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Human Rights Committee

Communication No. 1932/2010

Views adopted by the Committee at its 106th session (15 October–2 November 2012)

Submitted by:	Irina Fedotova (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	10 February 2010 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 March 2010 (not issued in document form)
Date of adoption of Views:	31 October 2012
Subject matter:	Bringing the author to administrative responsibility for "public actions aimed at propaganda of homosexuality among minors".
Substantive issues:	Right to impart information and ideas; permissible restrictions; right to the equal protection of the law without any discrimination.
Procedural issues:	Abuse of the right of submission; exhaustion of domestic remedies
Articles of the Covenant:	19; 26
Articles of the Optional Protocol:	3; 5, paragraph 2 (b)

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (106th session)

concerning

Communication No. 1932/2010*

Submitted by:	Irina Fedotova (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	10 February 2010 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2012,

Having concluded its consideration of communication No. 1932/2010, submitted to the Human Rights Committee by Irina Fedotova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Irina Fedotova, a Russian national born in 1978. She claims to be a victim of a violation by the Russian Federation of her rights under article 19 and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is not represented.

1.2 On 20 May 2010, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 13 August 2010, the Chairperson decided, on behalf of the Committee, to examine the admissibility of the communication together with the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanela Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, Committee member Sir Nigel Rodley did not participate in the adoption of the present decision.

The facts as presented by the author

2.1 The author is an openly lesbian woman and an activist in the field of lesbian, gay, bisexual and transgender (LGBT) rights in the Russian Federation. In 2009 she, together with other individuals, tried to hold a peaceful assembly in Moscow (so called "Gay Pride"), which was banned by the Moscow authorities. A similar initiative to hold a march and a "picket" to promote tolerance towards gays and lesbians was banned in the city of Ryazan in 2009.

2.2 On 30 March 2009, the author displayed posters that declared "Homosexuality is normal"[1] and "I am proud of my homosexuality"[2] near a secondary school building in Ryazan. According to her, the purpose of this action was to promote tolerance towards gay and lesbian individuals in the Russian Federation.

2.3 The author's action was interrupted by police and, on 6 April 2009, she was convicted by the Justice of the Peace of an administrative offence under section 3.10 of the Ryazan Region Law on Administrative Offences of 4 December 2008 (Ryazan Region Law) for having displayed the posters in question. This provision reads in relevant part: "Public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism) among minors shall be punished with administrative fine of between one thousand five hundred and two thousand roubles".[3] The author was ordered to pay a fine of 1,500 Russian roubles.[4]

2.4 On an unspecified date, the author appealed the ruling of the Justice of the Peace to the Oktyabrsky District Court of Ryazan (Oktyabrsky District Court). In her appeal, she asked the Oktyabrsky District Court to revoke the ruling and to request the Constitutional Court to assess the compatibility of section 3.10 of the Ryazan Region Law with articles 19, 29 and 55, part 3, of the Constitution of the Russian Federation of 12 December 1993 (Constitution). She also asked to suspend proceedings in her case, pending the ruling of the Constitutional Court on the matter.

2.5 In her appeal to the Oktyabrsky District Court the author stated that she did not dispute the facts but considered that the ruling of the Justice of the Peace was based on a provision of law that was contrary to articles 19 and 29 of the Constitution that, respectively, prohibit discrimination on the ground of social status and guarantee the right to freedom of thought and expression. She further submitted that it was unclear from the wording of section 3.10 of the Ryazan Region Law what was meant with "propaganda of homosexuality", because from the constitutional point of view "propaganda" was an essential component of the exercise of the right to freedom of expression. Therefore, the author added, she had a right to promote certain points of view in relation to homosexuality. She argued that section 3.10 of the Ryazan Region Law unreasonably discriminated against individuals with "non-standard sexual orientation" by prohibiting any dissemination of information about them. The author submitted that, by displaying posters, she acted on the basis of article 29 of the Constitution with the aim of promoting tolerance towards homosexuality among minors and the idea that homosexuality was "normal" from the point of view of medical science. Finally, she argued that section 3.10 of the Ryazan Region Law established restrictions on the exercise of her right to freedom of expression, although

[1] The original text in Russian reads as follows: "Гомосексуализм – это нормально".

[2] The original text in Russian reads as follows: "Я горжусь своей гомосексуальностью".

[3] The original text in Russian reads as follows: "Публичные действия, направленные на пропаганду гомосексуализма (мужеложства и лесбиянства) среди несовершеннолетних, - влекут наложение административного штрафа на граждан в размере от одной тысячи пятисот до двух тысяч рублей".

[4] Approximately US$ 44.9/33.6 euros.

under article 55, paragraph 3, of the Constitution, this right could be restricted only by federal law.

2.6 On 14 May 2009, the ruling of the Justice of the Peace was upheld by the Federal Judge of the Oktyabrsky District Court. The Court determined that, under article 55 of the Constitution, individual rights and freedoms, including those guaranteed under articles 19 and 29 of the Constitution, could be restricted by federal law and only to the extent necessary for the protection of the foundations of the constitutional order, public morals, health, or the rights and lawful interests of other persons, or for ensuring the State defence and national security. It added that the Code on Administrative Offences of the Russian Federation was in fact such a federal law and that, according to article 1.1 of the said Code, the law on administrative offences consisted of the present Code and laws on administrative offences adopted in compliance with it by the entities of the Russian Federation. The Court stated that the Ryazan Region Law was based on the Constitution and the Code on Administrative Offences, thus it was a part of the law on administrative offences. It concluded that section 3.10 of the Ryazan Region Law was not contrary to the Constitution and that it established restrictions (administrative liability) on the right to freedom of expression, including freedom to impart information, that were aimed at protecting morals, health, rights and legitimate interests of minors.

2.7 The author submits that she has exhausted all available and effective domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author submits that the ruling of the Justice of the Peace of 6 April 2009 interfered with her right to freedom of expression guaranteed under article 19 of the Covenant, because she was banned from disseminating ideas of a tolerant attitude towards sexual minorities and convicted of an administrative offence for doing so. Such restrictions can be justified under article 19, paragraph 3, only if they were "provided by law" and "necessary" for one of the legitimate aims.

3.2 The author further submits that she was convicted of an administrative offence under section 3.10 of the Ryazan Region Law and that, therefore, the restriction on the exercise of her right to freedom of expression was de jure "provided by law". She argues, however, that under article 55, paragraph 3, of the Constitution, freedom of expression can be restricted only by federal law. Since the Ryazan Region Law is not a federal law, the interference with her right to freedom of expression did not comply with the Constitution, and, therefore, cannot be regarded as being "provided by law" within the meaning of article 19, paragraph 3, of the Covenant.

3.3 The author claims that, even if the interference was "provided by law", it was not "necessary", because it did not pursue one of the legitimate aims set out in article 19, paragraph 3, of the Covenant. She acknowledges that the aim of the restriction was to protect public health or morals of minors (in the Russian Federation, persons under 18) by prohibiting others from "inciting minors to have intimate relations between persons of the same sex". In this regard, the author submits that she did not promote any ideas that would incite minors to such actions and that the purpose of her displaying posters was to educate the public, including minors, about a tolerant attitude towards homosexuality. She further claims that the wording of the Ryazan Region Law is not sufficiently clear, because it puts an absolute ban on disseminating any ideas related to homosexuality, including objective or neutral information aimed at educating minors and helping them to develop a tolerant attitude towards homosexual individuals. The author argues that the blanket ban on

imparting any information on homosexuality to minors makes her freedom of expression merely theoretic and illusory.[5]

3.4 In the present case, the author was fined for having displayed posters that declared "Homosexuality is normal" and "I am proud of my homosexuality" which, pursuant to section 3.10 of the Ryazan Region Law, is an administrative offence against public morals defined as "propaganda of homosexuality among minors". In this connection, the author submits that propaganda always implies dissemination of certain ideas or educating public on certain issues in order to change public opinion. From the Covenant's perspective, propaganda is one of components of freedom of expression and, therefore, anyone has the right to advocate for certain ideas in relation to homosexuality.

3.5 The author further submits that homosexuality is an objective characteristic of a large group of individuals in any society. In the present case, the author claims that the Ryazan Region Law prohibits dissemination of any information related to homosexuality, including neutral in its content, among minors. Judging by the fact that section 3.10 is placed in chapter 3 of the Ryazan Region Law (administrative offences against health, sanitary and epidemiologic well-being and public morals),[6] the aim of this prohibition is to protect morals of minors. It follows that the said law is based on the assumption that homosexuality is something immoral, which is clearly against modern understanding of homosexuality as a characteristic based on sexual orientation and not on someone's conscious choice of sexual behaviour.

3.6 The author claims, therefore, that the Ryazan Region Law is also contrary to article 26 of the Covenant, which states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. She adds that the Ryazan Region Law discriminates against homosexual individuals by de facto prohibiting dissemination of any information about them among minors and that there is no objective justification for such difference in treatment under the Covenant. In this respect, the author refers to the Committee's concluding observations on the sixth periodic report of the Russian Federation (CCPR/C/RUS/CO/6). The Committee noted with concern "the systematic discrimination against individuals on the basis of their sexual orientation in the State party, including hate speech and manifestations of intolerance and prejudice by public officials, religious leaders and in the media" (ibid., para. 27).

3.7 The author concludes by asking the Committee to find that the ruling of the Justice of the Peace of 6 April 2009, convicting her of an administrative offence for "propaganda of homosexuality among minors", was disproportionate to any legitimate aims pursued and therefore violated article 19 and article 26 of the Covenant.

State party's observations on admissibility

4.1 On 20 May 2010, the State party recalls the facts of the case and challenges the admissibility of the communication, arguing that the author did not exhaust all available domestic remedies. It submits that the author could have used the ordinary appeal procedures envisaged by article 30.9 of the Code on Administrative Offences and appealed the decision of the Federal Judge of the Oktyabrsky District Court dated 14 May 2009 to

[5] Reference is made the judgment of the European Court of Human Rights in *Church of Scientology Moscow* v. *Russia* (application No. 18147/02), 5 April 2007, paragraph 92, and judgment of the European Court of Human Rights in *Handyside* v. *United Kingdom* (application No. 5493/72), 7 December 1976, paragraph 49.

[6] The original text in Russian reads as follows: "Административные правонарушения, посягающие на здоровье, санитарно-эпидемиологическое благополучие населения и общественную нравственость".

another judge of the same Oktyabrsky District Court or to the Ryazan City Court. Furthermore, the author could have lodged an appeal to the Supreme Court of the Ryazan Region and then, if necessary, to the Supreme Court of the Russian Federation, against the decision of the Oktyabrsky District Court, which already became executory, under the supervisory review procedure envisaged by article 30.12, part 1, of the Code on Administrative Offences. The State party argues that the author has deliberately not availed herself of these avenues for appeal and, consequently, her assertion that she had exhausted all domestic remedies does not "correspond to the facts".

4.2 The State party also considers the present communication to be an abuse of the right of submission, because the author was not subjected to discrimination on any ground. It states that the institution of administrative proceedings against her was based on the fact that she breached specific legal provisions – and the author herself does not dispute this fact – and was unrelated to her sexual orientation. The State party submits, therefore, that the communication should be declared inadmissible under article 3 and article 5, paragraph 2 (b), of the Optional Protocol.

Author's comments on the State party's observations

5.1 On 22 July 2010, the author submits that the State party's claim in relation to article 30.9 of the Code on Administrative Offences is based on the "misinterpretation of the basic provisions of the Russian administrative proceedings". She argues that, under article 30.1 of the Code on Administrative Offences, a ruling on an administrative offence issued by a judge (as in her case) may be appealed to a higher court. For this reason, she appealed the ruling of the Justice of the Peace dated 6 April 2009 to a higher (second instance) court, that is, the Oktyabrsky District Court. The author further submits that article 30.9 of the Code on Administrative Offences invoked by the State party, does not apply to her case, because the provision in question covers appeals against decisions on administrative offences issued by non-judicial authorities, that is, State officials.

5.2 The author states that, pursuant to 329 of the Civil Procedure Code, decision of the higher (second instance) court becomes executory from the moment of its adoption. She adds in this regard that the Supreme Court of the Russian Federation has explained that article 30.9 of the Code on Administrative Offences does not provide for an opportunity to appeal against the decision of a higher (second instance) court and that, therefore, such decision became executory from the moment of its adoption.[7] The author submits, therefore, that she has used all ordinary appeal procedures available to her under the State party's law.

5.3 As to the State party's claim that the author could have lodged an appeal under the supervisory review procedure, she argues that such a procedure is not an effective remedy within the meaning of the Optional Protocol, because it does not guarantee an automatic right to have the merits of the supervisory appeal considered by a panel of judges (the Presidium of the Ryazan Region Court or the Supreme Court of the Russian Federation). The author states that, according to article 381 of the Civil Procedure Code, a supervisory appeal is considered by a judge of the supervisory review court, who has a right to reject it without requesting the case file from the lower instance. Only if this judge finds the appeal's arguments convincing enough, s/he may decide to request the case file and, at the judge's discretion, transmit the case for consideration by the panel of judges of the supervisory review court.

[7] Reference is made to letter No. 1536-7/gen of the Supreme Court dated 20 August 2003 on the explanations in relation to the procedure for entry into force of the rulings and/or decisions on administrative offences when they are being appealed.

5.4 In deciding on the admissibility of the present communication, the author respectfully asks the Committee to consider the position of the European Court of Human Rights, which held on numerous occasions that the supervisory review procedure was not an effective remedy within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), as the grounds for quashing final judgments of the lower courts were not clear from the Civil Procedure Code and the procedure was not directly accessible to the applicants.[8]

5.5 The author further submits that she, together with the other two individuals, has made a last attempt to seek justice on the domestic level by appealing to the Constitutional Court. In its ruling of 19 January 2010, the Constitutional Court dismissed her appeal and held that the prohibition of propaganda of homosexuality as "intentional and uncontrolled dissemination of information capable of harming health, morals and spiritual development, as well as forming perverted conceptions about equal social value of traditional and non-traditional family relations – among individuals who, due to their age, lack the capacity to critically and independently assess such information" could not be considered as a violation of constitutional rights. Therefore, the author requests the Committee to conclude that the position of the Constitutional Court is contrary to the standards enshrined in the Covenant, because in a modern democratic society ""traditional" (different-sex) and "non-traditional" (same-sex) relations should be considered as equally valuable. In her opinion, the Constitutional Court effectively upheld the approach of the Ryazan Region Law and the Ryazan Region Law on Protection of Morals of Children in Ryazan Region that any information about homosexuality is prima facie immoral and detrimental to the development of a child. The author argues that she has a right to disseminate information aimed at promoting the idea of equal value of homosexuals in the Russian society.

5.6 As transpires from the ruling of 19 January 2010, the Constitutional Court noted that article 38 of the Constitution specifically protects motherhood, childhood and the family. In the Court's view, the traditional understandings of family, motherhood and childhood are values that require special protection from the State. According to the Court, legislators acted on the premise that the interests of minors were an important social value. One of the aims of State policy on the protection of children was the protection of minors from factors that could negatively impact their physical, intellectual, mental, spiritual and moral development. More precisely, the Federal Law on the Basic Guarantees of the Rights of the Child in the Russian Federation protected children from information, propaganda and agitation that could harm their "health [and] moral and spiritual development". In the Court's view, the provisions challenged were adopted with the aim of ensuring the intellectual, moral and psychological security of children.

5.7 The Constitutional Court then analysed the protection of the right to freedom of expression provided by the Constitution. Article 29 of the Constitution guarantees the right to freedom of speech, as well as the right to freely disseminate information by all lawful means. However, the Court noted that, under article 10 of the European Convention, freedom of expression was subject to limitations, provided such limitations were

[8] Reference is made to the decision of the European Court of Human Rights in *Martynets* v. *Russia* (application No. 29612/09), 5 November 2009, in which the Court examined the "new" supervisory review procedure (in force since 7 January 2008) governed by the Civil Procedure Code and concluded that "the supervisory review procedure in the courts of general jurisdiction retains the essential features that earlier compelled the Court to consider it as being outside the chain of domestic remedies subject to exhaustion under Article 35, 1 § of the Convention". Furthermore, the Court found that "the supervisory review proceedings in respect of legally binding judgments may still be conducted through multiple instances, with an ensuing risk that the case will go back and forth from one instance to another for an indefinite period".

established by law, had a legitimate purpose and were necessary in a democratic society. Finally, the Court established that the Ryazan Region Law and the Ryazan Region Law on Protection of Morals of Children in Ryazan Region did not prohibit or disparage homosexuality. They did not discriminate against homosexuals nor did they grant excessive powers to public authorities. The Court therefore concluded that the provisions of the said laws that were challenged could not be considered to limit freedom of expression excessively.

5.8 The author submits a copy of the legal opinion prepared by the International Commission of Jurists upon her request and asks the Committee to take it into account in considering the merits of her communication.

5.9 In its legal opinion, the International Commission of Jurists firstly considers the effect of the Committee's Views in *Hertzberg et al.* v. *Finland*,[9] in which it accepted, as a justification provided for in article 19, paragraph 3, of the Covenant, the public morals limitation invoked by the Government of Finland in defence of paragraph 9 of chapter 20 of the Finnish Penal Code, which provided that anyone who "publicly encourages indecent behaviour between persons of the same sex" was subject to a six-month prison sentence or a fine. The International Commission of Jurists submits that the outcome in the said communication is not dispositive of this matter, because:

(a) Equality law, in the jurisprudence of the Committee and other human rights bodies, has developed significantly since April 1982 when the Views in *Hertzberg et al.* v. *Finland* were adopted. At that time, sexual orientation was not recognized as a status protected from discrimination and now it is;[10]

(b) Also since 1982, the Committee and other institutions have recognized that limitations on rights must not violate the prohibition of discrimination. Even a limitation with a permissible aim – such as the protection of public morality – may not be discriminatory;

(c) Conceptions of public morality are subject to change[11] and what was considered justifiable with reference to public morality in 1982 is no longer the case today. Laws similar to paragraph 9 of chapter 20 of the Finnish Penal Code have since been repealed in States such as Austria and the United Kingdom of Great Britain and Northern Ireland. Furthermore, the Committee's jurisprudence reflects the evolution of the "public morals" conceptions, as does the case law of the European Court of Human Rights.[12]

5.10 The International Commission of Jurists then submits that the Ryazan Region Law is an impermissible limitation of freedom of expression because it is discriminatory, for the following reasons: (a) sexual orientation is a protected ground under articles 2 and 26 of the Covenant;[13] (b) limitations on rights cannot be discriminatory, whether in law or practice –

[9] Communication No. 61/1979, *Hertzberg et al.* v. *Finland*, Views adopted on 2 April 1982.

[10] Reference is made to communication No. 488/1992, *Toonen* v. *Australia*, Views adopted on 31 March 1994, paragraph 8.7.

[11] Reference is made to the Individual Opinion of Torkel Opsahl in *Hertzberg et al.* v. *Finland*.

[12] Reference is made to *Toonen* v. *Australia*; and judgment of the European Court of Human Rights in *Dudgeon* v. *United Kingdom* (application No. 7525/76), 22 October 1981.

[13] Reference is made to *Toonen* v. *Australia*; communication No. 941/2000, *Young* v. *Australia*, Views adopted on 6 August 2003, paragraph 10.4. See also, general comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights on non-discrimination in economic, social and cultural rights, *Official Records of the Economic and Social Council, 2010, Supplement No. 2* (E/2010/22), annex VI, para. 32; general comment No. 2 (2007) of the Committee against Torture on implementation of article 2 by States parties, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI, para. 21; general comment No. 4 (2003) of the

a law that differentiates on the basis of sexual orientation is therefore discriminatory, in violation of the Covenant, unless it has a reasonable and objective justification, and is aimed at a legitimate purpose; and (c) public morality is not a reasonable and objective justification.

5.11 The International Commission of Jurists argues that enjoyment of all Convention rights without discrimination means that the freedom of expression of LGBT individuals, as well as the expression concerning sexual orientation and same-sex relationships cannot be restricted in a discriminatory manner. Any restriction on expression about sexuality must be neutral with respect to sexual orientation.[14] Laws restricting freedom of expression must be compatible with the aims and objectives of the Covenant and must not violate its non-discrimination provisions.[15] They may not be imposed for discriminatory purposes or applied in a discriminatory manner.[16] The International Commission of Jurists argues that even the proportionate use of a permissible aim, such as public morality, cannot be the basis for a restriction on freedom of expression if it is applied in a discriminatory manner. Therefore, by penalizing "public actions aimed at propaganda of homosexuality" – as opposed to propaganda of heterosexuality or sexuality generally – the Ryazan Region Law enacts a difference in treatment that cannot be justified. It singles out one particular kind of sexual behaviour for differential treatment. It does so even though sexual relationships between consenting adults of the same sex are not illegal in the Russian Federation.

5.12 Furthermore, although not every differentiation of treatment will constitute discrimination, the criteria for such differentiation must be reasonable and objective and the aim must be to achieve a purpose that is legitimate under the Covenant.[17] Because sexual orientation is a prohibited ground, a difference in treatment founded on sexual orientation constitutes discrimination, in violation of the Covenant, unless there is a "reasonable and objective" justification.[18] Public morality does not amount to such a justification. Since *Hertzberg et al.* v. *Finland*, public morality arguments have diminished in weight.[19] The International Commission of Jurists submits that courts around the world have held that public morality is not a sufficient reason to justify a difference in treatment and established that concerns about public morality cannot serve to defend disparate treatment based on sexual orientation.[20] It adds that the Ryazan Region Law is clearly intended to target any

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Committee on the Rights of the Child on adolescent health and development in the context of the Convention on the Rights of the Child, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 41* (A/59/41), annex X, para. 6.

[14] Reference is made to the recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010. Available from https://wcd.coe.int/ViewDoc.jsp?id=1606669.

[15] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, annex, E/CN.4/1985/4, principle 2; Committee's general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex VI, para. 8.

[16] Committee's general comment No. 22, para. 8; and the Individual Opinion of Torkel Opsahl in *Hertzberg et al.* v. *Finland*.

[17] Reference is made to the Committee's general comment No. 18 (1989) on non-discrimination, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, paragraph 13.

[18] General comment No. 20 (2009) of the Committee on Economic, Social and Cultural Rights, para. 13.

[19] Reference is made to *Toonen* v. *Australia*, paragraph 8.6; and judgment of the European Court of Human Rights in *Open Door and Dublin Well Woman* v. *Ireland* (applications Nos. 14234/88 and 14235/88), 29 October 1992, paragraphs 65–66.

[20] The legal opinion, inter alia, quotes the case law of the United States Supreme Court, the Constitutional Court of South Africa and the Philippines Supreme Court.

information about homosexuality, including information that is in no manner "obscene" under criminal law.

5.13 The International Commission of Jurists further submits that the Ryazan Region Law also has serious implications for the right of children to receive information. In addition to article 19, paragraph 2, of the Covenant, the right of children to receive information concerning sexuality is specifically protected under article 13 of the Convention on the Rights of the Child.[21] The right of children to receive information about sexuality and sexual orientation is related to their rights to education and to health.[22]

5.14 For the foregoing reasons, the International Commission of Jurists concludes that section 3.10 of the Ryazan Region Law contravenes the State party's obligations under the Covenant.

State party's further observations on admissibility and merits

6.1 On 9 December 2010, the State party recalls the facts of the case and states that the administrative fine imposed by the Justice of the Peace on the author was the minimal penalty provided for under section 3.10 of the Ryazan Region Law and was not "burdensome" for her. The State party then submits that all court decisions in the author's case are lawful and well-founded, and puts forward its arguments, which are similar in substance to those of the Oktyabrsky District Court (see paragraph 2.6 above) and of the Constitutional Court (see paragraph 5.6 above). It states that the author's claims about her being brought to administrative responsibility for her tolerant attitude towards homosexuality and for the free expression of her views do not "correspond to the facts". She was brought to administrative responsibility for *propaganda of homosexuality (sexual act between men and lesbianism) among minors*.[23]

6.2 The State party further submits that, according to the author, the aim of her actions was to promote a tolerant attitude towards homosexuality in the society, including among minors. Therefore, she had a deliberate intent to engage children in the discussion of these issues. As a result, the public became aware of the author's views exclusively on the initiative of the latter. Furthermore, her actions from the very beginning had an "element of provocation". The State party adds that the author's private life was not of interest either to the public or to minors, and that the public authorities did not interfere with her private life. For these reasons, the State party reiterates its initial argument that the present communication is an abuse of the right of submission and is thus incompatible with article 3 of the Optional Protocol.

6.3 The State party recalls that the author has deliberately not availed herself of the right to have recourse to the supervisory review procedure and that, therefore, her assertion that she had exhausted all domestic remedies does not "correspond to the facts". For the foregoing reasons, the State party concludes that the author's claims are groundless, the

[21] Reference is also made to the general comment No. 3 (2003) of the Committee on the Rights of the Child on HIV/AIDS and the Rights of the Child, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 41* (A59/41), annex IX, para. 16; and the concluding observations of the Committee on the Rights of the Child on the second periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, para. 44 (d).

[22] Reference is made to the reports of the Special Rapporteur on the right to education, A/HRC/8/10/Add.1, paragraphs 79–84, and A/HRC/4/29/Add.1, paragraphs 34–37. See also, decision of the European Committee of Social Rights, *INTERIGHTS* v. *Croatia* (complaint No. 45/2007), 30 March 2009.

[23] Emphasis added by the State party.

interference with her rights was proportionate and the communication itself is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Authors' comments on the State party's further observations

7.1 On 3 February 2011, the author recalls the State party's argument that bringing her to administrative responsibility had a legitimate aim of protecting children from "propaganda of homosexuality", i.e. from information harmful to children from a moral point of view. In this respect, she submits that this approach is clearly discriminatory, as it is based on a presumption that homosexuality – as opposed to heterosexuality – is something immoral. The author adds that this approach lacks objective and reasonable justification because, in her opinion, it prohibits dissemination of any information on homosexuality, including neutral information, such as in the present communication. She draws the Committee's attention to the findings of the European Court of Human Rights in *Alekseyev* v. *Russia*,[24] concerning the ban by the Moscow authorities on the so called "Gay Prides" in 2006–2008. The author respectfully asks the Committee to consider the position of the European Court of Human Rights with regard to the public morality arguments raised by the State party.

7.2 With regard to the State party's argument concerning the alleged non-exhaustion of domestic remedies, the author reiterates her earlier position explained in the submission of 22 July 2010 that the supervisory review procedure is not an effective remedy. Moreover, any doubts in this regard have been dispelled by the decision of the Constitutional Court of 19 January 2010.

7.3 On 21 November 2011, the author asks the Committee to give priority treatment to the present communication, which is seen by her as being of significance for the development of jurisprudence in the field of LGBT rights. She submits that recent developments threaten the fundamental human rights of LGBT individuals in the Russian Federation[25] and in other parts of the world,[26] including the freedom of expression, freedom of assembly and freedom of association.

[24] Judgment of the European Court of Human Rights in *Alekseyev* v. *Russia* (applications Nos. 4916/07, 25924/08 and 14599/09), 21 October 2010, paras. 82–84. The Court found a violation of article 11; article 13 in conjunction with article 11; and article 14 in conjunction with article 11 of the European Convention.

[25] Notably: (a) On 28 September 2011, the Parliament of the Arkhangelsk Region passed a similar law which prohibited propaganda of homosexuality among minors. This law came into force in October 2011. On 16 November 2011, the same Parliament passed amendments to the Arkhangelsk Region Law on Administrative Offences establishing administrative liability for propaganda of homosexuality among minors; (b) on 16 November 2011, the St. Petersburg Legislative Assembly adopted at its first reading a law which prohibited "propaganda of sexual act between men, lesbianism, bisexualism, transgenderism and paedophilia" and introduced fines for such actions. According to the media reports, an amendment of 7 March 2012 to the Law on Administrative Offences in St. Petersburg established administrative liability for "public actions aimed at propaganda of sexual act between men, lesbianism, bisexualism and transgenderism among minors" (art. 7.1) and "public actions aimed at propaganda of paedophilia" (art. 7.2); (c) on 16 November 2011, the speaker of the Moscow City Duma (parliament) said in an interview that a law banning propaganda of homosexuality among minors would definitely be passed in Moscow; (d) on 17 November 2011, the speaker of the Federation Council (upper chamber of the State Duma) supported introduction of a similar law on federal level.

[26] Earlier attempts to introduce a similar law were taken on the national level in Lithuania. The proposals were rejected only after the intervention from the European Union. A similar law which prohibits propaganda of homosexuality is currently being discussed in Ukraine.

State party's additional observations

8.1 On 17 August 2012, the State party submits its additional observations. It states that the amendments to the St. Petersburg and the Arkhangelsk Region Laws on Administrative Offences were introduced with the aim of "combating the propaganda of sexual act between men, lesbianism, bisexualism and transgenderism among minors, as well as the propaganda of paedophilia, due to the numerous and collective requests of community representatives who expressed their protest against such propaganda". The State party refers to the Model Law on Protection of Children against Information Detrimental to Their Health and Development that was adopted by the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States on 3 December 2009. According to this Law, "propaganda" stands for "activities of natural and (or) legal persons disseminating information aimed at conditioning children's behaviour and (or) creating stereotypes, or aimed at encouraging or effectively encouraging addressees of such information to perform certain actions or to refrain from performing certain actions".

8.2 The State party adds that the said law considers as "information detrimental to children's health and development information – the contents, presentation and (or) use of which – influence one's subconscious mind and are capable of harming children's physical or mental health and (or) provoking derangements of their spiritual, mental, physical and social development". Such "derangements" include "development of perverted social preferences and attitudes, instigation to commit potentially dangerous deeds and acts, aggression, cruelty, violence or other antisocial actions (including those punishable by criminal law), inculcation of pathologic fear and horror or encouragement of children's premature interest in sex and in early commencement of sexual life".

8.3 The State party also refers to article 4, paragraph 1, article 5, paragraph 2, and article 14 of the Federal Law on the Basic Guarantees of the Rights of the Child in the Russian Federation and submits that one of the objectives of the State policy carried out in the Russian Federation in the interests of the children is to protect them from the factors that could negatively impact their physical, intellectual, mental, spiritual and moral development.

8.4 The State party further submits that in order to protect children from information detrimental to their health and (or) development, the Federal Law on Protection of Children against Information Detrimental to Their Health and Development of 29 December 2010 (in force as of September 2012) established requirements for the dissemination of information to children. The requirements include classification of information outputs, their expert assessment, as well as the State oversight and control of the compliance with the law on protection of children against information detrimental to their health and (or) development.

8.5 The State party recalls that the rights guaranteed under article 19, paragraph 2, of the Covenant are subject to certain restrictions provided for in paragraph 3 of the same article. It refers in this context to articles 17 and 34 of the Convention on the Rights of the Child, as well as to article 4, paragraph 2, of the Federal Law on the Basic Guarantees of the Rights of the Child in the Russian Federation, which sets out standards for the dissemination of printed, audio, video and other materials inadvisable for children below the age of 18.

8.6 The State party maintains that the Constitutional Court has carefully examined the facts of the case submitted by the author and two others, as well as their arguments before arriving at the conclusion that pursuant to the requirements of the Federal Law on Protection of Children against Information Detrimental to Their Health and Development, lawmakers of the Ryazan Region adopted measures aimed at ensuring intellectual, moral and mental safety of children in the Ryazan Region by, inter alia, prohibiting public actions aimed at propaganda of homosexuality. The State party also reiterates the finding of the

Constitutional Court that the prohibition of such propaganda per se as "intentional and uncontrolled dissemination of information capable of harming health, morals and spiritual development, as well as forming perverted conceptions about equal social value of traditional and non-traditional family relations – among individuals who, due to their age, lack the capacity to critically and independently assess such information" could not be considered as a violation of constitutional rights.

8.7 The State party argues that, in her comments, the author does not put forward any new arguments in relation to the substance of the present communication but rather interprets provisions of international law. It adds that the State party's submissions of 20 May 2010 and 9 December 2010 cover both the admissibility and the merits. As to the author's comments in relation to the adoption of the laws prohibiting propaganda of sexual act between men, lesbianism, bisexualism and transgenderism among minors at the regional level, the State party submits that such laws are in full compliance with the international obligations of the Russian Federation and are aimed at protecting moral, spiritual, physical and mental development of children.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author could have used the ordinary appeal procedures envisaged by article 30.9 of the Code on Administrative Offences. In this respect, the Committee recalls that the State party must describe in detail which legal remedies would have been available to the author in the circumstances of her case, together with evidence that there would be a reasonable prospect that such remedies would be effective.[27] Given the fact that article 30.9 of the Code on Administrative Offences does not seem to be applicable to the present communication as argued by the author, because it covers appeals against decisions on administrative offences issued by non-judicial authorities, the Committee accepts the author's argument, which has not been challenged by the State party, that she has used all ordinary appeals procedures available to her under the State party's law.

9.4 The Committee also notes the State party's claim that the author could have lodged an appeal against the decision of the Oktyabrsky District Court, which already became executory, under the supervisory review procedure envisaged by article 30.12, part 1, of the Code on Administrative Offences. The Committee further notes the author's argument that such procedure is not an effective remedy within the meaning of the Optional Protocol, because it does not guarantee an automatic right to have the merits of the supervisory appeal considered by a panel of judges. Moreover, she has already unsuccessfully challenged the constitutionality of the Ryazan Region Law on the basis of which she was convicted of an administrative offence before the Constitutional Court.

[27] See communication No. 4/1977, *Ramirez* v. *Uruguay*, Views adopted on 23 July 1980, para. 5.

9.5 In this regard, the Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result.[28] It notes that the Constitutional Court has dismissed the author's appeal holding that the prohibition of propaganda of homosexuality could not be considered as a violation of her constitutional rights and that the State party does not claim that the courts that could have considered the author's case under the supervisory review procedure would (or even could) have arrived at an outcome different to that of the Constitutional Court. The Committee considers, therefore, that it would not be reasonable to require the author to have recourse to the supervisory review procedure, because such remedy could no longer be seen as an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, i.e. a remedy that would provide the author with a reasonable prospect of judicial redress.[29] The Committee, therefore, is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

9.6 The State party further argues that the present communication is inadmissible under article 3 of the Optional Protocol and constitutes an abuse of the right of submission, because the author was not subjected to discrimination on any ground, in particular, on the ground of her sexual orientation, and the State party's public authorities did not interfere with her private life. The Committee considers, however, that the arguments put forward by the author – that she was convicted of an administrative offence on the basis of section 3.10 of the Ryazan Region Law which allegedly discriminates against homosexual individuals – raise substantive issues and should be dealt with at the merits stage of the proceedings.

9.7 Accordingly, the Committee finds no further obstacles to the admissibility and declares the author's claims under articles 19 and 26 of the Covenant sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

10.2 The first issue before the Committee is whether or not the application of section 3.10 of the Ryazan Region Law to the author's case, resulting in her conviction of an administrative offence and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, on the author's right to freedom of expression. The Committee notes that section 3.10 of the Ryazan Region Law establishes administrative liability for "propaganda of homosexuality (sexual act between men or lesbianism) among minors". The Committee observes, however, that the wording of section 3.10 of the Ryazan Region Law is ambiguous as to whether the term "homosexuality (sexual act between men or lesbianism)" refers to one's sexual identity or sexual activity or both. In any case, there is no doubt that there has been a restriction on the exercise of the author's right to freedom of expression guaranteed by article 19, paragraph 2, of the Covenant.[30] In fact, the existence of the restriction in the present communication is not in dispute between the parties.

10.3 The Committee then has to consider whether the restriction imposed on the author's right to freedom of expression is justified under article 19, paragraph 3, of the Covenant,

[28] Communication No. 327/1988, *Barzhig* v. *France*, Views adopted on 11 April 1991, para. 5.1, and *Young* v. *Australia*, para. 9.4.

[29] Communication No. 550/1993, *Faurisson* v. *France*, Views adopted on 8 November 1996, para. 6.1.

[30] Communication No.780/1997, *Laptsevich* v. *Belarus*, Views adopted on 20 March 2000, para. 8.1.

i.e. provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (ordre public), or of public health or morals. The Committee recalls in this respect its general comment No. 34 (2011) on article 19 (freedoms of opinion and expression) of the International Covenant on Civil and Political Rights,[31] in which it stated, inter alia, that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.[32] Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".[33]

10.4 The Committee observes that, in the present case, the author and the State party disagree as to whether the restriction on the exercise of the right to freedom of expression is "provided by law". In particular, the author argues with reference to article 55, paragraph 3, of the Constitution, that freedom of expression can be restricted only by federal law, whereas the Ryazan Region Law on the basis of which she was convicted of an administrative offence for "propaganda of homosexuality among minors" is not a federal law. The State party in turn submits that the Ryazan Region Law is based on the Constitution and the Code on Administrative Offences, thus it is a part of the law on administrative offences. The Committee may dispense with considering this point because, irrespective of the domestic lawfulness of the restriction in question, laws restricting the rights enumerated in article 19, paragraph 2, must not only comply with the strict requirements of article 19, paragraph 3, of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant,[34] including the non-discrimination provisions of the Covenant.[35]

10.5 In this respect, the Committee recalls, as stated in its General Comment No. 34, that "'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations … for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination".[36] In the present case, the Committee observes that section 3.10 of the Ryazan Region Law establishes administrative liability for "public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism)" – as opposed to propaganda of heterosexuality or sexuality generally – among minors. With reference to its earlier jurisprudence,[37] the Committee recalls that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.

10.6 The Committee also recalls its constant jurisprudence that not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective criteria,[38] in pursuit of an aim that is legitimate

[31] *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 40* (A/66/40 (Vol. I)), annex V.

[32] See ibid., para. 2.

[33] Ibid., para. 22.

[34] See ibid., para. 26; and *Toonen* v. *Australia*, para. 8.3.

[35] General comment No. 34, para. 26, and General comment No. 18, para. 13.

[36] General comment No. 34, para. 32.

[37] See *Toonen* v. *Australia*, para. 8.7; *Young* v. *Australia*, para. 10.4; and communication No. 1361/2005, *X.* v. *Colombia*, Views adopted on 30 March 2007, para. 7.2.

[38] See, inter alia, communication No. 172/1984, *Broeks* v. *the Netherlands*, Views adopted on 9 April 1982, para. 13; communication No. 182/1984, *Zwaan-de Vries* v. *the Netherlands*, Views adopted on

under the Covenant.[39] While noting that the State party invokes the aim to protect the morals, health, rights and legitimate interests of minors, the Committee considers that the State party has not shown that a restriction on the right to freedom of expression in relation to "propaganda of homosexuality" – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced.[40]

10.7 Furthermore, the Committee is of the view that, by displaying posters that declared "Homosexuality is normal" and "I am proud of my homosexuality" near a secondary school building, the author has not made any public actions aimed at involving minors in any particular sexual activity or at advocating any particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it.

10.8 The Committee notes the State party's arguments that the author had a deliberate intent to engage children in the discussion of the issues raised by her actions; that the public became aware of the author's views exclusively on the initiative of the latter; that her actions from the very beginning had an "element of provocation" and her private life was not of interest either to the public or to minors, and that the public authorities did not interfere with her private life (see paragraph 6.2 above). While the Committee recognizes the role of the State party's authorities in protecting the welfare of minors, it observes that the State party failed to demonstrate why, on the facts of the present communication, it was necessary for one of the legitimate purposes of article 19, paragraph 3, of the Covenant to restrict the author's right to freedom of expression on the basis of section 3.10 of the Ryazan Region Law, for expressing her sexual identity and seeking understanding for it, even if indeed, as argued by the State party, she intended to engage children in the discussion of issues related to homosexuality. Accordingly, the Committee concludes that the author's conviction of an administrative offence for "propaganda of homosexuality among minors" on the basis of the ambiguous and discriminatory section 3.10 of the Ryazan Region Law, amounted to a violation of her rights under article 19, paragraph 2, read in conjunction with article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the Russian Federation of article 19, paragraph 2, read in conjunction with article 26 of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the value of the fine as at the situation of April 2009 and any legal costs incurred by the author, as well as compensation. The State party is also under an obligation to prevent similar violations in the future and should ensure that the relevant provisions of the domestic law are made compatible with articles 19 and 26 of the Covenant.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a

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9 April 1987, para.13; communication No. 218/1986, *Vos* v. *the Netherlands*, Views adopted on 29 March 1989, para 11.3; communication No. 415/1990, *Pauger* v. *Austria,* Views adopted on 26 March 1992, para 7.3; communication No. 919/2000, *Müller and Engelhard* v. *Namibia*, Views adopted on 26 March 2002, para 6.7; and communication No. 976/2001, *Derksen* v. *the Netherlands*, Views adopted on 1 April 2004, para. 9.2.

[39] See, inter alia, communication No. 1314/2004, *O'Neill and Quinn* v. *Ireland*, Views adopted on 24 July 2006, para. 8.3.

[40] See *Young* v. *Australia*, para. 10.4; and *X.* v. *Colombia*, para. 7.2.

violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]