

INTERNATIONAL COMMISSION OF JURISTS AMICUS CURIAE SUBMISSION

Case No. 002/12

Application on compliance of provisions of article 7.1 of St. Petersburg Law of 12 May 2010 no. 273-70 "On Administrative Offenses in St. Petersburg" with the Charter of St. Petersburg"

Introduction

1. This *amicus curiae* submission is offered with the intent of assisting the St. Petersburg Charter Court in analyzing Section 7-1 of the St. Petersburg Law on Administrative Offenses. Specifically, the submission is intended to provide an international human rights law perspective. The International Commission of Jurists believes that Section 7-1 is incompatible with treaty obligations undertaken by the Russian Federation and, as applied to Nikolai Alekseyev, violates his right to freedom of expression and his right to be free from discrimination.
2. The International Commission of Jurists is a non-governmental organisation headquartered in Geneva, Switzerland, and with offices in Thailand, Nepal, Guatemala and South Africa. Founded in 1952, the ICJ's aim is to promote human rights through the rule of law. The ICJ's work is guided by 60 Commissioners, all eminent legal scholars, judges and practitioners representing legal systems from every region of the world. The ICJ has submitted briefs and offered expert testimony in a wide variety of domestic and regional courts, including the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and constitutional or supreme national courts in such countries as Bangladesh, Colombia, Nepal, the Philippines, the United States, and the United Kingdom. The ICJ holds consultative status with the UN Economic and Social Council, UNESCO, the Council of Europe, and the African Union. The ICJ was awarded the first European Human Rights Prize by the Council of Europe in 1980, the Wateler Peace Prize by the Carnegie Foundation in 1984, and the United Nations Award for Human Rights in 1993.
3. Section 7-1 of the St. Petersburg Law on Administrative Offenses, adopted on 7 March 2012, provides as follows: "Public acts aimed at propagandizing male homosexuality, lesbianism, bisexuality, and transgenderism among minors shall be punished with the administrative fine for citizens in the amount of five thousand rubles; for public officials – fifty thousand rubles; for legal entities – from two hundred thousand to five hundred thousand rubles." The accompanying explanatory note, adopted by the legislature, states: "Public acts aimed at propagandizing male homosexuality, lesbianism, bisexuality, and transgenderism among minors should be understood in this section as the targeted yet unregulated conveyance of information by means that make such information publicly accessible and capable of causing harm to the health and the moral and spiritual development of a minor, such as the formation by a minor of a distorted conception of non-traditional unions as being equal to traditional ones."

4. Nikolai Alekseyev was charged and convicted under this law for a one-man demonstration near City Hall during which he held up a sign that read: "*Homosexuality is not a perversion. Field hockey and ice ballet are.*" He was quoting from a book entitled *Faina Ranevskaya: The Fate is a Whore* by Dmitry Shcheglov. Faina Ranevskaya was a famous Soviet-era actress and that book is available in bookstores throughout Russia.
5. The ICJ submits that under both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), treaties to which the Russian Federation is a party, the law at issue is not a permissible limitation on the right to freedom of expression for three reasons. First, it is so vague that it fails the requirement that a restriction be "provided by law." Second, it is not necessary for a legitimate purpose or proportional to achieving that purpose. Third, the law discriminates on the basis of sexual orientation, in violation of the requirement that restrictions on rights must not be discriminatory.

General Principles on Freedom of Expression

6. The right to freedom of expression is guaranteed by Article 19 of the ICCPR and Article 10 of the ECHR. Both articles contain nearly identical language on when this right may be limited. ICCPR Article 19 provides that any restrictions on the right must be "provided by law" and "necessary" for the "respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health or morals." ECHR Article 10 provides that restrictions must be "prescribed by law" and "necessary in a democratic society" "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
7. International law protects all kinds of expression, including expression that is unpopular or considered offensive by others. Thus the European Court of Human Rights has explained that Article 10 "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"¹ Similarly, the UN Human Rights Committee, the body charged with interpreting State compliance with the ICCPR, has stated that freedom of association, a right closely intertwined with freedom of expression, protects associations that "peacefully promote ideas not necessarily favourably received by the government or the majority of the population."² As the UN Special Rapporteur on the situation of human rights

¹ *Palomo Sanchez and Others v. Spain*, Application nos. 28955/06, 28957/06, 28959/06 and 28964/06, Judgment dated 12 September 2011, at para. 53.

² *Viktor Korneenko et al v. Belarus*, UN Doc. CCPR/C/88/D (2006) at para. 7.3.

defenders, Margaret Sekaggya, recently observed, “Ideas that ‘offend, shock or disturb’ are protected under the right of freedom of expression.”³

8. Making room for dissenting voices and minority or even unpopular views is a fundamental aspect of democracy. The Human Rights Committee has called freedom of expression “the foundation stone for every free and democratic society.”⁴ In *Bączkowski v. Poland*, the European Court stated: “Referring to the hallmarks of a ‘democratic society’, the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”⁵
9. On a number of occasions, the Court has reiterated “that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.”⁶

Provided by Law

10. The requirement that a limitation be characterized as a “law” means that it “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”⁷ Similarly, the European Court has stated that an individual “must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁸ Laws that are vague or that confer unfettered discretion on those charged with their execution fail this test.
11. Section 7-1 of the St. Petersburg Law on Administrative Offenses is so vague that it cannot be characterized as a “law” as defined by the UN Human Rights Committee and the European Court. What is “propaganda that promotes homosexuality”? The legislative note purports to offer an explanation but only sows more confusion. Propaganda in the note is described as the “distribution . . . of information that can harm the health or the process of moral and spiritual development of minors.” The notion of “moral and spiritual development” is itself indeterminate and the identification as to what may cause such harm is therefore not ascertainable. An example of what it means to harm the health or moral and spiritual development of

³ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, UN Doc A/64/226, at para. 29.

⁴ Human Rights Committee, General Comment No. 34, at para. 2.

⁵ *Bączkowski v. Poland*, at para. 63.

⁶ *Alekseyev v. Russia*, at para. 81.

⁷ Human Rights Committee, General Comment No. 34, para. 25.

⁸ *Revkenyi v. Hungary*, Application no. 25390/94, Judgment dated 20 May 1999, at para. 34.

minors is also provided: “forming among them the false perception that traditional and non-traditional relationships are socially equal.” This would appear to mean that expressing the position that same-sex couples and opposite-sex couples should have equal rights would fall within the reach of the law. Such opinions, however, are clearly protected by both Article 19 and Article 10, which guarantees the right to freedom of expression for everybody, including those expressing minority or unpopular viewpoints. It is not just popular or welcome speech that is protected. It is everyone’s speech.

12. In practice, it appears that any attempt to state that “homosexuality” is not perverse or abnormal, as Nikolai Alekseyev did when he quoted Faina Ranevskaya’s aphorism about homosexuality and ice ballet, is prohibited. Statements of pride in one’s identity or even publicly acknowledging that one is gay or lesbian are also banned. When Irina Fedotova held up a sign stating, “I am proud of my homosexuality. Ask me about it,” she was charged and convicted under the very similar Ryazan law. In short, the sweep of the law is so broad and so undefined that an individual cannot tailor his or her conduct in order to conform to Section 7-1.

Necessary and Proportional for a Legitimate Purpose

13. Section 7-1 of the St. Petersburg is not “necessary” for a “legitimate purpose,” as required by international law.⁹ Not only must restrictions be for a legitimate purpose, they must also be necessary to achieve that purpose and must conform to the principle of proportionality. This means that “they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”¹⁰ Similarly, in European Court jurisprudence, “necessary” implies “the existence of a pressing social need.”¹¹ Restrictions must also be “proportionate to the legitimate aim pursued.”¹² Furthermore, the reasons proffered by the national authorities to justify the measure must be “relevant and sufficient.”¹³
14. Assuming for the sake of argument that the St. Petersburg law was enacted with the intent of protecting “public morality” or “the rights of others” – two legitimate aims under the ICCPR and the European Convention – it nevertheless fails the tests of necessity and proportionality.
15. First, both the UN Human Rights Committee and the European Court have found morality concerns insufficient in similar situations, ie, the restrictions cannot be necessary to promote the ends of public morality. In *Toonen v. Australia*, the Human Rights Committee rejected public morality as a justification for a law criminalizing sodomy.¹⁴ In its General Comment on Article 19, the Human Rights Committee

⁹ Human Rights Committee, General Comment No. 34, para. 33.

¹⁰ Human Rights Committee, General Comment No. 27, para. 14.

¹¹ *Müller and Others v. Switzerland*, Application no. 10737/84, Judgment dated 24 May 1988, at para. 32.

¹² *Id.* at para. 32.

¹³ *Sosinowska v. Poland*, Application no. 10247/09, Judgment dated 18 October 2011, at para. 69.

¹⁴ *Nicholas Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (1994) at para. 8.6.

emphasized 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.”¹⁵

16. In a case concerning restrictions in Ireland on the provision of information about the availability of abortion in other countries, the European Court dismissed the argument that Ireland’s views of public morality, and in particular public disapproval of abortion, permitted the State to restrict freedom of expression about the availability of abortion elsewhere. The European Court observed: “Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.”¹⁶ It concluded that Article 10 had indeed been violated.
17. Second, the European Court has already decisively rejected national authorities’ claims of protecting morality or children as reasons to uphold a ban on gay pride marches.¹⁷ Referring to obscenity cases where national authorities had properly invoked protection of morality, the Court noted that a gay pride march would not involve obscenity, nudity, or sexually provocative behaviour. It stated:

Moreover, it transpires from the mayor’s comments (see, in particular, paragraphs 16 and 24 above) and the Government’s observations (see 61 above) that it was not the behaviour or the attire of the participants that the authorities found objectionable but the very fact that they wished to openly identify themselves as gay men or lesbians, individually and as a group. The Government admitted, in particular, that the authorities would reach their limit of tolerance towards homosexual behaviour when it spilt over from the strictly private domain into the sphere shared by the general public (*ibid.*, *in fine*).¹⁸

18. Since any restriction must be based on “an acceptable assessment of relevant facts,” the Court considered the reason for the ban on gay pride. It concluded that the “only factor taken into account by the Moscow authorities was the public opposition to the event, and the officials’ own views on morals.”¹⁹ This did not amount to a sufficient rationale. In fact, there was “no scientific evidence or sociological data at the Court’s disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children or ‘vulnerable adults.’”²⁰ The Court stated: “On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present

¹⁵ Human Rights Committee, General Comment No. 34, at para. 32.

¹⁶ *Open Door and Dublin Well Woman v. Ireland*, Application nos. 14234/88 and 14235/88, Judgment dated 29 October 1992.

¹⁷ *Alekseyev v. Russia*, Application nos. 4916/07, 25924/08 and 14599/09, Judgment dated 21 October 2010, para. 79.

¹⁸ *Id.* at para. 82.

¹⁹ *Id.* at para. 85.

²⁰ *Id.* at para. 86.

case.”²¹ Therefore, the Court concluded, the gay pride ban “did not correspond to a pressing social need and was thus not necessary in a democratic society.”²²

19. In the present case, there is simply no evidence that suppressing speech about LGBT human rights or assertions of a lesbian, gay or transgender identity is necessary to protect the rights of children. Nor is public morality a sufficient justification. Expressing viewpoints about the rights of minority groups does not cause harm to others. In short, the St. Petersburg law is not necessary or proportional for a legitimate purpose.
20. Third, although Nikolai Alekseyev’s sign did not concern sex, it is important to note that minors do in fact have the right to receive age-appropriate information concerning sexuality. Freedom of expression includes the right both to impart and to seek and receive information and ideas of all kinds. Article 13 of the Convention on the Rights of the Child, which the Russian Federation ratified in 1990, specifically guarantees this right to children. The UN Committee on the Rights of the Child, which interprets the treaty obligations of States, has explained that children “require relevant, appropriate, and timely information which . . . enables them to deal positively and responsibly with their sexuality in order to protect themselves from HIV infection. The Committee wishes to emphasize that effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information.”²³
21. In 2002, when confronted with a law in the United Kingdom that was similar to the “homosexual propaganda” bans, the Committee on the Rights of the Child urged the U.K. government to repeal it.²⁴ Similarly, in 2007 the Special Rapporteur on the Right to Education raised concerns about proposed legislation that would ban the “promotion of homosexuality” in schools.²⁵ The Special Rapporteur expressed fear that students would be denied access to sexual health information. The 2010 annual report of the Special Rapporteur was devoted to the right to education on sexual and reproductive health.²⁶
22. In 2009, the European Committee of Social Rights found violations of the right to non-discrimination and the right to health, both protected under the European Social Charter, with regard to a biology textbook used in Croatia that stigmatized homosexuality. The use of that text meant that Croatia had failed in its “positive obligation to ensure the effective exercise of the right to protection of health by means

²¹ Id.

²² Id. at para. 87.

²³ Committee on the Rights of the Child, General Comment No. 3 (HIV/AIDS and the – Rights of the Child), para. 16.

²⁴ CRC, Concluding Observations (United Kingdom of Great Britain and Northern Ireland), UN Doc. CRC/C/15/Add.188, at para. 44(d).

²⁵ Report of the Special Rapporteur on the Right to Education, Vernor Munoz Villalobos, UN Doc. A/HRC/8/10/Add.1, at paras. 79-84.

²⁶ Report of the Special Rapporteur on the Right to Education, Vernor Munoz Villalobos, UN Doc. A/65/162.

of non-discriminatory sexual and reproductive health education which does not perpetuate or reinforce social exclusion and the denial of human dignity.”²⁷

Restrictions Must not be Discriminatory

23. The ICCPR requires in article 2(1) that States respect and ensure all of the ICCPR rights without discrimination. The Human Rights Committee states that restrictions on rights “may not be imposed for discriminatory purposes or applied in a discriminatory manner.”²⁸ International law and standards prohibit discrimination on the basis of sexual orientation or gender identity.²⁹ The European Court has held that “if the reasons advanced for a difference in treatment were based solely on the applicant’s sexual orientation, this would amount to discrimination under the Convention.”³⁰ Thus restrictions on the right to freedom of expression must not only comply with the requirements above, as set forth in both Art. 19(3) of the ICCPR and Art. 10(2) of the European Convention, they also must be compatible with the aims and objectives of human rights law, including the guarantee of non-discrimination on the basis of sexual orientation.³¹

24. In three cases involving bans on gay pride marches, the European Court has found violations of the right to freedom of assembly as well as the right to be free from

²⁷ European Committee of Social Rights, *INTERIGHTS v. Croatia*, 45/2007 (30 March 2009).

²⁸ Human Rights Committee, General Comment No. 22, at para. 8.

²⁹ See, e.g., *Nicholas Toonen v. Australia*, CCPR/C/50/D/488/1992 (1994); *Young v. Australia*, CCPR/C/78/D/941/2000; *X v. Colombia*, CCPR/C/89/D/1361/2005; Committee on Economic Social and Cultural Rights, General Comments No. 20 (Non-discrimination in Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, at para. 32; No. 19 (The Right to Social Security), E/C.12/GC/19, 4 February 2008, para. 29; No. 18 (The Right to Work), E/C.12/GC/18, 6 February 2006, at para. 12(b); No. 15 (The Right to Water), E/C.12/2002/11, 30 January 2002, at para. 13; No. 14 (The Right to the Highest Attainable Standard of Health), E/C.12/2000/4, 11 August 2000, para. 18; Committee on the Rights of the Child, General Comment No. 13 (The right of the child to freedom from all forms of violence), CRC/GC/2011/13, at paras. 60 and 72(g); General Comment No. 4 (Adolescent health and development in the context of the Convention on the Rights of the Child); CRC/GC/2003/4, 1 July 2003, at para. 6; CRC, General Comment No. 3 (HIV/AIDS and the Rights of the Children), CRC/GC/2003/3, 17 March 2003, at para. 8; Committee Against Torture, General Comment No. 2 (Implementation of Article 2 by States Parties), CAT/C/GC/2, 24 January 2008, at para. 21; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 (on the core obligations of States parties under article 2), CEDAW/C/GC/28, 16 December 2010, at para. 18; General Recommendation No. 27 (Older women and the protection of their rights), CEDAW/C/GC/27, 16 December 2010, at para. 13. See also *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96, Judgment 21 December 1999 (sexual orientation covered by Article 14 of the European Convention).

³⁰ *Genderdoc-M v. Moldova*, Application no. 9106/06, Judgment of 12 June 2012, at para. 51.

³¹ Human Rights Committee, General Comment No. 34, at para. 26 (“Laws must not violate the non-discrimination provisions of the Covenant.”).

discrimination.³² In *Genderdoc-M v. Moldova*, the Court found a violation of the guarantee of Convention rights without discrimination under ECHR, where the “reason for the ban imposed on the event proposed by the applicant was the authorities’ disapproval of demonstrations which they considered to promote homosexuality.”³³ In *Alekseyev v. Russia*, the Court likewise concluded that where the “main reason for the ban . . . was the authorities’ disapproval of demonstrations which they considered to promote homosexuality,” it amounted to sexual orientation discrimination, in violation of Article 14.³⁴ The Court further pointed out that there “is no ambiguity about the other member States’ recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms.”³⁵

25. The St. Petersburg law has the effect of silencing all discussion of LGBT issues and rights. It makes it illegal to raise issues of discrimination or violence or to advocate for equality. Even public statements identifying oneself as gay or lesbian are prohibited. The effect of the law is to make LGBT people disappear from public view. The St. Petersburg law clearly violates the non-discrimination provisions of the ICCPR and the European Convention.

Conclusion

26. Section 7-1 of the St. Petersburg Law on Administrative Offenses is contrary to international guarantees of freedom of expression and non-discrimination and violates Mr. Alekseyev’s rights. It is impermissibly vague, is not necessary for or proportional to any legitimate purpose, and discriminates on the basis of sexual orientation and gender identity. For these reasons, the ICJ urges this Court to reverse Mr. Alekseyev’s conviction and to strike down the law.

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³² *Bączkowski v. Poland*, Application no. 1543/06, Judgment of 3 May 2007; *Genderdoc-M v. Moldova*, Application no. 9106/06, Judgment of 21 June 2012; *Alekseyev v. Russia*, Application nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010.

³³ *Genderdoc-M v. Moldova* at para. 54.

³⁴ *Alekseyev v. Russia* at para. 109.

³⁵ *Id.* at para. 84.