information constituting state secrecy that has been entrusted to a person or becomes known to him/her in connection with his/her job duties, studies or in other events provided for in the legislation of the Russian Federation, or provision of financial, material and technical, consulting or other assistance to a foreign state, an international or foreign organization or representatives thereof in activities aimed against the security of the Russian Federation”. This being said, the wordings like “in other events”, “other assistance”, as well as the extended notion “aimed against the security” as compared to the previous version (“to the detriment of the external security”) are uncertain and facilitate a violent interpretation. In accordance with the Criminal Code of the Russian Federation the liability arises in the event of provision of assistance to a foreign organization or its representatives in [their] activities aimed against security.

Therefore, the person held liable may have no criminal intent at all. It will be enough to prove: (1) the actual provision of “other” assistance; (2) that the activities of the foreigner concerned are directed against the security of Russia (irrespective of awareness thereof on the part of the person providing assistance).

The applying by NPOs for the inclusion in the register of “foreign agents” may serve as proof (in fact in form of full confession) of item 1: assistance to a foreign or international organization, while Article 51 of the Russian Constitution establishes the right against self-incrimination.

## **ANALYSIS OF ENFORCEMENT**

### **1. Preamble**

The GOLOS Association has launched the procedure of self-liquidation. Four more non-profit organizations are considering this option in case that the court ruling enters into legal effect. Two NPOs are waiting for a court trial of first instance, and more than 50 of them from 27 regions of the country from the Far East to Saint-Petersburg are currently in limbo. Tens of NPOs have been to the court at their own instigation, but neither of them has won the lawsuit yet. The fourth month at raw the mass prosecutor’s investigations of NPOs are in progress, which have affected more than one thousand organizations. The reason for this situation is the law on NPOs fulfilling the functions of a foreign agent (FL No.121). It binds Russian non-profit organizations receiving foreign funding and participating in “political activities” to call themselves “foreign agents”. In the meantime the prosecutors and the courts use the term “political” in relation to any socially beneficial activity and refer to charters of the organizations as to proof, and give retroactive effect to the law which is applied selectively. An NPO is recognized by the court as receiving foreign funding even if Sberbank of Russia assures the opposite. Meanwhile the enforcement of this law is accompanied by some high costs of political nature.

The draft law brought in on June 29, 2012 to the State Duma by a group of deputies representing United Russia was passed in a third reading on as early as July 13 (374 votes for it, 3 – against, and 1 abstained); on July 18 it was approved by the Federation Council (141 for, 1 against, 1 abstained) and on July 20 it was signed by the President. The law entered into force on November 21. However as of June 20, 2013 not one organization has been entered in the register of NPOs constituting “agents”.

Since the time of consideration of the law draft in the State Duma it has been criticized particularly by the Commissioner of the Council of Europe for Human Rights, the Committee Against Torture, the UN special rapporteurs on the protection of the freedom of expression, human rights defenders and the right for peaceful assembly. Deep concern has been expressed over the law and its application by the Secretary General of the Council of Europe, the European Union, the US De-

partment of State, the Ministry of Foreign Affairs of Germany, as well as the RF Presidential Council for the Development of Civil Society and Human Rights, and the Human Rights Commissioner of Russia.

## **2. Situation with “Shield and Sword”**

On December 21, 2012, the Chuvash citizen advocacy organization “Shield and Sword” decided to be the first to voluntarily join the register. The Chairman of the organization Aleksey Glukhov said: “Of course we are not a foreign agent and don’t consider ourselves a foreign agent. However after the enactment of this absurd law thousands of NPOs have ended up in limbo. The only way out we see is to get included in the register in order to have the opportunity to appeal against the decisions within the framework of this law and instigate court proceedings, including in the Constitutional Court of Russia. We hope these acts will create precedents to protect other NPOs”.

On January 16, 2013, the Minister of Justice A.Konovalov emphasized in the plenary session of the State Duma that the law was not repressive and did not involve harsh investigations or sanctions on the part of the Ministry of Justice of the Russian Federation. He noted that the law was contradictory to the spirit of the Russian legislation on NPOs.

On January 21, the Ministry of Justice of the Russian Federation refused to recognize “Shield and Sword” as a “foreign agent” and made a statement that it did not think that citizen advocacy activities were political activities.

## **3. Mass inspections of NPOs**

On February 14, 2013, President Putin stated in the extended session of the collegium of the Federal Security Service of Russia: “Today the procedure for the carrying out of activities by NPOs has been established in Russia, including with regard to funding from abroad. These laws must be unconditionally enforced”.

On February 22, in his report in the collegium of the agency the Minister of Justice Konovalov said that the activity in connection with the implementation of the “law on agents” must not cause “any special emotions” on the part of his colleagues. Konovalov asked them not to “fall into hysterics” in connection with the law and to “avoid insinuations in this respect”. He asked his colleagues to not take “hasty decisions”. The Minister confessed that one such decision had already been taken and subsequently cancelled in Saratov.

In early March the mass inspections of NPOs started at the direction of the General Prosecutor’s Office, which have been now in progress for four months. They are being performed with engagement of various government authorities from tax bodies to fire services. According to different estimates from 500 to some thousands of NPOs have now been checked. All inspections initially start under the pretext of combating extremism.

On April 4, the Deputy Prosecutor General A.Buksman admitted that the NPOs funded from abroad were being inter alia checked because they refused to get registered as foreign agents.

On the same day, the official representative of the Russian Ministry of Foreign Affairs A.Lukashevich said: “We are simply trying to get the activities of foreign non-profit organizations under control, that’s all there is to it”.

On the next day, Putin said in advance of his visit to the Federal Republic of Germany: “Currently 654 non-government organizations operate in Russia which, as it turns out, receive money from abroad... During four months only following the adoption by us of the corresponding law these organizations received in their accounts... 28 billion 300 million Roubles from abroad”.

On the second working day after the above mentioned speech of the Russian President the first “foreign agent” NPO proceeding was instituted.

## **4. Case of the GOLOS Association (Moscow)**

### **4.1. Standpoint of the Ministry of Justice**

On April 9, the Ministry of Justice of Russia instituted an administrative proceeding against the GOLOS Association and Lilia Shibanova, its Executive Director, for the alleged “breach of the procedure of carrying out of activities of a non-profit organization fulfilling the functions of a foreign agent” (Part 1 Article 19.34 of CAV RF).

As to political activities the Ministry of Justice referred to the preparation of the draft of the Electoral Code of the Russian Federation prepared by GOLOS RPO (a different legal entity), and not by the Association, and as to foreign funding – to the Sakharov Award received by the NPO for the “promotion of democratic values” by the Norwegian Helsinki Committee (NHC).



#### 4.2. Standpoint of NPO

After the receipt of the award GOLOS informed NHC that it could not accept it in money form because of the “law on agents”. In the court the representative of NHC admitted that the Committee had transferred the award by mistake. When GOLOS became aware of the transfer of the funds nearly a month prior to the institution of the proceeding by the Ministry of Justice it instructed the bank to return all money, which were returned from the bank’s transit account. The defendant emphasized in the court that no money had been received in the settlement account or current account of the NPO.

#### 4.3. Standpoint of Justice of Peace

On April 25, E.Semenchenok, the Justice of Peace of Judicial District No.379 of the Presnensky district of Moscow, found the GOLOS Association guilty of “violation of the procedure for the carrying out of activities by a non-profit organization fulfilling the functions of a foreign agent”. The NPO was inflicted a penalty in the amount of 300 thousand Roubles, and Ms. Shibanova – in the amount of 100 thousand Roubles.

As evidence of the guilty acts of the GOLOS Association Semenchenok called both the statement of the Ministry of Justice, the letter by the Federal Financial Monitoring Service, the opinion of the Central Electoral Commission of the Russian Federation with regard to the draft of the Electoral Code, and the charter of the association, the letters from Shibanova to Sberbank concerning the return from the transit account of the money transferred by NHC, the attorney’s request addressed to NHC and even the response thereto which stated that the money had been transferred by mistake through the fault of NHC. In addition, in the opinion of the justice court the guilty acts of the association were confirmed by the in-depth report within the framework of the agreement between GOLOS RPO and the European Commission.

#### 4.4. Availability of foreign funding

In the ruling the justice of the peace stated: “In accordance with Clause 2 Art.6 of the Law on Non-profit Organizations the funding from a foreign source is demonstrated by the receipt by an organization of money funds and other property from a foreign source *irrespective of the type of and grounds for such receipt, as well as the period of time during which the money funds or other property are received* (our Italics here and elsewhere — *Authors*)”. In fact, the court gave a retroactive effect to the “law on agents” after the manner of the Ministry of Justice.

In the ruling the following was recorded: “This sign [of an agent] is deemed demonstrated at as early as the time of receipt by the organization of the money, which in this case is determined by the actual receipt thereof in the transit currency account of the Association... Therefore, the Association has received money from NHC and disposed of it at its own discretion”.

#### 4.5. Political activities

Interpreting the “political activities” of the NPO the judge wrote: “The term “participation by a non-profit organization in the political activities carried out in the territory of the Russian Federation” *does not provide for a definite meaning excluding multiple interpretations*. According to the implication of law such participation may be expressed in form of performance of different acts and conduct of different events”. Consequently, the judge in fact admitted the vague nature of the definition of political activities in the law, which allows for a violent interpretation of its meaning.

It is worth taking note of the following affirmation of the judge: “Another evidence of the availability of grounds for the recognition of the Association as participating in the political activities carried out in the territory of the Russian Federation is that L.V.Shibanova, the Executive Director of the Association, participated on repeated occasions in public discussions proactively touching upon the matters of the electoral law and speaking in favor of amendments to the electoral legislation”. This means that not only the prosecutors in many warnings, but the court too, recognize the participation in public discussions as political activities, which means a much more dangerous trend. The ruling of the justice of the peace was appealed against in the district court.

#### 4.6. NPO’s appeal

By the time of consideration of the appeals on June 14 in the Presnensky District Court for the city of Moscow Sberbank of Russia confirmed in its letter addressed to the Association that the NPO had not received the money from NHC.

As it follows from the transit account statements, the Association had not given instructions to

the bank for the acceptance of the funds and transfer thereof to its current foreign currency account. That money had been returned to the sender in full amount from the transit account with the bank, which was confirmed by both the banking documents and the letter by NHC.

Attorney Ramil Akhmetgaliev: "The foreign currency transit account is not an account of the organization; funds can not be disposed of therefrom; it is opened automatically without the knowledge of or contract with the client". Therefore, it was proved in the court that the GOLOS Association had not received foreign funding.

The District Court upheld the ruling of the Justice of Peace. The decision entered into legal force. In fact Judge Maria Tsyvkina rewrote on ten pages the decision of the Justice of Peace accompanying it with phrases like "as correctly/conclusively established by the Justice of Peace", "the fact established by the Justice of Peace is correct and has been confirmed by documents", and "the Justice of Peace has come to a reasoned and impartial conclusion/ has correctly determined".

As the evidence of the guilty acts of GOLOS (like the justice of the peace earlier) the Presnensky Court calls inter alia the charter of the Association, the letters from Shibanova to Sberbank, the attorney's request to NHC and the response thereto which stated that the money had been transferred by mistake through the fault of NHC.

The following should be noted separately in both judicial decisions: "The subsequent actions of the Association expressed in the refusal to credit the received money to the settlement account of the Association and the instruction to the Bank to return them to the payer can not serve as a ground for the release from administrative liability because they took place after the receipt of the money and were connected with the disposal thereof".

#### *4.7. Situation review*

As soon as the draft law "on foreign agent NPOs" appeared in the public discourse many experts shared the opinion that it was adopted so hastily in order to address one particular organization – the GOLOS Association. It is this NPO that deals with the problem which is probably the most sensitive for the Russian government — violations during elections. For this reason hardly anybody was surprised by the fact that after the entry of the law into effect the association became the first NPO in the country against which the proceeding "on agents" was instituted, and which the court found to be an "agent" in just one session (unlike with other NPOs), and in relation to which the decision of the judge was the first to enter into force. In this connection Putin's speech of June 14 seems logical and consistent given that just a few hours after the entry into effect of the ruling on the recognition of GOLOS as a "foreign agent" he said: "I agree with my colleagues and, in particular, with my counselor on these issues that we have to analyze the practical application and think about the improvement of this legislation so that it does not cause problems for anybody". However if the GOLOS Association were the only aim of the law "on agents" it would be the only one affected by it.

In the meanwhile as of June 20 five NPOs were found "foreign agents" by the courts and subjected to heavy fines from 300 to 500 thousand Roubles. Two more NPOs from Saint-Petersburg and Perm are going to share the same fate. According to the AGORA Association the list of the NPOs believed by the Prosecutor's Office to be "foreign agents" contains around 60 NPOs, and on June 5 the Minister of Justice stated that there are "about one hundred foreign agents" operating in the country.

Thus, GOLOS was not the only victim of the law, and for the purpose of analysing the situation it is important to examine all available documents issued by the Prosecutor's Office and the decisions of the Justices of Peace relating to other cases.

### **5. Case of the Kostroma Centre of Support of Public Initiatives**

#### *5.1. Standpoint of the Prosecutor's Office*

On April 15, 2013, the Kostroma Prosecutor's Office instituted a case against the Foundation "Kostroma Centre for the Support of Public Initiatives" and its Executive Director Aleksandr Zamaryanov (Article 19.34 of CAV RF).

As evidence of the participation of the foundation in political activities the Prosecutor of Kostroma V.Smirnov quotes extracts from the NPO's charter:

- support of public initiatives of social significance and creation of conditions for the establishment of civil society in the Russian Federation;
- dissemination of legal... and other knowledge among the population which facilitate the establishment of a state governed by the rule of law;
- contribution to the strengthening ... of the state governed by the rule of law;
- facilitating the pursuing by the state of the policy capable of securing peace among citizens and interethnic concord.

As it follows from the list selected by the Prosecutor's Office in this case the prosecutors consider as political activities any contribution of the NPO to the "establishment", "strengthening", "improvement" of the "state governed by the rule of law". As for the "facilitating the pursuing by the state of the policy", whatever good purpose these activities of the NPO serve, the phrase itself contains two key words which are irritant to the government authorities: "state" and "policy" on which the prosecutors could not but react.

The political activities of the foundation included according to the Prosecutor's Office the "organizing and conduct of a "round table" in which "Howard Solomon, the Deputy Minister Counselor for Political Affairs at the US Embassy in Russia spoke". Further on, the Prosecutor's Office stated that the foundation had participated in and organized supervision during the election in March 2013.

On May 29, in the court of justice of Judicial District No.1 of Kostroma where the case of the foundation was heard the representative of the Prosecutor's Office stated that by political activities the "participation in association of citizens" (Part 1 Article 30), "participation in searching for, receipt, delivery, production and distribution of information using all lawful means" (Part 4 Article 29), "familiarization with the documents and materials kept by government authorities and immediately concerning human rights and freedoms" (Part 2 Article 24 of the Constitution of the Russian Federation) were meant.

Attorney R.Akhmetgaliev who represents the foundation thinks that the "speech of the Prosecutor once again confirmed the absurdity of the "law on agents". Any exercise by an association of citizens of their constitutional rights means, in the Prosecutor's opinion, political activities. Even the existence of such association alone means politics".

## *5.2. Standpoint of the NPO*

### *5.2.1. Absence of foreign funding*

In accordance with Article 54 of the Russian Constitution the law shall not have retroactive effect. The liability under Article 19.34 of CAV RF was introduced by the Federal Law "On amendments to CAV RF" dated November 12, 2012. The amendments entered into force on November 25. Therefore within the framework of any case involving "agent NPOs" the facts and circumstances of the legal relations may be considered which arose after November 25.

The last time when the foundation received funds from a foreign source was on November 22. In 2013 the foundation received no foreign funding, and the court did not have the right to go beyond this accusation.

### *5.2.2. Non-political activities*

In the court the defence of the foundation stated that it had not organized supervision during the elections. Nikolai Sorokin, the Board Chairman of the Foundation did not deny that he had participated as a private person in the capacity of a supervisor during the elections representing the Kostroma unit of the All-Russia Civil Movement "Russian Association of Electors". In the court the corresponding appointment as a supervisor was produced, that had been issued basing on the law and contained notes made by the Kostroma electoral commissions. This means that the status of Sorokin as a supervisor representing a totally different NPO was confirmed by the electoral commissions.

The defense of the foundation stated in the court that the NPO had never organized or conducted the working visit of the official delegation of the US Embassy which had been agreed upon with the Russian Ministry of Foreign Affairs and the Governor of Kostroma Region. The round table discussion had been one of the events included in the agreed upon program of the visit. Sorokin had acted as a moderator during the round table discussion.

## *5.3. Standpoint of the Court of Justice*

On May 29, Dmitriy Tretyakov, the Justice of Peace, stated the foundation guilty of "violation of the procedure of carrying out of activities by an NPO fulfilling the functions of a foreign agent". The NPO was inflicted with a penalty in the amount of 300 thousand Roubles, and the executive director in the amount of 100 thousand Roubles.

Therefore, the Kostroma Centre of Support of Public Initiatives became the second NPO to be found a "foreign agent" by the court. The decision in Kostroma was identical to the ruling of the Justice of Peace in Moscow for the case of GOLOS, including the amounts of the fines.

7 of 12 pages of the ruling contained the standpoints of the Prosecutor's Office and the defense, after which the court came to the conclusion about the presence in the acts of the NPO of the set of elements of offence and once again listed all arguments of the Kostroma Prosecutor's Office, this time with the note "the court considers it proved". The Justice of Peace considered proved the organizing and conduct by the foundation of the round table discussion and stated that

during it “the discussion of the matters took place which are connected with the adopted in the USA of the Magnitsky List and the Magnitsky Act limiting the right of Russian citizens for the liberty of movement”. The conclusion of the Justice of Peace stated: “This circumstance proves the engagement of the Foundation in the activities aimed at the shaping of public opinion on the matters of changing of the policy pursued in Russia”.

It follows from the decision of the Justice of Peace in Kostroma that for the purpose of recognition as a “foreign agent” of an NPO ever receiving funds from abroad the fact alone is enough that its Board Chairman has participated as a moderator in the round table discussion of the Magnitsky List.

## **6. Case of GOLOS RPO (Moscow)**

On May 13, 2013, Tatyana Vagina, the Deputy Director of the Department for NPOs of the Ministry of Justice, prepared a protocol of administrative violation relating GOLOS – a regional public organization defending democratic rights and freedoms. Like with the two previously mentioned organizations upon the NPO the “violation of the procedure of carrying out of activities by a non-profit organization fulfilling the functions of a foreign agent” was imposed as a charge.

The key claim raised by the Ministry of Justice against GOLOS RPO was identical to that against the GOLOS Association: discussion and promotion of a unified Electoral Code.

On June 4, the justice of the peace of Judicial District No.387 of the Basmannyi district of the city of Moscow Natalia Chukanova gave a ruling on holding GOLOS RPO liable under CAV RF. Like the GOLOS Association, GOLOS RPO was penalized in the amount of 300 thousand Roubles.

Only on June 18 GOLOS RPO managed to receive the court ruling. The decision of the Justice of Peace from the Basmannyi district literally repeated the decision of the Justice of Peace from the Presnensky district. The NPO was accused of absolutely the same acts and imputed with the same draft of the Electoral Code. Only the name of one NPO was replaced with the name of the other. In the hearing concerning the association the Shibanova’s interview was presented by Vagina as the interview of the head of the association, and in the hearing concerning the RPO as the interview of the head of the RPO.

## **7. Case of the International Gay and Lesbian Film Festival “Side by Side” (Saint-Petersburg)**

On May 6, 2013, the Prosecutor’s Office of the Central district of Saint-Petersburg instituted against the LGBT Film Festival “Side by Side” the case of “violation of the procedure of carrying out of activities by an NPO fulfilling the functions of a foreign agent”.

The Prosecutor’s Office considered as political activities the publishing of the brochure “International LGBT Movement: from local specifics to global policy” and the participation of the organization in the campaign “Let’s stop the homophobic law together” (meaning the campaign against the local law on fines for the propaganda of homosexuality). The activities took place prior to the entry of the law into force.

On June 6, the Justice of Peace of Judicial District No.206 for Saint-Petersburg Oleg Kamalidinov found the organization guilty and imposed the maximum possible fine in the amount of 500 thousand Roubles. The retroactive effect was again given by the court to the law on NPOs.

## **8. Case of the LGBT Organization “Coming Out” (Saint-Petersburg)**

On April 23, 2013, O.Levchenko, the Deputy Prosecutor of the Central district of Saint-Petersburg, demanded from the Director of the LGBT Organization “Coming Out” the submission of a number of documents, including “samples of published... literature”. The check resulted in the institution of the case “on agents” against both the NPO and its head Anna Anisimova. As political activities of the NPO the Prosecutor’s Office called the legal assistance provided to the LGBT community and like in the event of “Side by Side” the publishing of the brochure and the campaign against the law combating the propaganda of homosexuality.

On June 19, the Justice of Peace of Judicial District No.19 of Saint-Petersburg found the NPO guilty and imposed a penalty in the amount of 500 thousand Roubles.

The adverse judicial practice of application of the law on NPOs constituting “foreign agents” actually took shape.

## **9. Case of the Anti-Discrimination Centre “Memorial” (Saint-Petersburg)**

On April 30, 2013, A.Yurasov, the Prosecutor of the Admiralteysky district of Saint-Petersburg, instituted a case against the Anti-Discrimination Centre “Memorial”. The organization was charged

with both the “violation of the procedure of carrying out of activities by an NPO fulfilling the functions of a foreign agent”, and the “publishing... of materials... containing no indication that these materials are published and (or) distributed by an NPO fulfilling the functions of a foreign agent”.

As political activities the Prosecutor’s Office considered the preparation and publishing of the report “Gypsies, migrants, activists: victims of police brutality”. In the opinion of the prosecutors the text contains “signs of an appeal for standing in opposition to the acting government and government entities”.

In addition as political activities the Prosecutor’s Office called the conduct in the NPO’s office of the round table discussion of the matters of rights of migrant children, “the purpose of which... was the dissemination of knowledge about the rights of the child among social workers, employees of the Federal Migration Service and child care centers”.

The Prosecutor’s Office did not like the following of the recommendations contained in the NPO’s brochure: “To repeal regional laws prohibiting the “propaganda of homosexuality” which prejudice the rights of LGBT; to guarantee the liberty of expression; to ensure security for LGBT activists”.

Thus, all cases “on foreign agents” in Saint-Petersburg can be seen through the prism of harassment of LGBT and the defenders of their rights.

On May 27, Olga Glushanok, the Justice of Peace of Judicial District No.8 of Saint-Petersburg gave a determination on the returning of the prosecutor’s resolution on the institution of the case back to the Prosecutor’s Office for the purpose of remedying of deficiencies. The Justice of Peace stated that “it is not possible to establish what served as the ground for the adoption of the resolution on the institution of the case” against ADC “Memorial” and that documents were absent which could confirm the authorities of the prosecutor for the conduct of the check”. The judge also pointed at the absence in the protocol of the date and place of the alleged offence, the absence of documentary evidence of receipt by the NPO of money from foreign sources.

## **10. Case of the GRANY Centre**

On June 6, 2013, the Prosecutor’s Office for the Perm Territory instituted the proceeding against the Centre for Civil Analysis and Independent Research “GRANY” in connection with the “violation of the procedure of carrying out of activities by an NPO fulfilling the functions of a foreign agent”. As political activities of the Centre the Prosecutor’s Office considered the participation of its Director Svetlana Makovetskaya in the working group of the commission at the government of the Perm Territory for the coordination of the activities of the “open government” and her work in the political council at the Governor of the Territory, as well as the amendments proposed by the Centre to various draft laws of the Territory relating to the participation of the institutions of civil society in the assessment of the effectiveness of performance of the government authorities.

Like in the case of ADC “Memorial” the Justice of Peace returned the case files back to the Prosecutor’s Office for the purpose of remedying of deficiencies.

On June 13, Makovetskaya received from the representatives of the Prosecutor’s Office a modified and supplemented resolution on the institution of the case.

## **11. Analysis of prosecutor’s submissions and warnings**

On May 16, 2013, the AGORA Association produced the analysis of over 30 prosecutor’s submissions and warnings addressed to NPOs from 20 Russian regions in connection with the “law on foreign agents”.

The review shows that the accusation of participation in political activities may extend to those NPOs whose employees have as individuals acted as supervisors during the election or analysed the results thereof. The risk zone covers the NPOs that have stated in their charters the purposes which may be interpreted as political, for instance “participation in the elaboration of decisions of government authorities and local self-government bodies”, “facilitating of development of law drafts”, or “addressing of government authorities with proposals”. Further, under the threat of being called “foreign agents” by the prosecutors are the NPOs that are proactively present in the information environment, are engaged in publishing activities, organize or participate in public events. In fact the prosecutors can consider as political every socially beneficial activity. Citizen advocacy NPOs, LGBT NPOs and environmental NPOs have the greatest chance to be called “foreign agents”.

## **12. Conclusions**

The analysis of the law enforcement practice demonstrates that the law on “foreign agent” NPO is selective, politically motivated, aimed at the limiting of the citizens’ control over the activities of government authorities by way of elimination of NPOs and significant limitation of constitutional rights.

The examined rulings of the courts of justice actually limit without good reason the fundamental liberties: the liberty of expression, as well as the freedom of assembly and association (Articles 10 and 11 of the European Convention on the Protection of Human Rights and Fundamental Freedoms). The courts do not take into account the key principles established in the Constitution of the Russian Federation: “The state guarantees the equality of rights and freedoms of man and citizen irrespective of... membership in public associations” (Article 19), “the freedom of thought and speech is guaranteed for everyone... nobody may be forced to express their opinions and beliefs or waive the same” (Article 29), “the freedom of operation of public associations is guaranteed” (Article 30), “the law shall not have retroactive effect” (Article 54), “the rights and freedoms of man and citizen and their associations may be limited by the federal law only to the extent required for the purpose of protection of the foundations of the constitutional system, morals, health, rights and legitimate interests of other persons, ensuring of national defense and national security” (Article 55). According to the legal proposition of the Constitutional Court of the Russian Federation the international provisions, the provisions of the federal laws must be construed and applied in a systemic unity with account of the constitutional principles, which is also not complied with in the course of enforcement of the law.

By forcing NPOs to get registered as “foreign agents” under the threat of disproportionate fines, by introducing for them more complicated rules of carrying out of their activities and reporting, by making them vulnerable to the abuse of administrative power and violent interpretation of the vague wordings in the legislation, the “law on foreign agents” limits the rights of the members of these organizations and in fact discriminates Russian citizens.

The expression “an NPO which participates, including for the benefit of foreign sources, in political activities”, as well as the absence in the law of definitions for the terms “political activities” and “shaping of public opinion” opens broad possibilities for manipulation and prescribed treatment by both the Prosecutor’s Office, the Ministry of Justice, and the courts. This means that government authorities may interpret the terms and expressions used in the law violently and on the basis of their wish or a set task, or impede, or even terminate the activities of inconvenient NPOs.

Despite the small number of cases considered by the courts we can already speak about the adverse judicial practice in Russia in relation to the NPOs suspected of “violating the procedure of carrying out of activities by an NPO fulfilling the functions of a foreign agent”. This situation can result by autumn in mass fines imposed on NPOs with subsequent self-liquidation of the organizations that under no circumstances agree to be called “foreign agents”.

## **CONCLUSIONS AND RECOMMENDATIONS**

### ***Conclusions***

The performed analysis of the Federal Law “On NPOs” to the extent of regulation of activities of NPOs “fulfilling the functions of a foreign agent” enables us to come to the following conclusions.

1. The provisions of Clause 6 Article 2 are contradictory to Articles 2, 13, Part 1 Article 17, Part 2 Article 19, Part 1 Article 30, Parts 1 and 2 Article 55 of the Constitution of the Russian Federation.
2. The law contradicts to a whole number of international legal instruments, which requires its bringing in line with the international legal obligations of the Russian Federation in accordance with Part 4 Article 15 of the Russian Constitution and pursuant to the established law enforcement practice.
3. The legal provision is uncertain and ambiguous, which results in its ambiguous understanding and, hence, the possibility of its arbitrary application.
4. The notion “agent” contravenes the effective legislation of the Russian Federation and must be annulled on the said ground in relation to NPOs and public associations.
5. The notions “foreign agent” and NPO “performing the functions of a foreign agent” do not convey any legal meaning, “provide for no good reasons” and are of discriminatory nature when compared to those NPOs to which the analysed provisions of the Federal Law “On NPOs” do not extend.
6. The wording of Clause 6 Article 2: «...which receives funds and other property from foreign states, their government authorities, international and foreign organizations, foreign nationals, persons destitute of nationality or persons authorized by them and (or) Russian legal entities receiving funds and other property from the said sources...” contravenes the provisions of the international legal instruments and does not comply with the Constitution of the Russian Federation and the effective Russian legislation.

## **Recommendations**

The provisions of Clause 6 Article 2 of FL “On NPOs” must be annulled in full as contravening the international legal instruments, the Constitution of the Russian Federation and the Russian legislation.

As an alternative Clause 6 Article 2 can be restated to read as follows: “A non-profit institution which receives funds or other property from foreign states, their government authorities, international and foreign organizations, foreign nationals, persons destitute of nationality or persons authorized by them and (or) Russian legal entities receiving funds and other property from the said sources (hereinafter referred to as foreign sources) shall submit to the competent authority the documents containing a report on their activities, the membership of the management bodies, the documents describing the purposes of spending of funds and other property, on their actual spending and utilization. The forms and the term of submission of the above documents shall be determined by the authorized federal executive body”.

Sub-clause 9 Clause 5 Article 13.1 (“application for the inclusion of a non-profit organization in the register (referred to in Clause 10 of the present Article) of non-profit organizations fulfilling the functions of a foreign agent — for non-profit organizations fulfilling the functions of a foreign agent”) must be deleted.

Clause 10 Article 13.1 (“the data contained in the documents of the non-profit organization fulfilling the functions of a foreign agent submitted for the purpose of state registration shall comprise the register of non-profit organizations fulfilling the functions of foreign agent, the introduction of which shall be performed by the competent authority. The procedure for the maintenance of the said register shall be established by the competent authority”) must be deleted.

From the first paragraph of Clause 1 Article 32 the second sentence must be deleted beginning with “The annual accounting (financial) statements...”.

From the first sentence of Clause 3 Article 32 the following words must be deleted: “and the non-profit organizations fulfilling the functions of a foreign agent, also an auditor’s opinion”. From the second sentence the following words must be deleted: “For this purpose in the documents submitted by non-profit organizations fulfilling the functions of a foreign agent”.

The second paragraph of Clause 3 Article 32 must be restated to read as follows: “Non-profit organizations shall submit to the competent authority the documents containing a report on their activities, the membership of the management bodies, the documents describing the purposes of spending of funds and disposal of other property, including those received by them from foreign sources — once per each year”.

From Clause 3.2 Article 32 the following words must be deleted: “and the non-profit organizations fulfilling the functions of a foreign agent — once per each six months”.

Clauses 4.5 (“scheduled checks of a non-profit organization fulfilling the functions of a foreign agent shall be conducted no more frequently than once per each year”) and 4.6 (“the ground for the conduct of an extraordinary check of a non-profit organization fulfilling the functions of a foreign agent shall be...”) of Article 32 must be deleted.

Sub-clause 6 Clause 5 Article 32 (“suspend on the basis of their resolution for the period of not more than six months the activities of the non-profit organization fulfilling the functions of a foreign agent which fails to file an application for the inclusion thereof in the register (provided for in Clause 10 Article 13.1 of the present Federal Law) of non-profit organizations fulfilling the functions of a foreign agent. The resolution on the suspension of activities of such non-profit organization may be appealed against in a superior authority or a court”) must be deleted.

The second paragraph of Clause 7 Article 32 (“a non-profit organization wishing to carry out its activities after the state registration as a non-profit organization fulfilling the functions of a foreign agent shall file to the competent authority prior to the start of such activities an application for the inclusion thereof in the register (provided for in Clause 10 Article 13.1 of the present Federal Law) of non-profit organizations fulfilling the functions of a foreign agent”) must be deleted.

# SECURING OF THE FREEDOM OF PEACEFUL ASSEMBLY

## REVIEW OF THE RUSSIAN LEGISLATION AND THE RESOLUTIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

### *1. Introduction*

The freedom of peaceful assembly is one of the most important universally recognized freedoms of people guaranteed by the international law: Article 21 of the International Covenant on Civil and Political Rights and Article 11 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, as well as Article 30 of the Universal Declaration of Human Rights.

The freedom of assembly is of special importance in the securing of democratic values: the observance thereof determines the opportunity of implementation of other most essential human rights (liberty of speech, right to obtain and disseminate information, participation in the management of a state). As a rule, the violation of the freedom of assembly affects the interests of a significant number of people.

The ensuring of the freedom of assembly is to a large extent determined by procedural terms and allows for the possibility of limitation in certain circumstances. The most important source of establishment of the boundaries for the allowed interference is the precedent setting resolutions of the European Court of Human Rights (ECHR).

The freedom of assembly in the field of legal relations has its own unique specifics. Unlike the violations of other rights and freedoms the forms and ways of limiting the freedom of assembly are of public nature, i.e. all circumstances of prohibitions are documented and known to the fullest extent.

Over the last five years, ECHR has delivered only four judgments with regard to Russia recognizing the actual violation of the freedom of peaceful assembly (cases of Makhmudov, 2007; Barankevich, 2007; Sergei Kuznetsov, 2008; Alekseyev, 2010). In addition, the UN Committee for Human Rights handed down in 2012 one opinion on the acknowledgment of limitation of the freedom of assembly in the case of *Chebotaryov v. Russia*. A number of cases are still pending consideration.

Cases against Russia have their own specifics. Firstly, the Russian Federation has always been insisting on the lawfulness of limitations and restrictions of assembly. It substantiates the prohibitions by the requirement to protect law and order, morals, etc. which are allegedly jeopardized by meetings. These arguments are not accepted by ECHR for the reason that the state does not provide evidence of the real nature of such threats. Secondly, neither of the delivered judgments has in any way impacted the practice and the national legislation: no general measures have been applied for the purpose of elimination of conditions for and sources of violations; no court resolution has been reviewed concerning the complaints of the claimants. As a truly textbook example of how the authorities ignore the resolutions of ECHR upon the pretence of "national interests" the situation with the refusal to implement the resolution in the case of *Alekseyev v. Russia* can serve (prohibition of gay pride marches in Moscow).

For the Russian Federation the problem of limitation of the freedom of assembly has an extremely situational meaning, especially in the light of the gradual legislative limitations of the freedom of assembly. This being said, the wordings of the innovations introduced to the legislation are intentionally unclear, which provides for the opportunity of their broad interpretation in the law enforcement practice. This is just the reason why the greatest number of problems with the observance of the freedom of assembly is evident only in the regions where local authorities strive to limit the freedom of assembly to the maximum possible extent.

The situation deteriorated dramatically with the approval of the amendments to FL "On meetings, rallies, demonstrations, processions and picketing" (hereinafter referred to as FL No.54), as well as to the Code of Administrative Violations (CAV) that took effect on June 9, 2012. The amendments vested the constituent entities of the Russian Federation with wide-ranging powers of regulation of assembly. During the year 2012 in all 83 constituent entities of the Russian Federation the regional laws were enacted which made more severe the procedure and possibility of conduct of peaceful assembly by introducing the limitations that enable to prohibit every assembly on technicalities.

### *2. Provisions of the federal laws limiting the freedom of assembly*

FL No.54 even prior to the amendments of 2012 had contained the norms and provisions that had disproportionately limited the freedom of assembly in the Russian Federation.

The main contradiction was in the procedure for the "approval of public events" that determines the prohibition on a public campaign in the event when the local government insists on a dif-



ferent place or time of such campaign. Such essentially casuistic procedure is established with the help of the following provisions:

- Clause 2 Part 1 Article 12: “communicate to the organizer of the public event within three days upon receipt of the notification of the public event (and in the event of notification of picketing by a group of persons less than five days prior to such picketing — on the day of receipt thereof) a reasoned proposal on changing the place and (or) time of the public event, as well as a proposal on the removal by the organizer of the public event of nonconformity of the purposes, forms and other conditions of the event specified in the notification”;
- Clause 5 Article 5: “The organizer of the public event shall not have the right to conduct it in the event when the notification of the public event was not filed within the established term, or in the event when no agreement with the executive authority of the constituent entity of the Russian Federation or the local self-government body is reached with regard to the change upon their reasoned proposal of the place and (or) time of the public event”.

Consequently, local and regional authorities received the opportunity to shift the public event to a different place without prohibiting the declared public event. All kinds of reasons, even the most absurd ones, can be used as arguments, because the federal law does not contain any framework grounds in connection with which the authority could propose a different place for the conduct of the event. The organizers of the event will be most often unsatisfied with the proposed place because it will not enable the achievement of the goals thereof (in particular, in the event of protests against the acts and resolutions of government authorities).

On April 2, 2009, the Constitutional Court of the Russian Federation gave Determination No.484-O-P “With regard to the complaint of citizens Aleksandr Vladimirovich Lashmankin, Denis Petrovich Shadrin and Sergei Mikhailovich Shimovolos against the violation of their constitutional rights by the provision of Part 5 Article 5 of the Federal Law “On meetings, rallies, demonstrations, processions and picketing”. The complaint contained the description of the actual abuse of the provisions of FL No.54 in connection with the “proposals on the shifting of the assembly” appealed against in the courts of three regions of Russia without success. The court refused to recognize the actual breach of the Constitution of the Russian Federation without in fact giving any reasons. The only argument used by the Constitutional Court was that the “proposal” to change the place or time of the public event was not a “prohibition” in the meaning of this word.

It should be noted that the casus of the arbitrary but inexplicit prohibition of peaceful assembly rooted in the procedure of FL No.54 is not an unconditional regulatory constraint, but is used only in the events when the authorities are focused on fighting against protest campaigns. This political interest is confirmed by the practice of the selective prohibition of public events in regions. Furthermore, in the majority of the regions such prohibitions were either not applied, or applied in isolated instances before 2012.

International authorities also experience apparent difficulties in the assessment of this kind of procedural prohibitions.

On July 10, 2012, the ECHR delivered its resolution for the case of Berladir and others v. Russia (complaint No.34202/06). In this case, the refusal of the Moscow Government was appealed against to conduct an alternative anti-fascist demonstration and the prohibition of picketing near the building of the city hall. The Court resolved that Article 11 of the Convention was not breached and recognized as unconvincing the argument of the organizers of the picket that a place of picketing other than near the city hall would not enable them to achieve the goals thereof. Therefore, the ECHR recognized the argument of the state as convincing: the availability of a parking lot near the city hall (notwithstanding that the applicants had argued that on Sunday for which the picketing had been planned the parking lot had been empty). The President of the Chamber of the Court N.Vayich and the judge representing Russia A.Kovler had to express a dissenting opinion on the violation of Article 11 and the absence of an efficient court proceeding.

The resolution per se is unprecedented; it contradicts the letter and intent of all previously adopted resolutions regarding the freedom of association, contains the conclusions and assessments that are disproportionate to the values of the democratic society. The main gap in the conclusions of the Court was in the evaluation of the procedure of “approval of” public campaigns established in FL No.54. The Court, in particular, acknowledged that the procedure of “proposing of a different place for the conduct of the meeting” was not a disguised prohibition (irrespective of substantiation and achievement of the goal of the meeting) assuming that the “proposal” to shift the event to a different location was necessary and justified and presuming that the Moscow city hall had been judging from socially important and plausible reasons. The court in principle refused to study the arguments and reasons for the “shifting” and “did not notice” the political motivation in the acts of the authorities and the discrimination of the meeting organizers.

Along with that it is possible to state that the resolutions delivered by the ECHR did not affect the situation in Russia. The Russian Federation failed to take general measures in accordance with

the delivered judgments, including the review of the provisions of the law the implementation of which had become exactly the reason for the violation of the right for the freedom of assembly.

It is characteristic that the impact of the resolutions of the Constitutional Court of the Russian Federation on the national legislation is also very limited. Before 2013 the court adopted a number of essential provisions which have not been so far reflected in the legislation, in particular:

- the condition was defined for the “achievement of the goals of a public event”: “in the location and (or) at the time which correspond to its social and political significance”;
- the exact procedure was established for the determination of the boundaries of the location of the meeting: the conventional boundary of the event location should coincide with the boundaries of the land allotment of buildings, structures and infrastructure facilities;
- the authorities should negotiate the place of the meeting with the organizers.

On June 8, 2012, Federal Law No.65-FZ was enacted which introduced amendments to FL No.54, as well as CAV RF. The law was enacted hastily, immediately in two readings, and was not discussed publicly.

The law strengthened the administrative liability for violating the established procedure of organizing or conduct of meetings, rallies, demonstrations, processions and picketing. In particular:

- the maximum amounts of the administrative fines were increased unprecedentedly for violating the procedure for the conduct of a meeting, for citizens up to three hundred thousand Roubles, for officers up to six hundred thousand Roubles;
- the punitive sanction in form of compulsory community service was introduced and the administrative liability was established for the evasion of compulsory community service;
- the period of limitation was established of one year as from the day of administrative violation, which is also unprecedented for an administrative punishment.

The amendments and supplements made to FL No.54 establish, inter alia, that:

- a person with an unexpunged or unspent conviction for the commission of a premeditated crime against the fundamentals of the constitutional system and national security or a crime against public security and public order, or a person two or more times brought to administrative liability for violations of the legislation on assembly may not be the organizer of the public event;
- the organizer of the public event shall bear civil liability for damages inflicted by the participants of the public event;
- participants of public events may not: hide their faces, including use masks, concealment means, other objects designed for the purpose of causing difficulties in the checking of identity; bear arms or similar objects, explosive and flammable substances; have in their possession and (or) drink alcoholic beverages; stay in the place of the public event in a state of alcoholic intoxication;
- the time of finishing of the public event has been shifted from 11.00 p.m. to 10.00 p.m. local time;
- a picket shall be deemed a single-person picket only in the event when it is held at the distance of not less than 50 metres from the other picket.

The law has also introduced a special procedure for the regulation of assembly.

Article 8 of the law establishes the so called special locations for the holding of meetings: meetings shall be held there under the notification procedure, and without notification in the event of a small number of participants (as a rule less than 100 participants).

For the purpose of determination of specially designated locations the following shall be taken into account: “achievement of purposes of the public event, accessibility by transport, possibility of use by the organizers and participants of public events of infrastructure facilities, compliance with hygienic standards and rules, security of organizers and participants of public events, other persons”.

On the other hand, regions were granted the right to prepare the list of the locations where meetings are prohibited. According to FL No.54 they include “restricted” areas. No special limitations were established for the purpose of introduction of additional prohibitions in regions. Furthermore, as a justification for the limitation “preventive considerations” are applied — prohibitions may be established for the locations where public events *may result in* the disturbance of operation of institutions, transport, law and order.

It is important to note the positive changes resulting from the law. The supplement to Part 3 Article 12 *establishes only two grounds for a denial of registration of a meeting*: when the meeting is held in a “prohibited location” and when there are people among the organizers who have been previously held liable for violations of the legislation on assembly. At the same time the procedure established in Articles 5 and 12 for the proposing by the government of any “other place and time” subject to substantiation under any vain pretext remained unchanged. In fact the provisions of Article 12 can be construed so that when wishing to prevent the assembly the local government can

always insist on the holding of meetings only in “specially designated” places even if these places do not meet the goals of the meeting.

In connection with the adoption of the legislative amendments a request was sent to the Constitutional Court of the Russian Federation by the deputies of the State Duma E.Mizulina and V.Solovyov, as well as a complaint by E.Savenko. On February 14, 2013, the Constitutional Court of the Russian Federation delivered a corresponding ruling.

The court included the interpretation of the following provisions of FL No.54:

- in terms of the prohibition “to act as the organizer of a public event for a person two or more times brought to administrative liability for administrative violations” the period of limitation is established (which was not established in the law) of one year - a common one for administrative violations (Clause 1 of the concluding part of the ruling);
- in terms of the prohibition of campaigning prior to the approval of the public event established in Article 10 the Court determined that this provision “does not prevent the organizer of the public event prior to the agreement upon its place and (or) time from informing the future participants of the public event about its expected goals, form, place, time and other terms” (Clause 2 of the concluding part).

Only some provisions were recognized as contradicting the Russian Constitution:

- Clause 6 Article 5 in accordance with which the organizer bears liability “for damages inflicted by the participants of the public event irrespective of manifestation by them of due care for the maintenance of public order and the absence of guilt in the infliction of such damages” (Clause 4 of the concluding part);
- the outrageous amount of the minimum fines established in CAV RF for the violation of the legislation on meetings (Clause 7 of the concluding part), as well as the penalty in form of compulsory community service, but only when the event “did not cause harm to health, property of individuals or legal entities, or the occurrence of other similar consequences” (Clause 8 of the concluding part).

The assessment by the Constitutional Court of the Russian Federation of the procedure for the determination of the “uniform locations specifically designated or suitable for the purpose of public events” can be considered most important and essential. On the one hand, the Court decided that the delegation of authority to regions as regards the determination of such locations was not the limitation of the freedom of assembly but only determined the possibility of their “specification”. On the other hand, the Court, being probably under the impression of the list of the limitations established by regional laws, admitted: “No criteria are recognized on a regulatory basis which could ensure the equality of legal conditions of exercising by the citizens of the right for the freedom of peaceful assembly in the event of determination by executive authorities of constituent entities of the Russian Federation of specifically designated or suitable places for the conduct of public events, which results in the possibility of its ambiguous interpretation and, hence, arbitrary application” (Clause 6 of the concluding part).

For the most part the ruling seems declaratory because it contains a lot of general statements which make no practical impact. For example, “the public authority shall use its best endeavours to make it take place in the location specified by the organizer and at the scheduled time, and shall not attempt to find reasons upon any pretext which could justify the need for deviations from the proposals submitted by the organizer of the public event” (Clause 2.2).

It is important that Clause 12 prescribes bringing of regional laws in compliance with the resolution of the Constitutional Court. In the situation when the majority of them are extremely harsh and contradict not only the international standards but also the federal legislation, the resolution of the Constitutional Court can be recognized as very important and well-timed.

### **3. Regional Legislation**

The new version of the law enabled at the regional level in addition to the federal law (Article 8 of FL No.54) the limitation of the list of places where street campaigns are not allowed.

Previously mass meetings had been allowed everywhere except where explicitly prohibited by the federal law, and the list of limitations had been exhaustive. This provision legalized the previously used unspoken practice of reservations designated for public activities, because all places to which the activists were sent were most remote from government buildings and often turned out to be even suburban forests or cemeteries. Most popular among regional authorities was the idea of organizing “Hyde Parks” in an evidently perverted interpretation — the wish to designate only special places for the purpose of public events. This being said, regional authorities do not limit the places of mass cultural or formal events. In accordance with Clause 1.1 Article 8 of FL No.54, regional authorities determine “places specifically designated or suitable for the purpose of discussion of issues of public importance and expression of public opinion, as well as for the mass at-

tendance by citizens for the purpose of open sharing of public views with regard to topical issues primarily of socio-political nature”.

This clearly discriminatory approach and the wish to limit the protest activities of the population to the maximum possible extent determined the conditions for the adoption by regional authorities of the extremely repressive laws oversaturated with various limitations and procedural terms.

Since the time of approval of the amendments to FL No.54 the preparation of regional laws on the securing of the freedom of assembly started in regions. The first of such laws was enacted on July 5, 2012 in Kemerovo Region, the next one on July 25 in the Republic of Mari El.

The Kemerovo law <sup>23</sup> contains significant restrictive provisions, and the approval thereof caused protests on the part of the community in the region. The law contains a quite extensive list of locations where public meetings are prohibited: railway stations, airports, retail and leisure complexes (centres), markets, children’s and educational institutions, cultural, healthcare, fitness and sports organizations, as well as their detached territories, facilities and structures, buildings in which cultural, sportive, entertainment, educational centres are located (during cultural, sportive, entertainment and other events held therein); pedestrian ways, public transport stops, children’s and sports playgrounds, places where events are organized with the participation of children; as well as territories directly adjacent to the facilities listed in this article, and motor roads.

The standard was set for the maximum occupancy of such specifically designated places: one person (!) per each 2 square meters (!).

The law of Kemerovo Region was adopted as a sample by other regions. In these conditions the participants of the Network for the Legal Protection of the Freedom of Assembly developed a model law draft. The draft complied with the international standards, the interpretations of the provisions of the federal law adopted by the Supreme Court and the Constitutional Court of Russia. The draft was distributed via the network of regional human rights defenders, as well as through regional representative offices of the Communist Party of the Russian Federation. The discussion of the law drafts caused stormy debates in the regions. However the majority of votes in the regional legislative assemblies belong to United Russia, for which reason the Kemerovo law was taken as a basis.

In the early autumn, the laws were adopted in the first reading in the Tomsk, Kirov, Oryol, Sverdlovskaya, Ulyanovsk, Ivanovo, Chelyabinsk, Nizhny Novgorod, Samara region, the Perm Territory, the Chuvash Republic, Tatarstan and other regions. By the end of the year, the laws were enacted in all constituent entities of the Federation.

All regional laws contain an extensive list of places where meetings are prohibited. The majority of the laws set a flat ban on the conduct of meetings near the buildings of regional and local government. The distance varies from 50 to 100 m. It is characteristic that in a certain part of the regional laws (for example, in the Sverdlovskaya region) the definition “territories adjacent to the facilities” is used, which allows for the arbitrary varying of the territory of the “restricted place”.

In addition, the majority of the regional laws establish a ban on the conduct of meetings on pedestrian ways (in all places intended for the use by pedestrians) and next to public roads.

The list of “restricted locations” grew constantly due to the “exchange” between the legislative assemblies, and the laws were supplemented with new prohibitive terms and rules.

Thus, in Chelyabinsk Region and the Chuvash Republic the law drafts included the provisions on the prohibition of meetings next to privately owned buildings and structures (without the owners’ consent), and in Sverdlovsk Region – the prohibition of meetings next to multi-dwelling units and residential buildings and near the areas of location of religious organizations.

The law of the Chelyabinsk region “On the procedure of notification about public events” contains the provisions binding the organizer to submit to the city hall additional documents at the time of notification about the meeting:

- written permissions issued by owners of all property located within two hundred meters from the place of conduct of the campaign;
- statements of absence of records of conviction or administrative liability to be obtained by the organizer from the police.

In addition the Chelyabinsk legislation requires that the public servants have to be informed about all meetings to be held inside premises with the participation of more than one hundred people, which contravenes the federal law explicitly stating that the subject of its regulation covers only street campaigns.

In Chuvashia the regional legislation prohibits public campaigns at the distance of less than 200 meters from kindergartens, educational or healthcare institutions.

In Kazan the standards of the maximum occupancy during campaigns were set for 17 sites. On pedestrian ways, areas next to government buildings and retail centers, theatres and markets not more than 0.3 persons per each 1 square meter are allowed (i.e. per each participant more

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<sup>23</sup>Law of Kemerovo Region “On some issues of conduct of public events”.

than 3 square meters (!) of space). As a comparison: in Moscow even as many as two persons may protest on each 1 square meter according to the regional legislation.

In Nizhny Novgorod Region the list of the restricted locations for the conduct of meetings is comprised of 36 items<sup>24</sup>.

Typically, the “restrictions” regarding meetings in certain places extend automatically to single-person pickets for which no notification is required.

Furthermore, the regional legislation includes different innovations only adding restrictions to the disproportionately strict requirements to meeting organizers.

In the legislation of the Republic of Mari El meeting organizers must conduct a briefing for all (!) participants of the meeting prior to the start thereof. In Samara Region a prior consent of the police is required in order to hold a meeting.

Although the federal law declares the guaranteed application for meetings of specially designated locations without notification, even here the regions added extra conditions. For example, in Ulyanovsk Region meeting organizers must submit a procedure of the meeting for “approval”.

Revealingly, only two cases are known when the Prosecutor’s Office protested against the extremely strict rules of regulation of meetings which contradict the federal law.

The careful following of the regional laws means an absolute prohibition on the use of public places within the city for the purpose of meetings and rallies, as well as the absence of choice of routes for the purpose of processions.

#### **4. Wherein does the national legislation contravene the constitutional provisions and international standards?**

The current version of FL No.54 contravenes substantially the constitutional and international provisions and standards.

First of all, the provisions of the law contain the procedural restrictions of the freedom of assembly the application of which in fact establishes in the Russian Federation the *authorization-based* procedure of peaceful assembly. The condition of holding public events only in certain locations is formalized in the legislation, which disregards the principle of the free choice of the place and time of the meeting. These provisions contradict Article 31 of the Russian Constitution guaranteeing the freedom of assembly in the legal sense and in practice of its application. This right is recognized as indefeasible and is secured by the international treaties.

Judging from the precedent-based practice the ECHR applies the following definition: “The right for the freedom of assembly implies both private encounters and public meetings in public places, as well as meetings on the same location or processions; this rights may be exercised by both individual participants and meeting organizers”<sup>25</sup>.

In the case of Makhmudov v. Russia the ECHR emphasized the extrinsic value of the freedom of assembly: “The Court has acknowledged that the right for peaceful assembly formalized in Article 11 is the fundamental right in a democratic society and like the right to freedom of expression constitutes one of the keystones of the society”<sup>26</sup>.

The notification-based procedure presumes the right for a free choice by citizens of the location for a public event depending upon the goals thereof. The locations where public events are not allowed are limited and included in the exhaustive list (Article 8 FL No.54). However contrary to the legal logic and the principle of Article 55 of the Constitution of the Russian Federation (“the rights may be limited by the federal law”) the lawmakers have allowed for an arbitrary extension of the list of such locations in the regional laws. As a justification of limitation the “preventive considerations” are provided for: restrictions may be established for those locations where meetings “can cause” interference with the operation of institutions, transport, law and order.

Correspondingly, such conditions have resulted in prohibition of public events “on traffic ways” in the majority of the regional laws. Consequently, the regional laws in the Russian Federation have in fact introduced a **prohibition on all demonstrations**.

The exercise of freedom of assembly implies the possibility of conduct of spontaneous (impromptu) events caused by any important developments and occurrences. In such cases citizens arrive at public places in their cities to express their opinion regarding the occurrence. Such spontaneous demonstrations, meetings and processions are traditional for the Russian Federation.

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<sup>24</sup>Law “On the introduction of amendments to Law No.196-Z of the Nizhny Novgorod region dated December 27, 2007 “On the procedure of notification about public events in the territory of the Nizhny Novgorod region”.

<sup>25</sup>Barankevich v. Russia, Adali v. Turkey (March 31, 2005), Christians Against Racism and Fascism v. the United Kingdom (July 16, 1980), etc.

<sup>26</sup>July 26, 2007. In addition Djavit An v. Turkey (February 20, 2003), Christians Against Racism and Fascism v. the United Kingdom.

The ECHR acknowledged that impromptu meetings should be considered as an expected (and not the sole) exercise in healthy democracy. Therefore, government authorities must protect all kinds of impromptu meetings and facilitate the conduct thereof provided they are of peaceful nature<sup>27</sup>. In this connection, the federal law must provide for an exception from the requirement of prior notification in the event when such prior notification is simply impossible from the practical standpoint. Instead, the provisions of Articles 5 and 7 of FL flatly disallow spontaneous (impromptu) public events, which constitutes a direct violation of the freedom of assembly.

Article 8 of FL provides for the possibility of holding public events without notification, but only in the event when the number of its participants does not exceed 100.

More often than not regional and local government bodies render remote sites suitable for spontaneous events when preparing the list of places for the conduct of possible meetings. In the event of an excessive number of participants or in the event of absence of organizers at such meeting law enforcement agencies may terminate it at any time.

Such undue restrictions practically rule out the possibility of conduct of impromptu meetings.

The provisions of FL No.54 exclude the **presumption** of human rights and freedoms in this field of legal relations. Human beings and their rights are in accordance with Article 2 of the Russian Constitution the supreme value, and the protection of these rights is the main responsibility of the state. By implication of Article 18 human rights determine both the contents of laws and the practice of administration thereof.

This principle was not in fact mentioned in FL No.54 prior to the amendments dated 2012. The Constitutional Court of the Russian Federation in its rulings No.2-P dated January 15, 1998; No.3-P dated February 18, 2000 and No.484-O-P dated April 2, 2009 when determining the location for the meeting recognized the need to meet the following conditions: "Consequently, the disputed statutory provision stipulating the authority of public bodies to make a substantiated proposal to change the place and (or) time of the public event and stating the requirement to agree upon this proposal with its organizers, implies that the proposed option of the public event makes possible the achievement of the goals of this event in the place and (or) at the time corresponding to its socio-political importance".

In the amendments dated 2012 the achievement of the goals of a public event is mentioned in Clause 2.2 Article 8 among other conditions: "when determining the specially designated locations and establishing the procedure of their use".

This principle is in fact not applied in practice. The possibility of achievement of the meeting goals is practically not taken into account by local and regional authorities when they consider notifications about meetings and "propose other locations for the conduct of public events".

This principle is ignored in the regional laws in terms of determination of places where meetings are not allowed. The major part of the regional laws contains restrictions regarding the holding of meetings next to all government buildings. Thus, all protest campaigns against acts and decisions of government authorities are prohibited because an evident condition for the achievement of the goals of similar campaigns is their holding in the immediate proximity to the buildings where government authorities are located.

The above ruling of the RF Constitutional Court dated April 2, 2009 declares that "government authorities must negotiate the place of the meeting with organizers". However FL No.54 does not formalize the principles of not only the priority of the freedom of assembly, but also the parity of interest during such negotiations. The final decision on the notification falls within the scope of competence of the registration authority. Furthermore, the legislation establishes the right of this authority to determine the "suitability of the location" without taking into account the interests of the organizers of the public event.

The legislation determines the possibilities of limitation of the freedom of assembly on "preventive grounds" and the arbitrary interference by law enforcement agencies.

Part 2 Article 15 of the Russian Constitution establishes the responsibility of government authorities, local self-government bodies and officers to comply with the Constitution and the federal laws. Article 18 announces that the rights and freedoms of man and citizen define the meaning, contents and application of laws, the activities of the legislative and executive power, local self-government bodies, and are secured by the system of justice.

The constitutional provision on the legitimacy of limitation of the freedom of peaceful assembly for the purpose of protection of the constitutional principles is applicable "*only to the required extent*". This provision is consonant with the principles of proportionality, adequacy and substantiation of the immediate threat to the constitutional values.

In the judicial practice, the principle of proportionality of interference is not normally considered because Article 5 of FL No.54 (on the prohibition of meetings upon submission of substantiat-

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<sup>27</sup>Please refer to Oya Ataman v. Turkey (December 5, 2006).

ed proposals as to changes in the place and time of public events) does not contain any limitations.

According to the resolutions of the ECHR in the cases of Stankov and the United Macedonian Organization Ilinden v. Bulgaria (October 2, 2001) and the United Communist Party of Turkey and others v. Turkey (January 30, 1998), the principle of proportionality requires a full and impartial assessment of the particular circumstances impacting the meeting. The ECHR also resolved that the grounds to which government authorities refer for the purpose of confirmation of the proportionality of their actions must be “significant and sufficient”, as well as “rely on a “reasonable estimation of the relevant facts”.

In the case of Makhmudov v. Russia the ECHR gave the following assessment to the circumstances of the violation of the freedom of assembly (similar to those presented in the case files): “64. The states must not only protect the right of peaceful assembly, but also refrain from the unfounded indirect limitation of this right. Due to the specific nature of the freedom of assembly and its direct relation to democracy there must be cogent reasons for an entrenchment of this right”<sup>28</sup>.

It should be particularly noted that the ECHR had already considered cases where the same arguments and grounds had been used as those used by the registration authorities in the event of a “substantiated” limitation of the freedom of peaceful assembly and which were in their turn recognized as lawful by the courts (in the presented resolutions). In all such cases the ECHR had found such arguments and grounds unsound.

1. Grounds for the **ensuring of public security** (including the ensuring of security of other persons).

In the case of Makhmudov v. Russia, the Court recognized that the arguments about the restriction of meetings due to the “threat of terrorism” were unfounded because no proof of such threat was produced, including by the registration authority. In addition, the ECHR found wrongful the acts of the Prefect’s Office of the South-Western Administrative District of Moscow that despite referring to the threat of terrorism had held its own events in public places. Such outrageous fact made the Court give a harsh estimate to the acts of the registration authority: “By cancelling the claimant’s meeting the local authorities behaved despotically. The Court finds that there were no grounds for the entrenchment on the claimant’s right to assembly” (Clause 72 of the resolution).

In the same manner, in the case of Stankov and the United Macedonian Organization Ilinden v. Bulgaria the Court found that the safety considerations (even relating to the constitutional values) could not serve as a ground for the limitation of the freedom of assembly in the event when the “permissibility threshold” is observed, in particular in the demonstration of acts of violence. In this case the ECHR formulated a special requirement to the procedure of agreement established by the national legislation: “the automatic application of preventive measures for the purpose of suppression of the freedom of assembly and the freedom of expression, except in the events of incitement to violence or denial of the democratic principles (irrespective of how shocking and unacceptable certain opinions or expressions may seem to government authorities, and how unlawful the declared requirements may be) inflicts harm to democracy and often puts it under threat... The Court has resolved that although the considered issues related to the national symbols and the national identity that was not a sufficient ground for the granting to the government authorities of such wide discretion”.

2. In the resolution of the ECHR in the case of Makhmudov v. Russia the restriction of the public event due to the **conduct on the specified site of a different public event** was found unlawful too.

The ECHR recognized that the limitation of the freedom of assembly by the city administration for the reason of availability of other applications for public events was unacceptable in the resolution dated May 3, 2007 in the case of Baczowski v. Poland, as the city administration had not taken any measures in order to allocate the meetings across the territory. The concerns of the city administration regarding threats to the participants could not be taken into account because they were not based on actual and real threats.

3. In the above mentioned resolution the Court also determined that the restrictions of meetings due to the **observance of the traffic rules** “were not consonant with the constitutional guarantees of the freedom of assembly”.

4. The unacceptability of limitation is also determined by the **responsibility of the state to observe the right to counter-demonstrate** (resulting from the presumed “freedom of assembly”).

In particular, by the resolution of the ECHR in the case of Platform Ärzte für das Leben v. Austria (June 21, 1988) it was established that the “right to counter-demonstrate may not extend to the acts preventing the exercise of the right to demonstration”.

Therefore, as every human being or group of them have the right to express their views with-

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<sup>28</sup>Please refer to the case of the Political Party Ouranio Toxo and others v. Greece (October 20, 2005) and Adali v. Turkey.

out interference on the part of other persons the counter-demonstrators must not interrupt the acts of those who do not share their opinion. This being said, other public events (including festive events) organized at the instigation of the authorities themselves must not be considered meetings, and the priority in the exercise and protection must not extend to them<sup>29</sup>.

It is necessary to recognize as significant the circumstance that in the course of the practical registration of notifications the administrations intentionally organize other events on the specified sites for the purpose of justification of their refusal to register notifications.

5. Along with that the ECHR recognizes the priority in the securing of the freedom of assembly **over the interest of institutions and enterprises** (both state-owned and private) and determines for this purpose the responsibility of the authorities to secure the same.

In particular, in the case of *Appleby and others v. the UK* (October 15, 2002) the ECHR resolved that a successful exercise of the right to freedom of expression “does not just depend upon the responsibility of the state to refrain from interference, but may also require active protection even in the field of relations between private persons”<sup>30</sup>: “In the event... when the prohibition on access to private premises prevents any efficient exercise of the freedom of expression or it can be stated that a violation of the very essence of this right has taken place, the Court does not rule out the possibility of occurrence of an active responsibility of the state to protect the exercise of the rights guaranteed by the Convention by way of regulation of the right to private property. As an example a city with self-administration can serve where all municipal authorities are controlled by a private organization”.

In all cases of conflict of interest the following doctrine is applied: “The states must not only protect the right to peaceful assembly but also refrain from the unfounded indirect limitation of this right. Due to the specific nature of the freedom of assembly and its direct relation to democracy there must be cogent reasons for an entrenchment on this right”<sup>31</sup>.

Therefore, the arguments that can be used by the registration authority to substantiate “reasoned proposals” when they have no evidential basis are unlawful and result in an illegal limitation of the freedom of assembly. As different “concerns” are not supported by evidence of any threat or source of danger and are declared prior to the actual conduct of the public event they are a priori **unjust**.

Thus, judging from the resolutions of the ECHR it is allowed to use the limitation of the right to peaceful assembly only in the event of violent acts (or other acts unacceptable from the standpoint of the description in Part 3 Article 55 of the Russian Constitution). All measures of preventive nature for the purpose of avoiding of violations are unacceptable in the course of these legal relations.

FL No.54 establishes in its Articles 13 and 15-17 that the registration authority **may** allow for an interference with public events for the purpose of observance of the constitutional principles **only during the conduct thereof and only through an authorized person**. No other powers, including for preventive purposes, are given to the registration authority by the Federal Law. This procedure in general ensures both the priority in the protection of the freedom of assembly, and the possibility to limit the freedom of assembly in the event of a real threat on the part of the meeting of violation of the rights and freedoms of other people or other constitutional values. Along with that, the procedure of interference on the part of regional authorities established in the law is almost never complied with. For example, Article 17 of FL establishes the procedure of provision to organizers of a written instruction (protocol) in the event of cancellation of the meeting. However over the time the law remains in effect no single case of fulfillment of this requirement has been registered. Thus, regional authorities demonstrate the selective application of the provisions of the law acting in the conditions of impunity.

The provisions of FL give to the registration authority an unlimited opportunity to prohibit public events and act for their own benefit, including for political reasons.

The law stipulates that the regulation of the freedom of assembly is performed by the regional authority. However the law does not provide for clear criteria and procedures to determine such regulation. It only declares that the limitation of assembly may be justified by a “disturbing of the operation of vital infrastructure facilities, transport or social infrastructure, communication, or jam the movement of pedestrians and (or) means of transport, or impede access by citizens to residential premises or facilities of transport or social infrastructure”. Furthermore, regions establish rules of conduct of meetings in the territory of “monuments of history and culture”. Regions also approve at their own discretion the standards of the maximum occupancy and the distances for the locations of meetings<sup>32</sup>.

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<sup>29</sup>Case of Makhmudov v. Russia.

<sup>30</sup>Please also refer to the resolution in the case of *Ozgur Gundem v. Turkey* (March 16, 2000), as well as *Fuentes Bobo v. Spain* (February 29, 2000).

<sup>31</sup>Cases of Makhmudov v. Russia and Adali v. Turkey.

<sup>32</sup>Article 8 of FL No.54.



Consequently, **the Russian Federation has rejected the statutory regulation of the fundamental freedom** having allocated the whole responsibility for the implementation of FL No.54 to regional government authorities and created thereby the unprecedented conditions where 83 different regional laws securing the freedom of assembly are in effect in the same country. Such approach contradicts the constitutional principles of the Russian Federation (Article 18 of the Russian Constitution) that establish **the equality of all rights and freedoms of citizens irrespective of the place of residence**.

At the time of enactment of the law regulating the freedom of assembly the most important principle of substantiation of the legislative restriction of human rights and freedoms was violated. However this principle was not observed in the Russian Federation at the time of enactment of many other laws limiting the rights and freedoms. In the above mentioned petition to the Constitutional Court of the Russian Federation the deputies of the State Duma and writer Limonov stated the violation of this principle. However the RF Constitutional Court ignored the arguments of the claimants and did not find any violation of the Constitution; it only considered instead the compliance of the procedure of adoption of the law with the provisions of the rules of procedure of the State Duma of the Russian Federation.

In accordance with Part 3 Article 55 of the Russian Constitution a limitation of any right of a citizen is allowed only for the purpose of “protection of the constitutional system, health, rights and legitimate interests of other persons, and the ensuring of national defense and national security”.

A limitation may be used only to the required extent. By implication of Parts 1 and 2 Article 55 of the RF Constitution any limitation must not only be substantiated but also provide for a provable fact of threat to the principles and values established in Part 3. Furthermore, such limitation may not be used as a restrictive provision, but must be proportionate to not only the place but also the circumstances of avoidance of the threat of violations. This being said, the limitation must be time framed.

At the time of adoption in 2012 of the amendments to FL No.54 no arguments were stated even formally in the explanatory note to the draft to explain in support of what constitutional values the limitations are adopted with regard to freedom of assembly. The regional laws were enacted in the same manner.

The responsibility of organizers of public events can be recognized as discriminatory as it provides for outrageous administrative sanctions for violating the legislation on assembly.

The new version of the law deprives those persons of the right to act as organizers of campaigns who have a conviction or who have been held liable twice or more with the imposition of administrative sanctions under a number of articles of CAV, in particular Articles 20.2 (violation of the procedure of conduct of or participation in public campaigns), 19.3 (failure to obey legitimate demands of police officers). The prohibition is formalized in the law as an additional limitation but in fact it represents nothing but a second punishment in form of a restriction of a type of activity which is unacceptable according to Part 1 Article 50 of the Russian Constitution.

The increase of the fines for violating the procedure of participation in and organization of campaigns by ten times and more contravenes the resolution of the ECHR in the case of *Ezelin v. France* dated April 26, 1991: “The freedom of participation in peaceful assembly is so important that a person must not be subjected to sanctions — even the softest of the disciplinary penalties — for the participation in unrestricted demonstrations provided this individual does not commit something improper during this event”.

The first practice of imposition of fines demonstrates the disproportionality of the punishment, as well as the low efficiency of judicial authorities in the establishment of the real circumstances of the case. The main problem is that by violation of order practically any act may be meant, for example the exceeding of the expected number of participants of the campaign that the organizer has to specify in the notification.

## **5. Summary**

The situation with the securing of the freedom of assembly in Russia is critical. The amendments adopted in 2012 to the legislation are not in line with the Constitution of the Russian Federation and the international standards; they contravene the letter and intent of the Guidelines of the Freedom of Assembly of ODIHR OSCE and the Venice Commission of the Council of Europe in accordance with which:

- the rights and freedoms of man and citizen may be limited by federal law only to the extent required for the protection of the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other persons, the ensuring of national defence and national security (Part 3 Article 55 of the Constitution);

- it is important to eliminate the abuse of preventive measures and maintain the procedure of proving (on the basis of the principle of presumption of innocence);
- regulatory acts must not contain provisions and procedures allowing for violent interpretation.

With the transfer of the powers in connection with the regulation of the procedure of meetings to regional legislative authorities the situation has been created where each region establishes its own conditions for the exercise of the freedom of assembly by citizens. The regional laws are prepared without account and effect of the constitutional and international principles and rules of ensuring of the freedom of assembly. Neither of the regional laws contains the procedure of securing the goals of the meeting — a necessary condition mentioned in the federal legislation. It is evident that the extensive list of the limitations introduced by the regional laws can in no way secure the achievement of the goals of the meeting. In particular the prohibition on the conduct of meetings next to government buildings rules out the achievement of goals of a protest meeting.

The federal law introduces the disproportionately strict requirements to meeting organizers and the punitive sanctions. Where necessary these conditions enable the prohibition of any protest public event and thus create a pretext for mass political repressions.

## **ANALYSIS OF PRACTICAL SECURING OF FREEDOM OF PEACEFUL ASSEMBLY IN RUSSIA**

### **1. Preamble**

The violation of the freedom of assembly in the Russian Federation is of chronic and large-scale nature. The situation has been deteriorating year after year — the number of restrictions of and unfounded interferences with peaceful assembly has been growing. The majority of protest campaigns (which are the most topical of all campaigns and require a guaranteed protection) are prohibited by government authorities.

The situation with the securing of the freedom of assembly in Russia is of special importance because street rallies, demonstrations and pickets have been until recently the only available means of exercising by citizens of their political rights in terms of declaration of their interests. The freedom of assembly is one of the fundamental principles in a democratic society and one of the main conditions for its development and self-fulfillment of each citizen. At the national level, this right is formalized in Article 31 of the Constitution of the Russian Federation: “The citizens of the Russian Federation shall have the right to gather on a peaceful basis, unarmed, and hold meetings, rallies and demonstrations, processions and pickets”. These rights may be limited by the federal law only in the events provided for in Part 3 Article 55 of the Constitution (for the purpose of protection of the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other persons, and ensuring of national defence and national security), as well as in the extraordinary situations stipulated in Article 56 of the Constitution.

Therefore, the freedom of assembly in Russia is guaranteed but still consistently limited by both the legislation and the practical application.

The situation deteriorated drastically with the adoption of Federal Law No.65-FZ of June 8, 2012 which introduced amendments to the Federal Law “On meetings, rallies, demonstrations, processions and picketing” (hereinafter referred to as FL No.54), as well as the Code of Administrative Violations (CAV) of the Russian Federation, which entered into effect on June 9. The amendments to FL No.54 significantly broadened the authority of the constituent entities of the Russian Federation; in particular, the regions received the right of independent regulation of meetings. By spring 2013, such laws were adopted in 81 regions. The provisions of the regional laws made the procedure and the possibilities of conduct of peaceful assembly more rigorous and introduced limitations which enable the prohibition of any meeting based on technicalities. By way of consistent hardening of the legislation in Russia “the notification-based procedure of peaceful assembly established in the law often tends to turn into the actually permissive and even selectively permissive one”.

In the whole diverse practice of prohibition and limitation of peaceful assembly in Russia over the last year the following aspects give rise to concerns:

- 1) practice of prohibition of meetings for evident and outright political reasons;
- 2) arbitrary nature of prohibitions: noncompliance with procedural terms and substantiation;
- 3) absence of efficient ways of impacting legislative and judicial decisions to the extent of limitation of the freedom of assembly;
- 4) great danger for participants of being subjected to violence and severe punishment on arbitrary and contrived grounds.

## **2. Analysis of law enforcement since tightening of the national legislation in June 2012**

The new version of FL No.54 significantly extended the possibilities of restriction of peaceful assembly both at the stage of the agreement procedure and during thereof.

Already in the previous version of FL No.54 the casuistic provision had been included under which local and regional authorities had been in fact granted the right to change on any pretext (substantiation) the place and time of a public event<sup>33</sup>. They had made extensive use of the said possibility by setting knowingly unacceptable conditions for organizers preventing the achievement of the goals and the public nature of meetings.

Direct prohibitions on the conduct of meetings in the publicly important locations the lists of which are contained in the regional laws have now been added to such conditions. In addition, the liability of meeting organizers has been extended for any deviations from the specified conditions (regarding the number and behaviour of participants, program of the event, etc).

In fact, the regulatory provisions enable today the total prohibition on all public campaigns in Russia. Moreover, even the situation of some excessiveness of means of control has occurred, which is in the picture of both law enforcement and judicial practice.

### **2.1. Overall trends in the field of public assembly**

In the Russian Federation the attitude of government authorities to public campaigns does not so much mean the forms of manifestation of the public activity, as the sources of increased danger to the interests of the state. In the practice of approval of public events the selective approach is used which is reflected in the attitude to public campaigns declaring political goals and demands. Such events make less than 5 % of the total number of meetings, but these are as a rule most mass and significant meetings and processions. They are first on the list to be subject to prohibitions and limitations.

This doctrine determines for law enforcement agencies the task of special control over the conduct of protest meetings, the creation, preparation and equipping with special means of special police services for the purpose of disrupting meetings and demonstration.

The year 2012 was marked by the growth of public activity on the one hand and the increased attention to the measures of control by government authorities on the other.

In the collegium of the Russian Ministry of Internal Affairs of February 8, 2013 V.Kolokoltsev, Minister of Internal Affairs of the Russian Federation, said: "Significant efforts of the police were aimed during the reporting period at the ensuring of law, order and public security, including in the course of mass socio-political events".

It should be noted that the efforts of the Ministry were first of all expressed in the increased number of the engaged officers. Thus, according to official data, to 34 thousand mass events in Moscow in which 33 million people took part 538 thousand officers of the Ministry of Internal Affairs were allocated (8.3 % more than in the previous year) and 150 thousand military personnel (up 16 %). The information in the regions is even more telling. For example, in the Novgorod region 1.935 officers of the Ministry of Internal Affairs alone were allocated to control the public events with the total number of participants 4.141. Thus, **nearly one policeman was engaged per each two meeting participants.**

Notwithstanding the tightening of the legislation, the general practice of selective prohibitions in 2012 and the first half-year of 2013 did not undergo any big changes. First of all the limitations concerned some mass campaigns held next to government institutions. Because such events are more often than not of protest nature, we can ascertain the preservation of the discriminatory practice of limiting the freedom of assembly for political reasons.

The landmark event that had a disastrous influence on the situation with the securing of the freedom of assembly in 2012 was the institution of a criminal case in connection with the "organization of mass rioting" (Part 2 Article 212 of the Criminal Code of the Russian Federation) during the

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<sup>33</sup> Clause 2 Part 1 Article 12 of FL No.54: "2) communicate to the organizer of the public event within three days upon receipt of the notification of the public event (and in the event of notification of picketing by a group of persons less than five days prior to such picketing — on the day of receipt thereof) a reasoned proposal on changing the place and (or) time of the public event, as well as a proposal on the removal by the organizer of the public event of nonconformity of the purposes, forms and other conditions of the event". Clause 5 Article 5 of FL No.54: "5. The organizer of the public event shall not have the right to conduct it in the event when the notification of the public event was not filed within the established term, or in the event when no agreement with the executive authority of the constituent entity of the Russian Federation or the local self-government body is reached with regard to the change upon their reasoned proposal of the place and (or) time of the public event".

meeting in Bolotnaya Square on May 6. The criminal proceeding resulted in a whole wave of arrests, interrogations and searches that affected activists in different Russian regions. In total around 20 people were arrested. They are being accused of appealing for mass riots and use of violence towards representatives of the authority.

In the meantime, V.Lukin, Human Rights Commissioner of the Russian Federation, made a statement in which he emphasized in particular that in the absence of the signs of mass riots exhaustively listed in the law it was impossible to speak about the presence of mass riots themselves.

## 2.2. Practice of approval of public assembly

First and foremost, one should note the general attitude of representatives of both regional and local self-government authorities to meetings. Typically, the majority of them divide public events into “authorized” and “unauthorized”, or “permitted” and “prohibited”, which contradicts the principles declared in the federal law. This attitude revealed itself illustratively in the regional administrative regulations that were throughout named “Approval of meetings, rallies, demonstrations, processions and picketing”. Upon recommendation of the officials who prepared such regulations the authorities must in each case adopt in response to the notification a special resolution on the conduct of the meeting. In some cases such resolution contains only the decision on the delegation of a representative of the authorities to the meeting in the capacity of an authorized person. In other cases it serves as a documentary permission of the meeting by the authorities, i.e. the document without which the organizers may not hold the public event. Revealingly the notification sample was also approved in the addenda to the regulations. Such sample automatically became an obligatory “form” to be used for the purpose of application.

Indicative is the practice of warning of organizers about the liability provided for in Article 12.2 of FL No.54, and during the last year the corresponding documents were served upon organizers against signature ahead of not only “prohibited” but also “approved” meetings. Such understanding of the “prevention of violations” illustrates disrespect for the presumption of the freedom of assembly on the part of government officials.

Federal Law No.65-FZ of June 8, 2012 vested upon regional authorities the right to determine “places specifically designated or suitable for the purpose of discussion of issues of public importance and expression of public opinion, as well as for the purpose of mass attendance by citizens for open sharing of public views with regard to topical issues primarily of socio-political nature”<sup>34</sup>. Over the year 2012, special laws were adopted in the majority of the regions which established an extensive and diversified list of the locations where public events are prohibited.

Along with that the sample monitoring of public campaigns showed that the practice of denying the “approval” of public events in the regions did not undergo any qualitative changes in 2012 — early 2013.

The denials of “approval” of meetings can be divided into two categories:

### 2.2.1. Formal procedural grounds

Based on the data provided in the special report of the Human Rights Commissioner for Samara Region published in May 2013 the following typical reasons for a denial of “approval” can be specified:

- breach of the term for the submission of the notification;
- noncompliance of the notification of a public event with the requirements of FL No.54;
- absence in the notification of information about the exact quantity and categories of the means of transport, the average speed of movement, the length of the route; a line of more than 50 means of transport may impede the unobstructed movement of public transport, create traffic jams and congestion;
- absence in FL No.54 of such form of public events as gathering.

This being said, denials of approval of public events on the ground that the specified location is included in the list of “prohibited” locations are quite rare. More often the argument is used that the “specified location is not included in the list of recommended locations”, after which the authority automatically sends the organizers to the “designated” locations irrespective of the goals of the public event.

For instance, on October 26, 2012, the government of Novocheboksarsk (the Chuvash Republic) refused to approve a meeting in the central Cathedral Square and offered only four other places for the purpose of public events. The corresponding resolution of the town assembly was used as substantiation.

Such refusals to approve public events are as a rule used on a selective basis and mostly in relation to protest campaigns only, whereby arguments for this purpose may differ.

<sup>34</sup> Clause 1.1 Article 8 of FL No.54.

### 2.2.2. "Preventive" considerations

Below are the most common reasons for a denial:

- earlier notifications from other organizers about public events in the same location and at the same time;
- securing of unobstructed access by citizens to public institutions and movement of means of transport on traffic ways without congestion;
- exceeding of the maximum occupancy of the location of the public event and "impossibility to guarantee the ensuring to the full extent of security for the participants of the public event";
- public events of social significance coinciding with public holidays. Thus, the Prefect's Office of the Central Administrative District of Moscow refused to approve the procession in memory of Anna Politkovskaya because on October 7 the whole central part of the city was going to be busy due to other events;
- possibility of conduct of the public event "on the structural elements of buildings and monuments", absence of fences along the perimeter of the structure, "which can create threat to life and health of the participants of the public event";
- conduct of public events in locations situated in the immediate proximity to road traffic and next to territories of hazardous production facilities, for example in the territory of Port of Togliatti OJSC;
- absence of guaranteed security for the participants of the public event, impossibility to ensure their security using the resources of the police. Thus, the administration of Khimki, Moscow Region, prohibited the gay pride parade to be held by LGBT activists on the day of election of the town mayor on October 14 for the reason that the police officers were going to be engaged in the ensuring of security during the election. Furthermore, the authorities mentioned the heavy traffic in the location specified in the procession route, as well as the availability in the proximity to the place of the campaign of a public garden visited by minor children;
- obstruction of road traffic. For example, the organizers of the meeting and procession in Kazan on September 16 received a denial in response to their notification substantiated by the reasoned opinion of the Ministry of Transport and Public Roads of the Republic of Tatarstan stating the "impossibility of conduct of the demonstration (procession) along the specified route";
- repeated violations by organizers of the rules of conduct of public events. Thus, the Moscow Government refused to approve the campaign in support of Article 31 of the Russian Constitution to be held in Triumphal Square on October 31.

The substantiation of this kind can be formally identified as "preventive" considerations. The authorities judge from the assumption that the event may cause threats or inconveniences for the public and disturb the operation of institutions. Such arguments often run counter to common sense.

Analyzing the refusal to approve the meeting next to the building of the government of Samara Region I. Skupova, Human Rights Commissioner for Samara Region, states: "If the steps of the building of the government of Samara Region pose such threat to the life of the picketers, the officials must be then risking their lives on a daily basis when they come to work! Not to mention the government-owned cars approaching the entrance of the White House right through the "structural elements of the building" which are not fenced round along the perimeter from the grass lawn above which they are 2 meters in elevation. By the way, this is exactly the structural element of the building (in parlance "canopy") where all members of the regional government and heads of federal agencies gather on special occasions before they go to lay flowers to the Eternal Flame in the Square of Glory near the monument to the fallen defenders of the Motherland, including the officials who are in charge of security – it turns out that the region can at any time be left without its leaders!"

The basis for this practice was initially laid in Articles 5 and 12 of FL No.54 providing for the authority of a "government body of the constituent entity of the Russian Federation or local self-government body" to change the time and place of the public event at its own discretion. The only limits of such discretion are the "substantiations". Disagreement on the part of organizers with the shifting of the public event automatically means the prohibition thereof. Consequently, the government authorities make use of these possibilities solely at their own "discretion".

As evaluated by the Venice Commission<sup>35</sup> "the actual prohibitions on the conduct of public events" constitute a direct limitation of the freedom of assembly. The ECHR too gave a critical evaluation to such practice: "In order to be "required in a democratic society" a limitation of freedom must meet a vital social need, be proportionate (for example, a rational relatedness between

<sup>35</sup> Recommendation No.659/2011 of March 29, 2012 of the European Commission for Democracy Through Law (Venice Commission) "Opinion with regard to Federal Law No.54-FZ of the Russian Federation "On meetings, rallies, demonstrations, processions and picketing" dated June 19, 2004.

the goal of the government policy and the means used to achieve it, and there must be a fair balance between the observance of the interest of the community as a whole and the requirement to protect the fundamental rights of each individual). Meetings constitute the same lawful way of using public spaces as any other ways. Restrictions of assembly are allowed only in the events when the meetings are of destructive nature, and the hypothetically possible inconvenience as a result of the meeting does not justify the prohibition thereof. Indeed, causing of inconvenience to the authorized organizations or the public, including interference with road traffic, must not be a sufficient ground for a prohibition<sup>36</sup>.

The federal legislation as revised in 2012 establishes only two grounds for a denial of approval of public events: when the meeting is planned to be held in a “prohibited place”, and when among organizers there are persons previously held liable for violations of the legislation on assembly<sup>37</sup>. However, no cases of use of these grounds for a denial have been discovered in the regions because of the successful practice of the obligatory “shifting” of the public event upon any contrived pretext to a different place knowingly unacceptable for organizers.

The following statistics is included in the report of I.Skupova: “According to the government of the Samara urban district and the Togliatti urban district there were no denials on their part of approval of public events in 2012... However, according to the data of the Department for Public Security of the Government of Samara Region, the city government refused to approve 17 public events... Furthermore, in 167 cases the organizers of public events in Samara received information about the impossibility of conduct thereof, and in 64 of them for the reason of non-compliance of the filed notifications with the federal and regional legislation.

Formally, the government of the Samara urban district does not call such informing a “non-approval” but it is imaged just as a refusal in the minds of event organizers. In these cases the legal background of the notification-based procedure of conduct of campaigns stipulated in the law does not bother the police officers either. The need to guard the event or take measures aimed at its termination and arrest of violating citizens depends upon the availability of approval by government authorities”.

According to the Youth Human Rights Advocacy Movement, in 2012, the organizers of 53 campaigns from 15 regions faced problems with the approval or conduct of public events. In Samara Region alone “in 103 cases it was suggested to change the time or place of conduct of the public event (subject to the proposal of alternative options) due to the availability of earlier notifications claiming the same locations, and the limitations provided for in the law. In 52 of the said cases, the public event organizers agreed with the proposals and conducted their events, and in 27 cases they refused to do that. With regard to other applications there was no official feedback from the organizers, and the events were not conducted”.

### 2.3. *Conduct of public meetings*

FL No.54 contains the procedural terms of interference with the conduct of a public event. In particular, interference is allowed only by authorized representatives of the executive bodies of a constituent entity of the Russian Federation or a local self-government body, as well as an internal affairs department (Articles 13 to 15, 17). The authorized representatives may demand from the organizer the removal of the detected violations. And only in the event of non-fulfillment of the requirements it is allowed to interfere. In addition, individual participants of the event may not be detained without the knowledge of the organizer. In the event of adoption of the decision on the termination of the event the authorized representative of the executive body or the local self-government body instructs the organizer of the public event to terminate it stating the reason for such termination, after which he/she executes this instruction in writing within 24 hours and serves it upon the public event organizer.

Therefore, the arbitrary interference on the part of law enforcement agencies with the event (and even their presence in the place of the event) without the authorized representative of the internal affairs agency for the purpose of “prevention of offences” (except for violent acts on the part of the participants) is unlawful. It contradicts the procedure for the ensuring of security for the participants of public events established in FL No.54, and may be appealed against.

In practice the procedural terms of interference are not complied with. In particular, we are unaware of any single case of receipt by organizers of a written instruction after the involuntary termination of the public event.

Even if the government (registration authorities) complies with the terms of interference to

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<sup>36</sup> Resolutions of the ECHR in the cases of the Christian Democratic People’s Party v. Moldova of February 14, 2006, § 70; Barankevich v. Russia of July 26, 2007, § 26; Sergei Kuznetsov v. Russia of October 23, 2008, § 40.

<sup>37</sup> Part 3 Article 12 of FL No.54.

some measure, the police ignore them totally. This is largely due to the fact that the regulatory acts of the Ministry of Internal Affairs take no account of the provisions of FL No.54. Consequently, the police act only based on the authority granted to them by the Federal Law "On the police".

In 2012, the legislative amendments toughened the administrative liability for violating the established procedure of organizing or conduct of public events. Particularly, the maximum fines for violating the procedure for the conduct of a meeting were increased unprecedentedly for CAV RF: for individuals to up to three hundred thousand and for officers to up to six hundred thousand roubles; a new punitive measure was introduced — compulsory community service. In addition, a special period of limitation was established equaling to one year as from the date of the administrative offence. Subsequently the Constitutional Court of the Russian Federation found a number of the provisions contradicting the Russian Constitution.

The upgrading of penalties applicable to organizers and participants of meetings made an extremely adverse impact on the practice of interference with public events and in fact blocked the procedures provided for in the legislation.

### *2.3.1. Liability of organizers for the exceeding of the number of meeting participants*

This liability was introduced by the legislative amendments in 2012, and by the way it now arises irrespective of whether the exceeding of the number causes a violation of public order.

Thus, on November 4 a procession took place in Saint-Petersburg organized by V.Milov, deputy of the legislative assembly of the city. The deputy was brought to administrative liability on the basis of Article 20.2 of CAV RF ("Violation of the procedure for the conduct of public events"). According to the organizer "the specified number of the participants had been three thousand. Predictably, much more people arrived. The Ministry of Internal Affairs believes that there were more than five thousand people, and my estimate is around 10 to 15 thousand".

On December 13, in the Safonov Public Garden in Samara a picket took place against the adoption by the Russian State Duma of the "Dima Yakovlev Law". 50 participants had been specified in the notification about the public event, but in fact, there were about 100, including the press. That in no way affected the public order. Nevertheless, the organizer of the picket was brought to administrative liability. He was inflicted a penalty in form of an administrative fine in the amount of 1,000 Roubles.

The term "violation of the established procedure of organizing or conduct of meetings, rallies, demonstrations, processions or picketing" provided for in Part 1 Article 20.2 of CAV RF (as stated in the law draft) is by no means given in more detail in the disposition of this legal provision. It is not defined in FL No.54 either. It turns out that any deviation from the specified conditions of conduct of a public event may be interpreted in this manner, including that of no social danger. And because there is no intent and guilt on the part of the organizers in the violations of this kind, they can not be qualified as offences.

### *2.3.2. Prohibition on the hiding by meeting participants of their faces*

Article 6 of FL No.54 forbids the participants of public events to "hide their faces, including by way of using masks, concealment means, other objects specially intended for the purpose of causing identification difficulties". Thus, an essentially absurd prohibition was introduced on the conduct of costume parties, masquerades, or theatrical processions. This requirement constitutes a direct limitation of the freedom of peaceful assembly and invasion of privacy.

In June, a procession took place in Samara that included elements of a theatrical performance (using puppets) in support of Pussy Riot. Some of the participants of the campaign were brought to administrative liability for "hiding their faces".

### *2.3.3. Arbitrary detention and administrative punishments*

The practice of this kind had been used on a massive scale even prior to the adoption of the amendments to the law, but over the last year the scale thereof has increased substantially. The "offenders" are immediately inflicted the maximum possible penalty by the courts, for instance 20,000 Roubles for a single-person picket in Astrakhan called a meeting by the police, or 15,000 Roubles to be recovered from the participants of the non-political street event "Pillow Fight" in Saint-Petersburg, or 10,000 and 15,000 Roubles from activists V.Chernozub and S.Kozlovsky who being deprived by the new provisions of FL No.54 of the right to act as campaign organizers still filed their notification and then participated in the campaign, etc. The courts base their resolutions on the testimony of the police, and more often than not refuse to accept or ignore the argument of the defense. According to the Youth Human Rights Advocacy Movement, in 2012 alone more than 150 activists were sentenced to administrative sanctions only for the participation in peaceful campaigns.

On October 30, the day commemorating the victims of political repressions, the monument to the victims was opened after the renovation in the Gagarin Park in Samara. During the event orga-

nized by the city government a number of young people opened a banner saying "Release political prisoners!". They had planned to conduct their picket in that location but their application had not been approved. The police officers detained four people. Later each of them was fined in the amount of 10,000 Roubles because they "being the participants of a public event in form of picket violated the established procedure of conduct thereof". As the banner was in line with the objectives of the event and could not disrupt the opening of the monument the actual fact of unlawful limitation of the freedom of assembly is obvious.

Detentions take place not only during campaigns but also prior to or after them. Often occasional passersby become victims of detention.

Thus, on August 17, when walking with air balloons in the pedestrian zone of Leningradskaya Street in Samara four people were detained by the police without giving any reason and taken to the police station where in their relation reports were prepared on the administrative offence of violation of the procedure for the conduct of meetings, rallies, demonstrations, processions or picketing. As the basis the report of duty officer V.Gelms was taken who at the time of the detention had apparently been at his workplace in the department. Nevertheless, the court found them guilty and inflicted to each of them a fine in the amount of 10,000 Roubles. The court of appeal upheld the resolution. The Human Rights Commissioner for Samara Region came to the following conclusion: "In fact all those acts were aimed not at the establishment of law and order but at the application of measures of repressive nature to the people who had seemed suspicious and insecure to the law enforcement officers".

In October, 71 year old A.Zakurdayev was detained in Rostov-na-Donu. All his "wrongful" acts consisted in simply approaching the single-picketing woman who was holding a banner about the Magnitsky List. According to the court judgment that the elderly man attempted to appeal against in the court of appeal without success he has to pay a fine in the amount of 20,000 Roubles.

The practice of detention of participants of "unauthorized" public events has become traditional. Thus, in the town of Aramil, Sverdlovsk Region, on October 14, the disapproved meeting against the falsification of the results of the mayor election was dispersed in which 70 to 100 people took part according to different estimates. Some people were detained.

The participants of "unauthorized" events are by no means always detained. Often the police do not interfere with the event but later prepare a report on administrative violation by the organizer thereof.

According to the court statistics, in 2012 in the Samara region alone the courts considered 46 cases of violation of the established procedure for the conduct of meetings, rallies, demonstrations, processions or picketing (11 of them are pending cases dating back to 2011). One case was returned for the purpose of removal of non-conformities in the report; one case was transferred to a different jurisdiction. 26 people were sentenced to administrative penalties. 18 people were released from administrative liability.

The Constitutional Court of the Russian Federation found that the minimum amount of fines equaling to 10,000 Roubles for individuals "does not enable the consideration of all circumstances of the case and ensuring of the proper individualization of liability" thus contravening the Constitution<sup>38</sup>. Therefore, since February 14, 2013 the courts have no right to inflict fines as a penalty in the amount established in the amendments to CAV RF. Moreover, the fines inflicted over the period since the amendments were enacted must be reviewed. However, the resolutions have not yet been reviewed and the application of the excessive penal sanctions still continues.

#### *2.4. Practice of appealing in connection with public campaigns*

According to the statistical data of the Justice Department of the Russian Federation, in the whole Russia just over 51 % of claims are satisfied that appeal against the actions and resolutions of government authorities. In the regions these figures vary significantly (for example, in Moscow favourable judgments are given only in 27 % of cases, and in Nizhny Novgorod Region in 30 % of them). Unfortunately, no separate statistics is maintained with regard to the cases of violation of the freedom of assembly. The monitoring performed by the human rights advocacy NPOs provides a rough picture. There are regions where the major portion of claims is satisfied, e.g. the Sakhalin region. But in the regions with active protest movements (Moscow, Saint-Petersburg, Nizhny Novgorod Region, Samara Region, the majority of the national republics) less than 5 % of complaints are satis-

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<sup>38</sup> Ruling No.4/P of the Constitutional Court of the Russian Federation of February 14, 2013 in the case of the constitutional review of the Federal Law "On the introduction of amendments to the Code of the Russian Federation for Administrative Violations and the Federal Law "On meetings, rallies, demonstrations, processions and picketing" upon request of the group of deputies of the State Duma, and the complaint of E.V.Savenko // ConsultantPlus. URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=142234>.



fied. On the average not more than 10 % of complaints against violations of the freedom of assembly are satisfied throughout Russia. This is the lowest figure among all categories of cases in connection with violations of human rights and liberties. In 2012, in the Samara region alone the organizers of public events appealed eight times without success against the denied approval of public events.

The main specifics of consideration of such cases are based on the following standpoint of the national courts: in court hearings only procedural matters in connection with the organizing and conduct of public events should be considered. The research demonstrates that in 79% of cases the courts assess the actual violations of the freedom of assembly judging from the substantiation of the prohibition notices and almost never evaluate the proportionality of the limitation of the right for the freedom of assembly. Thus, on October 19, the Lomonosovsky District Court of Arkhangelsk found lawful the refusal by the city government to approve the picket of the LGBT organization Rakurs. Judge E.Drakunova believed that the conduct of the picket in the city center with the purpose of attraction of public attention to social problems of homosexual teenagers was unacceptable due to the prohibition on the “propaganda of homosexuality” among minor children currently in effect in the region.

Favorable judgments delivered by the courts are rather exceptions. One of such exceptions is the resolution of the Collegium for Civil Law Cases of the Nizhny Novgorod Region Court of February 6, 2013 in connection with the appeal of E.Zaitseva. The court found unlawful the acts of the government of Nizhny Novgorod, Mayor O.Kondrashov and his deputy M.Kholkina expressed in the denial of approval of the place and time of the Nizhny Novgorod citizens’ meeting to be held on September 15, 2012 in Liberty Square within the framework of the all-Russia campaign “March of Millions” and ruled to recover legal costs from the government in favour of Zaitseva. The complaint had been filed to the Nizhny Novgorod Region Court as early as on September 13; however judge N.Golysheva had failed to consider it before the event. The meeting was brutally dispersed by the police using special means. Around two tens of activists were detained and fined. Zaitseva herself received a brain concussion as a result of a stroke by warrant officer of the Special Purpose Police Unit Lebedev and taken to City Clinical Hospital No.39.

It is necessary to admit that Russia has no affordable justice or independent and fair judicial protection of the freedom of assembly.

### **3. Analysis of the expert reviews of the national legislation**

Public organizations attempted to influence the deputies and block the enactment of the law draft tightening the legislation on public events as early as at the stage of discussion. Experts of the Independent Council of Legal Expertise Doctor of Law B.Strashun and Candidate of Science (Law) S.Nasonov prepared expert opinions with regard to the law draft. The reputable lawyers came to the conclusion about the selectiveness of the sanctions, their disproportionality and un-specific nature. It was particularly stated: “In the proposed law draft the degree of wrongfulness of the specified acts is increased artificially as compared to other violations provided for in CAV RF”. The opinion points to the unacceptability of the transfer of the powers of authority to determine meeting locations to the regions, the unlawfulness of the prohibition on the covering of faces of public event participants, and the contravention of the law draft to the provisions of the Constitution of the Russian Federation.

In the opinion prepared by Candidate of Science (Law), attorney S.Golubok the analysis was presented of the practice of the European Court of Human Rights. The conclusion was drawn that the complaints filed to the ECHR would be unconditionally satisfied with all ensuing consequences, including the payment of compensation at the cost of the budget.

On the other hand, to the dedicated committee of the State Duma of the Russian Federation the analytical materials were submitted in May under the title “Individual provisions of the foreign legislation on liability for non-compliance with the procedure of conduct of mass events” listing the sanctions for violating the procedure of conduct of meetings and the extensive authority of the police to apply measures aimed at the prevention of riots in the legislation of a whole number of countries. The following standpoint is stated as a conclusion: “There is no one democratic society where meetings, processions or demonstrations could be organized and conducted on the basis of just a formal notification. In all countries without exception the authorities sanction mass events in one form or another, i.e. issue a permit”. The information provided in the statement did not in the slightest degree represent the real state of things. In fact, a forgery had been prepared for the deputies that impacted significantly the adoption of the law draft.

On March 20, 2012, the Venice Commission shared its opinion with regard to the Russian national legislation in the field of freedom of assembly<sup>39</sup>.

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<sup>39</sup> Opinion with regard to Federal Law No.54-FZ of the Russian Federation “On meetings, rallies, demonstrations, processions and picketing” of June 19, 2004. Adopted by the Venice Commission in the 90<sup>th</sup> plenary session (Venice, March 16—17, 2012) // URL: <http://rudocs.exdat.com/docs/index-503295.html>.

Having successively analysed the national legislation and the available practice of its administration the Commission came to the following conclusions: "Although the Law on Meetings does not formally grant to the executive authorities the right to deny the acceptance of notifications or prohibit the conduct of a public event, it gives them the right to change the format initially envisaged by the organizer by way of referring to the reasons that go far beyond the lawful grounds specified in the European Convention on the Protection of Human Rights and Fundamental Freedoms. One of these reasons is the "need to maintain the normal and uninterrupted operation of vitally important utility enterprises and transport infrastructure facilities", which is practically impossible in the event of processions and mass demonstrations. Further it was acknowledged and explicitly set forth in Article 5.5 of the Law on Meetings that in the event of failure by organizers to agree with local self-government bodies upon their reasoned proposal to change the format of the public event the latter shall be de facto prohibited. For this reason, in the opinion of the Venice Commission, the notification constitutes essentially an alternative to the requesting of the already existing permission, i.e. "is of de facto permissive nature"<sup>40</sup>, because permissions are rarely issued".

Further the Venice Commission stated that the limitations regarding the selection of location for the conduct of a public event may be justified by the measures "required in a democratic society" and agreed with the evaluation by the Constitutional Court of the required parity-based "coordination of interests of different parties" in the selection of the location for the conduct of the meeting. It stated however that no guarantees or procedures were provided for in the federal law for this purpose. The achievement of the meeting goals is not taken into consideration, and "hence, the organizer often faces a dilemma of refusing to conduct the public event (which will be de facto prohibited), or agree to conduct the meeting which will not meet the original objective". These conditions were recognized by the Commission as a violation of the freedom of assembly.

The Venice Commission allows for the possibility of transfer to the regions of some portion of the powers of regulation of public events, but only subject to proportionate and reasonable limitations. The Commission stated that the current federal law "does not establish significant principles" for such limitations and in general does not ensure "the presumption in favor of conduct of meetings", "the proportionality" and "the prohibition of discrimination".

The Commission gave a unique estimate that the list of places prohibited for the purpose of meetings and the time limiting thereof are unacceptable, and that such limitations "must be used on a case by case basis" and solely in accordance with the acceptable criteria.

The Venice Commission also stated the unacceptability of the legislative limitations in relation to spontaneous and parallel meetings.

As far as the responsibility of public event organizers in connection with the ensuring of law and order is concerned, the Commission believes that it is not only inadequate but also contravenes the responsibility of the state. The Commission expressed its concern about the practice of use of the sanctions "imposed on the organizer in the event of minor violations".

In addition, the inefficiency of the judicial supervision was mentioned, when it is in fact impossible to obtain a court judgment in the event of appealing against prohibitions of public events prior to the conduct thereof.

Unfortunately, the opinion of the Venice Commission did not impact the discussion of the law draft.

The adoption of the amendments caused an extremely negative reaction on the part of the public, including lawyers. The leaders of the human rights advocacy organizations initiated the gathering of signatures under the appeal to the Russian President for vetoing the law draft.

The Council at the President of the Russian Federation for the Development of Civil Society and Human Rights prepared an address to S.Naryshkin, Spokesman of the Russian State Duma, in which they stated in particular the unacceptability of enactment of the law draft failing discussion and necessary substantiation. The Council noted that "the amendments to Part 1 Article 3.5 of CAV RF introduce criminal penalty for an administrative violation", as well as the "absurdity" and risky non-clarity of the sanctions provided for in Articles 5.38, 20.2, 20.22 of CAV RF. They also stated the inconsistency of the sanctions towards meeting organizers and participants that contradict the provisions of the civil law, e.g. the introduction of liability applicable to organizers for damages inflicted by meeting participants. The apparent hazards of the loose interpretation and application of the law, as well as the required measures of control over arbitrary resolutions and acts of the police were also listed.

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<sup>40</sup> Judge of the Constitutional Court of the Russian Federation A.Kononov is of the same mind; please refer to the dissenting opinion to Resolution No.484-O-P of the Russian Constitutional Court dated April 2, 2009. The same is stated in the special report "About the constitutional right for the freedom of peaceful assembly in the Russian Federation" (2007) of the Human Rights Commissioner of the Russian Federation: "The notification-based procedure of conduct of all kinds of public meetings established in the Federal Law "On meetings, rallies, demonstrations, processions and picketing" tends to become permission-based which is not stipulated in the law".

A request from E.Mizulina and V.Solovyov, the deputies of the State Duma, was sent to the Constitutional Court of the Russian Federation, as well as a complaint from E.Savenko. V.Chernozub filed a complaint too. On February 14, 2013, the Russian Constitutional Court delivered the ruling mentioned above.

The ruling somewhat alleviated the tension arisen after the enactment of the law. Along with that it was adopted only after the approval in the majority of the regions of the right limiting and sometimes even repressive regional laws, and made in fact no impact on them. On the one hand, the Constitutional Court recognized that the transfer of authorities to the regions in connection with the determination of such locations did not constitute a limitation of the freedom of assembly but simply determined the possibility of their "specification". On the other hand, being probably under the impression of the list of the limitations established by the regional laws, the Court admitted: "No criteria are recognized on a regulatory basis which could ensure the equality of legal conditions of exercising by the citizens of the right for the freedom of peaceful assembly in the event of determination by executive authorities of constituent entities of the Russian Federation of specifically designated or suitable places for the conduct of public events, which results in the possibility of its ambiguous interpretation and, hence, arbitrary application" (Clause 6 of the concluding part of the ruling). At the same time Clause 12 establishes that the regional laws must be brought in line with the resolution of the Russian Constitutional Court.

For the most part the ruling makes an impression of an extremely fragmentary and declaratory document because it contains a lot of general statements with no practical meaning. For example, "the public authority shall use its best endeavours to enable its taking place in the location specified by the organizer and at the scheduled time, and shall not attempt to find reasons upon any pretext which could justify the need for deviations from the proposals submitted by the organizer of the public event" (Clause 2.2 of the ruling).

## **CONCLUSIONS AND RECOMMENDATIONS**

### ***Conclusions***

Based on the observations regarding the practice of ensuring of the freedom of assembly in Russia after the tightening of the legislation the following conclusions can be drawn:

1. In general, the practice of denying "approval" of public events did not undergo any changes. For the purpose of prohibiting of meetings the authorities registering public events take practically no recourse to the new powers but use the previous tried-and-true approach requiring to "shift" the meeting to a place knowingly unsuitable for the purpose thereof. Some reduction in the number of denials of approval of public campaigns can be noted which is to a large extent relating the decreased protest activity.
2. The practice of appealing against "prohibitions" of public events has not in fact changed. The courts very rarely give judgments in favor of meeting organizers. However even favorable judgments do not impact the practice of arbitrary and biased limitations of meetings because they are delivered after the scheduled date of the meeting.
3. The Ministry of Internal Affairs of Russia engages even more forces for the purpose of control over the conduct of public events. For the supervision of public activists, the procedural powers and the means of criminal prosecution are widely used, in particular in the so called "Bolotny" case.
4. The practice of detention of public activists is being extended, the measures of administrative punishment of the detainees are being stiffened. These measures make a notable impact on Russian citizens who are reasonably apprehensive about participation in public events fearing unprovoked detention and beating, even in the event when meetings are held legally, i.e. are "authorized".

### ***Recommendations***

#### *On changing the legislation*

1. Amendments and supplements are immediately required to the text of FL No.54 and CAV RF in connection with the recognition by the Russian Constitutional Court of a number of its provisions as contravening the Constitution of the Russian Federation.
2. Amendments are required to FL No.54 to establish the rules of determination of the term for the filing of notifications.
3. It is necessary to state that the notification must be filed "not more than 30 and not less

- than 10 days prior to date of the event”.
4. It is necessary to state that impromptu and urgent peaceful events with the participation of up to 20 people may be conducted without prior notification of the authorities in any public place not intended for use by public transport.
  5. It is necessary to formalize in the federal legislation the possibility of notification by mail or via the portal of government services gosuslugi.ru (at least for major cities).
  6. An amendment is required to FL No.54 in accordance with which in the event when the authority proposes a different location for the public event this proposed location must ensure the achievement of the goals of the public event, accessibility by transport of specially designated places, possibility of using by public event organizers and participants of infrastructure facilities, compliance with sanitary standards and rules, security for public event organizers and participants, as well as other persons.
  7. Article 12 of FL No.54 must include the responsibility of the authorized representative of the local self-government body to serve upon the public event organizer within 24 hours a reasoned decision on the termination thereof in the event of such termination.
  8. For the purpose of prevention of dispersal of peaceful assembly only for the reason of formal violations of the legislation Part 3 Article 15 and Parts 2 and 3 Article 16 of FL No.54 must be deleted as they allow for a disproportionate interference with the freedom of assembly. It is necessary to establish that a peaceful campaign may be terminated in exceptional circumstances which do not include the violation of the notification procedure or other violations of no violent nature.
  9. The regional legislation must be brought in line with the responsibilities of the Russian Federation to ensure the freedom of assembly and not allow for disproportionate interference.
  10. “Provide for ... the status of public overseers at the public event. This status may be elaborated in equivalent to the status of the authorized representative of the executive authority who must obligatorily attend the public event and facilitate the conduct thereof” (Clause 12 of the recommendations of the Presidential Council).

*On changing the application practice:*

1. As the limitation of the freedom of assembly for non-citizens is formalized in the Constitution of the Russian Federation the introduction of amendments is extremely difficult. At the same time, it is necessary to not allow for prohibitions on the conduct of public event for the reason that the organizer is not a Russian citizen.
2. For the purpose of dismissal of a case of administrative violation against the participant of organizer of a public event that was cancelled by the authorities before it ended the matter must be obligatorily taken into consideration about the institution of a case of administrative violation or a criminal case against the officer who allowed for the unlawful interference with the freedom of assembly.
3. Measures are required to be taken for the purpose of compliance by the authorities with Clause 6 Article 12 and Part 2 Article 18 of FL No.54 establishing the responsibility of communication of the matters constituting reasons for the conduct of the public event to the government authorities and local self-government bodies to which these matters are addressed, and the responsibility of the said authorities to consider them on the merits, adopt corresponding decisions and communicate the decisions to the public event organizer.
4. In the regional practice of determination of the specifically designated locations for the conduct of public events (not requiring a special notification) their list must include all “public places which are not intended for use by transport. Such events may be conducted freely provided that the participants of the event do not use the traffic way or obstruct the pedestrian flow” (Clause 11 of the recommendations of the Presidential Council).
5. The authorities must hold negotiations with organizers of meeting for the purpose of reaching of a voluntary agreement upon the time and location of meetings. The authorities may only insist on changing the above in the event of existence of “reasons of clear and direct threats to public security (including the security of people: both the participants of the public event, and passers-by) and national security. Other reasons must be excluded” (Clause 31 of the opinion of the Venice Commission).
6. It is unacceptable for the authorities to prohibit parallel and counter-demonstrations on the ground alone that another application exists for the same location and time. The authorities must ensure their simultaneous conduct making sure that the distance between them is adequate and meets the requirements to the security of the participants. The same requirements concern the possibility of conduct of meetings in parallel to cultural mass events (Clauses 38 to 40 of the opinion of the Venice Convention).
7. In case of bringing of public event participants to administrative liability the procedure must

be established for the obligatory use of “data obtained with the help of fixed or mobile surveillance cameras”. In the event of unavailability of such data at the disposal of law enforcement officers “administrative liability must be excluded”. It is necessary to terminate the practice of detention of public event participants in whose acts there are no elements of offence and who simply happen to be within the striking range of law enforcement agents (Clauses 2, 13.1 of the recommendations of the Presidential Council).

8. In the event of referral by organizers of meeting to the court for the purpose of appealing against decisions of the government authority the court must consider the complaint “prior to the scheduled meeting date”. This possibility is provided for in the proceeding rules but must be guaranteed in the procedure (Clause 49 of the opinion of the Venice Commission).
9. It is necessary to introduce the compulsory “identification of the law enforcement officers participating in the protection of public order during public events”. Police officers must “wear special badges, and the special outfit of the officers of the Special Purpose Police Unit must be marked with digital symbols enabling their identification” (Clause 13.3 of the recommendations of the Presidential Council).

## **PROHIBITION ON “PROPAGANDA OF HOMOSEXUALITY AMONG MINOR CHILDREN”**

### **LEGISLATION REVIEW**

#### **1. Preamble**

Currently the law on the prohibition of the so called propaganda of homosexuality among minor children is in effect in 11 regions (Republic of Bashkortostan, Arkhangelsk Region, Irkutsk Region, Kaliningrad Region, Kostroma Region, Magadan Region, Novosibirsk Region, Ryazan Region, Samara Region, Krasnodar Territory and Saint-Petersburg). In the Kaliningrad Region the “propaganda” is statutorily prohibited among people of all ages.

On June 30, 2013, Federal Law No.135-FZ “On the introduction of amendments to Article 5 of the Federal Law “On protection of children from the information impairing their health and development” and certain legislative instruments of the Russian Federation with the purpose of protection of children from the information promoting the negation of traditional family values” – the so called law on the prohibition of “propaganda of non-traditional sexual relations among minor children”.

As it follows from the expert opinions with regard to the regional laws and the federal law draft, the term “propaganda of homosexuality” (or “propaganda of pederasty, lesbianism, bisexuality and transgenderism”) is devoid of substance from the scientific viewpoint. The laws do not meet the criteria set to legal documents. They contravene both the Russian legislation and the international law. The application thereof will result in adverse consequences for both minor children, and the society in general. For this reason, we believe, all laws, including the federal law, must be repealed.

#### **2. Analysis of the federal law**

The unambiguousness and definiteness of legal terms are the universally recognized conditions of their effectiveness and the correct formulation of legislative provisions. Thus, Doctor of Law, Professor T.Kashanina distinguishes language rules among the techniques used in the legal engineering: “Accuracy, clarity and understandability are the essential conditions of their [legislative acts] effectiveness”<sup>41</sup>. Disclosing further the category of clarity applicable to the rules of lawmaking the scientists notes: “It is necessary to prepare a legal document so that it is understandable by everybody to whom its scope extends. An unclear legal act does not give the full picture of the required behaviour in one situation or another, which leads to uncertainty, misunderstanding and mistakes”<sup>42</sup>.

One of the most evident downsides of the proposed law draft is the indefiniteness of the key term “propaganda”. Being originally of legally technical nature, in practice this deficiency can result in various abuse and, in addition, like any other indefinite term contained in the provision establishing liability, serve as a corruption facilitating factor.

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<sup>41</sup> T.V.Kashanina. Legal technique. M., 2007. P. 103.

<sup>42</sup> Ibidem. P. 119.

The proposed law draft does not contain a defining provision, which leaves a wide room for the violation of rights because theoretically the term “propaganda” may include an incredibly extensive range of acts — from simple touches between partners without any sexual pretext that accidentally catch the eye of a minor child, to any information about events held with the purpose of legal education and protection of rights of homosexual, bisexual and transgender people.

The matters in connection with sexual orientation and gender identity form part of many art works — in cinematography, theatre, literature and art. The central and regional TV channels periodically touch upon the topic of homosexuality, as well as violation of the rights and the discrimination of the corresponding social group (including news, talk shows, or popular scientific programs). The problem of discrimination on the grounds of sexual orientation and gender identity is being raised, discussed and resolved at the political level in many foreign states and international organizations, including those in which the Russian Federation participates. It is in principle impossible to rule out the dissemination of all this information.

Speaking about the issue of indefiniteness of the term “propaganda of homosexuality” it should be separately emphasized that already in 2003 and 2006 the federal law makers expressed their standpoint with regard to the unacceptability of introduction of liability for the “propaganda of homosexuality”. This refers to the drafts of the laws on the introduction of criminal liability for the “propaganda of homosexuality contained in public speech, public performance or mass media, including in form of public display of the homosexual lifestyle and homosexual orientation” (No.311625-4, 367150-3 “On supplements to the Criminal Code of the Russian Federation providing for criminal liability for the propaganda of homosexuality”). In the context of the present opinion we are not going to focus on the branch-specific nature of the proposed liability; instead we are going to dwell on the reasons for the rejection of the law drafts.

In 2006, the draft was not supported by the Russian Government which noted among its downsides the fact that “the definitions contained in the draft do not allow for a clear wording of the objective side of the assumed set of elements of crime” (opinion No.2063p-P4 of the Government of the Russian Federation dated June 13, 2006). Similarly, in 2009, the Committee of the State Duma for Information Policy, Information Technologies and Communications did not support the law draft stating that the “wording of the definitions contained in the text of the law draft seems unclear and, thus, will cause difficulties in the establishment of signs of availability of crime elements in the acts of people” (opinion dated May 7, 2009).

Therefore, the proposed wording of the legal provision does not correspond to the requirements set to the legal and technical execution of law drafts for the reason of indefiniteness of the objective side of the crime and, as a consequence, the potential creation of opportunities for abuse and violation of human rights and freedoms. This circumstance contradicts the elementary rules of the legal technique and per se leads to the conclusion about rejecting it.

## 2.1. Analysis of expert opinions

### 2.1.1. Medical aspect

The modern medical science does not qualify homosexuality (both male and female) as a deviation from the norm, illness or perversion. The World Health Organization excluded homosexuality from the list of diseases in 1990 at the time of adoption of the International Classification of Diseases, 10<sup>th</sup> Edition (ICD-10). In the notes to Section F66 it is emphasized that “sexual orientation in itself is not considered as an abnormality”<sup>43</sup>.

The Russian Federation switched to ICD-10 on January 1, 1999 in accordance with Order No.120 of the Ministry of Healthcare of the Russian Federation dated May 27, 1997<sup>44</sup>. Hence, the Russian medical science too recognizes homosexuality as a variant of the norm, which is emphasized in the Russian adapted edition of ICD-10<sup>45</sup>.

The Royal College of Psychiatrists (the main professional association of psychiatrists in Great Britain) stated in 2007: “Notwithstanding the nearly century-long psychoanalytical and psychological speculations, there is no independent evidence in support of the assumption that the nature of upbringing or early childhood experience play any role in the formation of personalities of hetero-

<sup>43</sup> F66: Psychological and behavioural disorders in connection with sexual development and orientation — in the electronic version of ICD-10: <http://mkb-10.com/index.php?pid=4368>.

<sup>44</sup> Order No.170 of the Ministry of Healthcare of the Russian Federation “On the switching by healthcare authorities and institutions of the Russian Federation to the International Statistical Classification of Diseases and Health Related Issues, Version X” dated May 27, 1997. The electronic version of the order is available here: <http://sankurtur.ru/officially/item/463/>.

<sup>45</sup> Mental and behavioural disorders (F00-F99). Class V of ICD-10 adapted for the purpose of use in the Russian Federation / Under the general editorship of B.Kazakovtsev, V.Golland. M.: Ministry of Healthcare of Russia, 1988; Rostov-on-Don: Phoenix Treatment and Rehabilitation Research Centre, 1999. P. 270.

sexual or homosexual orientation. It seems that sexual orientation is of biologic nature predetermined by a complex interoperation of genetic factors and early intrauterine environment. Therefore, sexual orientation can not be chosen"<sup>46</sup>.

In June 1997, in the XIII World Congress of Sexology in Valencia the Valencia Declaration on Sexual Rights was adopted containing, in particular, the following provisions: "The right for an impartial attitude to sexuality and the equality of the right of its exercise, meaning the freedom from all forms of discrimination and due respect for diversity in the displaying of sexuality irrespective of sex, gender identity, age of human beings, their race and social status, religious confession and sexual orientation"<sup>47</sup>.

In 2008, the International Planned Parenthood Federation (IPPF) engaged a group of experts, including some internationally recognized specialists in the field of sexual and reproductive health and human rights, for the purpose of elaboration of the document "Sexual rights: Declaration of the International Planned Parenthood Federation". In 2009 it was published in the Russian language as well. Article 6 "Right for the freedom of thought, opinion and expression; right for association" of the Declaration says: "All people have the right to use the freedom of thought, opinion and expression in relation to sexuality, sexual orientation, gender identity and sexual rights without arbitrary interference or limitations based on the prevailing cultural views, or political ideology, or discriminatory vision of public order, public morals, public healthcare or public security"<sup>48</sup>.

The 17<sup>th</sup> World Congress of Sexology (Montreal, July 15, 2005) adopted the Montreal Declaration "Sexual Health for the Millennium" stating: "In order to achieve sexual health, all people, including the youth, must have access to systematic sexual education, information about sexual health, and the corresponding services over the whole lifecycle"<sup>49</sup>.

According to Pediatrics, the magazine of the American Academy of Paediatrics, "at least 47 % of homosexual teenagers have had serious thoughts about committing suicide, and 36 % have already attempted to commit suicide"<sup>50</sup>. This is the result of isolation, zero tolerance on the part of parents and age mates, mockery, insult and/or depression. The prohibition on the public discussion of the topic of sexual orientation and gender identity will certainly aggravate the situation for these teenagers. It is to be recalled that Russia is among the world leaders as far as the number of teenager suicides is concerned<sup>51</sup>.

Notwithstanding that, the biogenetic causes of homosexuality have not been studied in full, the majority of researchers believe that homosexuality constitutes a biological fact inherent to the human population<sup>52</sup>. Therefore, sexual orientation is a biological feature of individuals and can not be changed under the impact of external circumstances, including propaganda or threatening.

Consequently, from the medical viewpoint the notion "propaganda of homosexuality among minor children" is absurd. At the same time, the wording proposed in the law draft can be considered due to its indefiniteness as a direct prohibition on the dissemination among minor children of information about homosexual orientation, which, first and foremost, will make an adverse impact on homosexual teenagers.

### 2.1.2. Socio-psychological aspect

The sociological research shows that in modern communities the share of people with homosexual orientation is relatively stable and makes up to 10 %<sup>53</sup>. The recognition of homosexuality as a legitimate norm and the prohibition on the discrimination on the grounds of sexual orientation have not resulted in Europe in any increase of the share of homosexuals<sup>54</sup>.

In addition to the fact that homosexuality is not a disease and is not contagious, homosexuali-

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<sup>46</sup> Royal College of Psychiatrists: Submission to the Church of England's Listening Exercise on Human Sexuality // Royal College of Psychiatrists. URL:

<http://www.rcpsych.ac.uk/pdf/Submission%20to%20the%20Church%20of%20England.pdf>.

<sup>47</sup> The document is available here:

[http://www.infoshare.ru/files/programmy/msm/biblioteka/position\\_papers/Valencia\\_Declaration\\_sexual\\_rights\\_1997.pdf](http://www.infoshare.ru/files/programmy/msm/biblioteka/position_papers/Valencia_Declaration_sexual_rights_1997.pdf).

<sup>48</sup> Please refer to the website of IPPF:

[http://www.ippf.org/system/files/ippf\\_sexual\\_rights\\_declaration\\_russian.pdf](http://www.ippf.org/system/files/ippf_sexual_rights_declaration_russian.pdf).

<sup>49</sup> Please refer to the website of the World Association for Sexual Health: <http://www.gfu.zp.ua/2011-monreal.pdf>.

<sup>50</sup> Pediatrics. Vol. 118. No. 1. July 2006. P. 349—364.

<sup>51</sup> Mortality among teenagers in the Russian Federation. M., 2010.

<sup>52</sup> M. Butovskaya. Homosexuality in evolutionary perspective. M.: Vek-2, 2005.

<sup>53</sup> I. Kon. Sexual culture in Russia: Strawberry born of birch. M.: Vremya, 2010; Idem. Moonlight at dawn: Faces and masks of same-sex love. M.: Olymp; Firm ACT Publishing House LLC, 1998.

<sup>54</sup> I. Kon. Human sexualities at the turn of the XXI century // In search for sexuality: Collected volume of articles. St.-P.: Dmitriy Bulanin, 2002. P. 33.

ty is not a social deviation either. Homosexuality in itself does not result in asocial behavior. Homosexual people uphold various political, religious and cultural views. Many of them share the values of partnership, care and responsibility for the near and dear ones, stable family relations, parenthood, etc.<sup>55</sup> The formation of sexual and gender identity is an important part in the maturation of personality and socialization of an individual. It starts long before the majority age established in the Russian legislation is reached. Among teenagers also such phenomenon as “homophobic bullying” (or harassment) is common which is expressed in form of verbal, physical and sexual violence and sometimes becomes the cause of suicide among teenagers. According to the experts, to homophobic bullying both homosexual and heterosexual children are subjected<sup>56</sup>. A prohibition or restriction of access to reliable information about human sexuality, its variations, reproduction, contraception, etc. will result in even greater deterioration of the situation. And vice versa, an important condition for the formation of a “morally and physically healthy individual” is the ensuring for all people of equal access to the knowledge of this kind too<sup>57</sup>.

According to the data of the sociological and demographic research, in many countries and communities, including Russia, the transformation in the field of marriage and family relations, as well as private life is currently in progress<sup>58</sup>. One of the main features of such transformation is the growth of the diversity of forms of family relations: trial marriage, civil marriage, guest marriage, same-sex and polygamous matrimony, single mother, single father, voluntarily childfree matrimony, family based child care home and social (non-biological) parenthood, etc. While previously all this was described as symptoms of the “crisis of monogamous marriage”, now the majority of the researchers call it evolution<sup>59</sup> in the field of family relations and emergence of a “new” family. The abandonment of the “crisis-based” explanations is due to both the absence of a steep decline in the key demographic figures in the majority of the analyzed countries (including in the countries where the prohibition was established on discrimination on the grounds of sexual orientation)<sup>60</sup>, and the fact that “non-traditional” families cope successfully with all social functions of a family, including “reproduction and upbringing of healthy offsprings”, everyday life of family members, support of and looking after family members, especially ill and elderly ones, etc. Therefore, the thesis of “social non-equivalence” of different forms of family relations forming the basis of the law draft seems unjustified.

### 2.1.3. *Culturological and politological aspect*

The federal law introduces in the legal discourse the unscientific notions that are in fact euphemisms and ideologemes. Particularly, the construction “non-traditional sexual relations” is considered as a euphemism for “homosexual relations”. The construction “information promoting the negation of traditional family values” constitutes an ideologeme relating to the rhetoric of the right wing in politics.

Sexual relations between people have always been characterized by great diversity. Some cultures are distinguished by sexual liberalism, and sexuality there is deemed to be a natural sphere of living. Other cultures strive to suppress and limit sexuality<sup>61</sup>. In this relation, it is impossible to speak about common “traditional” and “non-traditional” sexual relations. For this reason, the construction “non-traditional sexual relations” does not bear any scientific sense.

The Russian Federation is a multinational state. Each ethnos and each religion have their own prescriptions in the field of marriage and family, as well as sexual relations and values. “Traditional family values” imply different formats of relationship for different peoples of Russia which can even be mutually exclusive (e.g., polygamy and monogamy, forced marriage and free choice of marriage partners, acceptance of variable sexual and gender-based behavior and zero tolerance thereto,

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<sup>55</sup> N.Nartova. Gender contract of the modern Russian society and nonconventional gender identities // *Woman in the Russian society*. 2008. No.3. P. 56—64.

<sup>56</sup> I.Kon. *Boy — father of a man*. M., 2010.

<sup>57</sup> The Okinawa Charter on Global Information Society adopted in 2000 declares that all people all over the world without exception shall have the possibility to enjoy the benefits of the global information society. In its turn the stability of the global information society is based on the democratic values stimulating human development, such as free exchange of information and knowledge, mutual tolerance and respect for the specifics of other people.

<sup>58</sup> *Family at the threshold of the third millennium*. M.: Centre for Universal Human Values, 1995.

<sup>59</sup> S.Zakharov. *Evolution of the regional specifics of reproduction of the Russian population*. M., 1990.

<sup>60</sup> A.Mikheyeva. *Concept of the social mechanism of transformation of family relations: the structurally genetic approach*. Novosibirsk: Institute of Economics and Industrial Engineering of the Siberian Branch of the Russian Academy of Sciences, 2012. P. 10—11.

<sup>61</sup> Please refer to Z.Lev-Starovich. *Sex in the cultures of the world*. M., 1991; E.Kashchenko. *Fundamentals of socio-cultural sexology: Course of lectures*. M., 2002; G.Parrinder. *Sexual morality in the world's religions*. M., 2002.



etc.). Therefore, it is impossible to speak about “traditional family values” shared by the whole population of the Russian Federation.

The reason for the indefiniteness of the term “value” is that it is unclear in what exactly meaning it is used by the law draftsmen. Many humanities deal with the studying of values: philosophy, ethics, aesthetics, axiology, cultural science, sociology, psychology, economics, etc. Each of them gives its own definition of the term “value”.

Similarly, the indefiniteness of the term “tradition” does not enable the understanding of what values are meant. If the draftsmen use this construction in the meaning “values existing in the traditional society” they essentially introduce a fine for criticizing the family format that existed in the preindustrial society, i.e. an extended multi-generation peasant family, because it is known that the humanities understand the “traditional society” as preindustrial<sup>62</sup>.

In the political discourse the term “traditional values” is energetically used in the populist rhetoric of the right conservative political wing. In this discourse by “traditional values” the “values based on the Bible” are meant<sup>63</sup>. This being said, the expressions “traditional values”, “family values” and “traditional family values” are synonymous.

By “family values” the political and social beliefs are meant that the nuclear family is the essential ethical and moral social unit. Familialism is an ideology promoting the high value of a nuclear family and “family values” as an institution<sup>64</sup>. Familialism defends Western “family values” and is normally against other social forms and models, for example, family with just one parent, family with more than two partners, LGBT parenthood, etc. A statement typical for familialism is that “normal” means a patriarchal nuclear family<sup>65</sup>.

Thus, the adopted federal law formalizes the ideological attitudes of the conservative part of the ruling elite.

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All of the above is equally applicable to the regional laws.

### **3. Analysis of compliance of the legislation with the Constitution of the Russian Federation**

The Constitution of the Russian Federation guarantees to everyone on an equal basis the freedom of thought and speech, the right to freely search for, obtain, transmit, produce and disseminate information, the right to association, the right to peaceful assembly (Articles 19, 29, 30, 31). In the Russian Federation laws, annulling or diminishing the rights and freedoms of man and citizen must not be adopted (Part 2 Article 55). The rights and freedoms of man and citizen may be limited by the federal law to the extent required for the purpose of protection of the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other people, and ensuring of national defence and national security (Part 3 Article 55). In contrast, the law draft analyzed directly limits the freedom of thought and speech, the right to association and the right to peaceful assembly.

Thus, any association whose activities are connected with the matters of sexual orientation and gender identity (to be emphasized that this is not about associations violating the federal, including criminal, legislation), in particular, human rights advocacy organizations engaged in the provision of legal, psychological or social services, are at a great risk of being held liable just for the dissemination of information about their work because where necessary this can be interpreted as “propaganda of homosexuality”.

Moreover, the law will ultimately call into question the possibility of any organizational activities in support of rights of homosexual people even notwithstanding that concern about the violations of rights because of sexual orientation and gender identity in Russia was voiced by the UN High Commissioner for Human Rights, the UN Committee for Human Rights, the UN Committee for the Elimination of the Discrimination Against Women, The Commissioner for Human Rights of the Council of Europe, the ECHR and others. The Russian Federation is member of the UN and the Council of Europe, and the dissemination of information about the issues considered by these organizations, as well as the protection of the rights of this social group, may not be prohibited.

The adoption of the law draft jeopardizes the freedom of peaceful assembly too, because any public event (picket, meeting, procession, etc.) in support of homosexual people or intended for the

<sup>62</sup> Please refer to the Newest Dictionary of Philosophy / Prep. by A.Gritsanov. Mn, 1998.

<sup>63</sup> Please refer to the website of the Traditional Values Coalition:

<http://traditionalvalues.org/content/defined>.

<sup>64</sup> Anne Revillard (2006) Work/Family Policy in France International Journal of Law, Policy and the Family 20(2):133-150.

<sup>65</sup> Kauffman, Linda (1992) Framing Lolita: Is There a Woman in the Text?

attraction of attention to the problems of discrimination of homosexual people in Russia, can be qualified as “propaganda of homosexuality among minor children” who may accidentally happen to be there.

Finally, the law will make an adverse impact on the freedom of expression because it can easily be called propaganda. In this case this is about the views shared (and this should be emphasized once again) by international organizations.

#### **4. Review of resolutions of the ECHR and the documents of other international institutions**

The ECHR believes that it is unacceptable in a democratic society to justify the prohibition on public campaigns in support of homosexual, bisexual and transgender people on the grounds of threat of the so called propaganda of homosexuality<sup>66</sup>.

In the Resolution dated October 21, 2010 in the case of *Alekseyev v. Russia* the ECHR stated that “the right for the freedom of assembly protects demonstrations that can raise ire or insult people who do not share the ideas or demands promoted by the demonstrators. The participants of the demonstration must have the opportunity to hold it without fear of becoming victims physical aggression from their opponents. The member state bears the responsibility of application of reasonable and proper measures enabling the peaceful conduct of lawful demonstrations”.

Having rejected the argument of the government that public campaigns in support of the rights of LGBT people “must be prohibited in principle, because the propaganda of homosexuality does not correspond to the religious doctrine and the moral values of the majority of people, as well as can inflict harm to children and vulnerable adults watching such events”, the Court emphasized that “in accordance with the internal legislation these grounds do not form the basis for the prohibition or other restriction of public events... and in any case the prohibition was not proportionate to any of the two declared goals”. The European Court also noted that “all measures of interference with the exercise of the right of assembly and expression, except in the events of incitement to violence or denial of the democratic principles, irrespective of how shocking and unacceptable certain words or viewpoints may seem to government authorities, inflict harm to democracy and often put it into jeopardy”.

In the case of *Vejdeland and others v. Sweden* (resolution dated February 9, 2012) the applicants had distributed leaflets in the school calling homosexuality a “sexual abnormality”, criticizing the attitude to homosexuality as to the norm and stating that the policy of the Swedish government aimed at the cultivation of tolerance was the “propaganda of homosexuality”. The applicants had been convicted by Swedish courts for agitation against a national or ethnic group (according to the Swedish law this criminal law provision also protected groups distinguished on the basis of sexual orientation). The ECHR did not find there any violation of Article 10 of the European Convention on the protection of Human Rights and Fundamental Freedoms and stated that the leaflets had been “extremely insulting” and their contents “were obtruded on the schoolchildren” because they had been put into their individual lockers. Therefore, the criminal offence was recognized as lawful.

Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2010)5 to the member states about the measures aimed at the counteracting the discrimination on the grounds of sexual orientation or gender identity dated March 31, 2010 adopted by consensus establishes that the member states must take a whole range of measures for the purpose of efficient compliance with and respect for the right for the freedom of association, peaceful assembly and expression (Clauses 9, 13, 14, 16 of the addendum to the Recommendation).

In 2007 Recommendation No.211 (2007) on the freedom of assembly and expression of opinion for lesbian, gay, bisexual and transsexual people was adopted by the Congress of Local and Regional Authorities of the Council of Europe.

A whole number of statements about the unacceptability of violations of public events and human rights defending activities in support of the rights of homosexual, bisexual and transgender people were made by the Human Rights Commissioner of the Council of Europe. In the report “Discrimination on the grounds of sexual orientation and gender identity in Europe” prepared based on the results of the two years long work in all 47 member states of the Council of Europe, the laws on the prohibition of “propaganda of homosexuality” are unambiguously referred to as non-conforming to the provisions of the European Convention, and the states are recommended to “show respect for the effective right for the freedom of expression by way of ensuring of the opportunity to receive and deliver information on the matters concerning sexual orientation and gender identity in any form, including the press, publications, verbal or written statements, arts or other mass media. It is necessary to abolish all discriminatory provisions which include any dissemination of actual information about sexual orientation and gender identity in the category of unlawful acts”.

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<sup>66</sup> Cases of *Baczowski and others v. Poland* (resolution dated May 3, 2007), and *Alekseyev v. Russia*.

In summer of 2010, the UN Committee for the Elimination of Women Discrimination based on the results of the review of the periodic report of the Russian Federation gave targeted recommendations on the changing of the practice and the stereotypes of discriminatory nature. Special attention was paid by the Committee to the problem of discrimination of homosexual, bisexual and transgender women and appealed to Russia for the “intensification of efforts in the counteraction of the discrimination against lesbian, bisexual and transsexual women, including via a campaign raising public awareness, as well as organizing of the corresponding training for law enforcement officers”<sup>67</sup>.

In 2009, the UN Committee for Human Rights expressed concern about the “systematic discrimination in the member state against individuals on the grounds of their sexual orientation, including the display of non-acceptance and prejudice on the part of government officers, religious leaders and mass media”. The Committee also stated that Russia should “intensify the efforts aimed at the counteracting of the discrimination against LGBT, including by way of conduct of an outreach and awareness raising campaign among the population, as well as ensuring of proper training for law enforcement officers; take all measures required for the securing of practical exercise of the right to peaceful association and assembly for the LGBT community”<sup>68</sup>.

On October 31, 2012 the UN Committee for Human Rights upon application of Irina Fedotova (CCPR/C/106/D/1932/2010)<sup>69</sup> appealing against the acts of Russia in connection with the bringing to administrative liability for “public acts aimed at the propaganda of homosexuality (pederasty and lesbianism) among minor children” according to Article 3.10 of the Law of the Ryazan region “On administrative violations”, acting in accordance with Clause 4 Article 5 of the Optional Protocol to the International Covenant on Civil and Political Rights, determined that the communicated facts were indicative of the violation by Russia of the provisions of Clause 2 Article 19 in combination with Article 26 of the Covenant. According to Clause 3 (a) Article 2 of the Covenant the member state must ensure efficient legal remedies for Fedotova. The member state must also not allow for similar violations in the future and must ensure the compliance of the provisions of the domestic legislation with Articles 19 and 26 of the Covenant. The Committee emphasized that the “concept of morality is based on many social, philosophic and religious traditions, therefore, the limitation of civil rights with the purpose of protection of morality may not be based on the principles resulting from just one tradition. Such limitations must be used with account of the principles of universality of human rights and prohibition of discrimination”. The Committee also noted that the Russian authorities “could not demonstrate that the limitation of the right for the freedom of expression of opinion with regard to the “propaganda of homosexuality” in contrast to the propaganda of heterosexuality or sexuality in general among minor children is based on a reasonable and unbiased criterion. Moreover, no evidence was produced to prove the existence of factors justifying such difference”. In addition, the Committee stated that “by demonstrating the banners saying “Homosexuality is a norm” and “I am proud of being homosexual” near the building of the secondary school the applicant did not perform any public acts aimed at the involvement of minor children in sexual relations or agitating in favor of some particular sexual orientation. On the contrary, she expressed her sexual identity and tried to bring about the understanding thereof”.

The main international treaty regulating the legal status of the child is the UN Convention on the Rights of the Child<sup>70</sup> ratified by the Russian Federation and having a stronger legal effect than any legislative act adopted at the federal or even more so regional level. Article 2 of the Convention establishes:

“1. The member states shall show respect for and secure all rights provided for in the present Convention for each child within their jurisdiction without any discrimination and irrespective of race, skin colour, sex, language, religion, political and other beliefs, national, ethnic or social origin, financial status, state of health and birth of the child, his/her parents or tutors at law, or any other circumstances.

2. The member states shall take all measures required for the ensuring of protection of the child from all forms of discrimination or punishment on the basis of status, activities, expressed views or beliefs of the child, the child’s parents, tutors at law, or other family members”.

The UN Commission for Protection of Child’s Rights controlling the compliance by the member

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<sup>67</sup> Clause 41 of the Concluding Remarks of the Committee for the Elimination of all Forms of Discrimination Against Women: Russian Federation, CEDAW/C/USR/CO/7.

<sup>68</sup> Clause 28 of the Concluding Remarks of the UN Committee for Human Rights based on the results of the review of the sixth periodic report of the Russian Federation, CCPR/C/RUS/CO/6.

<sup>69</sup> Resolution in the English language: <http://www2.ohchr.org/english/bodies/hrc/docs/CaseLaw/CCPR-C-106-D-1932-2010.doc>.

<sup>70</sup> Please refer to the website of the UN:  
[http://www.un.org/ru/documents/decl\\_conv/conventions/childcon.shtml](http://www.un.org/ru/documents/decl_conv/conventions/childcon.shtml).

states with the Convention and providing the official interpretation of its provisions emphasized on repeated occasions that the responsibilities of the state also include the protection of children from discrimination on the basis of sexual orientation and gender identity. For example, “the member states shall ensure that all people under the age of 18 use all rights provided for in the Convention without any discrimination”, including on the basis of sexual orientation, because “teenagers subjected to discrimination are more vulnerable to abuse, other forms of violence and exploitation, and their health and development are at a greater risk. In this connection they have the right to special attention and protection on the part of all society groups”<sup>71</sup>; “the groups of children which may be subjected to violence include in particular: ...lesbian, gay, transgender or transsexual children”<sup>72</sup>. The Committee also showed concern about the discrimination against girls on the grounds of their sexual orientation, as well as the absence for them of access to preventive measures and services<sup>73</sup>.

In practical application and interpretation of the provisions of Articles 8 and 14 of the Convention the ECHR stated that homosexuality in itself did not impact the ability or inability of a parent to bring up a child or the ability of an adoptive parent to discharge parental duties<sup>74</sup>. Thus, in the case of *Salgueiro da Silva Mouta v. Portugal* (resolution dated December 21, 1999) the ECHR considering the criteria of the discriminatory treatment agreed with the argument of Portugal that the protection of rights and health of a child was the legitimate purpose of distinguishing by the state between homosexual and heterosexual parents. However, the Court did not find any reasonable proportionality between the used means and the purpose to be achieved, which constitutes the second one of the required conditions for the recognition as lawful of discrimination by the state of homosexual parents. In particular, the ECHR rejected the arguments of the national authorities that “the child must live in a... traditional Portuguese family” and that “our task does not consist in the determination of whether homosexuality is a disease or not, or whether sexual orientation is present in relation to people of the same sex. This is not normally in both cases, and children must not be raised in the shadow of an abnormal situation”. As emphasized by the ECHR, by depriving the homosexual father of the right of custody the state had allowed for a difference based on the considerations relating to the applicant’s sexual orientation, which was unacceptable from the viewpoint of the requirements of the Convention. Consequently, the ECHR established the violation of Articles 8 and 14 of the Convention.

In Recommendation CM/Rec(2010)5 the Committee of the Ministers of the Council of Europe noted: “Paying due attention to the fundamental interests of the child the member states must apply proper legislative and other measures towards education workers and pupils in order to ensure that the right for education is actually exercised without discrimination on the grounds of sexual orientation or gender identity; particularly, these measures must include the protection of the rights of children and youth for education in a safe environment free from violence, bullying, social rejection or other forms of discriminatory or humiliating treatment due to sexual orientation or gender identity. For this purpose and with due attention to the fundamental interests of the child proper measures must be applied at all levels aimed at the ensuring in schools of mutual tolerance and respect irrespective of sexual orientation or gender identity. These measures must include the securing of unbiased information about sexual orientation and gender identity, for example in the school curriculum and educational materials, as well as the provision to pupils and students of required information, protection and support to enable them to live in accordance with their sexual orientation and gender identity”<sup>75</sup>.

In the majority of the Western states the issue of possible introduction of liability for the dissemination of information about homosexuality, bisexuality and transgenderism (we certainly do not take into account pornographic or extremist materials) is not even being raised. Only in Poland and Lithuania that traditionally rely upon catholic values the law drafts on the prohibition of “propaganda of homosexuality” were considered but later rejected. Thus, in December 2009, in Lithuania the law “On protection of minor children from the adverse impact of public information” was enacted. However, the provisions concerning the “propaganda of homosexual and bisexual relations” were deleted from its original version. In 2007, in Poland similar amendments to the law “On the system of education” were rejected<sup>76</sup>.

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<sup>71</sup> Paragraph 8 of General Remarks No.4 — Health and development of teenagers in the context of the Convention on the Rights of the Child. May 19 — June 6, 2003, CRC/C/GC/4.

<sup>72</sup> Clause g Paragraph 72 of General Remarks No.13 (2011) — Right of the child for freedom from all forms of violence. April 18, 2011, CRC/C/GC/13.

<sup>73</sup> Paragraph 6 of General Remarks No.3 — HIV/AIDS and the rights of the child. January 12—31, 2003.

<sup>74</sup> Please refer also to the resolution in the case of *E.V. v. France* (Resolution dated January 22, 2008).

<sup>75</sup> Paragraphs 31 and 32 of the addendum to Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2010)5.

<sup>76</sup> Please find details in the report “Discrimination on the grounds of sexual orientation and gender identity in Europe”.

At the same time in the resolution in the case of *Alekseyev v. Russia* the ECHR recognized as unacceptable the statements of the Mayor of Moscow and the equivalent arguments of the Government regarding the requirement to “limit all mentioning of homosexuality by private sphere and push gays and lesbians out from the sphere of public attention assuming that homosexuality is a result of a conscious and asocial choice”. The Court stated: “There are no scientific or sociological data assuming that the mentioning itself of homosexuality or open public discussions of the status of the sexual minorities can make an adverse impact on children or “vulnerable adults”. On the contrary, only through fair and public discussions can the society address such complex issues raised in this case. These discussions supported by academic research will facilitate the social cohesion through the ensuring of the possibility to listen to all opinions, including the opinions of the persons concerned. They can also help to clarify the situation with a number of disputable aspects – in particular, whether it is possible to train homosexuality in a human being or draw him/her into it, or voluntarily become or cease to be homosexual. In this case the applicant has attempted to initiate exactly these discussions, and the officials may not replace them with spontaneously expressed ignorant opinions deemed as widely accepted”.

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# ANALYSIS OF PRACTICAL ADMINISTRATION OF LAW

## 1. Preamble

The report is dedicated to the review of the practical administration of the regional laws on the prohibition of the so called propaganda of homosexuality among minor children.

These laws have been enacted in different wordings in 11 regions of the Russian Federation: Ryazan Region, Arkhangelsk Region, Kostroma Region, Novosibirsk Region, Magadan Region, Samara Region, Kaliningrad Region, Irkutsk Region, Krasnodar Territory, Republic of Bashkortostan and Saint-Petersburg<sup>77</sup>.

Of 11 Regions where the laws on the prohibition of “propaganda of homosexuality” have been enacted, it is only Arkhangelsk Region where the law is applied on a regular basis. In two more Regions (Saint-Petersburg and the Kostroma Region) the administration of the law is performed on an ad hoc basis. In the remaining regions the law has not been applied even once.

In the events when the laws are applied they are used for the limitation of right for freedom of assembly and expression in relation to LGBT activists and LGBT organizations. It happens more often than not at the stage of notification about public events, or during single-person pickets.

In other words, the laws do not work in the way originally conceived by their authors, for which reason they have to be abrogated.

## 2. Law enforcement practice in Regions of the Russian Federation

### 2.1. Ryazan Region

In the Ryazan Region the law prohibiting “public acts aimed at the propaganda of homosexuality among minor children” was adopted in April 2006<sup>78</sup>. The law introducing liability for “public acts aimed at the propaganda of homosexuality (pederasty and lesbianism) among minor children” was adopted in December 2008<sup>79</sup>.

In connection with the adoption of the latter LGBT activists Nikolai Bayev and Irina Fedotova attempted on March 30, 2009 to hold single-person pickets near Ryazan schools and the regional children’s library using the banners saying “Homosexuality is a norm” and “I am proud of being homosexual. Ask me about it”. They were detained and accused of violation of that very law. On April 6, Marina Nazarova, Justice of Peace of Judicial District No.18 of the Oktyabrsky district of Ryazan, found the activists guilty of “propaganda”, i.e. the commitment of the offence provided for in Article 3.10 of the Administrative Code of Ryazan Region. Bayev and Fedotova were fined in the amount of 1,500 Roubles each. On May 14, the Oktyabrsky District Court dismissed their appeal against the resolution of the justice of the peace.

In September of the same year N.Alekseyev, N.Bayev and I.Fedotova referred to the Constitutional Court of the Russian Federation with an appeal against the violation of their constitutional rights by the Ryazan laws. In Ruling No.151-O-O dated January 19, 2010 the Russian Constitutional Court took the side of the courts of inferior jurisdiction and stated that the prohibition established by the lawmakers of the Ryazan Region on “public acts aimed at the propaganda of homosexuality” among children was not unconstitutional and conformed to Clause 1 Article 4 of Federal Law No.124-FZ “On the fundamental guarantees of the rights of the child in the Russian Federation” of July 24, 1998, and namely to the requirement of establishment of “measures ensuring the intelligent, moral and psychic security of children in the Ryazan Region”. In addition, the Court believed that “the prohibition in itself of such propaganda — as an activity aimed at the targeted and uncontrolled dissemination of the information capable of impairing health, moral and spiritual development, including build distorted conceptions of the social equivalency of the traditional and non-traditional marriage relations — among the persons who due to their age can not independently exercise judgment in the interpreting of such information, may not be considered as a violation of the constitutional rights of citizens”. It stated further that the Ryazan laws “do not formalize any

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<sup>77</sup> On June 30, 2013 Federal Law No.135-FZ “On the introduction of amendments to Article 5 of the Federal Law “On protection of children from the information impairing their health and development” and certain legislative instruments of the Russian Federation with the purpose of protection of children from the information promoting the negation of traditional family values” was enacted – the so called law on the prohibition of “propaganda of non-traditional sexual relations among minor children”. It is available here: [http://ru.wikisource.org/wiki/Федеральный\\_закон\\_от\\_30.06.2013\\_№\\_135-ФЗ](http://ru.wikisource.org/wiki/Федеральный_закон_от_30.06.2013_№_135-ФЗ).

<sup>78</sup> Law No.41-OZ of the Ryazan region “On protection of morality and health of children in the Ryazan region” of April 3, 2006.

<sup>79</sup> Law No.182-OZ of the Ryazan region “On administrative violations” of December 4, 2008.

measures aimed at the prohibition of homosexuality or its official censure, do not contain any signs of discrimination and based on their meaning do not allow for excessive acts on the part of the public authority. Consequently, the acts disputed by the applicants can not be considered as disproportionately limiting the freedom of speech”.

On February 10, 2010, the activists referred to the UN Committee for Human Rights. On October 31, 2012, in the 106<sup>th</sup> session the Committee found the Ryazan law violating the international treaties. The resolution<sup>80</sup> published on the Committee’s website states, inter alia, that in that case “a limitation took place of the exercising of the right for the freedom of self-expression guaranteed in Article 19 Clause 2 of the Covenant [on Civil and Political Rights]” and that the said limitation could not be justified by referral to Clause 3 Article 19 of the Covenant. In addition, the Ryazan law contravened Article 26 of the Covenant, and namely the prohibition of any discrimination, including on the grounds of sexual orientation (in accordance with Clause 5 Article 4 of the Optional Protocol to the Covenant), because there were no grounds for distinguishing the “propaganda of homosexuality” separately from the “propaganda of heterosexuality” or sexuality in general. The UN Committee for Human Rights requested from the Russian Federation the “ensuring for the claimant of efficient legal remedies, including the repayment of the fine both in connection with the situation in April 2009 and any other legal expenses incurred by the claimant, and as compensation. The member state must also not allow for similar violations in the future and must ensure that the corresponding provisions of the domestic legislation are amended to be compliant with Articles 19 and 26 of the Covenant”.

Currently the case is also being considered by the ECHR.

On June 14—15, 2013, the Venice Commission adopted in the 95<sup>th</sup> session the Opinion on the laws on “propaganda of homosexuality” (signed on June 18)<sup>81</sup>. The Commission came to the conclusion that these laws were incompliant with the international standards of human rights and the resolutions of the ECHR. In particular, they contradict the principle of non-discrimination, as well as the right for the freedom of expression. The Commission reminded that sexual orientation (including homosexuality) is protected against discrimination in accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. The use of the argument about the “protection of morals in a democratic society” and “protection of the rights of minor children” for the purpose of justification of adoption of the laws is unfounded. The Commission recommended the abrogation of the enacted laws.

## 2.2. Arkhangelsk region

In September 2011, the regional law prohibiting “public acts aimed at the propaganda of homosexuality among minor children”<sup>82</sup>, and in November the law providing for liability for the said acts were adopted.

At that same time the Arkhangelsk city government refused to approve the conduct of the “meeting with the purpose of condemnation of the statutory prohibition on the propaganda of homosexual relations among minor children approved by the law of Arkhangelsk Region”, the “picketing with the purpose of public dissemination of unbiased information about the nature of homosexuality, as well as attraction of attention to the discrimination against minor persons of homosexual orientation”. In the latest response of the city government to the organizers it was stated that “in accordance with Article 10 of Regional Law No.113-OZ “On certain measures of protection of morality and health of children in Arkhangelsk Region” dated 15.12.2009 public events aimed at the propaganda of homosexuality among minor children are not allowed”. It was stated further: “The specified territory of conduct of the public event in form of procession constitutes an area where children’s educational institutions are located. In the event of conduct of the procession with the purpose planned by you on Sunday at day time the above provision of the law will be violated”. The denials were appealed against in judicial proceedings. On April 4, 2012, the Oktyabrsky District Court of Arkhangelsk dismissed the claims.

In December 2011, the city government denied the activists of the Moscow Gay Pride the conduct of the pickets “There are no less gays and lesbians among children than among adults” to be held on December 17 next to the Children’s Activity Centre “Gramotey” and the regional children’s library named after A.Gaidar. Ten people had planned to participate in the campaigns. The objective was to “disseminate among minor children the unbiased information about the nature of homosexuality on the basis of available global research and the attraction of attention of the socie-

<sup>80</sup> URL: <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.106.D.1932.2010.doc>.

<sup>81</sup> URL: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e).

<sup>82</sup> Law No.336-24-OZ of the Arkhangelsk region “On the introduction of amendments and supplements to the regional law “On certain measures of protection of morality and health of children in the Arkhangelsk region” of September 30, 2011.

ty and the authorities to homophobia and discrimination of gay and lesbian minors". In the reply to the organizers the city government stated that the "conduct of public events in the specified locations will result in a violation of the regional law prohibiting the propaganda of homosexuality among minor children". On January 27, 2012, the Oktyabrsky District Court represented by judge Elena Akishina found lawful the refusal by the city government to approve the pickets. On April 2, the Arkhangelsk Regional Court upheld the resolution of the district court.

On January 10, 2012, the city government denied the approval of picketing of the regional children's library to be held on January 14. The letter signed by the Deputy Mayor of the city V.Garmashov was delivered to the organizer of the event N.Alekseyev on the same day. On January 17, judge Akishina found the denial lawful, whereas the main substantiation thereof was the provision of the regional law on the prohibition of the so called propaganda of homosexuality among minor children. The authorities believed that the specified location might be attended by children who must not watch such campaigns. On March 26, the regional court dismissed the appeal.

On January 11, the Arkhangelsk police detained three activists of the LGBT project "Gay Russia" and the Moscow Gay Pride N.Alekseyev, A.Kiselyov and K.Nepomnyashchiy who were holding single-person pickets at the entrance to the regional children's library. The picketers were holding the banners saying "Russia leads the world in the number of suicides among teenagers. A huge part of them are homosexual. They make this choice due to lack of information about who they are. Deputies are child killers. Homosexuality is good!", "According to Article 13 of the Convention on child's rights children have the right to know. Great people can be gay too. Gays become great too. Homosexuality is a norm!", "Homosexuality is a healthy form of sexuality. Children and grownups have to know it!". The detainees were accused according to Part 1 Article 2.13 of the Law of Arkhangelsk Region "On administrative violations". On February 3, Marina Glebova, Justice Peace of Judicial District No.6 of the Oktyabrsky district of Arkhangelsk, fined each one of the gay activists at the amount of 2,000 Roubles. This is the maximum penalty provided for in connection with this offence. On March 22, the Oktyabrsky District Court dismissed the appeals of the activists against the rulings of the Court of Justice. Judge Natalya Kopytko confirmed the lawfulness of the detention of the gay activists and the imposition of the administrative sanctions.

On January 12, 2012, the Arkhangelsk city government denied the activists of the LGBT project "Gay Russia" and the Moscow Gay Pride the approval of conduct of a gay pride procession in support of tolerant attitude to and compliance with the rights and liberties of people of homosexual orientation in Russia in the city on January 24. The response signed by Garmashov stated the unacceptability of propaganda of homosexuality among minor children pursuant to the laws effective in Arkhangelsk Region. The locations where the procession was planned could be attended by people with infants and minors, which would lead to a violation of the law provisions. On January 19, the Oktyabrsky Regional Court of Arkhangelsk represented by judge Natalya Lobanova found lawful the government's denial of approval of the procession. On March 26, the appeal was dismissed.

The denial of approval of the campaigns, the detention of people holding single-person pickets and the court resolutions are currently being appealed against by Gay Russia in the ECHR.

On May 22, the Arkhangelsk Regional Court represented by judge A.Bragina considered the case upon application of the Director of the Arkhangelsk LGBT organization "Rakurs" T.Vinnichenko appealing against the adoption of the regional law on the prohibition of "propaganda of homosexuality among minor children". In substantiation of her demands T.Vinnichenko stated that the provisions of the regional laws contradicted the federal legislation taking precedence, and namely Article 1.4 of CAV RF and Clause 1 Article 14 of the Federal Law "on the fundamental guarantees of child's rights in the Russian Federation", contained the terms "propaganda" and "homosexuality" that were defined neither in the federal legislation, nor the regulatory legal acts of Arkhangelsk Region, which violated the principle of legal certainty. Further Vinnichenko noted that the disputed provisions violated her rights because she as an activist of the movement for the rights of LGBT people could not understand due to the legal uncertainty of the disputed provisions where the boundaries of lawful behavior were for the purpose of conduct of awareness raising humanitarian campaigns aimed at the shaping in the society of tolerant attitude to the minorities, and the overcoming of homophobia and transphobia. The court refused to satisfy the claim of Vinnichenko.

On August 15, the Supreme Court of the Russian Federation comprised of judges V.Pirozhkova, V.Anishina and E.Gorchakova dismissed the appeal of Vinnichenko. It however provided a number of significant explanations. In particular, the ruling of the Supreme Court says: "By dismissing the appeal of T.V.Vinnichenko, the Court was judging from the fact that the lawmakers of the constituent entity of the Russian Federation had adopted within the scope of their competence the provisions of the regional laws appealed against by the applicant for the purpose of ensuring of protection of the rights and legitimate interests of children by way of establishing of measures of prevention of public acts aimed at the propaganda of homosexuality among minor children". The Court rejected the applicant's argument about the legal uncertainty of the terms "propaganda" and "homosexuality". The Court referred to the common understanding of the term "propaganda" and the availability thereof in the Russian legislation



on liability for the propaganda of drugs, and Nazi attributes and symbols. The Court made the point that “not all public acts can be recognized as propaganda; consequently the prohibition of propaganda of homosexuality does not impede the exercising of the right to obtain and disseminate information of general and neutral nature about homosexuality, hold public events in accordance with the procedure provided for in the law, including open public debates about the social status of the sexual minorities without the obtrusion of homosexual attitudes on minor children who are unable to exercise judgment in the interpreting of such information due to their age”. And further: “The propaganda of homosexuality among minor children implies active public actions with the above purposes associated with the building of an attractive image of non-traditional sexual orientation and a distorted picture of social equivalency of the traditional and non-traditional marriage relations”. Referring to Federal Law No.124 “On the fundamental guarantees of the rights of the child in the Russian Federation of July 24, 1998 and the UN Convention on the Rights of the Child, the Court claims: “An unforced development of the child (as an individual who is only taking shape and is incapable of exhibiting due physical and mental maturity) must be in particular ensured by way of establishment of limitations on the interference with his/her private life by which propaganda can also be meant as a public and active obtrusion of homosexuality and the information about it, the contents of which may make an adverse impact on the formation of the child’s personality, including in terms of his/her sexual self-identification, spark interest in non-traditional sexual relations that is not impartially based on the physiological specifics of such child due to his/her inability to develop attitude with the sufficient degree of criticism to different types of sexual relations between people”. At the same time the Court made the point that the “disputed provisions do not limit the right of the child to obtain information, including about homosexuality, if this is caused by the needs of the child in conformity with his/her age specifics”. Further the Court says referring to the Russian Constitution: “In the Russian Federation the following is meant by family values: ...family, motherhood, fatherhood and childhood protected by the state. Consequently, the federal legislation does not include homosexual relations in the scope of family values in accordance with the national traditions and with account of the international provisions”. Referring to the Federal Law “On protection of children from the information impairing their health and development” and in particular to Clause 4 Article 5 defining the types of the information “impairing health and (or) development of children which also includes the information negating family values”, the judicial panel states: “Consequently, the federal lawmaker has included in the information impairing health and development of children the information negating family values which in its turn may include propaganda of homosexuality too in the context of the above legal regulation”.

Commenting on the determination of the Supreme Court of the Russian Federation lawyer of an international law firm S.Spector notes: “The Russian law is not a precedent-based law, and the resolutions of the courts are not binding for a party that does not participate in the process. This means that the resolution of the Supreme Court will not directly affect the practical application of the law of Arkhangelsk Region and the interpretation of similar laws of other constituent entities... One can discuss the rights of gay and lesbian people but can not claim that same-sex marriages are equivalent to the traditional family relations. This being said, it remains unclear how the debates should be conducted if their participants have limited possibilities at their disposal for the purpose of maintaining one of the positions”.

Spector was right: the resolution of the Supreme Court of Russia did not impact the law administration practice of Arkhangelsk Region.

Thus, on August 30, 2012, S.Fomin notified the Arkhangelsk city government on the conduct of a picket with the purpose of informing and attraction of attention of the society to the social problems of homosexual children and teenagers on September 10 in the public garden in Pomorskaya Street. On September 3, he received a response with the proposal to change the location. On September 5, he filed a notification specifying as the new location of the event the site in front of the downward way to the city beach on the Severnaya Dvina embankment in the proximity to Mira Square, or other place proposed by the city government. On September 8, he received a response from which it followed that the specified purpose of the picket constituted the propaganda of homosexual relations, in which connection the city government could not recommend to the applicant any other location for the conduct of the picket in the territory of the municipal entity of the city of Arkhangelsk. The courts of first and second instance supported the city government because its decision was adopted “for the purpose of non-dissemination of information which could impair the moral development of minor children”.

A similar situation occurred with the notifications of R. on the picket on December 19 near the Lenin monument in Lenin Square, and of S.Aleksandrov about the picket on January 22, 2013 for the purpose of protesting against the adoption of the federal law on the prohibition of “propaganda of homosexuality among minor children”: the city government denied their approval, and the courts supported it therein (please refer to the rulings of the regional court dated March 18 and March 28, 2013).

### 2.3. Kostroma Region

The law prohibiting in Kostroma Region the “propaganda of homosexuality (pederasty and lesbianism), bisexuality and transgenderism among minor children” was adopted in February 2012<sup>83</sup>.

On March 12, the city government of Kostroma received notifications on the conduct of public events. Five campaigns in form of pickets, meetings and a procession were planned to take place during the period from March 22 to March 26 including from 10 to 200 participants. The denial of approval of conduct was communicated in the letter signed by B.Satuyev, the acting Head of the Kostroma government. The letter said: “In the territory of Kostroma Region the Law of Kostroma Region “On the guarantees of the rights of the child in Kostroma Region” has been adopted and is currently in force, in accordance with Article 19.3 of which the propaganda of homosexuality (pederasty and lesbianism), bisexuality and transgenderism among minor children, as well as pedophilia, is not allowed”. The prohibition on the public events was appealed against in the court. On December 4, the Sverdlovsk Regional Court represented by judge S.Varsanotyeva dismissed the claim of the activists, whereby it in fact supported the prohibition of the public events by the regional government. On March 20, 2013 the Kostroma Regional Court found unlawful the denial by the city government of approval of the gay pride procession and two meetings (please refer to the case file on the court’s website).

On March 23, 2012, activists N.Alekseyev, A.Kiselyov and K.Nepomnyashchiy performed single-person pickets near the children’s library holding the banners saying “Heterosexuality, homosexuality, bisexuality. All this is a norm”, “You can’t choose your sexual orientation”, “Who will protect gay teenagers?”. All the three participants were detained, and on the same day they appeared before the court. Judge N.Vdovina declared the participants of the single-person pickets not guilty due to the absence in their acts of the elements of the administrative offence provided for in Article 20.1 of the Code of Kostroma Region for Administrative Violations (propaganda of homosexuality among minor children). The Leninsky District Court of Kostroma dismissed the protest of the police.

On July 6, the Kostroma Regional Court represented by judge S.Andreyeva refused to satisfy the claim of M.Bakumova for the recognition as invalid of part of Law No.193-5-ZKO of Kostroma Region dated February 15, 2012. The court came to the conclusion that the “lawmakers of the Kostroma region had acted within the scope of the authority granted by the effective legislation”. It stated that “the terms used in the Law, including “propaganda”, “bisexuality”, “transgenderism” are well known and do not cause divergent interpretations”. In the course of the court hearing the Children’s Ombudsman of Kostroma Region failed to give a definition to or explain what transgenderism meant. However the court stated that the “terms “bisexual” and “transgender” are used in particular in Recommendations CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe”. It is worthy of note that the court says: the law provisions “do not contain conditions preventing the shaping among minor children of an equally tolerant attitude to all people irrespective of their sexual orientation and gender identity, because the shaping of such attitude is possible without the propaganda of certain phenomena. The law does not formalize any measures aimed at the prohibition or official condemnation of homosexuality, bisexuality or transgenderism”. Furtheron, the court believes that “the law does not provide for a prohibition of and liability for simple mentioning of homosexuality or discussion about the social status of the sexual minorities, which is *inter alia* confirmed by the law enforcement practice”.

The judgment of the regional court was appealed against in the Supreme Court of the Russian Federation. The determination of the Supreme Court did not bear an air of originality in terms of argumentation and was in general identical to the resolution under the law of Arkhangelsk Region, however made a greater emphasis on the “family as a natural and main society unit”<sup>84</sup>.

Unfortunately, despite the resolution of the Supreme Court of the Russian Federation and the law enforcement experience of the year 2012 the administration of the law changed its trend towards prohibition in Kostroma Region in 2013. Thus, in May the authorities of Kostroma prohibited the previously approved conduct in the city of a gay pride procession in support of the tolerant attitude to and the observance of the rights and liberties of persons of homosexual orientation in Russia. Also two meetings against the local law on the prohibition of “propaganda of homosexuality among minor children” were prohibited. In both cases the authorities did not refer to the law itself.

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<sup>83</sup> Law No.193-5-ZKO of the Kostroma region “On the introduction of amendments to the Law of the Kostroma region “On the guarantees of the rights of the child in the Kostroma region” and the Code of the Kostroma region for Administrative Violations” of February 15, 2012.

<sup>84</sup> Ruling of the Supreme Court of the Russian Federation in case No.87-APG12-2 dated November 7, 2012. //Website of the Supreme Court of Russia. URL: [http://www.vsrp.ru/stor\\_pdf.php?id=512110](http://www.vsrp.ru/stor_pdf.php?id=512110).

## 2.4. Novosibirsk Region

The law on the prohibition of the “propaganda of homosexuality among minor children” was enacted in Novosibirsk Region in June 2012<sup>85</sup>. As of today no law enforcement practice has been detected in the region in connection with this law.

## 2.5. Magadan Region

The law on the prohibition of “public acts aimed at the promotion of pederasty, lesbianism, bisexuality among minor children” was enacted in Magadan Region in the early June 2012<sup>86</sup>. As of today, there has been no law enforcement practice in the region in connection with this law.

## 2.6. Samara Region

In Samara Region the law providing for liability for “public acts aimed at the propaganda of pederasty, lesbianism, bisexuality and transgenderism among minor children” was enacted in July 2012<sup>87</sup>.

In October E.Razuvayeva and P.Zyryayev referred to the Samara Regional Court with a claim for the recognition of the law as contravening the federal legislation. On November 13, judge E.Shabayeva refused to satisfy the demands of the applicants referring to the support of such laws in other regions by the Supreme Court of the Russian Federation. The determination of the regional court was appealed against in the Supreme Court of Russia. The resolution of the latter was identical to previous resolutions delivered in connection with similar claims (please refer to the ruling dated February 27, 2013 in case No.46-APG 13-2).

## 2.7. Kaliningrad Region

The law on the prohibition of “public acts aimed at the propaganda of paedophilia, sexual relations with minor children, pederasty, lesbianism and bisexuality” was enacted in Kaliningrad Region in January 2013<sup>88</sup>. Unlike other regions, here the “propaganda” is prohibited among people of all ages. There has been no law enforcement practice in the Region in connection with this law.

## 2.8. Irkutsk Region

In the late April 2013 Irkutsk Region enacted the law on the “protection of children from the information impairing their health and (or) development, including the information negating family values”<sup>89</sup>. As of today, there has been no law enforcement practice in connection with this law.

## 2.9. Krasnodar Territory

The law providing for liability for the “acts aimed at the targeted dissemination by generally available means of the information which may impair health, moral and mental development of minor children, including the information facilitating the building among them of a distorted image of compliance of non-traditional sexual (intimate) relations (homosexuality) with the social standards” was enacted in the territory in the early July 2012<sup>90</sup>. It should be noted that that was done with the

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<sup>85</sup> Law No.226-OZ of the Novosibirsk region “On the introduction of amendments to certain laws of the Novosibirsk region” of June 14, 2012.

<sup>86</sup> Law No.1507-OZ of the Magadan region “On the introduction of amendments to certain laws of the Magadan region to the extent of protection of minor children from the factors adversely impacting their physical, intelligent, physic, mental and moral development” of June 9, 2012.

<sup>87</sup> Law No.75-GD of the Samara region “On the introduction of amendments to the Law of the Samara region “On administrative violations in the territory of the Samara region” of July 10, 2012.

<sup>88</sup> Law No.199 of the Kaliningrad region “On the introduction of amendments and supplements to the Law of the Kaliningrad region “On the protection of the population of the Kaliningrad region from the information products impairing the mental and moral development” of January 30, 2013, and Law No.196 of the Kaliningrad region “On the introduction of supplements to the law of the Kaliningrad region “Code of the Kaliningrad region for administrative violations” of January 30, 2013.

<sup>89</sup> Law No.29-OZ of the Irkutsk region “On the introduction of amendments to the Law of the Irkutsk region “On certain measures of protection of children from the factors adversely impacting their physical, intelligent, psychic, mental and moral development in the Irkutsk region” of April 24, 2013.

<sup>90</sup> Law No.2535-KZ of the Krasnodar Territory “On the introduction of amendments to certain legislative

violation of the rules of procedure.

As reported by the Russian LGBT network, on June 20, in the 63<sup>rd</sup> session of the Legislative Assembly of the Territory (LAT) Governor A.Tkachov brought in the draft law on the prohibition of “propaganda of homosexuality”. The deputies adopted it in the first reading, which was reported by many mass media, as well as personally the instigator of the draft law — the corresponding information appeared on the website of the governor of the Territory and on his page in Twitter. In accordance with the federal legislation and the Charter of the Krasnodar Territory every draft law of the constituent entity of the Russian Federation must be considered by the legislative authority in at least two readings. On July 14, the law was officially published with the signature of the governor and entered into effect. It follows from the document that Tkachov signed it on July 3. Meanwhile the second reading could not have taken place earlier than on July 11, in the 64<sup>th</sup> session of LAT. Between June 20 and July 11 no sessions of LAT took place. In any case, there is no information about it on its website. There is also no information about the preparation of the draft law for the second reading. However, a copy exists of the resolution of LAT dated June 20 on the enactment of the law and forwarding thereof to the governor for signing and subsequent publishing.

The actual violation of the procedural standards, as well as the law itself, was disputed by M.Gigineyshvili and T.Novikova in September. Nevertheless judge of the Krasnodar Territorial Court S.Driyanov refused to accept the claim because the “claimants are actually disputing the legal provision to the extent which does not obviously involve their rights, freedoms or legitimate interests”. “The judge further believes that the claimants have no corresponding powers to speak in support of the rights of other people for education violated, in their opinion, by the statutory provision being disputed”, says the ruling dated September 25.

There has been no enforcement practice in connection with this law.

## 2.10. Republic of Bashkortostan

The law on the prohibition of “public acts aimed at the propaganda of homosexuality (pederasty, lesbianism), bisexuality and transgenderism among minor children” was enacted in the Republic of Bashkortostan in July 2012<sup>91</sup>. As of today, there has been no enforcement practice in the region in connection with this law.

## 2.11. Saint-Petersburg

The law providing for liability for “public acts aimed at the propaganda of pederasty, lesbianism, bisexuality and transgenderism among minor children” was enacted on February 29, 2012<sup>92</sup>.

On April 5, the police detained activists of the Moscow Gay Pride A.Kiselyov and K.Nepomnyashchiy at the Palace of Arts for Youth in Nevsky Avenue. They spent that night in a police station, and in the morning the court released them and returned the reports of administrative violations to the police for the purpose of removal of deficiencies. The activists were not summoned to appear before the court thereafter.

On April 7, activists I.Kochetkov and S.Kondrashov were detained near the Oktyabrsky Concert Hall holding single-person pickets within the framework of the Day of Silence. Both were accused of “propaganda of homosexuality” and “disobedience of lawful demands of police officers”. However they appeared before the court for the “disobedience of lawful demands of police officers” only. Kondrashov was found guilty, and Kochetkov not guilty.

N.Alekseyev was the first to be convicted for the “propaganda of homosexuality” On April 12, he was detained by the police at the entrance to Smolny where he was holding a single-person picket. The activist’s banner contained the following saying of F.Ranevskaya: “Homosexuality is not perversion. Perversion is grass hockey and ice ballet”. On May 4, justice of the peace of Judicial District No.208 of the Central district of Saint-Petersburg M.Yakovleva delivered a judgment on the declaration of Alekseyev guilty of propaganda of homosexuality among minor children and fined him in the amount of 5.000 Roubles.

The LGBT organization “Coming Out” appealed against the law in the city court disputing the observance of the federal legislation. However, the court represented by judge T.Gunko dismissed

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acts of the Krasnodar Territory to the extent of intensification of protection of health, as well as mental and moral development of children” of July 3, 2012.

<sup>91</sup> Law No.581-z of the Republic of Bashkortostan “On the introduction of amendments to the Law of the Republic of Bashkortostan “On the fundamental guarantees of the rights of the child in the Republic of Bashkortostan” of July 23, 2012.

<sup>92</sup> Law No.238 of Saint-Petersburg “On the introduction of amendments to the Law of Saint-Petersburg “On administrative violations in Saint-Petersburg” of February 29, 2012.

the appeal. As it can be seen from the text of the resolution received on March 31 the judge had ignored the argument of the organization<sup>93</sup>. The resolution was appealed against in the Supreme Court of Russia. The ruling of the latter is in no way different from the equivalent rulings in connection with the laws in the regions (please refer to the ruling dated October 3, 2012 in case No.78-APG12-16<sup>94</sup>).

Thereafter the city government referred at least twice to the law on “propaganda” in order to limit the right for the freedom of assembly.

Thus, on December 14 the Committee for the Matters of Lawfulness, Law, Order and Security of Saint-Petersburg received the notification from O.Muzyk on the conduct of a picket on December 19 in Pionerskaya Square near the Griboyedov monument. The notification said that the picket would be held using billboards, banners, leaflets and other visual means of campaigning with the purpose of informing people about the need to counteract homophobia at the national level and within the society as a whole, as well as the unacceptability of introduction to CAV RF of amendments in form of Article 6.13.1 as a provision discriminating people on the grounds of sexual orientation and gender identity. Muzyk received a response with the requirement to change the location of the event, because some other event was to take place in Pionerskaya Square. As an alternative place the bottom of Dobraya Gorka Street in the residential settlement of Novoselki of the Vyborgsky district of the city was proposed. A travesty, there is no other way of putting it. The decision of the Committee was appealed against in the court that confirmed the justification of the denial without recourse to the argument of protection of minor children from propaganda. However, in justifying the correctness of the resolution of the court of first instance the city court called on the protection of minor children from propaganda. The determination thereof states in particular: “The Griboyedov monument in Pionerskaya Square of Saint-Petersburg is located in the immediate proximity to the Theatre of Young Audiences which is situated in the same square, and is the place through which children of different ages pass when going to and from the theatre... As follows from the notification of O.L.Muzyk, filed on December 14, 2012 to the Committee for the Matters of Lawfulness, Law, Order and Security of Saint-Petersburg, during the picket the participants of the said event had planned to use billboards, banners, leaflets and other visual means of campaigning containing, in particular, the following slogans: “Say no to the violation of the rights of gay and lesbian people!”; “Homophobic laws give the green light to violence against gay and lesbian people!”; “It’s not the composition of a family, but love and respect, that matter!”; “A child and 2 mothers is a family, not propaganda!”... In the meanwhile the family law of the Russian Federation judges from the necessity to strengthen the traditional family relations based on the feeling of mutual love and respect between a man and a woman, and their children (Articles 1, 12, 47 of the Family Code of the Russian Federation) and does not provide for the possibility of raising children by same-sex couples<sup>95</sup>. Further are the references to the Federal Law “On protection of children from the information impairing their health and development” and the Law of Saint-Petersburg “On the standards of distribution in Saint-Petersburg of printed products, audio and video products, other products which are not recommended for use by children under the age of 16”. The court draws the conclusion: “The attempt by the participants of the picket planned for December 12, 2012 to distribute near the Theatre for Young Audience leaflets and other visual means of campaigning appealing for tolerant attitude to gay and lesbian people and other sexual minorities, as well as containing the propaganda of upbringing of children in same-sex families (considering that the slogans quoted by the applicant in the notification were not of exhaustive nature) should be recognized as unadvisable due to the potential threat to the moral and mental development of children... Consequently, the denial by the Committee of approval of conduct by the applicant of the picket on Pionerskaya Square does not violate the applicant’s rights, because it has in fact prevented the distribution in the immediate proximity to a cultural institution (Theatre for Young Audiences) that demonstrates theatrical performances for children, the information capable of building distorted images of social equivalency of the traditional and non-traditional marriage relations among the persons who due to their minor age can not exercise proper judgment in independent interpreting of such information”. In other words, notwithstanding that the court does not refer directly to Article 7.1 of the Law of Saint-Petersburg “On administrative violations in Saint-Petersburg” prohibiting the “propaganda of homosexuality among minor children” the argument taken right from there is used.

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<sup>93</sup> Please refer to the resolution of the Saint-Petersburg City Court in case No.3-97/12 of March 24, 2012 on the website of “Coming Out”:

[http://comingoutspb.ru/assets/files/homophobic%20bill/gorodskojsud\\_reshenie.pdf](http://comingoutspb.ru/assets/files/homophobic%20bill/gorodskojsud_reshenie.pdf).

<sup>94</sup> Ruling of the Supreme Court of the Russian Federation in case No.78-APG12-16 of October 3, 2012. // ConsultantPlus. URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=301444>.

<sup>95</sup> Appellate decision dated May 22, 2013 г. // Website of the Saint-Petersburg City Court. URL: [http://sankt-peterburgsky.spb.sudrf.ru/modules.php?name=sud\\_delo&srv\\_num=1&name\\_op=doc&number=602642&delo\\_id=5&text\\_number=1](http://sankt-peterburgsky.spb.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=602642&delo_id=5&text_number=1).

The second case took place in March 2013. R.Savolainen addressed the government of the Moskovsky district of Saint-Petersburg with a notification on the conduct of a public event with the purpose of “attraction of attention of the general public and representatives of the law enforcement agencies of Saint-Petersburg to the problem of discrimination against transgender and transsexual people and other gender minorities, as well as improvement of the visibility of the transgender community for the society as a whole and representatives of the authorities”. In the response dated March 26 V.Korovin, Head of the district government denied approval of the public event with reference to the above Article 7.1. In particular, he wrote: «Moskovskaya Square is a place of mass entertainment for the residents of the Moskovsky district. The largest quantities of the residents, including parents with children, as well as minors, attend Moskovskaya Square during weekends. The organizer plans to hold its public event on 31.03.2013 at the time from 02:00 p.m. till 03:0 p.m., i.e. at the time when the largest number of people come to Moskovskaya Square, including minor children who will involuntarily become participants of the picket declared by the organizers”. It was suggested that the organizer should change the location of the public event. The case is currently appealed against in the court.

## **CONCLUSIONS AND RECOMMENDATIONS**

### ***Conclusions***

The laws have been enacted in 11 Regions, but only in Arkhangelsk Region the legislation is used regularly. In Saint-Petersburg and Kostroma Region the law is used on an ad hoc basis. In the other eight Regions the law has not been used at all.

The laws are used for the limitation of the right for the freedom of assembly in relation to LGBT activists and LGBT organizations. More often than not it happens at the stage of notification about the conduct of public events.

Four times penal sanctions under these laws have been applied in relation to the participants of single-person pickets: three times in Arkhangelsk (February 2012) and once in Saint-Petersburg (April 2012).

The law is used for the purpose of limitation of right for freedom of assembly contrary to the resolutions of the Supreme Court of the Russian Federation (in Arkhangelsk, Kostroma, Samara Regions and in Saint-Petersburg).

The laws are of discriminatory nature because they establish the “social non-equivalency of the traditional and non-traditional” relations in violation of the principle of non-discrimination in the international law on human rights.

The UN Committee for Human Rights and the Venice Commission have expressed their views in favour of abolishment of the laws, because their existence can be justified from the perspective of protection of neither morality, nor minor children, and poses a threat to the observance of such human rights as freedom of expression, freedom of assembly, freedom of association, right to disseminate and search for information.

### ***Recommendations***

1. In the name of the law the federal lawmakers replaced the words “propaganda of homosexuality” with the words “propaganda of non-traditional sexual relations”, probably because the term “homosexuality” is not defined in the effective legislation. At the same time, the term “non-traditional sexual relations” is even vaguer. In this connection it is essential to specify in more detail what exactly must fall within the scope of prohibition with account of the legal position of the Judicial Panel for Administrative Cases of the Russian Supreme Court.
2. The main problem of the statutory regulation in the field concerned, both at the federal and regional level, is as considered from the viewpoint of the international legal standards its undoubtedly discriminatory nature on the grounds of sexual orientation. If the lawmakers really want to protect children from harmful influences, they must provide the law administrators, and ultimately the courts, with the opportunity to decide based on the totality of the circumstances of each particular case, whether each particular propaganda is harmful for children irrespective of what kind of sexual relations are meant there. Otherwise, in the absence of evidence for the unbiased distinguishing by the lawmakers of homosexuality alone, the condemnation of Russia by the international bodies dealing with the protection of human rights, including the ECHR, can not be avoided.
3. There is no justification for the discriminatory attitude to foreigners as administrative offend-

ers in terms of the sanctions provided for in Article 6.21 of CAV RF, in which connection the corresponding qualifying feature must be removed from the law, especially as we approach the Olympic Games.

4. In connection with the inclusion in CAV RF of Article 6.21 the existing and legislation of the constituent entities of the Russian Federation on administrative violations that has been reviewed here seems excessive and duplicative, for which reason it must be abrogated by the legislative (representative) authorities of the relevant Regions.

## **DENIAL OF ACCESS TO PROHIBITED INFORMATION ON INTERNET**

### **SOME LEGAL ASPECTS**

The practice of recognition of information as prohibited for dissemination is not new for Russia; it is regulated by a whole corpus of federal laws. The subject matter of the present analysis are not the limitations imposed on publishing of information constituting a secrecy protected by the law – commercial secret, business secret, attorney-client privilege, tax secrecy or adoption secrecy. What is meant here is that the government thinks it necessary to impede or even prohibit the accessing of information on ethical grounds by citizens as they understand them.

The primary regulatory legal instrument governing the relations in the information sphere is Federal Law No.149-FZ “On information, information technologies and protection of information” of July 27, 2006 (hereinafter referred to as FL “On information”). This act provides the key definitions such as *information*, *access to information*, *electronic document*, *dissemination of information*, *domain name*, etc., formalizes the general principles of statutory regulation, as well as determines on a framework basis the procedure for the denial of access.

For the purpose of our analysis, the general principle of freedom of search for obtaining, transmission, production and dissemination of information using any lawful means (Clause 1 Article 3 of the Law) is of paramount importance. This being said, any limitation of access to information is possible solely pursuant to the federal law and only for the legitimate purpose of protection of the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other persons, and ensuring of national defence and national security. The Constitution of the Russian Federation establishes the prohibition on propagandism or campaigning causing social, racial, national or religious hatred and antagonism, as well as propagandism of social, racial, national, religious or language superiority.

FL “On information” does not determine the procedure for denial of access to information, which may be ad hoc different. Special federal laws do not always contain requirements to the procedure for the recognition of information as prohibited. Before the entry into effect of the amendments to FL “On protection of children from the information impairing their health and development”, “On information” and “On communication” the main instruments of blocking access to websites was the anti-extremist legislation and the rules of registration of domain names.

In 2012, the analysts of the AGORA Association recorded 608 cases of blocking of access to Internet pages. One of the most commonly used grounds for this purpose was FL “On counteracting extremist activities”. Article 12 of the law prohibits the use of public communications networks for the purpose of extremist activities. In the meanwhile by extremist activities many different actions are meant that are in one form or another connected with the distribution of information: public extenuation of terrorism and other terrorist activity; incitement of social, racial, national or religious hatred; propagandism of exclusiveness, superiority or deficiency of a human being on the grounds of his/her social, racial, national, religious or language affiliation, or attitude to religion; distribution of extremist materials; propagandism of Nazi and similar symbols, etc. Consequently, the Prosecutor’s Office and the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications (Roskomnadzor) as the bodies in charge of counteracting extremism on the Internet have two grounds to require blocking of access to Internet resources: (1) distribution of materials included in the Federal List of Extremist Materials maintained by the Ministry of Justice of Russia, and (2) publishing of materials causing, for example, social hatred as it is understood by the agencies.

It is worthy of note that the provisions of the anti-extremist legislation are regularly criticized for the non-specific and vague wordings allowing for their arbitrary interpretation and application.

Not only the indefiniteness of the term “social group” invites questions, for which reason citizens criticizing officials can be held liable for the incitement of hatred towards representatives of the authorities. The quality of the expert opinions on the basis of which the resolutions are as a rule

adopted on the recognition of information materials as extremist, are beneath criticism too. E.Strukova, Expert of the SOVA Centre, made the following stinging remark: “The incompetency of experts and the illiteracy of court officials who add items to the Federal List of Extremist Materials have not long been surprising anyone”.

As stated in the special report of the AGORA Association “Russian Internet services in the government’s employ”, over the recent years the Russian authorities have been increasingly frequently trying to control the Internet not directly but via the so called intermediaries represented by pseudo-NPOs (what is called GONGO — government-operated non-governmental organizations in the English speaking world), providers depending on the terms of licensing, registrars of domain names, etc.

An extremely convenient method of practically instant blocking of access to an unwanted website if it is registered in Russian national domains *.ru* or *.рф* was provided to the Russian authorities by the Coordination Centre (CC) of the National Domain Name on the Internet (an autonomous non-profit organization authorized to discharge the functions of a national registrar and, consequently, develop the rules of registration of secondary level domain names).

In November 2011, CC approved the new version of the Rules of registration of domain names in the domains *.ru* and *.рф*<sup>96</sup>.

Previously the Rules had provided the registrar with the opportunity to terminate the delegation of a domain in the *.рф* zone without the administrator’s consent only on the basis of a court judgment or a *substantiated* request of one of the heads of the agency engaged in the investigative activity (which is unlawful too but could give at least some guarantees). The rules for the *.ru* domain had not at all provided for such ground as request by power-wielding agencies. The new version of the rules does not require any substantiation or explanation. It is sufficient to simply forward a corresponding decision to the registrar and spare oneself the trouble of argumentation. After the scandal caused by the publishing in October 2011 of the new Rules, the CC had to explain away and make corrections. A few months later the “explanations” of the disputed item appeared on their website, however the Rules themselves remained unchanged.

The RU-CENTER company — one of the biggest Russian registrars and the actual monopolist when it comes to third level geo domains of *xxx.msk.ru* and *xxx.spb.ru* types - went to even greater lengths.

Clause 3.3.6 of the Regulation on the registration of third level domains constituting an obligatory addendum to all contracts for domain name registration deserves to be quoted in full:

«3.3.6. The Contractor shall have the right to immediately terminate the delegation of the domain for the purpose of prevention of illegal activity, as well as activity inflicting harm to third parties, including the activity in connection with the distribution and promotion of pornographic materials, incitement to violence, extremist activities, overthrow of power, etc., as well as the *activity conflicting with public interests, the principles of humanity and morals, infringing on human dignity or religious feelings, etc.* For this purpose, the Registrar may rightfully give an independent evaluation of the User’s activity with respect to violation of the legislation, including in the events when no definition of these acts is formalized in regulatory instruments (our Italics. — MHG). The definition of pornographic materials is published on the Registrar’s website: [http://www.nic.ru/dns/service/hosting/moral\\_standards.html](http://www.nic.ru/dns/service/hosting/moral_standards.html)».

This “etc.” with which the open list of the grounds for blocking of information at the discretion of RU-CENTER ends is worthy of special note.

However, the most high-profile legislative initiative of the recent time in the field of regulation of the Internet and censoring was the so called law on black lists — Federal Law No.139-FZ “On the introduction of amendments to the Federal Law “On protection of children from the information impairing their health and development” and certain legislative instruments of the Russian Federation concerning the limiting of access to illegal information on the Internet” dated July 28, 2012.

In fact the discussion of the matter of granting to the government of the right to block access to “harmful information” on the spot without court resolutions had long been in progress, however when the decision was taken the draft underwent three readings and was signed by the President within one and a half months. Clearly, there was no public discussion, and neither the Internet community, nor the civil society, nor even representatives of the business sphere were asked.

Nevertheless, there was a lot of vocal criticism. The Russian Association of Electronic Communications (RAEC) proposed a whole range of amendments to the draft law noting that “the too extensive class of materials subject to the inclusion in the Register on the basis of the decision of the federal executive body authorized by the Russian Government can result in abuse and sabotage the implementation of the law provisions. The expert evaluations that will be taken as the basis for the purpose of determination whether the material “incites for the performance of acts posing a threat to their life and (or) health, including infliction of harm to their own health, or for suicide”

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<sup>96</sup> Please refer to the website of the CC: <http://cctld.ru/ru/docs/rules.php>.



cause disbelief and must be substantiated in a court proceeding”.

In the official Google blog it was stated as follows: “The adverse consequences of application of the law will exceed the expected positive effect and put user access to legal resources under threat”.

Live Journal said: “The amendments to the law may lead to the introduction of censoring in the Russian language segment of the Internet, the creation of a black list and stop lists, as well as blocking of individual websites. Unfortunately, the practice of enforcement of the law in Russia bespeaks a high probability of exactly this worst case scenario”.

Yandex: “The proposed methods provide room for possible abuse and give rise to many questions on the part of users and representatives of Internet companies”.

On July 10, 2012, before the adoption of the draft law immediately in the second and third readings the Russian speaking Wikipedia interrupted its operation for one day as a mark of protest against censoring. The special press release said: “The lobbyists and activists supporting these amendments claim that they are intended exclusively against the content like child pornography and “similar things”, but the observance of the provisions and wordings brought in for discussion will result in the creation in Russia of an equivalent of the “great Chinese firewall”. The campaign was supported by Yandex, Live Journal, Lurkmore, Vkontakte, 2ck and some other services and portals.

The draft law was also criticized by representative of the OSCE in charge of the matters of freedom of mass media D.Miyatovich for the non-transparency of the procedures, the exclusion of the court from the process of taking decisions on the blocking of websites, and the unclear criteria of inclusion of information in the prohibited category: “Any attempt to prohibit the unclearly defined contents on the Internet in the absence of a transparent procedure will most likely lead to the excessive blocking of contents and possibly to censoring, which as a result will obstruct the free information flow”.

After the entry of the law into effect and a few months of its application V.Lukin, the Human Rights Commissioner of the Russian Federation paid attention to the defects thereof and noted in his annual report that “while understanding and sharing the motives that had actuated the lawmakers to develop the listed laws the Commissioner still considers necessary to monitor their application during the current year with the purpose of discovering of possible gaps and deficiencies, including those conditioned upon their unexplainably quick enactment”.

The law is in essence about the “creation of the Unified Register of domain names, page indexes on the Internet and network addresses enabling the identification of websites on the Internet containing the information prohibited for dissemination in the Russian Federation”.

The Register is maintained by an authorized organization (this role was initially applied for by the Safe Internet League) or a government body (currently the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications (Roskomnadzor)) which on the basis of opinions issued by specialists of the Federal Drug Control Service (FDCS), the Federal Service for Supervision of Protection of Consumer Rights and Human Welfare (Rosпотребнадзор) or the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications adopts a decision on the inclusion in the register of certain pages, websites or whole IP addresses.

The register includes the websites that contain two categories of prohibited information: (1) the information recognized as prohibited on the basis of a judicial act, and (2) information recognized as prohibited on the basis of a decision of the executive body authorized by the government. The first category includes child pornography, information on the methods of production and use of drugs, and information on the ways of committing suicide, as well as appeals for committing suicide. The second category includes any information recognized as prohibited by the court, for instance, extremist materials.

In April 2013, the law was enacted that supplemented the list of the materials subject to blocking without court ruling *with information about minor children that suffered as a result of unlawful acts (omission to act), the dissemination of which is prohibited on the basis of the federal laws*<sup>97</sup>.

It should be noted that again, like in other new laws, the limitation of rights and freedom is performed on the basis of an extremely vague provision (the original version was even about the possibility of extrajudicial blocking of “information inciting children to commit acts posing threat to their life and (or) health”). It should be kept in mind that the list of the grounds for extrajudicial blocking will be inevitably supplemented if for no other reason than because FL “On protection of children from the information...” contains a quite extensive spectrum of prohibited topics. In accordance

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<sup>97</sup> Federal Law No.50-FZ of the Russian Federation “On the introduction of amendments to certain legislative instruments of the Russian Federation to the extent of limiting of dissemination of information about minor children who suffered as a result of unlawful acts (omission to act)” of April 5, 2013» // Ros. gaz. 10.04.2013. No. 6053. URL: <http://www.rg.ru/2013/04/10/deti-dok.html>.

with Part 2 Article 5 of the Law “the information prohibited for dissemination among children includes the information:

- 1) inciting children to commit acts posing threat to their life and (or) health, including to harm their own health or to commit suicide;
- 2) which can arouse children’s desire to use narcotic substances, psychotropic and (or) intoxicating substances, tobacco goods, alcoholic and alcohol-containing products, beer and beverages produced on the basis thereof, participate in gambling, prostitution, vagrancy or beggary;
- 3) that substantiates or justifies the acceptability of violence and (or) brutality, or incites to perform violent acts in relation to people or animals, except for the events provided for in the present Federal Law;
- 4) negating family values and developing disrespect for parents and (or) other family members;
- 5) justifying wrongful behaviour;
- 6) containing strong language;
- 7) containing information of pornographic nature”.

Clearly, there are no distinct criteria in the legislation for the inclusion of information in the listed categories, because they can hardly be developed in principle. Meanwhile, this inclusion means that all providers will have to block access to such information for their subscribers. Therefore, the website owner will have either to delete the information in relation to which an unknown expert adopts a decision on prohibition on unclear grounds, or appeal against such blocking in the court. This being said, one should be prepared to the following: considering the speed of performance of Russian courts the website can remain blocked for a long time.

The methods using which the information is assessed, and the identities of experts, as well as the expert opinions themselves are inaccessible to the public and the owners of the blocked websites. They may at the best hope to obtain from the provider a copy of the decision of the government authority on the recognition of the information as prohibited. However this document does not contain any useful data, except for the number and date of the decision that may be appealed against. In an attempt to obtain more information one can only refer to the court requesting the opinion and the methods, as well as summoning experts for questioning.

The complete list of the blocked resources is closed as well. An average user can only check on the official website [www.zapret-info.gov.ru](http://www.zapret-info.gov.ru) whether some particular address, website or page is included in the register.

Apart from the indefinite grounds for the denial of access, the method thereof constitutes a serious problem too. The law says that the denial of access may be performed on the basis of the domain name, the universal page locator or the network address. This means that because of just one page containing unwanted information not only the whole website can be blocked, but even the IP address which may easily be common for tens of resources not connected between one another. According to the RosKomSvoboda portal (RuBlackList.net), the register contained 237 IP addresses as of March 11, 2013, which resulted in an involuntary blocking of over 4.5 thousand resources that had shared the address with the prohibited ones.

As the only method of protection of rights of owners of the blocked websites, the appealing can serve against the unlawful acts of Roskomnadzor or other authorized bodies in connection with the inclusion of the IP address in the Register, in the court on the basis of Article 254 of the Civil Procedural Code of the Russian Federation or in the arbitration court on the basis of Article 198 of the Arbitration Procedural Code of the Russian Federation.

A year earlier the Supreme Court of the Russian Federation voiced its opinion as regards the role of the provider in the denial of access<sup>98</sup>, that stated that in providing the technical capability of accessing information prohibited by the law the provider in fact acts as its disseminator in relation to other parties. Being technically capable, it must pursuant to the law take measures aimed at the restriction of access to the website concerned. By doing this the provider ends up in the situation when it is first forced to implement even a knowingly unlawful decision on blocking, and only after that has the right to appeal against the same. It is clear that in the vast majority of cases the providers that fully depend on licensing terms will not dispute the decision but obey in order to maintain the conformable conditions of doing business.

The law “on black lists” and the decisions adopted on the basis thereof can not obviously pass the “test for the observance of three conditions” of the ECHR in accordance with which any limitations of the rights and freedoms are acceptable only in the event when they are provided for in the law, pursue a legitimate purpose and are required in a democratic society.

The law sets the goal to protect children from the information impairing their health and development. But in fact it restricts access of all Internet users to an indefinite range of information. The government failed to provide arguments in favour of an urgent public need for the introduction

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<sup>98</sup> Determination No.58-Vpr11-2 of the Judicial Panel for Civil Law Cases of the Supreme Court of the Russian Federation dated May 10, 2011: [http://www.vsr.ru/print\\_page.php?id=7647](http://www.vsr.ru/print_page.php?id=7647).

of full extrajudicial blocking of entire IP addresses, whereas such blocking is considered in the international law as an extraordinary and exceptional measure similar to the prohibition on issuing newspapers or broadcasting.

The law does not meet the requirements of legal certainty, as it does not enable citizens to reasonably foresee the consequences of their acts. Moreover, the mechanism of implementation of the law is such that even bona fide website owners against whom the government raises no claims may face limitations of their constitutional right only because their website shares the IP address with a prohibited resource.

A significant limitation of the capabilities of the owner of the blocked resource in terms of judicial defence becomes a consequence of the closed nature of the procedures of recognition of information as prohibited, the methods using which the evaluation is performed, and the procedure of appointment of experts, because information of this kind is required for the purpose of preparation of the claim.

Only some cases of appealing against inclusion in the Register and denial of access to websites are known. However, the court decisions in these cases can be of paramount importance in the situation with the regulation in the sphere of the Internet.

## **ANALYSIS OF PRACTICAL ADMINISTRATION OF THE LAW**

The situation with the “law on black lists”, a conventional name for the corpus of the provisions contained in FL “On protection of children from the information impairing their health and development”, FL “On information” and Decree No.1101 of the Russian Government dated October 26, 2012, confirms one again the thesis that only bad administration of a law can be worse than a bad law. As a result the idea of harmonization of the regulation of legal relations on the Internet proactively promoted by some deputies has been fully discredited. Only a serious review of the law may improve the situation accompanied by the formalization of the guarantees of observance of the constitutional freedom of expression of opinion.

As can be seen even now the costs, including economic and reputational costs, incurred by Russia in connection with the implementation of the law exceed by far its usefulness which is confirmed by nothing at all. Indeed, there is no substantiated research in support of the positive effect of the law on the preservation of children’s health and development. The “Streisand effect” and the nature of the Internet itself lead to an immediate and unlimited distribution and duplication of all prohibited information. This can only be stopped through full disconnection of RuNet as exemplified by North Korea.

On the other hand, the application of the law is being criticized by the Internet industry represented by the Russian Association of Electronic Communications believing it to be dangerous for the development of RuNet, make an adverse impact on the business, and capable of resulting in a collapse of many regional mass media.

The law has made a serious impact on the reputation of the Russian authorities both at the international level, and within the country. Many unfounded denials of access to some extremely popular resources like Wikipedia, Lurkmore.to and RuTracker.org caused first outrage and later laughter on the part of millions of Russian Internet users. The vicious press releases of the Federal Service of Supervision of Protection of Russian Consumer Rights and Human Welfare, the ignorant “expert opinions” on the basis of which individual posts in social networks and entire Internet services were blocked, the complaints of Roskomnadzor about the lack of highly-skilled specialists for the purpose of maintenance of the register, the war against imaginary drugs — all this could not be reacted on in any way other than roars of laughter and mockery.

The small number of claims against the unfounded denials must not be interpreted misleadingly — this is just the beginning, and the number of claims will definitely grow. The dismissals cranked out by Russian courts will be compensated by the significantly increased speed of consideration of cases by the ECHR. By the way, only a few months ago the ECHR requested Turkey to pay 8.5 thousand euro to the owner of the unlawfully blocked website. Multiply this amount by 13,500 (the maximum quantity of the websites blocked under the law “on black lists”) and you will receive more than one hundred million euro that may be potentially recovered from our country as a result of acts of the deputies, officials and courts.

The law “on black lists” has been in effect for a sufficiently long time to enable the evaluation of its practical administration and the efficiency of the established mechanisms of controlling the materials distributed on the Internet.

When the discussions of the idea of filtering of content with the purpose of protection of children started in Russia the representatives of the Internet community and online-businesses expressed their nearly unanimous opinion that the proposed methods of counteraction of “harmful

information” would lead to not exactly the results that were claimed by the draft law authors.

During the round table discussion in the TV studio of the Dozhd television channel one of the authors – S.Zheleznyak, deputy of the State Duma representing United Russia, said: “Our task is certainly to protect, not attack... protect our children from the information that can directly harm their health and even life”.

The authors of the report prepared by the Centre for New Media and Society of the Russian School of Economics published in 2012 claimed: “The piecemeal approach used by the Russian Government to the regulation of the Internet by way of regulation of harmful content in accordance with Law No.436 [FL “On protection of children from the information impairing their health and development”] can undermine the development of ICT, violate civil liberties and impede the development of computer literacy”.

The digital awareness of our fellow citizens in connection with the enactment of the law has rather increased, at least regarding the matters connected with the use of anonymizers and VPN-clients. But the freedom of speech has suffered a massive blow delivered by the law “on black lists”. It is even not about thousands of websites becoming inaccessible on doubtful grounds without any judicial or public control. The statutory formalization of the possibility of arbitrary denial of access to not just individual pages but also entire IP addresses results in the vagueness of the legal system, corrupts the executors of law, and ultimately shakes the foundations of the constitutional system.

It is to be recalled that the objective of the “black lists” is the protection of children from the information impairing their health and development. For the purpose of achievement of this undoubtedly noble goal millions of adult legally capable Russian citizens are limited in their constitutional right to receive information freely and deprived of access to thousands of websites against the owners of which even no claims have been raised in connection with their content. This state of things violates not only Part 3 Article 55 of the Constitution of Russia establishing that the rights and liberties of man and citizen may be limited by the federal law *only to the extent required* for the purpose of protection of the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other persons, and ensuring of national defence and national security. The law “on black lists” and especially its practical administration also contravene the set of the international legal responsibilities of our country.

When joining the Council of Europe Russia undertook to observe the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as recognized the jurisdiction of the European Court for Human Rights as obligatory in connection with all matters of interpreting and application of the Convention. Part 2 Article 10 of the Convention requires from the state in each case of limitation of rights and freedom to evaluate critically the actual need for such limitation in a democratic society and the proportionality of the applied measures to the legitimate purpose. In this respect, the provisions of Part 3 Article 55 of the Constitution fully comply with the article of the Convention.

The broadly applied practice of inclusion of IP addresses in the Register, and, as a result, thousands of “innocent” resources are blocked, obviously violates the principle of proportionality of the limitation. This is exactly how the ECHR assessed the similar situation in the case of Ahmet Yildirim v. Turkey (resolution of December 18, 2012) on the blocking of an IP address. The applicant was the owner and administrator of a private website within the Google Sites system on which he had been publishing academic articles and his opinions with regard to various issues. His resource had been blocked after the delivery by the court of Denizli of the ruling on the blocking of access to the website of the accused as an injunctive remedy within the framework of a criminal case of an insult to the memory of Atatürk. The Telecommunications Administrations of Turkey (analogous to our Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications) referring to the technical incapability of isolated blocking of the said website had blocked access to the whole service sites.google.com, as a result of which also the applicant’s website had been affected. The ECHR came to the conclusion that the interference by the government with the exercising of the applicant’s right for the freedom of expression had been unlawfully limited, and stated, in particular, that the absence of a clear legal framework enabling the regulation of the process of limitation of the freedom of information on the Internet contradicted the guaranteed right for the freedom of expression.

It is worthy of note that the Joint Declaration of the UN, the OSCE and the OAS on Freedom of the Internet adopted on June 1, 2012 establishes that the forced blocking of entire websites and IP addresses constitutes an exceptional measure similar to the prohibition of newspapers and broadcasting. It is impossible to imagine that in a democratic society the issuing of newspapers or broadcasting of a TV channel were terminated without any court ruling. However, when it is about an IP address or a domain name no problems occur notwithstanding that from the perspective of the principles of the international law on the freedom of information the termination of broadcasting of, say, Channel One does not in any way differ from the blocking by the providers of access to the IP addresses of YouTube or even an individual private blog.

Having analyzed the available information about the administration of Article 15.1 of FL “On information”, as well as the Rules of creation, generation and maintenance of a unified automated information system “Unified register of domain names, page indexes of websites in the information and telecommunications network Internet, and network addresses enabling the identification of the websites in the information and telecommunications network Internet containing the information prohibited for distribution in the Russian Federation” approved by Decree No.1101 of the Government of the Russian Federation on October 26, 2012, we can come to the conclusion that the law does not comply with the requirements of legal certainty, and the Rules introduce an actually obligatory inclusion in the Register of IP addresses, which will constantly mean unfounded blocking.

Thus, according to RosKomSvoboda, 98.9 % of the domains are being blocked unlawfully<sup>99</sup>.

Unfortunately, in the final versions of the draft law “on black lists” and Decree No.1101 the recommendations of the experts of the Russian Association of Electronic Communications (RAEC) to specify the conceptual framework in more detail and waive the blocking of IP addresses were completely ignored.

The explanatory note to the law draft said that “the Russian legislation to the extent of forced blocking of Internet pages containing information prohibited for distribution is well behind the best equivalents existing in the world”. Even if that was so, Russia must be well “ahead” of them now. Director for Liaison with Government Authorities of Mail.Ru Group M.Yakushev noted: “This is not the Chinese option. This is obviously the option of some more hindward countries that strive to control the information environment of the state based, for example, on religious considerations like the national religion of Islam”.

This applies especially to the grounds for blocking and the judicial control of the law administration. To the list of the grounds for the extrajudicial blocking of access to information on the Internet that was previously comprised of three items – child pornography, propaganda of drugs and instructions on committing suicide — one more item has now been added without any substantiation: information about minor children who suffered as a result of unlawful acts (omission to act) the distribution of which is prohibited by the federal laws, e.g. personal data such as last name, first name, patronymic, birth date, place of study or work, as well as photo and video images of minor children, audio records of their voices, personal data of their parents, etc.

During the short public discussion the experts of RAEC — the key association of participants of the Internet industry — stated that the law draft contradicted the Constitution and posed threat to the development of Internet in Russia. While there is a consensus in the world on the prohibition of child pornography (not to mention different approaches to the definition of this term), the appeal for suicide is an exclusively Russian know-how.

As a matter of fact, on April 8, 2012, when the list was supplemented one thing happened that the experts had been apprehensive about even before the enactment of the law: having created and mastered the mechanism of prompt blocking of information on the Internet the authorities began to extent the list of the grounds. Now the suggestion is to include the materials insulting the feelings of believers, intellectual property items in connection with which an application of the right holder exists, information about the private life of people (including property owned by officials abroad), etc.

The attitude of the Internet community to such initiatives was illustrated by the research performed by Wobot Company upon request of the Public Opinion Foundation. Having analyzed the discussion in the blogosphere of the activities of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications in connection with the creation of the Register of prohibited websites during the first month of its existence the authors came to the conclusion that “the establishment of the register of prohibited websites has caused a stormy negative reaction on the part of Internet users, which is due to the stable attitude of Russian users to information on the Internet as to free and publicly available”. Since then the situation has hardly changed, and the term “black lists” has been long replaced by the new less academic but much more rich one – “sh...t register”.

Nevertheless, the website [zapret-info.gov.ru](http://zapret-info.gov.ru) enjoyed evident popularity. As reported by representatives of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications, during the first 12 hours of operation of the resource it was visited by 100,000 unique visitors. On November 9, the head of Roskomnadzor said that more than 180 websites had been already included in the Register. The new rules of blocking affect most diverse resources, and given the availability of information about the methods used by the specialists of the FDCS, Roskomnadzor and especially Rospotrebnadzor, as well as the total non-transparency of the procedure, the justness of the vast majority of blockings raises serious doubts.

Access to the Encyclopaedia of Modern Culture, Folklore and Subcultures “Lurkomorie” ([Lurkmore.to](http://Lurkmore.to)) was blocked on the basis of resolution of the Federal Drug Control Service that

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<sup>99</sup> As of September 5, 2013. Please find here: <http://reestr.rublacklist.net>.

found some articles to be the propaganda of drugs. The administrators of the website became aware of the claims of the agency only after the blocking of access - the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications did not attempt to resolve the situation at all. After a few days of the trench warfare accompanied by the change of the IP address and statements about the unacceptability of censoring, the disputed materials were deleted and the resource was removed from the Register.

The next websites to catch it in the neck were the torrent tracker RuTracker.org and one of the biggest free online libraries LibRus.ec. The first one paid the price for the seeding of "Encyclopaedia of suicide", and the second one for the "cannabis soup" from the "Anarchist's cookbook". Both resources had to obey and removed the said materials under the threat of full blocking.

On November 18, one of the IP addresses of Google appeared in the Register for the first time. A few days later, the situation repeated with another address and as a result users faced problems with accessing the services of the social network Google+ and the Blog platform Blogger. After that, practically all popular social networks in Russia — V Kontakte, LJ.rossia.org, Odnoklassniki, Facebook, YouTube — were subject to blocking.

In early April of the current year, claims were raised against Wikipedia: the article "Smoking cannabis" was found by the Federal Drug Control Service to be an instruction on the use of marijuana. It turned out later that 15 pages (17 according to Wikipedia) had been included in the Register). However, the service decided to ignore the existence of the Register. On April 8, the founder of Wikipedia J.Wales said that blocking is always more preferable than making concessions to censors, and that "bowing to pressure from weak and cowardly politicians — those who are afraid of dissemination of knowledge — is not the way of Wikipedia". That's exactly what happened. The articles were edited, but not because the Internet community recognized the justness of the claims, but because they had not been in line with the rules of Wikipedia itself. After that the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications in order to save the face pretended that everything was fine and the pages were removed from the Register.

By the way, the story with Wikipedia illustrated that blocking does not achieve the claimed goals of protection of children and that they are totally inefficient given the availability of a huge number of most easy to use bypass means. On the contrary — after the inclusion in the Register of the article "Smoking cannabis" its traffic increased by more than 100 times — the "Streisand effect" worked.

It is characteristic that in some cases the blocking of the biggest social networks occurred kind of accidentally, for just a few hours. Then the message appeared informing about a "technical failure".

That was how Rostelekom explained the blocking of YouTube, Odnoklassniki and V Kontakte in Oryol, Bryansk and Ryazan Regions.

In May, the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications called the inclusion of V Kontakte in the Register a "sad mistake". It turned out that four specialists of the agency in charge of the maintenance of the register had been working flat out 12 hours each day sometimes inevitably pressing wrong buttons.

It should be noted, that already six months before the management of the agency had complained about failures in the operation of the system caused by imperfect software (supplied by the way by the Safe Internet League) and high load. In all appearances the technological problems have not been solved until today, and the situation with the evaluation of information does not look better. Approximately at that time the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications had declared its plan to start training experts in the field of information products under the aegis of the Moscow State University. The materials that become available to the public after the court proceedings in connection with the unfounded blockings are indicative of the disastrously low level of professionalism of the experts engaged in the evaluation of network publications. There is no other way to obtain them — the whole procedure of evaluation of information and decision making is in fact a secret.

Notwithstanding that, there are now thousands of websites and hundreds of IP addresses in the Register, not more than ten cases of judicial appealing against blockings are known. We are aware of three court judgments in connection with the operation of the Register. There may be more of them, but not by much.

On April 1, 2013, the Obninsk City Court dismissed the claim of the administrator of the farcical encyclopaedia Absurdopedia.net requiring the recognition as unlawful the inclusion in the Register of the article "How to do it right: committing suicide". The publication was of obviously humorous nature, and all instructions reduced themselves to the following: "Don't rush, even in the water closet. This is so much for losers. This is a stupid death in agony... Don't play Anna Karenina, even with a tram. You will definitely die, but does the driver deserve all this trouble?". Meanwhile, the decisions of the Federal Service for Supervision of Protection of Consumer Rights and Human

Welfare and the court with regard to the lawfulness of blocking access to this material are absolutely serious and based on expert opinions.

The professor of the Department of Psychiatric and Narcology of the Sechenov Medical University writes: “despite the ironical hue of the material it describes different way of committing suicide... some descriptions of the ways to commit suicide are preceded by the following words: “I you want to be remembered...”, “You will die in glory if...»”. This may create an opinion about suicide as an acceptable act encouraged by the society”.

The professor of the Department of Oral Lore of the Faculty of Arts of the Moscow State University claims authoritatively: “Prohibited information *is contained in the whole website* and in the heading first of all...”.

The Director and Deputy Director of the Centre for studying of problems of upbringing, formation of healthy lifestyle, prevention of drug use and social and pedagogical support to children and youth come to the conclusion: “The authors overestimate their artistic skills and demonstrate the lack of their own mental and moral upbringing... Adults with a steady mind will probably react with irony on these recommendations, but in the event of children reading them it is difficult to forecast how they will be perceived”.

Certainly, there is no description of the logic of the research, indication of commonly accepted scientific methods of evaluation of the text or argumentation in the expert opinions fertile in such words as “apparently”, “probably” and “difficult to forecast”. However, there were enough of them to limit the constitutional rights of citizens. By the way, the inclusion in the Register of the network address of the Absurdopedia led to the blocking of all websites hosted by Wikia.

On May 6, 2013, the Arbitration Court for Moscow refused to recognize upon application of YouTube LLC as unlawful the decision of the Federal Service for Supervision of Protection of Consumer Rights and Human Welfare on the prohibition of the video “The correct way to cut your veins”. As a result, the company had to restrict the access to the video in the territory of Russia. Like in the above case under the scary title one can find a farcical recommendation on the preparation for Halloween and making a fancy dress. Supporting the rightness of the Federal Service for Supervision of Protection of Consumer Rights and Human Welfare the court stated particularly: “in some cases the way to commit suicide can be contained even in its title that without excessive details, descriptions and photographs, e.g. “dying from 1.000 cuts” may point to how to commit suicide<sup>100</sup>”.

The third case is similar to that in which the ECHR had recognized the violation by Turkey of Article 10 of the Convention. On December 19, 2012, the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications included upon decision of the Federal Drug Control Service the IP address 69.163.194.239 in the Register because on the website “Rastaman Fairy Tales” located there something about cannabis had been found. It did not at all bother the executors of the law that under the said address some tens of innocent websites were registered. The owner of one of them — News of Electronic Book Publishing (digital-books.ru) — referred to the court with a claim. However, on June 19, 2013 the Tagansky District Court of Moscow dismissed it. In the course of consideration of the case, it turned out that in strict compliance with the requirements of Clause 12 of the Rules of creation, generation and maintenance of the Register Roskomnadzor in the event of refusal to delete the prohibited page included the whole IP address in the Register, and the providers, consequently, had to block the said address. Despite the discovered statutorily formalized disproportionality of reaction and the apparent contradiction of the provisions of the law “on black lists” to the Main Law of the country, the district court supported by Roskomnadzor refused to forward the request to the Constitutional Court of the Russian Federation.

A telling illustration of the problems that occur with the filtering of the content of IP addresses was the story with the 23 minute long blocking by Rostelekom of Yandex for the reason that one of the network addresses coincided with the address of some resource containing information about psychotropic substances.

In August a hearing was to be held in the Tverskoy District Court of Moscow about a tweet where the officers of Rospotrebnadzor had found such a serious appeal for committing suicide that it had been necessary to block access to that short message across the whole Russia.

It is typical for all mentioned cases that neither the law administration agencies represented by Rospotrebnadzor, the FDCS and Roskomnadzor, nor the judges did not bother to substantiate the need for the prohibition of information, which is an apparent and gross violation of a whole corpus of statutory provisions, from FL “On information” to the Russian Constitution and the European

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<sup>100</sup> Resolution of the Arbitration Court for the city of Moscow of May 13, 2013 in case No.A40-14061/2013. Please refer to the website of the Moscow Arbitration Court: [http://kad.arbitr.ru/PdfDocument/a2b2663f-0694-4e0a-bf9a-fb1088a2e991/A40-14061-2013\\_20130513\\_Reshenija%20i%20postanovlenija.pdf](http://kad.arbitr.ru/PdfDocument/a2b2663f-0694-4e0a-bf9a-fb1088a2e991/A40-14061-2013_20130513_Reshenija%20i%20postanovlenija.pdf)

Convention on the Protection of Human Rights and Fundamental Freedoms.

The experience of the law administration shows that any resource can be under threat, a word like “drug” or “suicide” found there is enough. A good example is the website of the online game Eve Online the administrators of which had to delete the page mentioning an imaginary drug.

It even came to more ridiculous incidents. The universal macro image for the blocking of any website in the territory of the Russian Federation – a table with farcical ways to commit suicide, usage of drugs and three naked babies – ended up in the register immediately after publishing.

The most serious defect is in Clause 12 of the Rules of maintenance of the Register. It is this clause that provides for the obligatory inclusion in the Register of the network address of the resource from which the disputed information was not deleted. It is the blocking of IP addresses, not indexes of particular pages, that attracts a good deal of criticism on the part of the experts. Provided there is a capability of isolated blocking of information recognized as illegal by the court the blocking of the address is a means blatantly disproportionate to the pursued goal.

## RECOMMENDATIONS

- It is necessary to: statutorily formalize clear and scientifically substantiated criteria of evaluation of information, based on the checking of availability of a real threat to the health of children.

- Supplement the open part of the “Uniform register...” with a section containing the full texts of resolutions of authorised bodies on the recognition of information as prohibited, with attachment of all materials on which such resolution is based (expert opinions, statements, assessments, etc.)

- Delete from FL “On information” and Decree No.1101 the possibility to block network addresses. Limit the Unified Register only with uniform resource locators (URL).

- Delete from the list of prohibited information constituting ground for the inclusion in the Register “appeals for suicide” and “information about minor children” as non-specific and allowing for an arbitrary limitation of the freedom of speech without evident positive effect.

- Introduce a moratorium on further extension of the list of grounds for the blocking of access to information.

- Exclude Rospotrebnadzor from the list of the agencies authorized to take decisions constituting grounds for the inclusion of page indexes, domain names and network addresses in the Register.

- Formalize an exhaustive list of sites accessible by children where the implementation of administrative and organizational measures is required, as well as the application of technical, software and hardware means of protection of children from the information impairing their health and development.

## LIABILITY FOR LIBEL

### REVIEW OF THE RUSSIAN LEGISLATION

The migration over a few months of libel from the criminal to the administrative legislation and back is interesting not because of the demonstration thereby of unscrupulousness and lack of professionalism in United Russia. And not because it has shown the real role of D.Medvedev in the country. And even not because of the discussion about the required criminal liability for defamation that has been afresh called into existence.

The main result of this story is the confirmation of the thesis of the quite unstable Russian legal system causing disrespect for the law that in its turn shakes the said system even more. Basically, this is exactly what the authors of the most well-known legislative innovations of the recent time have been doing. The fines provided for in CAV for the violation of the law on meetings that exceed the similar sanctions stipulated in the Criminal Code, destroy the generally well set up legislation on administrative violations. The practice of extrajudicial blocking of websites formalized in the law “on black lists” emphasizes the disrespect of the authorities for the court.

The draft of Federal Law No.559740-5 “On the introduction of amendments to the Criminal Code of the Russian Federation and certain legislative instruments of the Russian Federation” that decriminalized libel had been brought in for consideration to the State Duma by President Medvedev in June 2011 within the framework of the widely advertised liberalization of the criminal legislation. On November 17, 2011, 312 deputies voted for the said law draft in the third reading, including P.Krashennikov, I.Yarovaya, D.Vyatkin, R.Shlegel, B.Reznik representing United Russia.



That was them who later together with the deputies who joined them in the new State Duma proposed the law draft returning libel back to the Criminal Code.

The poorly reasoned tearing around of the deputies who first supported the “presidential law draft” almost unanimously and six months later abrogated it with poker faces showed once again that they do not even think about the public good, but press voting buttons mechanically as instructed by the heads of the faction.

Explaining the reasons for their “correction of mistakes” the authors of the new law on the new criminalization of libel said the following.

Yarovaya: “Only those see threats who understand that libel for them is a lifestyle and means of living”.

Krashennikov: “The decriminalization of the article “Libel” performed within the framework of liberalization of the criminal policy and the stipulation for various libellous fabrications, and in other words the dissemination of false statements about someone, of administrative fines in the amount of up to three thousand Roubles have resulted in the practically unpunished accusation of the deepest sins made by some citizens and calling the people mobsters, terrorists and bribe takers”.

In the explanatory note to the draft law the idea of the deputy was expanded: “the existing measures of protection of the honour and dignity of an individual formalized in CAV RF... are totally insufficient. Thus, the sanctions stipulated in Part 1 Article 5.60 “Libel” of CAV RF in form of a fine for individuals in the amount of up to two thousand Roubles seem inefficient... In the opinion of the authors the adoption of the law draft will facilitate the ensuring of improved protection of the constitutional rights of citizens, first and foremost against the dissemination of knowingly false information discrediting the individual’s honor and dignity”.

Clearly, there was no research of efficiency or inefficiency of the decriminalization of libel over the six months during which Article 5.60 of CAV was in effect. It is impossible to assess impartially its effect over such short period when even the courts did not have enough time to understand clearly how to apply the new provision. Speaking about some citizens who with impunity call people bribe takers the former deputy from the Union of Right Forces as simple as betrayed himself.

On the contrary, according to the explanation given in the explanatory note to the law draft decriminalizing libel and insult, these acts “correspond in terms of their social danger... to offences provided for in the Code of the Russian Federation for administrative violations rather than the Criminal Code of the Russian Federation”. This law draft was approved and supported by Russian the Supreme Court and the government that made a point of the need for the humanization of the criminal policy.

As far as libel and insult are concerned, the document really became a revolutionary one. Libel had been considered a criminal offence in the Russian Empire, the Soviet Union and the Russian Federation. It is characteristic, by the way, that since the time of the first Soviet Criminal Code of 1922 and till summer of 2012 the structure of the set of crime elements had little changed. The differentiation had been based on the extent of dissemination of the discrediting information with addition of an accusation of a grave offence as an extra qualifying feature.

In general the problem of legal liability for libel has, in our opinion, two aspects. The first one is associated with the structure of the set of crime elements and the qualification. The second one is the matter of principle concerning the expediency of criminal liability for an offence that obviously does not result in any immediate danger to the society.

On May 5, 1998, the European Convention on Protection of Human Rights and Fundamental Freedom entered into effect for the Russian Federation, which means that the precedent-based practice of the ECHR became obligatory. This particular circumstance imposes on Russia the responsibilities of general nature in form of the requirement to bring the national legislation in compliance with the provisions of the Convention.

For example, the use in the article of the extremely broad term “information” contravenes the standpoint of the ECHR regarding the need to distinguish between stating of facts the correspondence of which to the real state of things can be verified, and personal judgments and opinions. The criteria of truth and falseness can not be applied to the latter and, hence, one can not speak about the “undoubted falseness” of such information. Meanwhile, neither the old, nor the effective version of the article “Libel” makes this distinction, which provides ample opportunities for their arbitrary interpretation and application. Moreover, in this wording the law does not meet the requirements of legal certainty, i.e. judging from the text of the law citizens can not match their cats to the requirements thereof. Theoretically this situation will enable the casting of discredit on any issued verdict of guilty in a case of libel.

The Plenum of the Russian Supreme Court had to remove the deficiencies of the law. Ruling No.3 “On judicial practice in cases of protection of honour and dignity of individuals, as well as business reputation of individuals and legal entities” dated February 24, 2005 said that the “term “defamation” used by the ECHR “ is identical to the term of dissemination of discrediting information that does not reflect the real situation contained in Article 152 of the Civil Code of the Rus-

sian Federation”, and that courts “should distinguish between the existing statements of facts the correspondence of which to the real state of things can be verified, and personal judgments, opinions, beliefs that do not constitute the subject matter of judicial defense in accordance with Article 152 of the Civil Code of the Russian Federation because they can not be verified for the correspondence to the real state of things as they constitute the expression of personal opinion and views of the defendant”.

It is unclear why the authors of the law on the criminalization of libel decided to walk twice into the same water.

However, as can be seen in the analysis of the text of Article 128.1 of the Civil Code of the Russian Federation, the legal drafting technique had more than once let the deputies down. Thus, Part 4 establishes liability for libel combined with the accusation of a “crime of sexual nature”, whereas the Criminal Code contains no definition of such crimes. It is possible that the deputies meant the crimes specified in Articles 131 to 135. But the criminal law can not be applied on the basis of assumptions and, therefore, the acts listed in Article 18 of the Criminal Code of the Russian Federation “Crimes against sexual immunity and sexual freedom of individuals” can not be considered crimes of sexual nature for the purpose of Article 128.1 pursuant to the principles of lawfulness and legal certainty.

In addition, Part 4 establishes liability for libel “stating that an individual suffers from a disease posing threat to other people”<sup>101</sup>. This provision implies that the availability of such disease certainly discredits the individual, which is a violation of the constitutional rights of ill people for the equality before the law and the court, as well as for the protection of dignity of the individual, increasing their social stigma. It should be reminded that in accordance with Part 3 Article 5 of the Federal Law “On the fundamentals of protection of health of citizens of the Russian Federation” the state guarantees for citizens the protection from all forms of discrimination on the grounds of their diseases. The special provision of Article 17 of the Federal Law “on prevention of spreading in the Russian Federation of the disease called the human immunodeficiency virus (HIV)” prohibits the discrimination of individuals on the grounds that they have HIV. Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms prohibits all discrimination on any grounds. This being said, discrimination may be expressed not only in the establishment of certain restrictions on the exercising of rights and liberties, but in the encouragement by the state of the stigma aimed against particular social groups, which takes place in the event of the law provision concerned. The ECHR claims that indirect discrimination occurs when there is a “general political course or measures that being disproportionately prejudged affect some particular group notwithstanding that such course/measure are not aimed specifically at this group” (resolution dated May 4, 2001 in the case of Hugh Jordan v. the United Kingdom, § 154).

Part 5 provides for punishment for libel combined with the accusation of individual of a grave and especially grave crime, i.e. in accordance with Article 15 of the Criminal Code of the Russian Federation of deliberate acts for which the Code provides for the maximum possible punishment in form of imprisonment for the period of over five years. This category includes the most common malfeasances in office such as abuse of office, exceeding of official powers, bribe taking and giving and a whole number of other crimes. As a rule, these are the crimes that become the subject matter of journalistic investigations, and, hence, Article 128.1 in its most severe part targets mostly journalists, which can not but make an impact on their desire to discharge their professional duties. The maximum scope of the penalty established by this article is obviously excessive. The most severe sanction implies a fine in the amount of up to 5 million Roubles or compulsory community service of up to 480 hours. Previously persons convicted of libel, especially for the first time, could be subjected to conditional sentence. Now the maximum possible fine stipulated in the Criminal Code can be imposed in accordance with Part 5.

It is worthy of note that it is the person that considers himself/herself affected as a result of the dissemination of discrediting information contrary to the real state of things who is to the greatest extent interested in the restoration of honour and dignity, as well as compensation for the inflicted harm. And the efficient mechanism of achievement of both goals is provided by the Civil Code of the Russian Federation and the legislation on mass media that stipulate the refutation of false information and the compensation for the inflicted harm as a result of its dissemination. The sufficiency of the civil law mechanism was pointed to on repeated occasions by practicing lawyers and legal theorists. For example attorney H.Reznik: “For an individual the protection by the civil law is more efficient, as well as more useful. A libeled citizen is firstly interested in rehabilitation and secondly in the compensation for the inflicted harm. The civil law fully satisfies these interests: mass media disseminating lies are bound by the court to publish a retraction, compensate the individual

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<sup>101</sup> Please refer to Decree No.715 of the Russian Government “On the approval of the list of diseases of social significance and diseases posing threat to others” dated December 1, 2004. Among them: HIV, hepatitis B and C, tuberculosis, sexually transmitted diseases, malaria, and some other.

concerned for property damage and emotional distress — the experienced physical and moral suffering”.

The article on libel establishing liability for the dissemination of knowingly false information that discredits honour and dignity of other person does not take into account the nature of such information even in the event when it is about public discussions of political and other matters of social importance.

In accordance with the legal proposition of the Supreme Court of the Russian Federation voiced in the above Decree of the Plenum, the courts should keep in mind that according to Articles 3 and 4 of the Declaration on Freedom of Political Discussion in Mass Media adopted on February 12, 2004 in the 872<sup>nd</sup> session of the Committee of Ministers of the Council of Europe, the politicians who strive to earn support from public opinion agree by doing so to become the subject matter of the public political discussion and criticism in mass media. Government officials can be subjected to criticism in mass media in relation to how they discharge their duties because it is necessary for the purpose of ensuring of an open and responsible exercising by them of their powers. This principle must be applied in the criminal law as well, however the lawmakers has ignored this requirements.

The ECHR insists that the freedom of journalism includes, inter alia the possibility to make recourse to some degree of exaggeration or even provocation<sup>102</sup>. We believe that the real risk of abuse and arbitrary application of Article 128.1 of the Criminal Code of the Russian Federation for the purpose of putting pressure of journalists performing their investigations outweighs far the dubious need for the existence in a democratic society of such extensive interpretation of the notion of criminal libel.

The Council for the Development of Civil Society and Human Rights at the Russian President proposes, apart from the reduction of the sanctions and the limiting of the disposition of this article on libel with the dissemination of information about a person's private life, to transfer all such cases to the category of private charge in order to deny the government the opportunity to hold people liable on an arbitrary basis without personal judgment by the affected party as regards the assessment of the inflicted harm.

These proposals of the Council seem one-legged. The final goal of such reform must be the complete abolishment of criminal or administrative liability for libel.

## ABOUT SOME PROBLEMS OF TRANSFORMATION OF CONSTITUTIONAL LEGISLATION IN TODAY'S RUSSIA

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### ***About the situation in general***

What is going on with the modern Russian society? I dare say, this question has recently become more important than the two sacramental Russian questions “What is to be done?” and “Who is to blame?”. Wishing to answer it in an academic way one can write several scientific works. But they – these works – exist in large quantities; for this reason I am going to try to produce some “dry solids”. I am totally convinced that ***we witness the process of transformation of the civic awareness. In Russia, not only the public requirements to the government are changing, but also the view of the population of the nature, the purpose, and the place of the government in the society.*** This awareness is being improved and structured on a daily basis, and sometimes even hourly, depending upon the occurring events, and the requirements to the authorities are becoming ever better articulated and more sophisticated.

What we have on our hands is the fundamental change of its vision of priorities and the alignment of forces within the political system that has previously never been characteristic of the Russian society. Government institutions are ceasing to be “God given” or representing “the advanced defenders of the interests of working people”. Citizens start to understand that the government is only the apparatus maintained at the expense of their own tax contributions and intended for the purpose of discharging of certain duties of social significance. This means that in a civil society the switching to the European model is in progress in a natural way, whereas the government contin-

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<sup>102</sup> Resolution dated March 22, 1995 in the case of Prager and Oberschlick v. Austria, § 38.

ues to perform based on the Asian one.

The changing of the view of the government could not have occurred without changes in the legal awareness. Because it is the legal instructions through which the government fulfils its main regulatory function in relation to the society, and the society assesses the performance of the government through the quality, convenience and effectiveness of the legal provisions. Just in this connection and in the context of the current changes the analysis is interesting of the reaction of the society on some legislative novels constituting seemingly the reaction of the government operating based on the Asian model on the acts of the substantial part of the society within the framework of the European one. It is about the adoption during 2012—2013 of a number of amendments to the effective legislation that have become the immediate response of the government to the so called Bolotny process — the public activity that increased steeply in the winter of 2011 and covering now the majority of the regions of our country.

Instead of participating in the ample public debates with the purpose of detection of the pending problems, correcting their actions and thus mitigating the occurred confrontation the government opted for the tightening move. A package of obstacles was created to impede the activity of the non-government elements of the political system, the additional punitive and other measures were introduced aimed at decrease of “dangerous thinking” – the administration and resource targeted mopping-up operation on the platform of printed and electronic mass media, as well as and attempt was made to limit the dissemination of information on the Internet.

However, instead of the expected reaction of fright and attenuation of the public processes the government received the diametrically opposed result an eloquent evidence of which this research represents. Who could assume, say, seven years ago that over the shortest possible term the society would be able to examine carefully and monitor not only all disadvantages of the very essence of the statutory regulation (substantive law) but also its practical application? You may well ask! Who could assume that the society itself would create this practice and act not only as a harsh critic of law makers and executors, but would develop and propose the system of measures aimed at the remediation of the situation?

### ***About the laws***

So, five federal laws have been subject to the analysis of the content and administration, four of which were enacted in the summer of 2012, and one a year later. The sampling is not accidental: all these laws are focused on changing the procedures of exercising of the constitutional rights and liberties of citizens and are characterized by some pronounced common features and specifics.

1. The first and the main specifics of these acts is their quite ***dubious constitutionality***. Federal Law No.65-FZ “On the introduction of amendments to the Code of the Russian Federation for Administrative Violations and the Federal Law “On meetings, rallies, demonstrations, processions and picketing” of June 8, 2012 limits the right of citizens to assembly peacefully and unarmed, although the Constitution rigidly stipulates the rule (Part 3 Article 55 and Article 56) of possible limitation of this right solely in the conditions of an emergency situation or for the purpose of protection of the fundamentals of the constitutional system, morals, health, rights and legitimate interests of other persons, and ensuring of national defence and national security. Contrary to Clause c Article 71 of the Constitution by which the regulation and protection of the rights and freedoms of man and citizen are included exclusively in the scope of competence of the federation, the same Law delegated the regulation of meetings to the constituent entities.

Federal Law No.121-FZ “On introduction of amendments to certain legislative instruments of the Russian Federation to the extent of regulation of activities of non-profit organizations fulfilling the functions of a foreign agent” of July 20, 2012 ignores the provisions of the Constitution (Part 2 Article 19) where it is explicitly emphasized that “the state guarantees the equality of the rights and freedoms of man and citizen irrespective of membership in public associations”. Part 4 Article 13 formalizes additionally and purposefully the equality of public associations before the law. And as all public associations without exception are non-profit organizations the introduction of a special status for some of them violates this principle materially.

The nontransparent and controversial procedures of Federal Law No.139-FZ “On the introduction of amendments to the Federal Law “On protection of children from the information impairing their health and development “and certain legislative instruments of the Russian Federation” of July 28, 2012 put directly under threat Part 4 of the article of the Constitution: “Everyone shall have the right to search for, obtain, transmit, produce and distribute information freely and using all lawful means”.

And undoubtedly all of them contravene Part 2 Article 55 of the Constitution which says: “No laws must be issued in the Russian Federation that abrogate or reduce the rights and freedoms of man and citizen”.

2. Another common feature of the laws analysed in this research is their ***conflict with the in-***

**ternational responsibilities** undertaken by Russia. They create favorable conditions for the violation by our state of Articles 6, 10, 11, 14 and 17 of the European Convention on the Protection of Human Rights and Fundamental Freedoms signed and ratified by the Russian Federation in full, Article 22 of the International Covenant on Civil and Political Rights, Article 2 of the UN Convention on the Rights of the Child, the UN Declaration on the Freedom of Expression on the Internet. The ECHR and the UN Committee for Human Rights have already adopted a number of resolutions recognizing the limitation of the freedom of assembly and the right to association of citizens in Russia. Many similar cases are now pending consideration. The complaints about the unfounded denials of access to information on the Internet have the same fate – their number will only increase. The dismissals cranked out by Russian courts will be compensated by the significantly increased speed of consideration of cases by the ECHR. It should be noted that quite recently the ECHR bound Turkey to pay 8.5 thousand euro to the owner of the website that had been unlawfully blocked. In 2012 alone Russia paid 221 million Roubles (5.5 million euro) to its citizens as a compensation for the violation of the Convention. All this in addition presses heavily on taxpayers. The Venice Commission, an expert body of the Council of Europe has once stated the noncompliance of the Russian legislation on the freedom of assembly with the international standards. However, the Russian lawmakers have been continuing to make the situation even worse.

3. For all analysed acts the **legal indefiniteness** is typical, although exactly this requirement of certainty constitutes the most important feature of the law as a system of social norms. It is first and foremost about accuracy, clarity and unambiguousness of wordings of the regulatory material. The law must formalize exactly the requirements set to the behaviour of people, the limits of the possible, required and prohibited conduct, describe in detail possible or required options of lawful acts, as well as consequences of violation thereof. “Any ambiguity in this respect contradicts the term itself of the rule of law and puts an individual in a quite difficult situation where it is unclear what should be done and to what one should adapt to... An individual who ends up face to face with the society, the government has the right to demand from the latter a clear instruction as to what is required from him and what limits are set”, wrote a great Russian “Roman” Iosif Pokrovsky<sup>103</sup>. Ubijusincertum, ibinullum (a non-specific law means no law) says one of the postulates of the Roman law.

In the opinion of the ECHR, a provision can not be considered a law if it is not set forth with the required level of accuracy enabling a person to coordinate his/her behaviour therewith: a person must have the opportunity, subject to the obtaining of necessary advice, to foresee within reasonable limits and in application to particular circumstances the consequences that may result from such behaviour. The same standpoint has been voiced on several occasions by the Constitutional Court and the Supreme Court of Russia. At the same time Federal Law No.65-FZ does not provide for the criterion of mass scale, its provisions in combination with the effective legislation lead to the confusion of the notions “organizing of mass disorders” and “organizing of public events”; “organizer of a public event” and “organizer of a crime”. The same is with the application of the provision on appeals for mass disorders. Federal Law No.121-FZ does not contain a clear definition of the key term “political activities” and its components: “political campaign” and “decisions aimed at the modification of the pursued national policy”. Federal Law No.135-FZ “On the introduction of amendments to Article 5 of the Federal Law “On protection of children from the information impairing their health and development” and certain legislative instruments of the Russian Federation with the purpose of protection of children from the information promoting the negation of the traditional family values” of June 29, 2013 does not provide for a definition of the key notion “propaganda”. In Federal Law No.139-FZ the terms “pornographic image” and “locations accessible by children” are not explained.

4. All analysed regulatory acts **do not meet** to one extent or another **the criteria of systemic nature and consistency of the Russian legislation**. Thus, in Federal Law No.65-FZ the degree of unlawfulness of acts is artificially increased as compared to other offences, the maximum amounts of administrative fines for the violation of the procedure of conduct of meetings are increased unprecedentedly for CAV RF for individuals to up to three hundred thousand Roubles (more than 1,000 dollars) and for officers to up to six hundred thousand Roubles (more than 2,000 dollars). Instead of two months the period of limitation is set at one year following the date of commitment of the administrative violation — unprecedentedly as well as regards administrative penalties. All this deprives of reasonable criteria and destroys the uniform system of assessment of the public danger of violations and liability for them, which is absolutely unacceptable from the perspective of the theory and practice of codification of statutes.

On the basis of the determination of the Constitutional Court dated February 14, 2013 the sanctions for the violation of the procedure for the conduct of public events were recognized as disproportionate. Nevertheless, no amendments have yet been made to the legislation.

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<sup>103</sup> I.Pokrovsky. Basic problems of the civil law. Petrograd, 1917.

A similar situation occurred in connection with Federal Law No.141-FZ “On the introduction of amendments to the Criminal Code of the Russian Federation and certain legislative instruments of the Russian Federation” of July 28, 2012, when fines for libel in relation to judges and other officials of law enforcement agencies exceeded by ten times the maximum fines for all kinds of offences and could be only compared to the liability for bribery — an offence incomparable to libel in terms of danger to the public. This Law must make it into the history of lawmaking as an example of deputies' incoherence, dependency and lack of any substantiated position on the adopted matters. As we remember, the decriminalization of libel had been performed less than one year before it was returned back to the Criminal Code. Then, in June 2011, for the draft brought in by President Medvedev within the framework of the broadly advertised liberalization of the criminal law, 312 deputies had voted with Krashennikov, Yarovaya, Vyatkin, Shlegel, Reznik among them — all those who less than a year later returned libel to the Criminal Code failing to stand the critical attitude on the part of the population to the “wonders” of the national law enforcement system.

5. Another common feature of nearly all laws within the scope of this research is the **specifics of adoption thereof** — the uncalled for haste without proper discussion and with violation of all possible rules and principles of the lawmaking process. For instance, Federal Law No.65-FZ was approved by the State Duma without public discussion within two months and adopted it in the third reading on June 5, 2012 in a night session (unprecedented throughout the whole history of operation of this Parliament chamber) trying to make it in time to the known date of a protest meeting. This being said the law was on the very next day approved by the Council of the Federation, which could not have been done taking into account the Rules of Procedure of this chamber. However even that was not enough. It entered into effect in a unique way contravening Federal Law No.5-FZ “On the procedure of publishing and entry into effect of Federal Constitutional Laws, Federal Laws, acts of the chambers of the Federal Assembly” — on the date of publishing, not ten days hereafter. Otherwise, it could not have been possible to resolve the set political task in time.

Federal Law No.121-FZ brought in for consideration to the State Duma on June 29, 2012 was adopted in the third reading on as early as July 13, approved by the Council of the Federation on July 18, and signed by the President on July 20.

Almost in the same quick manner the other laws analysed in this research were adopted, approved and signed. It took Federal Law No.135-FZ five days, and Federal Law No.141-FZ one week, after their adoption by the Duma to be approved by the Council of the Federation. Only they entered into force in a regular, not expedited, manner.

6. **The administration** of all studies laws without exception **is accompanied by high political and legal costs**: scandals in mass media, arrested people, property redistribution, arbitrary interpretation and selectiveness in the use of the provisions requiring constant explanation, and even as much as blatant stupidity, which is absolutely expected and natural when in such big country a new statutory regulation comes into effect so quickly and without due discussion and elaboration of procedures.

Each of the laws that have entered into force has its own “dark” story. For example, the law “On foreign agent NPOs” was immediately given a retroactive effect. One of the justices of the peace wrote exactly the following in the resolution: “According to the Law on non-profit organizations, the sign of funding from a foreign source is demonstrated by the receipt by the organization of money funds and other property from the foreign source **irrespective of the type and grounds for such revenue**, as well as **the time period during which the funds or other property are received**”. Whoever the Prosecutor’s Office tried to recognize as foreign agent in the heat of the performance zeal! The Far Eastern Conservation Area for the Protection of Cranes, the association of Sami in the Lovozersky area of Murmansk Region. As early as on January 21, 2013 (two months after the entry of the law coming into force) the Ministry of Justice that had refused to recognize NPO “Shield and Sword” as a “foreign agent” had to declare publicly that it did not consider human rights advocacy activities as political.

Then again, all miracles of the law administration are set forth in detail in this collected book.

However, the reasons that have caused this harmful situation, which is quite harmful for the government, are worth mentioning. Exactly so. The situation is much more harmful for the government than for the affected citizens. Because these citizens after voicing yet again at the back of their mind everything they have already said about their government on multiple occasions began to clear with Russian ingenuity the obstacles created by it and became stronger. As for the government, it got weaker yet again having lost another large portion of authority and faith of those for the benefit of whom, as declared, it has been working fingers to the bone.

Strange as it may appear, the reason is exactly rooted in what causes the maximum discontent of the citizens and what prompted the intensification of public activity in December 2011 — the procedure for the conduct of elections and vote counting. As long as the personal composition of the deputy corps depends upon the degree of loyalty of the majority thereof towards the president and the executive authorities, as long as the Council of the Federation plays the role of the “heav-

only group” for retired officials we will continue facing problems with the quality of law. Not only because such parliament is not independent. It is incapable of ensuring the proper level of brainstorming required for the purpose of working with law drafts and forecasting the risks of law administration. It is good for almost nothing because it bears no responsibility for its acts to the future parties to legal relationships, i.e. citizens. The same applies to the Council of the Federation, which for the same reasons has fully stopped to fulfil its initial function of the regional legislative filter. All because these very future parties to legal relationships make no impact on its fate and are unable to assess the results of its work by way of voting during elections.

This is where the reasons for the distortion of the principles of the lawmaking process and the violation of the procedure thereof are rooted. This is where the deprofessionalisation of the lawmaking activity comes from, a natural and logical result of which is the mass-scale weakening of authority of the parliament in the eyes of the society. Could it have been possible to imagine at the time of the parliament of 1993—1999 that it would take just a few weeks or even days from the introduction of a law draft to the entry of the adopted law in effect? No, until the so called package agreement was breached and power in the Duma was seized by one faction the leader of which gave a very precise wording to the essence of the today’s Russian parliamentary system: instead of the Socratic “Truth is born of arguments” he said that the parliament was no place for discussions.

Unfortunately, the miracle workers who over more than ten years have been permanently transforming the electoral legislation to meet the up-to-the-minute political needs do not understand it because they don’t see the whole picture. Their task is simple – the ensuring of victory for certain political forces in some particularly developed conditions without account of long-term effects. Nothing can be further from their mind than the idea that certain harsh laws regulate the machinery of the state and the operation of the law, the violation of which results in a runaway chain reaction in form of ruthless consequences.

All this was predicted more than a hundred years ago by a great Russian “Roman” Boris Chicherin: “A strong and tough government is necessary, but it must focus on the goals dictated by the public good, be guided by the enlightened understanding of the true demands of the people; when it acts at cross purposes it incurs overall displeasure that when accumulated may finally manifest itself in dangerous explosions. The leadership that values the principle of power most of all often gets into this groove; by overestimating the value thereof and rejecting all the rest they shake the foundations thereof. An excess of any one-legged principle leads to its negation and, hence, collapse. In the vent of such course one thing disappears that constitutes the main internal strength of the government – its ethical authority<sup>104</sup> .

There is one more issue that can not be kept quiet on. It is the catastrophic lack of the culture of human rights among government officials in Russia. Masses consist of personalities. And it’s only these personalities who make countries strong. It’s only them who become engines of progress, doers, creators and glory of the society. However our government officials still can not get used to the idea that it’s not for them to determine what the rights and freedoms of citizens should be, and that it the opposite is true: ***the rights and freedoms of an individual determine the sense, the content and the administration of laws, the activity of the legislative and executive power, and the local self-government*** (Article 18 of the Constitution). Unlike them, citizens have grasped this constitutional truth. As a result a qualitative positive change occurred in the legal awareness of the people in the conditions of adverse practice of lawmaking, law administration and justice.

Over more than twenty years since the collapse of the USSR the society has grown up. The more the government ignored the Constitution, the better the citizens knew and understood it. While at the time of adoption of the Constitution the constitutional idea in Russia was first of all defeated by the society that was not prepared to exercise freedom on a responsible and well-organized basis, after some time it was the society where the revival of the constitutional movement was to start. The reason is that irrespective of whether the Constitution is good or not it forms the centrepiece of the legal system without which this system twists out of shape turning into chaos witnessed by us today. But just at the moment when the crisis of law becomes the main threat to the stable existence of the society the latter using its defensive reaction becomes rational and starts searching for a way out of that crisis.

If the authority is incapable of understanding it and gradually putting its relationship with the people on a new track, the development of the country will be progressively constructive. However there are quite well-founded fears that the government will turn out to be more conservative than the citizens as regards the vision of the system of their interaction. In this event a conflict can not be avoided the responsibility for which the government will bear because it’s the government whose behavior is inflexible in the intrinsically changing conditions. It would be perfect to avoid

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<sup>104</sup> B.Chicherin. About the representation of the people. M., 1899.

such conflict. The authority does not have too many chances left. As the old saying goes, “Leaders should dread the day when the people stops crying and starts laughing instead”.

There is nothing stronger than the idea for which the time is ripe. The prediction of legal philosopher Vladimir Pastukhov is coming true: “The Constitution is dashing like a comet through the cosmos of law nihilism carrying the spores of the liberal ideas that in favourable conditions are ready to turn into new life forms”<sup>105</sup>. Time has come, and the idealism of the authors who had embedded the highest constitutional standard in the provisions that remained idle for twenty years, has served the good turn to the society. Exactly for this reason the quantity of the sincere admirers of the Constitution is increasing. The Constitution is coming into fashion. And fashion is a strong force exponentially alluring each and all into its net.

It is perfectly obvious who is going to win in this attraction of the opposite poles. As another one prominent Russian philosopher and law theorist Ivan Ilyin wrote, only “*the live legal awareness of the people gives to the form of government fulfilment, life and strength; therefore, the form of government depends primarily upon the level of legal awareness of the public, the historic and political experience gained by the people, its willpower and national character*”<sup>106</sup>. The government can only accelerate the process by prohibiting the latest fashions — every prohibition on something fashionable only stirs up interest in it. But how foolish it will look restricting its own Constitution!

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<sup>105</sup> V.Pastukhov. Restoration instead of reformation: Twenty years that shook Russia. M., 2012. P. 453—456.

<sup>106</sup> I.Ilyin. About the form of government // Out objectives: Articles 1948—1954: In 2 vol. / I.A.Ilyin. M., 2008.V. 1. P. 71.