EUROPEAN COURT OF HUMAN RIGHTS

Nikolay Alekseyev and Movement for Marriage Equality v. Russia and *Nikolay Alekseyev and Others v. Russia,* Application nos. 35949/11 and 58282/12

THIRD PARTY INTERVENTION BY

THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY

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These written comments are submitted by the Human Rights Centre of Ghent University[1], pursuant to leave granted by the President of the Third Section of the European Court of Human Rights in his letter dated 11 July 2016, and in accordance with rule 44 § 5 of the Rules of the Court. Leave was originally granted for a joint third party intervention by the Human Rights Centre and the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. However, due to time constraints resulting from the short submission deadline, which coincided with Ghent University's collective holiday period, there was insufficient time to obtain consensus between the interveners on the content of a joint intervention. For this reason, the present third party intervention is submitted by the Human Rights Centre only. The Human Rights Centre's expertise and experience was set out in the application for leave to intervene, dated 8 June 2016.

The interveners submit that the cases of *Alekseyev and Movement for Marriage Equality against Russia* and *Alekseyev and Others against Russia* (Application nos. 35949/11 and 58282/12) raise a number of issues and legal questions that threaten the right to freedom of association today. States increasingly limit this right by relying on exceedingly wide and often problematic interpretations of the legitimate aims that may justify rights restrictions. Secondly, vulnerable groups suffer disproportionately from these practices, which severely and discriminatorily impact upon their ability to exercise their freedom of association. The cases at hand provide an excellent opportunity for the Court to provide the necessary guidance on these matters. We invite the Court to set clear and strong protective standards and to be conscious of the leading role it plays in ensuring effective protection of human rights standards in the Council of Europe and – through the authority of its case law – across the globe.

This submission concerns two principal matters. First, the need for specific criteria and systematic scrutiny of the purposes or aims States invoke for restricting the right of freedom of association (Article 11 ECHR) is discussed (1). Second, we argue that the present cases warrant several considerations in relation to Article 14 ECHR (prohibition of discrimination) due to stereotyping and stigmatizing judicial decisions at the domestic level (2).

1. On the Need for Thorough Scrutiny of Purposes Invoked to Restrict Rights

The call for a more systematic analysis of the legitimate aim criterion by the Court is made against the background of a growing global trend of States abusing the legitimate interests enumerated in human rights guarantees to restrict human rights. States base their restrictive actions upon broad interpretations of legitimate interests or terminology loosely related to it. Examples are "plotting mass disorder",[2] referring to public morality to restrict LGBTI associations or assemblies,[3] equating "financial stability" and "natural resource exploitation" to national security[4] and using claims of national security and threats of terrorism to silence human rights defenders.[5] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism underlined that governments must not use these legitimate interests as smokescreens for hiding the true purpose of the limitations, such as suppressing opposition, or to justify repressive practices against their populations.[6]

[1] For the Human Rights Centre, the team consisted of Eva Brems, Helena De Vylder, Corina Heri, Eline Kindt, Laurens Lavrysen and Stijn Smet.
[2] For an example concerning the search of the apartment of a human rights activist, see Joint allegation letter, Russia 01/2013, in A/HRC/23/29/Add.2, § 344.
[3] See A/HRC/26/29, §§ 29-30, with specific reference to Russia.
[4] A/HRC/32/36, §§ 33-34.
[5] Examples are India (with regard to access to funding for associations, see http://freeassembly.net/wp-content/uploads/2016/04/UNSR-FOAA-info-note-India.pdf), Ethiopia (with regard to threats to journalists and opposition leaders; U.N.Doc. A/HRC/29/25 Add.3, §§ 30 and 27) and Brazil (with regard to restrictions to freedom of assembly following the anti-terrorism law).
[6] U.N. Doc. A/61/267, § 20. See also U.N. Doc. A/HRC/20/27, para 21. In the same sense see also Inter-American Commission on Human Rights, *Second Report on the situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II Doc. 66 (2011), § 167.

On national security, the Special Rapporteur on the Freedom of Expression warned specifically against the "use of an amorphous concept [...] to justify invasive limitations on the enjoyment of human rights [...] The concept is broadly defined and is thus vulnerable to manipulation by the State as a means to justifying actions that target vulnerable groups".[7] These worrisome observations and negative practices around the globe call for more critical guidance by the Court.

1.1. Experiences from the Global Level: General Minimum Standards

The UN Human Rights Committee (HRC) has taken a consistent approach to the analysis of the legitimate interest or aim for restrictions, across the rights to freedom of expression (Article 19 ICCPR), freedom of peaceful assembly (Article 21) and freedom of association (Article 22), characterized by three general criteria.

First, the duty lies with the State not only to indicate the interest it seeks to protect, but also to substantiate it.[8] Rights holders should not be left in the dark about which aim the State seeks to protect.[9] Further, it deserves to be underscored by the Court that the aims exhaustively mentioned in Article 11 of the Convention warrant strict interpretation.[10] General Comment 34 of the HRC provides clarification on the core notions. Public order refers to the sum of rules ensuring the peaceful and effective functioning of society. National security refers to the political independence and/or territorial integrity of the State. With regard to public morality, it observes that indeed the content may differ widely form society to society. However, it clarified that the concept of morals cannot be derived exclusively from a single tradition.[11] Moreover, in a joint report, the Special Rapporteurs on extra-judicial, summary and arbitrary executions and on the rights to freedom of peaceful assembly and of association clarified for example that "national, political or government interest is not synonymous with national security or public order".[12] Economic interests as such are equally not part of the interests as enumerated.[13]

Second, the arguments provided by the State need to be reasonable and objective.[14] Frivolous arguments or arguments not reasonably related to the proclaimed interest or aim cannot be considered to fulfill this requirement. On several occasions the HRC found a violation on the mere basis that no pertinent information or no information at all was given to justify any of the legitimate interests.[15]

Third, in addition to being reasonable and objective, arguments need to be specific: explanations cannot be made *in abstracto* or by indicating general risks,[16] but must be done in an individualized fashion,[17] applied in the particular case[18] or with a specific justification.[19] In *Schumilin v. Belarus*, the HRC found the restriction violated the ICCPR, *in casu* Article 19, because the state had not explained "how, in practice, in this particular case, the author's actions affected the respect of the rights or reputations of others, or posed a threat to the protection of national security or of public order (ordre pub-

[7] U.N. Doc. A/HRC/23/40, § 60.
[8] HRC, *General Comment 34 on Freedom of Expression*, § 33.
[9] See also the statement that "[t]he onus is on the Government to prove that a threat to one of the grounds for limitation exists and that the measures are taken to deal with the threat" (U.N. Doc. A/61/267, § 20, referring also to HRC, *Vladimir Petrovich Laptsevich v. Belarus*, Communication No. 780/1997, U.N. Doc. CCPR/C/68/D/780/1997 § 8.5 (2000) (on public order)).
[10] "The rights may only be limited to protect certain enumerated aims [which] are not to be interpreted loosely", U.N. Doc. A/61/267, § 19.
[11] HRC, *General Comment 34 on Freedom of Expression*, § 33.
[12] U.N. Doc. A/HRC/31/66, § 31.
[13] U.N.Doc. A/HRC/32/36, § 33.
[14] See *int. al.* HRC, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002, § 7.2 (2005).
[15] HRC, *Kovalenko v. Belarus*, Communication No. 1808/2008, U.N. Doc. CCPR/C/108/D/1808/2008, § 8.6 (any pertinent information) for Article 19 and § 8.8 (any information) for Article 21 (2013). See also *Nurbek Toktakunov v. Kyrgystan*, Communication No. 1470/2006, CCPR/C/101/D1470/2006, § 7.7 (2011) (any pertinent explanation; explicitly including all the legitimate aims, including public health or morals) and *V. Evrezov et al. v. Belarus*, Communication No. 1999/2010, U.N. Doc. CCPR/C/112/D/1999/2010, §§ 8.7-8.8 (2014).
[16] HRC, *Alekseev v Russia*, Communication No. 1873/2009, U.N. Doc. CCPR/C/109/D/1873/2009 (October 2013), § 9.6.
[17] HRC, *General Comment 34 on Freedom of Expression*, § 33.
[18] HRC, *Schumilin v. Belarus*, Communication No. 1784/2008, U.N. Doc. CCPR/C/105/D/1784/2008, § 9.4 (2005).
[19] HRC, *Kim v. Republic of Korea*, Communication No. 574/1994, CCPR/C/64/D/574/1994, § 12.5 (1998).

lic), or of public health or morals."[20] In a case specifically concerning homosexuality and freedom of expression, the HRC concluded that the State failed to demonstrate why on the facts of that communication it was necessary for one of the legitimate purposes to restrict the applicant's right to express her sexual identity, seek understanding for it and even engage children in discussion on issues of homosexuality.[21]

For the legitimate aim of national security, the HRC additionally clarified that the State must demonstrate the precise nature of the threat[22] as well as the fact that the restrictions "are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order."[23]

We urge the Court to take into account the global necessity for clearer guidance and establish minimum standards for States when invoking the protection of the enumerated interests to restrict rights to avoid leeway to unfettered discretion for authorities to limit rights.

1.2. The Complaint under Article 11: Need for Thorough Scrutiny of the Legitimate Aim

1.2.1. *On the Legal Basis of the Measures*

Before turning to the legitimate aim of the measures at issue, we would urge the Court to first also scrutinize their legal basis. Beginning the examination of the compatibility of a measure with the Convention by analyzing its proportionality lends a sheen of legitimacy and acceptability to the measure and to the ideas that underlie it. As concerns the present cases, we observe that a discriminatory interpretation of the domestic legal basis has in fact taken place, which indicates that the legislation is overly broad and lacks foreseeability.[24] The idea that providing a safe space for peaceful advocacy against homophobia and discrimination and for the recognition of equal LGBTI rights could be considered an extremist agenda is arguably not a foreseeable consequence of the law in question. In this regard, the Court has an opportunity to make the principled point that individuals cannot be expected to foresee an interpretation of a general term in a law as providing for discrimination against the societal group to which they belong.

1.2.2. *On Whether the Measures Had a Legitimate Aim*

(i) General Considerations

In this section, we will argue that homophobic or discriminatory purposes can never be considered as legitimate aims in the sense of Article 11 § 2. It will moreover be argued that the legitimate aims provided in this section cannot be used as a smokescreen for hiding ulterior homophobic or discriminatory purposes.

With respect to the cases at hand, it is submitted that, should the Court find a violation of Article 11, it would be appropriate to devote adequate attention to the question of whether the aim invoked by the authorities as a justification of their rights-restrictive measures is a genuinely legitimate and not an ulteriorly homophobic or discriminatory one. In a 2010 freedom of assembly case, *Alekseyev v. Russia*, involving one of the applicants in the present cases, the Court declined to scrutinize the government's legitimate aim claims, and preferred to immediately examine the requirement of necessity in a demo-

[20] HRC, *Schumilin v. Belarus*, Communication No. 1784/2008, U.N. Doc. CCPR/C/105/D/1784/2008, § 9.4 (2005).
[21] HRC, *Irina Fedotova v. Russia*, Communication No. 1932/2010, U.N.Doc. CCPR/C/106/D/1932/2010, § 10.8.
[22] HRC, *General Comment 34 on Freedom of Expression*, § 33.
[23] HRC, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002, § 7.2 (2005). Since then, the Committee has confirmed this position in *A. Belyatsky et al. v. Belarus*, Communication No. 1296/2004, CCPR/C/90/D/1296/2004, § 7.3 (2007).
[24] Compare *Sindicatul 'Păstorul cel Bun' v. Romania* [GC], no. 2330/09, Reports 2013, § 153, citing *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V, § 52.

cratic society.[25] It is submitted that there are good reasons to justify critical scrutiny of the legitimate aims invoked in support of a rights-restrictive measure, as the Court has done in a number of other important cases (notably *S.A.S. v. France*, regarding the aims of protecting gender equality and human dignity; and *Baka v. Hungary*, regarding the aim of maintaining the authority and impartiality of the judiciary).[26]

The purpose of the legitimate aim test is to serve as a threshold criterion[27] requiring the Court to scrutinize "whether an interference is aimed at a purpose or goal that is compatible with a democratic society."[28] According to Barak, it "draws a clear line between considerations that can justify limitations on human rights and considerations that cannot."[29] When the goal that is pursued by a government through the restriction of Convention rights and/or the underlying motivation is in itself at odds with the Convention, the Court would give the wrong signal were it to examine the necessity in a democratic society of the rights restriction, since hereby the Court would confer legitimacy on the aim invoked to justify such restriction. As held by van der Schyff, "it would be senseless to investigate [the proportionality of an interference] where the purpose as such was unworthy of pursuit."[30] When the Court fails to scrutinize an aim that is in itself at odds with the Convention and the values of a democratic society and therefore does not find it to be impermissible for the purposes of the second paragraph of Articles 8-11, it wrongly suggests that such a blatantly illegitimate aim must be accorded weight in the balancing exercise or that, even were the Court to find a violation under the necessity in a democratic society test, the State could still attempt to further the invoked aim using less restrictive means. In such a case, the Court should instead give the clear message that the policy objective is itself illegitimate under the Convention and therefore cannot justify *any* restriction of Convention rights.

It is submitted that the facts of the cases under consideration require the Court to carefully scrutinize the legitimacy of the aim invoked to justify the restriction of the applicant's rights. As held by the Court in *Alekseyev v. Russia,* the government is not allowed "at this stage [to] substitute one Convention-protected legitimate aim for another one which never formed part of the domestic balancing exercise".[31] Instead, the Court should focus on carefully scrutinizing the aims invoked by the domestic authorities in order to justify the decisions affecting the applicant at the domestic level. In the present cases, the arguments adduced by the domestic decision-makers cast serious doubts on the legitimacy of their motives for restricting the applicants' rights. It is respectfully submitted that, were the Court to find it established that the rationale for the rights restriction concerned was a homophobic and discriminatory one, it should find a violation of Article 11 on account of the illegitimacy of the invoked aim. In the context of LGBTI rights, the Court has repeatedly stated under Article 14 ECHR that "[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention."[32] If this holds true under Article 14, it *mutatis mutandis* also hold true under Article 11. Indeed, a coherent reading of the Convention, construing Articles 8-11 in harmony with Article 14,[33] is incompatible with considering an inherently discriminatory aim as legitimate for the purposes of the second paragraph of Articles 8-11.

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[25] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, § 69.

[26] *S.A.S. v. France* [GC], no. 43835/11, Reports 2014, §§ 118-120; *Baka v. Hungary* [GC], no. 20261/12, Judgment of 23 June 2016, §§ 155-157. For other recent cases in which the Court has seriously scrutinized the legitimacy of the invoked aim, see e.g. *Vintman v. Ukraine*, no. 28403/05, Judgment of 23 October 2014, § 94-99 (Article 8); *Zaieţ v. Romania*, no. 44958/05, Judgment of 24 March 2015, § 42 (Article 8); *Emel Boyraz v. Turkey*, no. 61960/08, Judgment of 2 December 2014, § 52-56 (Article 14 in conjunction with Article 8); and *Dimitrovi v. Bulgaria*, no. 12655/09, Judgment of 3 March 2015, § 51-55 (Article 1 Protocol 1).

[27] A. Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 247.

[28] G. van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights,* Nijmegen, Wolf Legal Publishers, 2005, 145.

[29] A. Barak, *op. cit.*, 248.

[30] G. van der Schyff, *op. cit.*, 185.

[31] *Alekseyev v. Russia*, *op. cit.*, § 79.

[32] E.g. *X and Others v. Austria* [GC], no. 19010/07, Judgment of 19 February 2013, § 99.

[33] Mutatis mutandis *Pretty v. the United Kingdom*, no. 2346/02, Judgment of 29 April 2002, § 54.

Below, the Court is invited to carefully scrutinize whether the aims invoked by the domestic authorities distract the legitimate aims listed in the second paragraph of Article 11 from their genuine purpose, serving as pretext for a homophobic and discriminatory aim that is incompatible with the Convention and the values of a democratic society.

(ii) Specific Aims

As far as the legitimate aim of the *protection of the rights of others* is concerned, it is clear that the applicants' activities – which are essentially the promotion of the rights of LGBTI people – do not directly affect the rights of other individuals, and that the promotion of marriage equality does not affect the rights of individuals or families living in a 'traditional' family. In any event, the Court considers the aim of protecting the family in the traditional sense to be rather abstract[34] and therefore it is respectfully submitted that such an aim is not capable of justifying restrictions of the freedom of association.

To the extent that the domestic authorities justified the restrictive measures in the cases at hand by reference to the protection of the rights of others, the opposing right in question appears to be the right of those members of Russian society who feel uncomfortable with visible manifestations of the existence of homosexuality or of support for equal rights for LGBTI people not to be confronted with such expressions. It is submitted that no such right exists.

As the Court held in *Dudgeon v. the United Kingdom*, the mere fact that "members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts" cannot serve as a justification for restricting the rights of LGBTI people.[35] In any event, invoking the purported rights of others not to be confronted with expressions of homosexuality is a mere reiteration of arguing that the interference is justified on the grounds of morality,[36] wherefore the arguments presented hereunder against restricting LGBTI rights on the grounds of morality equally hold true here.

To the extent that the Court considers that the idea that an intolerant majority can determine the rights of a minority – in other words, the idea that the majority can choose not to be confronted with a minority's otherness – underlies the contested domestic decisions, it should be cautious to accept such an argument. The domestic courts' argumentation – that permitting the registration of the applicant organisations would lead to "social and religious hatred" and social backlash – needs to be addressed, also for the sake of future cases. The idea that the societal majority will react in an intolerant way – be it a homophobic reaction, a racist one, or one otherwise bereft of tolerance – does not justify limiting the rights of the affected minority. In this context, reference can be made to *Smith and Grady v. the United Kingdom*, where the Court found, concerning whether negative attitudes about homosexuals held by heterosexuals are "a threat to the fighting power and operational effectiveness of the armed forces", that "[t]o the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights (...) any more than similar negative attitudes towards those of a different race, origin or colour."[37]

In the cases at hand, the domestic authorities also invoked the legitimate aim of the *protection of morals,* both the Gagarinskiy District Court (in case no. 35949/11) and the Pervomayskiy District Court (in case no. 58282/12) having justified the rights-restrictive measures at least partly on the basis of a reference to 'basic morality'. The former court stated that the aim of promoting the legalisation of same-sex marriage is incompatible with basic morality. The latter court ruled that the aims of combating homophobia and creating positive attitudes towards LGBTI sportspeople are incompatible

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[34] *X and Others v. Austria* [GC], no. 19010/07, Judgment of 19 February 2013, § 139. See also *Taddeucci and McCall v. Italy*, no. 51362/09, Judgment of 30 June 2016, § 93.
[35] *Dudgeon v. the United Kingdom*, no. 7525/76, Judgment of 22 October 1981, § 60.
[36] *Id.*, § 47.
[37] *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, Reports 1999-VI, §§ 96 and 97.

with basic morality. Both courts stated that the promotion of such goals undermines "the conceptions of good and evil, of sin and virtue established in society".

It is submitted that these statements strongly suggest that the protection of morals is being interpreted in a homophobic and discriminatory manner that is incompatible with the Convention and the values of a democratic society. As we argue elsewhere in this intervention (see 2.1.), these statements are themselves expressions of discriminatory stereotypes. They suggest that the concept of morals is being interpreted in a way that discriminates against LGBTI individuals and that denies them their fundamental rights.

Finally, neither the legitimate aims of the *protection of national security* nor the *protection of public order* can be invoked to justify homophobic or discriminatory policies. Indeed, the reasoning of the Pervomayskiy District Court in case 58282/12, to the effect that the applicant's "activities amount to propaganda of a non-traditional sexual orientation, which may undermine national security, cause social and religious hatred and enmity and undermine the sovereignty and territorial integrity of the Russian Federation by decreasing its population", cannot be considered as referring to a precise threat or real danger to national security or public order. As we argue below (see 2.1.), the rhetoric of the court in this paragraph is instead a textbook example of harmful stereotyping or even hate speech.

1.2.3. On the Necessity of the Measure in a Democratic Society

The cases at hand concern the limitation of Article 11 rights in the interest of blatant discrimination, and we would urge the Court to focus its examination on the legal basis and legitimate aim of the measures concerned in order to avoid lending them the sheen of legitimacy that would result from examining their proportionality. In short, thus, the measures at issue here should be examined not with regard to whether the extent to which individual rights were limited is acceptable, but from the more fundamental perspective of whether it was acceptable to limit individual rights in this manner at all.

2. The Need to Examine the Cases under Article 14 Jointly with Articles 6 § 1 and 11 ECHR

In addition to our arguments concerning Article 11 ECHR taken on its own, we submit that there is also a need to separately examine whether there has been a violation of the prohibition of discrimination in Article 14 ECHR, taken together with Articles 6 and 11 ECHR. Three elements in the present cases are relevant in this context. First, we consider that discrimination is at the core of these cases given the inherently discriminatory manner in which the domestic law was interpreted, as outlined above. This alone, we submit, merits separate examination under Article 14 taken together with Article 11. Secondly, we invite the Court to note the use of harmful negative stereotypes as a justification of the initial denial of registration: this, we submit, is further evidence of a problem under these same provisions. Lastly, we consider that the fact that these harmful stereotypes were employed by judges raises an issue under Article 14 taken together with Article 6 ECHR.

2.1. On Article 14 Jointly with Article 11 ECHR

As concerns Article 14 taken together with Article 11, we first recall that the Court has previously stressed that democracy does not simply mean that the views of the majority override those of the minority, nor that the exercise of Convention rights by the minority is made conditional upon the acceptance of the majority.[38] In this democratic context, the state is the ultimate guarantor of pluralism and may have a particular positive obligation with respect to persons belonging to minorities in

[38] *Young, James and Wester v. UK*, nos. 7601/76 and 7806/77, Judgment of 13 August 1981, § 63; *Chassagnou and others v. France*, nos. 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, § 112; *Bączkowski and Others v. Poland,* no. 1543/06, Judgment of 3 May 2007, § 63; *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, § 81.

securing their effective enjoyment of the right to freedom of association.[39] Furthermore, associations themselves play an important role in safeguarding pluralism, enabling the participation of citizens in a democratic process and achieving social cohesion through the harmonious interaction of persons with varied identities.[40]

Strict scrutiny. The fundamental democratic value of the freedom of association, jointly with expression and assembly is generally recognized. Interfering with freedom of association in cases other than incitement to violence or rejection of democratic principles, however shocking certain views may appear to be, does a disservice to democracy and often endangers it.[41] When this interference is based on a distinction such as sexual orientation, particularly weighty reasons must be brought before the Court to justify the measure. In light of the intimate and vulnerable sphere of the individual's private life, the margin of appreciation of the State is significantly narrowed. The Court has repeatedly stressed 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".[42]

Irrelevance of consensus on marriage equality. Moreover, it is important to recognize that there is a right to advocate for marriage equality even absent a right to same-sex marriage. The Court has recognized the right to advocate for certain rights, the exercise of which could shock or disturb the majority. Here, we draw a parallel to the Court's case-law concerning the impermissibility of limiting the provision of information on abortion services, notably *Open Door and Dublin Well Woman v. Ireland*[43] and *Women on Waves and Others v. Portugal.*[44] Subsequently, the Court has repeated this principle concerning LGBTI advocacy. Indeed, the Court has not yet found a European consensus concerning the recognition of same-sex marriage.[45] However, the absence of said consensus is not a relevant reason to restrict a person or association's right to advocate for it. The Court clarified that "conferring substantive rights on homosexual persons is fundamentally different from recognizing their right to campaign for such rights."[46] The Court has furthermore found a European consensus concerning the right of individuals to openly identify themselves as LGBTI or any other sexual minority, and to promote their rights, in particular by exercising their freedom of peaceful assembly.[47]

Harmful stereotypes. We draw the Court's attention to the use of stereotyped conceptions of sexuality and the homophobic elements of the domestic discourse, which are evident, for example, in the "sin" and "evil" language used by both domestic courts. This portrays LGBTI people as moral deviants and betrays a lack of understanding about the nature of sexual orientation. In addition, the arguments of the domestic courts were based on the underlying assumption that contact with LGBTI rights advocacy will lead more people to identify as LGBTI and will even lead to a decline in the birth rate, which is understood as a danger for the nation's 'national security'. This propagates the idea that LGBTI people seek to "recruit" or "convert" heterosexuals – a stigmatizing idea that may inspire fear and, as a result, hatred or violence. By claiming that LGBTI activism will lead to a drop in the birth rate – a claim made without any empirical or factual basis – the domestic judges legitimized and

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[39] *Informationsverein Lentia and others v. Austria*, nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, Judgment of 24 November 1993, § 38; *Bączkowski and Others v. Poland,* no. 1543/06, Judgment of 3 May 2007, § 64. Vulnerable groups are disproportionately affected by violations of the right to freedom of association. See A/HRC/26/29; §§ 29-30 deals specifically with LGBTI people.

[40] *Bączkowski and Others v. Poland,* no. 1543/06, Judgment of 3 May 2007, § 62.

[41] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, § 80.

[42] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, § 108; *Genderdoc-M v. Moldova*, no. 9106/06, Judgment of 12 June 2012, §51. For the purpose of the prohibition of discrimination, sex is to be taken as including sexual orientation (HRC, Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), § 8.7).

[43] *Open Door and Dublin Well Woman v. Ireland*, nos. 14234/88 and 14235/88, §§ 67-77, Series A246-A.

[44] *Women on Waves and Others v. Portugal*, no. 31276/05, §§ 36-44, Judgment of 3 February 2009.

[45] *Schalk and Kopf v. Austria*, no. 30141/04, Judgment of 24 June 2010, § 58; *Hämäläinen v. Finland*, no. 37359/09, Judgment of 16 July 2014, § 96; *Oliari and others v. Italy*, nos. 18766/11 and 36030/11, Judgment of 21 July 2015, §§ 192-194; *Chapin and Charpentier v. France*, no. 40183/07, Judgment of 9 June 2016, §§ 48-51; *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, § 83.

[46] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, § 84.

[47] *Id.*

reinforced stereotyped understandings about LGBTI people. The Court found in *Alekseyev v. Russia* concerning the stereotyped views voiced by the domestic authorities that

> "[t]here is 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". On the contrary, it is only through fair and public debate that society may address (...) some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily. This was exactly the kind of debate that the applicant in the present case attempted to launch, and it could not be replaced by the officials spontaneously expressing uninformed views which they considered popular."[48]

In the present cases, much like in *Alekseyev*, there is a strong indication that "the main reason for the ban imposed [...] was the authorities' disapproval of demonstrations which they considered to promote homosexuality."[49] Like in *Alekseyev*, therefore, we urge the Court to examine these statements not only under Article 11, but also under Article 14 ECHR.

2.2. On Article 14 Jointly with Article 6 ECHR

We submit that the present cases raise a separate issue under Article 14 (prohibition of discrimination) taken together with Article 6 ECHR (fair trial). This is due to the fact that, by relying on the abovementioned stereotypes about LGBTI people to justify their decisions, the domestic judges to whom the applicants turned in order to obtain relief and seek justice, further discriminated against them and reaffirmed the stigmatization and discrimination that they suffered on the basis of their sexual orientation. We submit that it is incompatible with the independent and impartial role of the judge to use harmful stereotypes about certain groups of claimants. In this regard, we refer to *Moldovan and Others v. Romania (No. 2),* where the fact that the domestic court made repeated stigmatizing remarks about the Roma as a group was used as a separate element to find a violation of Article 14 ECHR taken in conjunction with Articles 6 and 8.[50] As indicated by the Moldovan case, the potential that judges may be biased against an applicant – in the cases at hand, they are prejudiced against LGBTI persons, whom they consider moral deviants – is highly problematic in terms of Article 6 ECHR. It throws a doubt over the fair treatment of the applicant who belongs to the group that is being stereotyped and it suggests that the domestic courts were not impartial. We therefore invite the Court to find that stereotyping and the resulting bias and prejudice on the part of judges are not compatible with the requirement of impartiality and more generally with the right to a fair trial enshrined in Article 6, taken together with Article 14. Scrutinizing not only the outcome but also the discriminatory and stereotyping approaches of the domestic judgments provides the Court with an opportunity to expose harmful stereotypes as such, which represents an important step in taking away some of the power of these stereotypes.

2.3. Positive Obligations of the State under Article 14

Finally, the cases at hand raise an issue in terms of the positive obligations under Article 14. States' commitment to human rights means that they must facilitate a culture of acceptance and encourage tolerance and debate; the concluding section of this submission substantiates this in more detail. We draw attention to *D.H. and Others v. the Czech Republic*, wherein the Court held that "Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article".[51] Furthermore, in *Nachova and Others v. Bulgaria*, the Court held that States "must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment."[52] Other cases concerning the State's attitude towards Roma

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[48] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, § 86.
[49] *Id.*, § 109.
[50] *Moldovan and Others v. Romania (No. 2)*, nos. 41138/98 and 64320/01, §§ 139-140, Reports 2005-VII (extracts).
[51] *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, Judgment of 13 November 2007, Reports 2007-IV, § 175.
[52] *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, Judgment of 26 February 2004, § 145.

students in public schools have equally referred to "the positive obligations of the State to undo a his-history of racial segregation in special schools."[53]

We submit that existing negative stereotypes and discrimination against LGBTI persons constitute "factual inequalities" which the State can or must work towards to correct. Therefore, we argue, States are under a positive obligation to use all available means to combat homophobia and discrimination on the ground of sexual orientation, and to take measures to counteract the societal exclusion of vulnerable groups, which includes the LGBTI community.

2.4. A Conclusory Note: Human Rights and Cultural Change

To conclude this intervention, we would like to briefly point at the broader context of the type of arguments made by the domestic authorities, and invite the Court to take it into account. This concerns the debate on universality and cultural particularity in international human rights (a), and the orientation of human rights toward cultural change (b). Both elements reinforce the case for free societal debate on LGBTI rights, which we submit is the core issue at stake in this case.

a. "Traditional Values" Arguments and the Universality Debate

Scholarly discussion about culture-based resistance to (some) human rights has long been focused on "non-Western" discourses.[54] Today, however, such resistance is also part of human rights debates in Europe, amongst others in contexts relating to sexual and reproductive rights and LGBTI rights. Hence it may be relevant to be aware of the outcome of those broader debates. Overall, scholarship has concluded that the universality of human rights does not entail uniformity in the interpretation and implementation of human rights, and that there is room for a degree of cultural diversity at those levels. The Court may wish to reflect to what extent this also applies within the European regional human rights protection system. Another issue for reflection is that when it comes to concrete applications, scholars argue that there can room for diversity in the interpretation of general concepts or in the balancing between rights and restriction grounds. Yet *scholars generally do not defend the accommodation of cultural claims that would exclude categories of people from human rights protection.* In any case, it is relevant to note that while the scholarly consensus leaves this room for cultural diversity in human rights, it also agrees on the need for cultural change toward human rights (in particular where tradition-based claims go beyond an acceptable margin of diversity in interpretation or implementation) and it points to *internal debate within society* as the way *par excellence* to promote such cultural change.

What is at stake in the cases at hand, is precisely the matter of internal debate within Russian society about a human rights related matter on which some parts of society are ready to embrace cultural change, whereas other parts of society resist such change. As the Court has stated in *Alekseyev v Russia*, "conferring substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights".[55]

The matter at stake in these cases is not whether 'Europe' can 'force' Russia to accept full equality (including marriage equality) of LGBTI people. At stake is whether Russia can block the debate in its society about this matter. It is submitted that even if one were to go along with the claim that it is for the Russian people to decide about LGBTI rights in Russia, it cannot be justified that the Russian state would hinder its people from debating this matter.

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[53] *Horváth and Kiss v. Hungary*, no. 11146/11, Judgment of 29 January 2013, § 127. See also *Lavida and Others v. Greece*, no. 7973/10, Judgment of 30 May 2013, § 73.
[54] See for example Eva Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff publishers, 2001.
[55] *O.c.*, § 84.

b. A Human Rights Obligation to Help Realize Cultural Change

International human rights law is strongly committed to the promotion and protection of the rights of members of groups that have been subjected to structural discrimination and/or marginalisation in the past, such as women, children ethnic minorities, and persons with disabilities. The realization of the rights of these individuals requires cultural change, that is focused in particular on the way society at large views members of those groups, and international texts impose state obligations to help realize that cultural change. Specific state obligations to this effect are included amongst others in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[56] the Convention on the Rights of Persons with Disabilities (CRPD),[57] and the Yogyakarta Principles on LGBTI rights.[58] It is important to recognize the cultural change dimension of LGBTI rights. Like all emancipation struggles, it requires adjustment of deeply and sincerely held beliefs. Cultural resistance to emancipation rights is not necessarily an expression of bad faith; it is deeply human. *The role of the state in this process has been clearly set out in international human rights law, and it is the opposite of the role that Russian authorities have taken on in the cases at hand.* Among the associational goals that were found to go against public morality by the Russian judiciary, are "combating homophobia and creating positive attitudes towards LGBTI sportspeople". In other words, the association Sochi Pride House wants to achieve "the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression". This is exactly what the Yogyakarta Principles (Principle 2, f) describe as the government's obligation, in line with how the CEDAW (Article 5) sees state obligations toward eradicating gender prejudice, and how the CPD (Article 8) construes state obligations to create positive attitudes toward people with disabilities.

The Russian government cannot be held fully responsible for the fact that important segments of Russian society do not embrace equality on grounds of sexual orientation. This is a matter of cultural change that by definition needs some time. But the Russian government can be held responsible for failing to show evidence of working toward the realisation of such cultural change. One way for a government to fulfil its international human rights obligations toward the realisation of cultural change for equality, is by supporting the work of civil society organisations that combat discrimination and prejudice. One way for a government to violate such human rights obligations, is by hampering the work of such organisations.

Yours Sincerely,

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28 July 2016

[56] See Article 5 (a) CEDAW.

[57] See Article 8 CRPD.

[58] Principle 2, sub (f) (Principle 2: The rights to equality and non-discrimination): "States Parties shall (...) [t]ake all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression."