CRIME AND PROPAGANDA: WHAT IS TO BE DONE WITH RUSSIAN FEDERAL LAW № 135-FZ

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INTRODUCTION

A recent study published by Human Rights Watch in December 2014, graphically documented the abuse of self-identifying homosexuals in the Russian Federation.[1] The report examined a total of seventy-eight cases in sixteen urban centers that have occurred since 2012.[2] In addition to soft discrimination (e.g., employment termination and verbal harassment), the report described various harrowing and violent personal attacks: forced sodomy with a bottle in public, and the brutal tearing-out of a transgender woman's toenails after being stripped and abandoned in a forest.[3] These events often are video-recorded and subsequently posted across internet domains to ensure maximum humiliation.[4] Furthermore, attacks that have resulted in permanent blindness, shootings,[5] and the gruesome murder of two men who were tortured to death on separate occasions in 2013, have been attributed singularly to the victims' homosexual orientation.[6]

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1 HUMAN RIGHTS WATCH, LICENSE TO HARM (2014), https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia [hereinafter LICENSE].

2 Alexey Eremenko, *Violence Against LGBTs Getting Worse in Russia, Study Says*, MOSCOW TIMES (Dec. 15 2014), http://www.themoscowtimes.com/news/article/violence-against-lgbts-getting-worse-in-russia-study-says/513341.html.

3 *Id.*

4 *Russia: Impunity for Anti-LGBT Violence*, HUMAN RIGHTS WATCH (Dec. 15, 2014), http://www.hrw.org/news/2014/12/15/russia-impunity-anti-lgbt-violence.

5 HUMAN RIGHTS CAMPAIGN FOUND., RUSSIA: YEAR IN REVIEW REPORT 6–7 (2015).

6 Steve Gutterman, *Gay Man Killed in Russia's Second Suspected Hate Crime in Weeks*, REUTERS (June 3, 2013), http://www.reuters.com/article/us-russia-killing-gay-idUSBRE95209Z20130603.

While the legal persecution and statutory prosecution of homosexuals on the numerous iterations of Russian territory is not novel,[7] the rapid and unprecedented increase in vigilante activities against them in the previous two years alone is imputed wholly to the passing of a landmark bill on June 29, 2013.[8] An almost universal consensus of opinion assigns responsibility for the present and pervasive vitriol to this one particular law. [9] Allegedly written to protect minors against homosexual propaganda, [10] the Russian State Duma authored [11] and President Vladimir Putin perforce signed Federal Law № 135-FZ (the "New Law"),[12] a brief amendment to the original federal law—On the Protection of Children from Information Detrimental to Their Health and Development.[13] The New Law established penalties for those convicted of disseminating certain proscribed information to minors[14] pursuant to the promotion of homosexuality.[15] Stark evidence for the direct correlation between the enactment of the New Law and the consequent outbreak of abuse is likewise illustrated by the fact that Russia decriminalized homosexuality in 1993.[16] To wit, a markedly noticeable increase in the number of attacks began only in 2013, when the New Law was enacted.[17]

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[7] *See* Ben De Jong, *"An Intolerable Kind of Moral Degeneration": Homosexuality in the Soviet Union*, 8 REV. SOCIALIST L. 341, 341–42, 344–45 (1982).

[8] Gabrielle Tétrault-Farber, *Russia's 'Gay Propaganda' Law One Year On*, MOSCOW TIMES (June 29, 2014), http://www.themoscowtimes.com/news/article/russias-gay-propaganda-law-one-year-on/502697.html.

[9] Keith Perry, *More than 200 Leading Authors Protest Against Russia's Anti-Gay and Blasphemy Laws*, TELEGRAPH (Feb. 6, 2014), http://www.telegraph.co.uk/news/worldnews/europe/russia/10620893/More-than-200-leading-authors-protest-against-Russias-anti-gay-and-blasphemy-laws.html.

[10] Maria Issaeva & Maria Kiskachi, *Immoral Truth vs. Untruthful Morals? Attempts to Render Rights and Freedoms Conditional upon Sexual Orientation in Light of Russia's International Obligations*, 2 RUSS. L.J. 81, 89 (2014). Homosexual propaganda is not defined under Russian law, and is otherwise legislatively ambiguous; however a thorough analysis of the relevant case law establishes perhaps a few parameters that make the definition somewhat more transparent.

Per the Constitutional Court of Russia, homosexual propaganda is "an activity of 'purposeful and uncontrolled dissemination of information, detrimental to health [and] moral . . . development forming a distorted image of the social equality of traditional and non-traditional relationships.'" Further, the traditional relationships of "family, motherhood and childhood . . . are those values which ensure continuous change of generations and . . . development of the whole multinational people of the Russian Federation." *Id.*; *Russia's Anti-gay 'Propaganda Law' Assault on Freedom of Expression*, AMNESTY INT'L (Jan. 25, 2013), https://www.amnesty.org/en/latest/news/2013/01/russia-anti-gay-propaganda-law-assault-on-freedom-expression/.

Per the Supreme Court of Russia, homosexual propaganda is "an activity of natural or legal persons consisting in the dissemination of information, aimed at forming in the consciousness certain attitudes and stereotypes, or encouraging persons to whom it is addressed to commit something or refrain from it." That is, homosexual and propaganda have "well-known meanings"; and homosexual propaganda occurs when (1) "[it] denies traditional family values," and (2) "a child cannot critically assess incoming information and that his or her own interest in non-traditional relationships can easily be incited despite the fact that such interest is not 'objectively based' on the physiological characteristic of the child." Issaeva & Kiskachi, *supra*, at 90.

Further, the Russian executive agency tasked with enforcing the New Law, Roskomnadzor, has enumerated its own criteria for identifying homosexual propaganda: "[information] arguing that traditional families do not meet the needs of modern society or the 'modern individual' . . . websites that publish 'out-of-context' statistics about children adopted by gay and straight couples . . . using 'attractive' or 'repelling' images to discredit traditional [families] and propagate alternative family models . . . or publishing lists of famous living or deceased gay individuals." *Id*. at 94–95.

Perhaps the best definition, however, is provided in the official commentary or explanatory note to the New Law: "The promotion of homosexuality has sharply increased in modern-day Russia. This promotion is carried out via the media as well as via the active pursuit of public activities which try to portray homosexuality as a normal behaviour. This is particularly dangerous for children and young people who are not able to take a critical approach to this avalanche of information with which they are bombarded on a daily basis. In view of this, it is essential first and foremost, to protect the younger generation from exposure to the promotion of homosexuality . . . . It is therefore essential to put in place measures which provide for the intellectual, moral and mental well-being of children, including a ban on any activities aimed at popularising homosexuality. A ban of this kind of propaganda as an activity involving the intentional and indiscriminate spreading of information which may be injurious to physical, moral and spiritual wellbeing, including instilling distorted ideas that society places an equal value on traditional and non-traditional sexual relations amongst people who are incapable, due to their age, of critically assessing this information on their own, cannot in itself be considered a breach of the constitutional rights of citizens . . . . The bill confers the right of drawing up charge sheets relating to activities carried out in public which are aimed at promoting homosexuality to minors on officials of the authorities responsible for internal affairs (the police) and of considering any resulting cases – on the courts." HUMAN DIGNITY TRUST, RUSSIA: THE ANTI-PROPAGANDA LAW 1 (2014).

[11] *See* AMNESTY INT'L, *supra* note 10. The Russian State Duma voted almost unanimously to pass the New Law in its first reading – only one representative voted against and one abstained. *Id.*

[12] HUMAN DIGNITY TRUST, *supra* note 10; Federal'nyĭ zakon ot O vnesenii izmeneniĭ v stat'iu͡ 5 Federal'nogo zakona "O zashchite deteĭ ot informat͡sii, prichiniai͡u͡shcheĭ vred ikh zdorov'iu͡ i razvitiiu͡" i otdel'nye zakonodatel'nye akty rossiĭskoĭ federat͡siiv t͡seli͡akh zashchity deteĭ ot informat͡sii, propagandiruiu͡shcheĭotritsanie traditsionnykh semeĭnykh t͡sennosteĭ" [Federal Law on Amending Article 5 of the Federal Law on Protecting Children from Information Causing Harm to Their Health and Development and Certain Legislative Acts of the Russian Federation for the Purposes of Protecting Children from Information Conducive to the Negation of Traditional Family Values] June 2013, No. 135.

The New Law's most salient and contested alteration occurs in Article 3(2)(b), which states "[p]ropaganda of non-traditional sexual relations among minors, manifested in the distribution of information aimed at forming non-traditional sexual orientations, the attraction of non-traditional sexual relations, distorted conceptions of the social equality of traditional and non-traditional sexual relations among minors, or imposing information [about] non-traditional sexual relations [that] evoke interest in these kinds of relations if these actions are not punishable under criminal law[, subject citizens] to administrative fines . . . in the amount of 4,000–5,000 rubles; for administrative officials, 40,000–50,000 rubles; for legal entities, 800,000–1,000,000 rubles or suspension of business activities for up to 90 days." *Russia's "Gay Propaganda" Law: Russian Federal Law #135-FZ*, THE SCHOOL OF RUSS. AND ASIAN STUDIES (Aug. 21, 2013), http://www.sras.org/russia_gay_propaganda_law.

The approximate USD value of the fines is difficult to determine due to the Russian currency's recent severe fluctuations. However, rounding to an average of 60 rubles per 1 USD at today's rate, the fines total $67–$83 for citizens; $667–$830 for administrative officials; and $13,333–$16,667 for legal entities. *See* CENT. BANK OF RUSS. FED'N, http://www.cbr.ru/eng/ (last visited Mar. 25, 2016).

[13] Federal'nyĭ zakon ot (red. Ot 14.10.2014) O zashchite deteĭ ot informat͡sii, prichiniai͡ushcheĭ vred ikh zdorov'iu͡ i razvitiiu͡ [Federal Law on the Protection of Children Against Information that may Be Harmful to Their Health and Development (with Amendments and Additions)] Dec. 2010, No. 436; *see also Russia: Use Leadership to Repeal Discriminatory Propaganda Law*, HUMAN RIGHTS WATCH (Sept. 5, 2013), https://www.hrw.org/news/2013/09/05/russia-use-leadership-repeal-discriminatory-propaganda-law [hereinafter *Russia: Use Leadership to Repeal Discriminatory Propaganda Law*].

[14] *See Russia: Use Leadership to Repeal Discriminatory Propaganda Law*, *supra* note 13. Minors in Russia are defined generally as citizens under the age of eighteen, though there are exceptions. Russia (née Soviet Union) ratified the International Convention of the Rights of the Child (the "CRC") in 1990; however, "[d]ifferent pieces of Russian legislation do not follow the definition of children provided by the CRC uniformly. Despite the fact that article 1 of the CRC states that everyone under eighteen years of age is recognized as a child, most specialized health care programs in Russia do not include children older than fourteen, or older than sixteen, if a child is disabled. Parental consent for medical procedures is required for children under sixteen, and tax legislation treats minors under sixteen, and between sixteen and eighteen years of age differently." *Children's Rights: Russian Federation*, LIBRARY OF CONGRESS, http://www.loc.gov/law/help/child-rights/russia.php (last visited Mar. 25, 2016); *Convention on the Rights of the Child*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en. (last visited Mar. 25, 2016); GRAND VALLEY STATE UNIV. HUMAN RESEARCH REVIEW COMM., G-9: HRRC GUIDANCE ON AGE OF MAJORITY/ADULTHOOD IN USA & OTHER COUNTRIES 3 (2012), https://www.gvsu.edu/cms3/assets/E122C984-F34A-F437-8340DB5CD900C177/procedures/g-9._guidance_on_age_of_majority_in_us_and_foreign_countries._0725.2012.pdf.

[15] *See Russia: Use Leadership to Repeal Discriminatory Propaganda Law*, *supra* note 13. The limits of the New Law are still being tested. For example, in February 2014, a district court in central Russia found a woman not guilty of breaching the New Law for creating a social media site/forum on Facebook to assist teenagers struggling with homosexuality. The case has been appealed. *Russian Journalist Accused of Anti-Gay 'Propaganda' Defeats Charges*, AMNESTY INT'L UK (Jan. 29, 2016), https://www.amnesty.org.uk/russia-journalist-elena-klimova-lgbt-gay-propaganda; Tom Balmforth, *Children-404: LGBT Support Group in Kremlin's Crosshairs*, RADIO FREE EUR./RADIO LIBERTY (Nov. 21, 2014), http://www.rferl.org/content/russia-lgbt-children-404-propaganda/26703500.html.

Current scholarship positions the controversy over the New Law squarely in the arena of human rights. The New Law is seen as a restriction on the fundamental exercise of free speech, and more importantly as a surreptitious vehicle for state discrimination against practicing homosexuals.[18] Recognized legal experts argue effectively that the New Law is a direct violation of the Russian Federation's obligations under various international conventions—the most significant being the European Convention on Human Rights, which Russia ratified in 1998.[19]

Conversely, other experts have cast a wider proverbial net, and have argued persuasively that human rights in Russia, including therefore the New Law and the Russian Federation's attendant international commitments under various international conventions, must be understood in a much broader context (i.e., cultural exceptions). The present Note reviews a recently published article espousing the well-reasoned belief that the New Law must be governed by the European Convention on Human Rights,[20] and surveys three contextual arguments: national identity,[21] national sovereignty,[22] and by analogy—national autonomy.[23] The Note ultimately posits a new approach—a cultural

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Further, sympathetic heterosexuals who encourage the non-discrimination of homosexuals may be liable under the New Law: "Ekaterina Bogach, a Spanish language teacher from St. Petersburg, was targeted by a homophobic group for her support of LGBT rights. Media reports said that in November 2013, the group began an online campaign harassing Bogach and claiming that her involvement with the Alliance of Heterosexual People for LGBT Equality was harmful to her students. They also sent a letter to the city committee on education calling Bogach a 'supporter of perverts' and harmful to her students' 'psyche,' the media reports said. Despite the harassment campaign against her, Bogach kept her job." *Russia: Anti-LGBT Law a Tool for Discrimination: An Anniversary Assessment*, HUMAN RIGHTS WATCH (June 29, 2014), http://www.hrw.org/news/2014/06/29/russia-anti-lgbt-law-tool-discrimination.

16 Matthew Schaaf, *Advocating for Equality: A Brief History of LGBT Rights in Russia*, HARRIMAN MAG., Feb. 10, 2014, at 23–24. Homosexuality was initially decriminalized in the Soviet Union immediately succeeding the Russian Revolution in 1917, but recriminalized again in 1933. Jong, *supra* note 7, at 342.

17 *See* LICENSE, *supra* note 1.

18 *Russian Constitutional Court Rules on Anti-Gay Law*, HUMAN RIGHTS FIRST (Sept. 26, 2014), http://www.humanrightsfirst.org/press-release/russian-constitutional-court-rules-anti-gay-law.

19 Issaeva & Kiskachi, *supra* note 10, at 96–101; Frédéric Pinard, *Council of Europe: Russia Ratifies European Convention on Human Rights*, IRIS MERLIN, http://merlin.obs.coe.int/iris/1998/6/article6.en.html (last visited Mar. 25, 2016).

20 *See* Issaeva & Kiskachi, *supra* note 10, at 83.

21 *See* Petr Preclik, *Culture Re-introduced: Contestation of Human Rights in Contemporary Russia*, 37 REV. CENT. AND EAST EUR. L. 173, 173 (2012).

22 Mikhail Antonov, *Conservatism in Russia and Sovereignty in Human Rights*, 39 REV. CENT. & EAST EUR. L. 1, 2 (2014).

23 *See* Merilin Kiviorg, *Collective Religious Autonomy Versus Individual Rights: A Challenge for the ECtHR?*, 39 REV. CENT. AND EAST EUR. L. 315, 315 (2014).

exception not yet thoroughly investigated or advanced, and which therefore, touches immediately upon the validity of the New Law: Russian customary/indigenous law is a human right protected under (1) the International Covenant of Economic, Social and Cultural Rights;[24] (2) the International Covenant on Civil and Political Rights;[25] and (3) the United Nations Declaration on the Rights of Indigenous Peoples.[26]

While each of the three contextual arguments may advocate indirectly for the appreciation of customary law as it applies positively to human rights in Russia,[27] none attempt to link traditional indigenous rights with modern human rights via a relevant international agreement. The present Note attempts to do so—with trepidation and humility as the topic is innately sensitive. The intent is to explore whether the New Law is valid precisely because it is protected as a compelling expression of "cultural free speech" and/or an authentic product of indigenous Russian law. There is no intent to justify, excuse or in any way condone the prejudiced malcontents, whether private or public, [28] who have perpetrated the horrendous accusations and crimes against homosexuals in Russia that the New Law seems to have so vigorously engendered.

This Note is divided into four sections: section one—The Origins of the New Law; section two—The Exclusivity Argument: The New Law Violates the European Convention on Human Rights; section three—The

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[24] *See* International Covenant on Economic, Social and Cultural Rights arts. 1, 5, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[25] *See* International Covenant on Civil and Political Rights arts. 1, 5, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[26] *See* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous People, at 1 (Oct. 2, 2007) [hereinafter UNDRIP].

[27] Preclik, *supra* note 21; Antonov, *supra* note 22; Kiviorg, *supra* note 23.

[28] While the majority of attacks are from non-state actors, semi-official acquiescence is tolerated due to deliberate inaction. *See* Susannah Cullinane, *Human Rights Watch Criticizes Russia, Says It Fails to Protect LGBT People*, CNN (Dec. 15, 2014), http://www.cnn.com/2014/12/15/world/europe/russia-hrw-gay-report/ ("The police officer who took his complaint said to him, 'It's all right, you're gay so it's normal that you were attacked. Why would you need to file a complaint against anyone?'"); *see also* David M. Herszenhorn, *Gays in Russia Find No Haven, Despite Support from the West*, N.Y. TIMES (Aug. 11, 2013), http://www.nytimes.com/2013/08/12/world/europe/gays-in-russia-find-no-haven-despite-support-from-the-west.html?_r=0 ("Few gay people in Russia openly acknowledge their sexual orientation, and those who do are often harassed. When some gay people protested the propaganda law by kissing outside the State Duma, the lower house of Parliament, police officers stood by and watched as the demonstrators were doused with water and beaten by antigay and religious supporters of the bill."); *see also* Kseniya A. Kirichenko, *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity Legal Report: Russian Federation*, DANISH INST. FOR HUMAN RIGHTS 70 (2009), http://www.coe.int/t/Commissioner/Source/LGBT/RussiaLegal_E.pdf (Tambov Governor Oleg Belin made an aggressively offensive pre-New Law statement in 2008: "Faggots must be torn apart and their pieces should be thrown in the wind!").

Contextual Argument: The New Law as Cultural Exception to the European Convention on Human Rights; and section four—The New Law as Russian Customary Law Under International Agreements.

I. THE ORIGINS OF THE NEW LAW

The New Law is in reality not very new at all. The New Law is simply the most recent and comprehensive restatement of multiple similar laws that were first enacted regionally beginning in 2006.[29] A total of ten regional anti-propaganda laws have since been enacted: Ryazan (2006); Arkhangelsk (2011); Bashkortostan (2012); Kostroma (2012); Krasnodar (2012); Magadan (2012); Novosibirsk (2012); Samara (2012); St. Petersburg (2012); and Kaliningrad (2013).[30] The New Law, enacted seven years thereafter, resembles closely the first anti-propaganda law—the Ryazan law:

> According to the Law of the Ryazan Region on Administrative Offences, "public actions aimed at propaganda of homosexualism (sodomy and lesbianism) among minors shall be punishable by a fine in the amount of from 1500 to 2000 [rubles] on citizens, from 2000 to 4000 [rubles] on officials, and from 10000 to 20000 [rubles] on legal entities" (Art. 3.10 "Public actions aimed at the propaganda of homosexualism (sodomy and lesbianism) among minors").[31]

Likewise, at the federal level, the New Law was conceived as early as 2003, and a second attempt to pass a federal anti-propaganda bill was made in 2006. However, unlike the New Law, violating the initial federal draft bill was considered a criminal offense; [32] a violation of the New Law is an administrative offense subject to fines.[33] Also, the initial federal draft bill did not target minors specifically but instead was applicable to the general public.[34]

Furthermore, the initial federal draft bill was roundly rejected by all

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[29] HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 5, at 3.

[30] *Id.*; Maria Kozlovskaya, *NGO Alternative Report 2013 for the United Nations Committee on the Rights of the Child*, INTERREG'L SOC. MOVEMENT 'RUSS. LBGT NETWORK' (2013), http://www.lgbtnet.org/sites/default/files/dlya_sayta_angl.pdf.

[31] Kirichenko, *supra* note 28, at 21 (emphasis omitted).

[32] *Id.* at 20.

[33] LICENSE, *supra* note 1.

[34] Kirichenko, *supra* note 28, at 20 ("Both drafts proposed adding to the Criminal Code of Russia Art. 242.1 to read as follows: 'Article 242.1. Propaganda of homosexualism. Propaganda of homosexualism contained in a public statement, publicly demonstrated works or in the mass media, including those expressed in the public display of homosexual lifestyle and homosexual orientation, shall be punished by deprivation of the right to occupy certain posts or practice certain activities for a period of two to five years.'").

levels of the federal government. The Supreme Court of Russia refused to endorse the initial federal draft bill declaring, "in accordance with the current legislation sodomy and lesbianism are considered as criminal only if these deeds are associated with the violence or with the threat of it, or in taking advantage of the victim's helpless condition."[35] The Government of the Russian Federation found numerous anomalies in the initial federal draft bill concluding, "the prohibition, proposed by the draft, contradicts the first part of Art. 14 of the Criminal Code, under which only socially dangerous deeds may be recognised as a crime, and this phenomenon is not classed by legislation to such deed."[36] The Russian State Duma ultimately rejected the initial federal draft bill in accordance with the reasons expressed by the Government of the Russian Federation.[37] President Vladimir Putin also withheld support on three occasions.[38]

The New Law's resurrection in 2013, however, has been accredited implicitly to anti-government protests that occurred subsequent to the Russian State Duma elections in 2011, and President Vladimir Putin's reelection in 2012.[39] The protests were the largest in decades,[40] and instigated an immediate crackdown on the government's opponents.[41] Thereafter, the government has been "demonstrating an intolerance for dissent that has since deepened and widened."[42] Such intolerance extends to homosexuals, it is contended, because they often are identified with the

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[35] *Id.*

[36] *Id.* at 21.

[37] *Id.*

[38] HUMAN RIGHTS FIRST, CONVENIENT TARGETS: THE ANTI-"PROPAGANDA" LAW & THE THREAT TO LGBT RIGHTS IN RUSSIA 1 (2013).

[39] *Id.; see also Russia: Freedom in the World 2014*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/2014/russia (last visited Mar. 25, 2016).

[40] *Russia: Freedom in the World 2013*, FREEDOM HOUSE, https://www.freedomhouse.org/report/freedom-world/2013/russia#.VKDe2F4AE (last visited Mar. 25, 2016) ("In the weeks following the elections, the largest antigovernment demonstrations since Putin came to power were held in Moscow, with smaller protests taking place in other cities in Russia. The demonstrators called for the annulment of the election results, an investigation into vote fraud, and freedom for political prisoners. Hundreds of people were arrested, and several protest leaders were jailed for short periods.").

[41] CONVENIENT TARGETS, *supra* note 38 ("The pushback against gay rights is part of a broader crackdown on "positive liberties" and dissent that has its roots in the massive anti-government protests born in December 2011, when Russians took to the streets to protest alleged fraud in the parliamentary elections. The unrest sent shockwaves through the political establishment and prompted President Putin, when he returned to the presidency in May 2012, to use repressive laws and law enforcement to try to weaken civil society.").

[42] *Id.* at 3.

opposition.[43] This is the "fear factor."

However, this analysis, though perhaps honest, may be somewhat constrained: it is predicated on the belief that the New Law is inherently anti-homosexual.[44] If the fear factor is a reasonable interpretation, the purpose of the New Law is not to circumscribe homosexual behavior per se, but rather to restrict a vocal minority from actively opposing the government. Thus, the New Law may not be ipso facto anti-homosexual.

Furthermore, while it may be accurate to associate homosexuals in Russia with opposition to the current government, and the New Law's reemergence as a reaction to recent protests, an alternative explanation nevertheless may be permissible: due to the increasing popularity of similar laws in the regions, perhaps the New Law was enacted not to quash the nascent opposition, but rather to assuage discernible discontent among the majority of the population.[45] That is, the New Law may be a manifestation of populism, and not purely an instrument of latent anti-homosexual hate.

Still, others believe that the sudden about-face in the federal

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[43] *See* Alekseyev v. Russia, App. No. 4916/07, 25924/08, 14599/09, Eur. Ct. H.R. (2011), http://hudoc.echr.coe.int/eng?i=001-101257. While an entirely different but equally important topic from the primary subject discussed in the present Note, there is a long history of homosexuals conducting a very public campaign for equal rights in Russia, including the constitutional right to assemble. *See id.* This right regularly has been abrogated – applications for gay pride parades have been denied across the country consistently. Recent developments have seen the first officially sanctioned gay pride parade held in St. Petersburg in 2014. *See First Peaceful Gay Pride Parade Held in St. Petersburg*, MOSCOW TIMES (July 27, 2014), http://www.themoscowtimes.com/news/article/first-peaceful-gay-pride-parade-held-in-st-petersburg/504124.html.

[44] LICENSE, *supra* note 1 ("A legal opinion issued in June 2013 by the Venice Commission, the Council of Europe's advisory panel on constitutional matters, concluded that the draft of the adopted federal anti-LGBT law was 'incompatible with [the European Convention on Human Rights] and international human rights standards' and should be repealed. The opinion, which covered draft legislation under consideration in Russia, Ukraine, and Moldova, found that the purpose of such laws 'is not so much to advance and promote traditional values and attitudes toward family and sexuality but rather to curtail nontraditional ones by punishing their expression and promotion.'").

[45] *See* Press Release, Russ. Pub. Op. Research Ctr., Law Banning Gay Propaganda: Pro et Contra (June 11, 2013), http://www.wciom.com/index.

government[46] is due neither to a fear factor nor populism but rather is one more manifestation of the government's anti-Western rhetoric: homosexual tolerance is a decadent Western value promulgated by decaying societies that must be curtailed.[47] Regardless of the precise catalyst or its exact origins, the New Law remains controversial—not simply because its enactment correlates directly with a precipitous increase in pugnacious attacks and humiliating abuse both by ordinary individuals and government officials against practicing homosexuals et al., but because its legal legitimacy is singularly circumspect under international law.[48]

II. THE EXCLUSIVITY ARGUMENT: THE NEW LAW VIOLATES THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In a recent article, two expert authors have argued that the New Law is a clear violation of the European Convention on Human Rights (the "European Convention")—to which the Russian Federation is a signatory,

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[46] *See* Kirichenko, *supra* note 28, at 20. Compare the Constitutional Court of Russia's stance in *supra* note 28 with Chairman of the Constitutional Court of Russia, Judge Valery Zorkin's recent comments 2013: "In a speech devoted to 20 years of the Russian Constitution, Judge Zorkin condemned Russia's obligations of so-called 'limitless tolerance' as 'tolerance of any vicious sexual or gender practices.' He also defined as dangerous for the social and cultural identity of Russia attempts to forcibly impose (i.e. by means of propaganda and regulations) psychological and legal innovations that are unacceptable to Russian society, which is still deeply traditional. In Judge Zorkin's view, there is a rising conflict between the moral norms deeply rooted in society and the 'tendency of changes in the Russian reality which are propagated and observed,' and which, he states, threaten Russia's 'relative stability,' 'sociality' and 'statehood.'" Issaeva & Kiskachi, *supra* note 10, at 93–94.

[47] Miriam Elder, *Why Russia Turned Against the Gays: Vladimir Putin's New Campaign for National and Political Survival*, BUZZFEEDNEWS (Aug. 1, 2013), http://www.buzzfeed.com/miriamelder/why-russia-turned-against-the-gays#.fuGA94wdr. Further, the initial decriminalization of homosexuality in the Soviet Union under a relatively liberal regime after the Russian Revolution, and its recriminalization under a reactionary and increasingly dictatorial Stalin sixteen years later may in fact parallel contemporary Russian history. Likewise, the reasons set forth by the Stalin government for recriminalization surprisingly mirror the current Russian administration's anti-Western sentiment: "In capitalist society homosexuality is a widely spread phenomenon. . . . In Soviet society, with its healthy moral climate, homosexuality is considered a shameful and criminal perversion . . . In bourgeois countries where homosexuality is a symptom of the moral dissolution of the ruling classes, it is in practice not punishable." Jong, *supra* note 7, at 343; Dan Healey, *A Russian History of Homophobia*, MOSCOW TIMES (Mar. 30, 2012), http://www.themoscowtimes.com/opinion/article/a-russian-history-of-homophobia/455804.html. It is important to point out, however, that the Russian Federation has not recriminalized homosexuality via enacting the New Law. LICENSE, *supra* note 1 (clarifying that only homosexual propaganda, but not just being homosexual, is an administrative violation and will result in a fine).

[48] LICENSE, *supra* note 1; Issaeva & Kiskachi, *supra* note 10, at 96.

and therefore obligated.[49] It is beyond the scope of the present Note to untie the Gordian Knot that perplexes many concerning the jurisdictional boundaries that circumscribe the European Convention;[50] and eschews the "margin of appreciation" enigma entirely.[51] The Note presumes, as do the authors, that Russian law is subject to review by the European Court of Human Rights (the "European Court"), which has the primary authority to interpret the European Convention.[52]

The authors' main thrust is that the New Law violates the European Convention in two specific areas: Article 10 (Freedom of Expression) and Article 14 (Prohibition of Discrimination)[53]—both protected human rights under the European Convention.[54] However, the authors cite European Court case law for concluding that the two distinct protections should be conflated: "Importantly, the ban of propaganda of homosexuality would ordinarily be considered by the [European Court] and the [United Nations Human Rights Committee] under freedom of expression provisions in

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[49] *See generally* Issaeva & Kiskachi, *supra* note 10, at 96–99.

[50] *See* Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under the European Convention*, 20 EUR. J. INT'L L. 1223, 1226 (2009) ("Whether Article 1 of the European Convention extends to the extraterritorial acts of signatory states and therefore enables affected individuals to challenge their actions before the European Court has been a long-standing subject of debate in the Court's jurisprudence. It has become increasingly contentious of late, as the Court has decided a number of major cases on the subject. Rather than clarifying the meaning of Article 1, however, these cases have instead compounded the incoherence of the Court's jurisprudence.").

[51] *See* Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, COUNCIL OF EUR. 5, 5–6 (2000), http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17%282000%29.pdf.

[52] *See* European Convention on Human Rights, arts. 19, 32, Nov. 4, 1950, 213 U.N.T.S 221 [hereinafter ECHR].

[53] *Id.* arts. 10, 14; Issaeva & Kiskachi, *supra* note 10, at 96.

[54] ECHR, *supra* note 52, arts. 10, 14.

ARTICLE 10—Freedom of Expression: 1. "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." 2. "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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." *Id.* at 230.

ARTICLE 14—Prohibition of Discrimination: "The enjoyment of [the] rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.* at 232.

conjunction with articles prohibiting discrimination." The authors' understanding is informed by the belief that a restriction on the expression of homosexuality is intrinsically a form of discrimination against homosexuals.[55] Unless sanctioned by a corresponding exception, the authors' assert that the European Court is bound to rule the New Law a de facto violation of two universal human rights because it seeks to limit not speech alone but also the equal treatment of homosexuals in society.[56]

As evidence, the authors rely not on a European Court case but a decision by the United Nations Human Rights Committee (the "UN Committee").[57] In *Fedotova v. Russian Federation*, the UN Committee ruled the original anti-propaganda law, the regional Ryazan law, was a violation of Article 19 (Freedom of Expression) and Article 26 (Equality before the Law) of the International Covenant on Civil and Political Rights.[58] The UN Committee concluded,

> In the present case, the Committee observes that . . . 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. . . . [T]he

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[55] Issaeva & Kiskachi, *supra* note 10, at 97.

[56] *Id.* at 97–98.

[57] *Id.* at 88–89. "On 30 March 2009, the author displayed posters that declared 'Homosexuality is normal' and 'I am proud of my homosexuality' 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. 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." Human Rights Comm., Views adopted by the Comm. at its 106th session, at 3, U.N. Doc. CCPR/C/106/D/1932/2010, (Nov. 19, 2012), http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.106.D.1932.2010.doc [hereinafter *Fedotova*].

[58] *Fedotova*, *supra* note 57, at 2, 14–16; ICCPR, *supra* note 25, arts. 19, 26.

ARTICLE 19—1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals. *Id.* art. 19.

ARTICLE 26—All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Id.* art. 26.

> Committee recalls that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. . . . 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.[59]

The authors have taken the facts of the *Fedotova* decision handed-down by the UN Committee and superimposed them upon the European Court as it pertains to the New Law—similar laws, similar agreements, similar articles, similar courts, and therefore, a similar result. What is relevant is that to date there are no similar facts, which easily can turn a case. Though there are conspicuous similarities, and the European Court may very well agree with the authors' strong analogical reasoning,[60] the pertinent exceptions that exist in the European Convention may extend to the New Law, and cannot be ignored pell-mell.[61] It is important to mention that though the two agreements and their applicable articles are

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[59] *Fedotova*, *supra* note 57, at 15–16.

[60] Issaeva & Kiskachi, *supra* note 10, at 99 ("The [UN Committee] has adopted a very similar position. In the case of *Fedotova v. Russia*, the Committee found a violation of freedom of expression provisions under the ICCPR when read in connection with Art. 26 thereof prohibiting discrimination. While the protection of morals is a legitimate aim to pursue in seeking to limit freedom of expression under both the [European Convention] and the ICCPR, the [European Court] normally regards only obscene expressions as contradicting public morals, and the [UN Committee] evinces support for this inclination.").

[61] Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*, COUNCIL OF EUR. 5, 25–26 (1997), http://www.echr.coe.int/Library Docs/DG2/HRFILES/DG2-EN-HRFILES-15%281997%29.pdf ("Despite the emphasis placed upon the importance of freedom of expression in a democratic society, the *Handyside* and *Müller* cases indicate the reluctance of the Court to interfere with restrictions based upon the protection of morality, particularly where sexual matters are concerned. The appropriateness of a wide margin of appreciation may be easier to justify here than with respect to other forms of expression. Risks to the democratic nature of any society are undeniably posed by restrictions upon the expression of views about, for example, the economy and government, with the result that there is a clear need for a common European standard. But although sexual matters are fundamental to human well-being and, as such, all democratic societies must permit them to be discussed publicly, it is not so clear that any given society is less democratic than others because it places more restrictions upon, for example, the artistic expression of certain forms of sexuality. There may, in other words, be more room for different national standards here than in other areas. What matters most is the degree of consensus or lack of it within a given state about the issue in question, the importance which ought to be attached to particular forms of sexual expression, how 'pressing' the social need is and how proportionate the restriction or penalty is to the activity to which it has been applied.").

strikingly consistent, and form a solid basis of guaranteed protections, there remain substantive differences.[62]

Presuming the New Law is prima facie invalid under the European Convention, the authors then move to make a careful analysis of the European Court's three-criteria test to ascertain whether the New Law may be exempt.[63] In order for freedom of expression to be restricted, and by default to possess the ability to discriminate against a suspect class apparently, a restriction must be (1) "provided by law"; (2) "pursue a legitimate aim"; and (3) "be proportionate and necessary for [the]

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[62] Cenap Cakmak, *Shortcomings in ECHR and Other Council of Europe Legal Documents on Human Rights*, 2 REV. INT'L L. & POL. 117, 120 (2006) ("Therefore, while 'the substantive protections guaranteed by the two treaties is broadly similar . . . the International Covenant is arguably more extensive in a number of respects, thereby providing greater scope for the individual petitioner.' As noted earlier, the European Convention on Human Rights does not protect certain rights, while those rights are protected as well as defined more broadly and expressly in the International Covenant. Among these, the right to freedom from discrimination, which is referred to throughout the Covenant, but lowered, to a secondary status under the Convention, is of significance. The superiority of the International Covenant over the European Convention is not limited to its larger scope of rights than that of the latter. Although both documents recognize certain limitations on the enjoyment of rights, the International Covenant permits narrower state discretion in imposing limits. For example, 'the privacy guaranteed under Article 8 of the European Convention expressly permits states to limit the right to privacy, whereas the parallel privacy guarantee under Article 17 of the International Covenant does not'. Likewise, while both documents recognize that the right to freedom of expression may be restricted in certain cases, the grounds upon which a state may restrict this right are more limited under the International Covenant. Similarly, both documents contain provisions allowing the use of the doctrine of margin of appreciation by States Parties. However, this discretion is expressly acknowledged in the jurisprudence of the Convention system, whereas the margin of appreciation doctrine has a much narrower scope under the International Covenant.").

Further, a rigorous comparison of *Toonen v. Australia* and *Dudgeon v. the United Kingdom* highlights the significant distinctions in each court's approach. While both landmark court decisions struck down anti-sodomy laws for the first time in the history of human rights activism, the UN Committee based its decision on the anti-discrimination provisions of Article 26 of the International Covenant on Civil and Political Rights, but the European Court noticeably based its decision on the right to privacy provisions of Article 8 of the European Covenant: the Court voted 14 to 5 against also examining the case under Article 14 taken in conjunction with Article 8, which would otherwise have meant considering the aspect of discrimination. It stated that, "once it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 . . . by reason of its breadth and absolute character . . . there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons." Dudgeon v. United Kingdom, App. No. 7525/76, Eur. Ct. H.R. ¶ 66–67, 69 (1981), http://hudoc.echr.coe.int/eng?i=001-57473; Human Rights Comm., Selected Decisions of the Human Rights Comm. Under the Optional Protocol (Volume 5, Forty-Seventh to Fifty-Fifth Sessions), at 133–34, 139–40, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

[63] Issaeva & Kiskachi, *supra* note 10, at 97.

achievement of that aim."[64]

The authors distinguish two prongs for the first criterion: is the law sufficiently clear and unambiguous, and is it foreseeable?[65] That is, in order for a restriction to be provided by law, it must not be "expansively defined," or a "blanket provision," and it must "enable a person to determine (if need be with professional advice), 'to a degree that is reasonable in the circumstances, the consequences which a given action may entail,' and to regulate his or her conduct accordingly."[66] The authors argue that the "provided by law" restriction does not apply to the New Law because the meaning of propaganda and minors remains legislatively unclear.[67] Furthermore, the New Law does not meet the foreseeability prong because there is a "risk of abuse by the executive," and it "permits the assumption that one of its immediate effects will be to censor any medium of expression, including books, movies or exhibitions."[68]

While correct that the undefined terms in the New Law are hopelessly deficient, the authors admit, "the [European Court] has noted that, although a degree of vagueness will always be present in any law, 'legal discretion granted to the executive' should not be expressed 'in terms of unfettered power.'"[69] Others have opined that the New Law, while unjustifiably ambiguous, has not unleashed the authorities' unchecked policing power:

> Russia's vaguely worded law, approved by Vladimir Putin last summer, bans the promotion of homosexuality to minors. It is an unnecessary, clumsy piece of legislation . . . . It has also triggered a spike in homophobic violence . . . . But while western opponents of the Kremlin's law may have noble intentions, their criticism has far too often been both hysterical and hypocritical . . . . [A] sense of perspective is in order, especially if critics want to claim the moral high ground . . . . The new legislation is certainly not, as US-based gay rights activists have claimed, "one of the most draconian anti-gay laws on the planet." Amid the furore, it's easy to overlook some simple facts . . . . To date, over six months since the law came into force, fewer than a dozen people have been fined for "gay propaganda." Not a single person has been jailed. Russian police do not have powers to detain people they suspect

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64 *Id.*

65 *Id.* at 97–98.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* at 98.

of simply being gay or lesbian.[70]

To wit, the authors may be comingling unnecessarily the frighteningly hostile effects of the New Law and/or the public's misperception of its purpose with the right of the Russian Federation to provide by law a permissible restriction on freedom of expression under the European Convention. Indeed, the appropriate accusation against the executive is not that it has been active, but very much passive—tolerating deplorable activities, but not manufacturing them.[71]

The authors combine the second and third criteria into one standard prescription: a "pressing social need" that allows the authorities to interfere due to a "relevant and sufficient reason."[72] An example of a sufficient reason has been characterized as the "European Consensus," whereby "common ground exists between member states on a given matter," and "similar regulation is adopted by other member states."[73] While the authors argue that the New Law's purported aim—the protection of morals—is a warranted exception under Article 10 of the European Convention,[74] and therefore would permit a restriction, such exception does not apply to the New Law because "the [European Court] normally regards only obscene expressions as contradicting public morals."[75] That is, because the New Law's primary purpose is not to restrict obscene expression, the protection of morals exception does not apply.

Furthermore, the authors assert that, "The [European Court]'s case law, as derived from *Dudgeon v. UK*, firmly rejects the notion that an 'erosion of existing moral standards' could serve as sufficient justification for an interference with the right to privacy under Art[icle] 8."[76] The connection the authors craft may be very much correct; however, the protection of morals exception discussed above was tested not against Article 8, but rather against the right to freedom of expression found in

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[70] Marc Bennetts, *Russia's Anti-Gay Law Is Wrong – But so is Some of the Criticism from the West*, GUARDIAN (Feb. 5, 2014), http://www.theguardian.com/commentisfree/2014/feb/05/russia-anti-gay-law-criticism-playing-into-putin-hands.

[71] Courtney Weaver, *Russia Gay Propaganda Law Fuels Homophobic Attacks*, FIN. TIMES (Aug. 16, 2013), http://www.ft.com/intl/cms/s/0/71eaa49e-0580-11e3-8ed5-00144feab7de.html#axzz3zRI9J2H6.

[72] Issaeva & Kiskachi, *supra* note 10, at 99.

[73] *Id.*

[74] *Id.* at 98.

[75] *Id.* at 99.

[76] *Id.* at 100 (citing Dudgeon v. United Kingdom, App. No. 7525/76, Eur. Ct. H.R. ¶ 14 (1981), http://www. http://hudoc.echr.coe.int/).

Article 10.[77] The "pressing social need" that allows the authorities to interfere due to a "relevant and sufficient reason" must be analyzed in accordance with Article 10 and not Article 8, as freedom of expression and non-discrimination are the primary thrust of the authors' argument.[78] The right to privacy is never substantially weighed as the topic is arguably inapplicable since the Russian Federation has not recriminalized homosexuality.[79]

To properly assess the applicability of the protection of morals exception in Article 10 to the dictates of the New Law, and therefore by extension satisfy the three-criteria test for permissible restrictions that the European Court employs, three important additional European Court cases must be apprehended: *Akdaş v. Turkey*;[80] *Mouvement Raëlien Suisse v. Switzerland*;[81] and *Murphy v. Ireland*.[82] That is, it may be disingenuous to claim that pursuant to the protection of morals exception in Article 10, the European Court exclusively will permit a restriction on freedom of expression only where such expression is considered "obscene"[83] and "contradicting public morals."[84]

A. Akdaş v. Turkey

While the European Court ruled in *Akdaş* that the plaintiff's right to freedom of expression had been violated, and that the Turkish government had no valid protection of morals exception under Article 10,

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[77] ECHR, *supra* note 52, arts. 8(2), 10(2). The Sub-section 2 provisions containing the protection of morals exceptions in both Articles 8 and 10 are quite different.

ARTICLE 8(2)—"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Id.*

ARTICLE 10(2)—"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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." *Id.*

[78] Issaeva & Kiskachi, *supra* note 10, at 99, 103.

[79] LICENSE, *supra* note 1 (clarifying that only homosexual propaganda, but not the trait of homosexuality, is an administrative violation and will result in a fine).

[80] Akdaş v. Turkey, App. No. 41056/04, Eur. Ct. H.R. (2010), http://www.hudoc.echr.coe.int/.

[81] Mouvement Raëlien Suisse v. Switzerland, 2012-IV Eur. Ct. H.R. 373.

[82] Murphy v. Ireland, 2003-IX Eur. Ct. H.R. 1.

[83] *Contra* Issaeva & Kiskachi, *supra* note 10, at 99.

[84] *Id*.

the European Court nevertheless established a new principle by which to examine the validity of a state's claim to restrict the freedom of expression: the national authorities' better position.[85]

> It was not disputed that there had been an interference, that the interference had been prescribed by law and that it had pursued a legitimate aim, namely the protection of morals. The Court further reiterated that those who promoted artistic works also had "duties and responsibilities", the scope of which depended on the situation and the means used. The requirements of morals varied from time to time and from place to place, even within the same State. The national authorities were therefore in a better position than the international judge to give an opinion on the exact content of those requirements, as well as on the "necessity" of a "restriction" intended to satisfy them.[86]

B. Mouvement Raëlien Suisse v. Switzerland

Conversely, in *Mouvement*, the European Court accepted Switzerland's restriction on the plaintiff's freedom of expression due to a protection of morals exception under Article 10; and significantly, (1) the decision took into account the safety of minors, and (2) the European Court did not apply the exception because the expression was factually obscene, but because it concerned sexual activities and minors.[87]

> The Court finds that the domestic authorities' accusations against certain members of the applicant association, as regards their sexual activities with minors, are of particular concern. Admittedly, it is not within the Court's remit, in principle, to review the facts established by the domestic bodies or the proper application of domestic law; therefore, it is not called upon to ascertain whether the authorities' accusations are proven. However, the Court is of the opinion that, having regard to the circumstances of the present case, the authorities had sufficient reason to find it necessary to deny the authorisation requested by the applicant association.[88]

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[85] Press Release, Registrar, Eur. Ct. H.R., Seizure of the Novel *Les Onze Mille Verges* by Guillaume Apollinaire and Conviction of the Publisher Hindered Public Access to a Work Belonging to the European Literary Heritage (Feb. 2, 2010), http://hudoc.echr.coe.int/eng#{"itemid":["003-3030159-3344927"]}.

[86] *Id*.

[87] Mouvement Raëlien Suisse v. Switzerland, 2012-IV Eur. Ct. H.R. 373, 393, 396, 402.

[88] *Id*. at 402 (quoting Mouvement Raëlien Suisse v. Switzerland, App. No. 16354/06, Eur. Ct. H.R. ¶ 56 (2011), http://www.hudoc.echr.coe.int/).

C. Murphy v. Ireland

Likewise, in *Murphy*, the European Court held that Ireland had not violated the plaintiff's freedom of expression, and permitted a protection of morals exception under Article 10.[89] Again, the European Court inserted the exception not because the expression was found to be obscene, but because there was a compelling need "to protect from such material those whose deepest feelings and convictions would be seriously offended"; and that "country-specific religious sensitivities" can be taken into consideration when certain expressions "might have been potentially offensive to the public."[90]

> In such circumstances, particular deference had to be paid to the domestic authorities' assessment in that they were uniquely positioned to identify and assess the strength of the relevant vital forces within Irish society which dictated the correct balance between the competing interests involved . . . . [The] Act concerned subjects which had proved "extremely divisive in Irish society in the past" and it also agreed that the government had been entitled to take the view that Irish citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements could lead to unrest.[91]

The authors' argument that the New Law will inescapably fail if tested before the European Court is perhaps premature. The authors underestimate the significant distinctions between the International Covenant on Civil and Political Rights and the European Convention per their respective articles on freedom of expression and non-discrimination, which possibly would render any *Fedotova* analogy inapplicable at the European Court.[92] Furthermore, the authors' use of the European Court's three-criteria test to determine whether a freedom of expression restriction is permissible under an Article 10 protection of morals exception is not fully developed. While the authors are correct to insist that the New Law's definition of homosexual propaganda must be made more clear and unambiguous, they are perhaps wrong to assume that due to such deficit the New Law is fatally flawed.[93] Finally, the authors equate

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[89] Murphy v. Ireland, 2003-IX Eur. Ct. H.R. 1, 31.

[90] *Id.* at 27–29.

[91] *Id.* at 19, 29 (quoting Murphy v. Indep. Radio & Television Comm'n [1999] 1 IR 12, 22 (Ir.).

[92] *See generally Murphy*, 2003-IX Eur. Ct. H.R. 1; ICCPR, *supra* note 25; ECHR, *supra* note 52, arts. 10, 14; *Fedotova, supra* note 57.

[93] *See* Issaeva & Kiskachi, *supra* note 10, at 97 (discussing the "three-criteria" test); ECHR, *supra* note 52, art. 10(2).

the principle of "pressing social need" exclusively with the idea of preventing obscenity.[94] A more comprehensive understanding of the relevant case law broadens the principle to include first proffering deference to local authorities, and also protecting minors and acknowledging a member country's unique social history.

III. THE CONTEXTUAL ARGUMENT: THE NEW LAW AS CULTURAL EXCEPTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A trend has emerged wherein the European Court is criticized for its juridical overreach.[95] The trend certainly is not delimited to Russia, [96] and the accusation of judicial activism echoes across the Atlantic.[97] However, it is undeniable that the Russian Federation for a number of years has had the largest number of applicants to the European Court.[98] Several scholars have elected to follow a normative approach—examining human rights in context, and thereby clarifying what in fact Russia's relationship to the European Court should be.[99] These scholars seek to bridge the widening gap between the European Court's emerging judicial philosophy and the Russian Federation's distinct cultural heritage.[100] If the scholars

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[94] Murphy, 2003-IX Eur. Ct. H.R at 22–23.

[95] Luzius Wildhaber, *Criticism and Case-overload: Comments on the Future of the European Court of Human Rights*, *in* TURNING CRITICISM INTO STRENGTH 9, 10 (Spyridon Flogaitis et al. eds., 2013) ("Criticism against the Convention system and the Strasbourg Court has been expressed *inter alia* with respect to the perception of exaggerated judicial activism, neglect of the system's subsidiary principle and the perception of an underlying human rights-centralism, which, it is alleged, is not necessary in a democratic society. . . . The Court has been blamed for constantly expanding the notion of human rights, beyond the ideas of the founders and beyond the will of present day democratic institutions.").

[96] *See*, *e.g.,* Owen Bowcott, Senior Judge, *European Court of Human Rights Undermining the Democratic Process*, THE GUARDIAN (Nov. 28, 2013), http://www.theguardian.com/law/2013/nov/28/european-court-of-human-rights.

[97] *See generally Judicial Activism,* THE HERITAGE FOUND., http://www.heritage.org/initiatives/rule-of-law/judicial-activism (reporting instances of judicial activism in the Unites States).

[98] "The importance of the [European Court] to Russian citizens has since continued to grow: to wit, Russia is Europe's leader in complaints filed against a member state. Specifically, as of October 31, 2010, Russia was responsible for 40,050 out of 141,450 pending applications (28.3 percent). In 2007, out of the 79,427 petitions pending before the ECHR decision body, 20,296 (26 percent) were complaints against Russia. And in 2006, some 20 percent of all applications pending before the Court were against Russia (as compared with 12 percent and 10 percent against the next states in line—Romania and Turkey, respectively). Russia was also the absolute leader in 2003, 2004, and 2005." Julia Lapitskaya, *ECHR, Russia, and Chechnya: Two Is Not Company and Three Is Definitely a Crowd*, 43 N.Y.U. J. INT'L L. & POL. 479, 486–87 (2011).

[99] Preclik, *supra* note 21, at 176–77; Antonov, *supra* note 22, at 3; Kiviorg, *supra* note 23, at 315.

[100] *See generally supra* note 99.

are correct, the European Convention is inclusive of national culture as an essential element in judicial rule-making; and if properly placed in context, the European Convention should, therefore, temper the European Court's recent tendencies to ignore member state's social particularities.[101] Furthermore, the New Law may fall within this cultural exception.

A. National Identity

In his article entitled, "Culture Re-introduced: Contestation of Human Rights in Contemporary Russia," Petr Preclik argues strongly for disjoining the discussion of human rights from its normally accepted but staid universalist milieu—civil society and international organizations—and affixing it to something much more transient and personal—individual states and national self-image.[102]

> Why should human rights, the most recent claimant of universal good, concern itself with such an ever changing, unstable and evanescent phenomenon as culture? The aim of rights is to emancipate individuals from state power, to protect them against perceived threats, and allow them undisturbed development. Unfortunately, this approach too often falls into the trap of endless universalism as it supposes that people around the globe demand the same rights and that only stubborn governments are depriving them of these, so that cultural differences are disregarded.[103]

That is, he begins with the premise not of human rights, but national identity as the foundation of social order and fundamental law: "National identity unites the nation around a system of shared meanings and notions and divides one nation from another by nurturing ideas of distinctiveness, uniqueness, specialness or mere divergence."[104]

Furthermore, he argues that both human rights and national identity distinctions are equal variables for determining the "general good,"[105] and therefore, "Russian efforts to claim a specific—sometimes even unique—notion of human rights cannot be discarded so easily."[106] Ultimately, he contends that the notion of human rights itself is imbued with dominant if not dormant national cultural values: "In other words, human rights are not somewhere 'out there' waiting to be discovered and directly applied

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[101] *Id.*; *see also supra* note 52, arts. 10, 14, 19, 32.

[102] Preclik, *supra* note 21, at 179.

[103] *Id.* at 185.

[104] *Id.* at 186.

[105] *Id.* at 187.

[106] *Id.*

from point zero'. . . . In this sense, human rights cannot be detached from national identity."[107]

As human rights carry a certain degree of inherent cultural baggage, and national identity or values structure the foundation of cultural meaning,[108] the author holds that Russians are justifiably apprehensive about importing a foreign "secular liberal" concept of human rights: "Doubts are consequently raised whether the 'secular liberal' concept of human rights can be accepted as universal 'without an appropriate correction' for Russian conditions."[109] The author identifies three Russian cultural characteristics that may be incompatible with the prevailing secular liberal concept: Russia's fear of cultural hegemony and/or globalization of values; [110] Russia's traditional communalization or collectivism; [111] and Russia's non-Western moral precepts. [112] Thus, he establishes that human rights devoid of national identity concerns are not only dishonest, but culturally destructive; [113] and therefore, national identity must be a part of the contextual lens through which human rights are systematically perceived.[114]

B. National Sovereignty

In his article entitled, "Conservatism in Russia and Sovereignty in Human Rights," Mikhail Antonov begins by evaluating Russian constitutional law as it pertains to Russia's international obligations, and makes an interesting observation:

> The correlation between state law and international law seems to be clearly stated in Article 15 of the 1993 RF Constitution: "The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates rules other than those stipulated by Russian law, the rules of the international treaty shall apply". . . . The question thus arises: if international principles and norms form component parts of the Russian legal

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[107] *Id*. at 194.

[108] *Id*. at 179.

[109] *Id*. at 204 (quoting Marsha Lipman, *Fear of the West in Russia*, WASH. POST (May 2, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/01/AR2006050101273.html).

[110] *Id*. at 221.

[111] *Id*. at 219–20.

[112] *Id*. at 223.

[113] *Id*. at 224.

[114] *Id*. at 225–26.

> system, what place do they occupy in the normative hierarchy of Russia's legal order?[115]

In an attempt to determine priority, he cites a 2013 Supreme Court of Russia decision, which instituted an original legal doctrine: instrument for enhancement.[116]

The instrument for enhancement doctrine asserts that European Court jurisprudence "is characterized as being subsidiary to the provisions of domestic Russian legislation and international treaties."[117] That is, the place European Court jurisprudence occupies in the hierarchy of Russia's legal order is decidedly second-tier; and should only be deployed to assist with interpreting legal disputes, but is never dispositive if in conflict with Russian law. According to Antonov, the clear rationale for this doctrine is national sovereignty:

> From the perspective of contemporary Russian legal doctrine, it implies that only the sovereign people can adopt legal rules—immediately, via a referendum, or through the intermediary of an elected parliament. If foreign actors (including organizations of the international community such as the [European Court]) were to impose binding legal rules from the outside (or otherwise undermine the validity of Russian legislation), it would be regarded by this doctrine as an unlawful encroachment on the sovereign rights of the people.[118]

Furthermore, he affirms that Russian national sovereignty remains the preeminent barometer in the adjudication of human rights in the Russian Federation because (1) Russian society imagines positive rights differently than others;[119] (2) Russian society demurs the individual and emphasizes group communitarianism;[120] (3) Russian society fears the West;[121] and (4) Russian society is associated with traditional values.[122] That is, in light of overriding national sovereignty interests, the context of Russian substantive law circumscribes the application of international human rights law in the Russian Federation.

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[115] Antonov, *supra* note 22, at 7 (quoting KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15 (Russ.)).

[116] *Id.* at 11.

[117] *Id.*

[118] *Id.* at 12–13.

[119] *Id.* at 23.

[120] *Id.* at 24–25.

[121] *Id.* at 36.

[122] *Id.* at 38.

C. National Autonomy

Admittedly, Merilin Kivoirg's highly relevant article, "Collective Religious Autonomy Versus Individual Rights for the ECtHR," does not address the specific rights examined in this Note, namely freedom of expression and non-discrimination; however, the article by analogy incorporates many of the same concepts that define a contextual approach to discerning apposite human rights.[123] Briefly, he argues a particular right guaranteed under the European Convention, freedom of religion, is under threat:

> [T]here is a theoretical chaos in the jurisprudence of the Court which is evident in the Court's inconsistent case law and theoretical reasoning in cases dealing with individual or collective freedom of religion or belief. Principles developed by the Court itself have been made to clash, instead of constructing a framework robust enough to guide the interpretation of freedom of religion or belief in Europe. The impression is that the Court is not sure itself what its role is as regards the protection of freedom of religion or belief. This lack of clarity has led to controversial cases which have restricted either individual or collective freedom of religion or belief.[124]

Stated more succinctly, the author surmises that:

> The increased attention and pressure of a part of the human-rights 'community' to protect human rights and liberal values within religious communities presents a significant challenge to collective religious autonomy. . . . This may incline the Court to provide greater protection to 'dissenters' and ignore the rights of those who follow their communities' 'conservative' beliefs.[125]

As an alternative, he advances an autonomy-based method for balancing competing group versus individual rights: (1) the reasonableness of the demands of the community; and (2) the centrality of beliefs to a community.[126] That is, where an autonomous group's beliefs are both reasonable and central to a community, conflicting individual rights must not supersede mutually agreed upon communal practices.[127] Furthermore, he concludes, "It needs to be noted that not only individuals

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[123] *See generally* Kiviorg, *supra* note 23.

[124] *Id*. at 319–20.

[125] *Id*. at 321–22.

[126] *Id*. at 330.

[127] *See*, *e.g.*, Schuth v. Germany, 2010-V Eur. Ct. H.R. 397, 420–21, 423–24. The author convincingly illustrates the dangers to a religious community's self-governance if such an approach is not applied. Kiviorg, *supra* note 23, at 341.

but, also, groups and religious organizations are protected (have rights) under today's human-rights law, including the [European Convention]."[128] The autonomy-based method may present a similar defeasible argument in like circumstances where other rights are involved (e.g., freedom of expression).

The contextual-culture meme is evident is each of the three articles: human rights should not be exclusive to objective socio-culture benchmarks. It can be presupposed that all three articles identify essentially the same three reasons for why this is particularly true for Russia: (1) priority of tradition; (2) priority of the community as against the individual; (3) priority to the nation as against foreign influences.[129] That is, whether for national identity, sovereignty or autonomy reasons, the European Court should consider national culture in equal proportion to other legitimate legal concerns when concluding a decision. Were the European Court to pay serious attention to this exception, the New Law may survive a challenge on the grounds that it is a violation of freedom of expression or non-discrimination under the European Convention.

IV. THE NEW LAW AS RUSSIAN CUSTOMARY LAW UNDER INTERNATIONAL AGREEMENTS

One prominent Russian legal anthropologist has described the study of customary law as investigating "the right of the other to be different."[130] Likewise, a seminal and lengthy report recently compiled in 2013 examining perceptions of law by Russian immigrants indicated that research appertaining to traditional legal practices entails by default ethical debates about the "difference between what is legally right and what we consider really right or just." [131] This forms an important foundation for a later discussion dissecting a canonical difference in the Russian understanding of truth and law:

> Ethnographic data testifies that there is an enduring and rigid opposition of law and justice in Russian traditional culture, and the notion of justice is superior to the notion of law. In Church Slavonic and in early Russian the notions of *pravda* (truth) and *zakon* (law) were closely linked semantically. Gradually,

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[128] Kiviorg, *supra* note 23, at 324–25.

[129] *See supra* Part III(A)–(C).

[130] N.I. NOVNKOVA, SOTSIOKUL'TURNAIA ANTROLOGIIA, ISTORIAE, TEORIIA I METODOLOGIIA: ENTSIKLOPEDICHESKII SLOVAR', POD RED. IU. M. REZNIKA 579–85 (2012).

[131] LARISA FIALKOVA & MARIA YELENEVSKAYA, IN SEARCH OF SELF: RECONCILING THE PAST AND PRESENT IN IMMIGRANTS' EXPERIENCE (2013), *in* 12 COLLECTION SATOR 84– 85 (The notion of the "other" is defined in this text as "'external legal culture' representing the opinions and pressures of the lay public and brought to bear by various social groups).

> however, this connection disappeared. *Pravda* acquired religious connotations and came to be perceived as earthly reflections of heavenly truth. *Zakon* lost associations with *pravda* but remained ideological and acquired negative connotations that were reinforced by social practices.[132]

The report further emphasizes that "'justice' and 'fairness' is one of the most important values in Russian culture and is reflected in the lexis. Notably 'law' and 'legality' are often juxtaposed with 'justice' and 'what is moral and fair.' Unlike formal legality . . . justice appeals to the inner sense."[133] This distinction had practical consequences:

> At the same time the realization of the discrepancy between official legislation and the needs of peasant life, as well as great importance of custom in peasant court procedures contributed to the legalization of the latter. Custom was initially recognized as a real source of law in matters of succession in families (the 1861 Reform, Articles 21, 38 and 107), and subsequently the Law of July 12, 1889 established as obligatory the use of folk law in settling peasant cases in court.[134]

Furthermore, a concurrent perspective regarding specifically the separation between the Russian and Western loci of law acknowledges:

> While the legal system of imperial Russia was properly part of the civil law tradition, it did not have the same historical roots as the other European civil law countries. At a time when Western Europe was experiencing the revival of Roman law and some Western European countries such as Germany had formally received Roman civil law as binding law, Russia adhered to its local laws and customs.[135]

In fact, there exist modern examples of the pertinence of custom to current Russian legal practice:

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[132] *Id*. at 88.

[133] *Id*. (citation omitted).

[134] S.S. Kryukova, *Custom and Law in Marriage and Family Relations Among Russian Peasants During the Second Half of the Nineteenth Century*, 46 J.L. PLURALISM & UNOFFICIAL L.135, 137, 143 (2001) (further illustrating the divide between and/or amalgam of official "zakon" and customary "pravda": "Analysis of peasant legal practices in the sphere of family relations demonstrated simultaneous operation of both written and folk law. But custom regulated a wider variety of issues than official law. Interrelation of custom and law was both mixed and parallel. That is why the points of their crossing may be interpreted as elements of historically accepted norms").

[135] WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 3 (3d ed. 2004).

> There is at least one example in Russian law of what might be called "constitutional custom." In one case, the Constitutional Court relied on constitutional "traditions" (*traditsii*), which, according to the Court, established "a rule" (*norma*) that legislative bodies of the constituent units of the Russian Federation could be elected for any period of time, but not for longer than five years.[136]

Thus, it may be adduced that (1) customary law is decisive in forming the Russian legal consciousness; (2) customary law historically has played and continues to play a quintessential role in Russian legal behaviors; and (3) these factors make legal practices in Russia distinct from those promulgated in the West.

Three accepted parameters that demarcate the Russian customary law landscape are, therefore, an adherence to tradition,[137] a deference to public opinion (collective ministration),[138] and a preference for religious

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[136] *Id*. at 25.

[137] *See* Samuel Kucherov, *Indigenous and Foreign Influences on the Early Russian Legal Heritage*, 31 SLAVIC REV. 257, 275 (1972). "'[A]ccording to the feelings of the Muscovite people of the Muscovite state, the notion of what is right corresponds to what has been done in olden times'.…'Ancient Russians valued custom as a norm of divine origin, a Sacred rule'.…The whole life of the ancient principalities, private and state rights, was, therefore, regulated chiefly by custom." *Id*. at 267–68 (quoting VASILI IVANOVICH SERGEEVICH, LEKTSII PO ISTORII RUSSKAGO PRAVA 23 (1910); V.N. LATKIN, LEKTSII PO ISTORII RUSSKAGO PRAVA 6 (1912)).

[138] *See* Marjorie Mandelstam Balzer, *Introduction* to RUSSIAN TRADITIONAL CULTURE: RELIGION, GENDER AND CUSTOMARY LAW xiv (Marjorie Mandelstam Balzer ed., 1992) ("[O]ne still had to know what was considered proper, socially approved, communal and individual behavior. Peasants living in close-knit communities in Russia and Siberia, before and after the revolution, were fully aware of societal norms. Public opinion played a strong constraining role, even for folks in far-flung tough frontier villages of Siberia. . . . Tensions over what was 'proper' or 'normal' might wrack a village or a family, and could land them in rural courts."). *See also* M. M. Gromyko, *Traditional Norms of Behavior and Forms of Interaction of Nineteenth-century Russian Peasants*, *in* RUSSIAN TRADITIONAL CULTURE: RELIGION, GENDER, AND CUSTOMARY LAW, at 225 ("The solving of a number of problems at community meetings depended on the reputation of the peasant. The otherwise latent mechanism of public opinion appeared in blatant form during discussions of the misdeeds of community members at the meeting."). *See also* Kryukova, *supra* note 134 at 138 ("One of the main demands on a bride was her unblemished reputation: loss of virginity was a disgrace. In view of the important role of public opinion among peasants, it was necessary to provide certain protection for the victim. In some communities of Orel province a particular method was used to protect the honor of a girl. If a girl was slandered, the procedure of the so-called 'public inspection' took place. The community appointed three women to inspect the victim of the slander. The results of the inspection were announced at a meeting, after which the elder of the community ordered one of his associates to notify all households 'that the so-and-so girl was pure.' The person guilty of slander could be fined (the fine being from one to six rubles), or be sent to a district center for birching.").

precedents.[139] A Russian law that fit comfortably within this theoretical space could perhaps be considered a reflection of custom, or ancient legal practices. To wit, even modern legislation may ineluctably mirror

[139] *See* Ferdinand Feldbrugge, *Law in Medieval Russia*, *in* 59 LAW IN EASTERN EUROPE 83–85 (William Simons ed., 2009) ("According to the Primary Chronicle, in the entry for the years 994-996, the Kievan grand prince Vladimir had a church built in honour of the Mother of God and pronounced: 'I bestow upon this church of the Holy Virgin a tithe of my property and of my cities.' He then wrote out a donation and deposited it in the church, declaring: 'If anyone violates this promise, may he be accursed.' More than 200 copies of the Church Statute of Vladimir are extant, dating from the 14th to the 19th century, most of them included in *kormchie*, and it is generally assumed that it, or rather its oldest nucleus, is the deed referred to in the Chronicle. Through the ages numerous additions have been made, but a reconstruction of the most likely original text indicates two main points that probably constituted a very short text as the initial nucleus. The first is the bestowal of tithes upon the church in Kiev. This favour was soon extended to all churches. The second element which probably goes back to the time of Vladimir is the granting of exclusive jurisdiction to the church in certain matters concerning the family and morality in general (offences against sexual morality, church thefts, witchcraft, etc.). At a later stage, a third element may have been added: exclusive church jurisdiction in all matters over persons connected with the church. The second major text in this category is known as the Church Statute of Iaroslav. The majority of the more than 90 copies of this text form part of *kormchie*, other copies have been included in chronicles and other collections. The oldest copies are from the second quarter of the 15th century. The textual history of the Church Statute of Iaroslav is much more complicated than that of the Church Statute of Vladimir; at this point, it will be sufficient to summarize some of the findings of Shchapov, who carried out the most detailed study of the various church statutes. The bulk of the provisions of the Statute (which is much longer than that of Vladimir) are what we would regard as criminal law: definitions of offences and the appropriate penalties. It completes what was only indicated in a general way in Vladimir's Statute (certain types of offences being assigned to church jurisdiction) by defining these offences and setting the penalties. It complements the [*Russkaia Pravda*], which regulates the purely secular types of offences. Most penalties consist of fines forfeited to the church, but in a smaller number of cases the formula "and the prince shall punish" is added. According to Shchapov, the key to understanding the Statute of Iaroslav is the close connection between church and state. The prince assigned a very sizeable section of jurisdiction and the income to be derived from it to the church, which functioned in this context virtually as a department of the state.").

traditional customary law cum culture.[140] The New Law may be just such an example: if the New Law adheres to a traditional social value, and the New Law pays proverbial homage to a corporate, popular public opinion, and the New Law has a religious anchor, then the New Law is an expression of "cultural free speech" and/or an authentic product of indigenous Russian law.

Noticeably, cultural biases are a protected exception that permit the restriction of rights under several international agreements. Article 4 of the International Covenant of Economic, Social and Cultural Rights provides that a state may subject covenantal rights to restriction if permitted by state law, to promote the general welfare, and if such restriction is compatible with the covenant. [141] Article 5 clarifies compatibility—conspicuously making an exception for custom. [142] Furthermore, the International Covenant on Civil and Political Rights makes the same exception in Article 5.[143] Finally, although the Russian

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[140] *See* EDWARD W. YOUNKINS, CAPITALISM AND COMMERCE: CONCEPTUAL FOUNDATIONS OF FREE ENTERPRISE 142–43 (2002) ("Anglo-Saxon customary law involved a group of individuals often referred to as a bohr, pledging surety for each of its members. In such an arrangement, each person secured his property claims by freely accepting an obligation to respect the property rights of others, who were expected to reciprocate. The group would back up this pledge of surety by paying the fines of its members if they were found guilty of violating customary law. The surety group had financial incentives to police its members and exclude those who frequently and flagrantly engaged in undesirable behavior. Individuals would deal cooperatively with those known to be trustworthy while refusing to interact with those known to be untrustworthy. These solidarity rules evolved spontaneously as individuals utilized ostracism instead of violence. There is a certain timeless appeal to such reciprocal arguments. Modern parallels to these reciprocal voluntary agreements can be found in insurance agencies, credit card companies, and credit bureaus. Insurance agencies spread risks through the combining of assets. Credit card companies stand behind their actions and claims of their members. In addition, credit bureaus attest to the financial standing of their members.").

[141] ICESCR, *supra* note 24, art. 4.

ARTICLE 4—"The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." *Id.*

[142] *Id*. art. 5.

ARTICLE 5—"1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant. 2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." *Id*.

[143] ICCPR, *supra* note 25, art. 5.

Federation abstained from voting for the United Nations Declaration on the Rights of Indigenous Peoples in 2007, and admittedly, the United Nations Declaration on the Rights of Indigenous Peoples may not apply to a majority population, it is salutary to mention nevertheless that both in the Annex and in Articles 3, 5, 8, 9, 11, 12, 15, 17, and 20, that there is a devout effort to protect custom and cultural values as a fundamental human right.[144] Again, specifically Articles 27, 34 and 40, single-out customary legal practices as marked for special protection.[145] Should the New Law be considered a product of traditional customary law, the New Law may find sanction in various international agreements that either recognize the important role of custom in the application of law to a particular society or broadly target indigenous law as an independent human right.

CONCLUSION

The Note began with a discussion about a recent report regarding the atrocious attacks inflicted on self-identifying homosexuals in the Russian Federation. It is fitting that the Note should conclude observing a recent poll conducted there: "62 percent of respondents say that order in the government takes priority over the protection of human rights in

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ARTICLE 5—"1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." *Id.*

[144] UNDRIP, *supra* note 26, at 1–2, 4–7.

[145] *Id*. at 8–10.

ARTICLE 27—"States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process." *Id.* at 8.

ARTICLE 34—"Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards." *Id.* at 9.

ARTICLE 40—"Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights." *Id.* at 10.

Russia."[146] In addition, scholars have commented that, "If we confine ourselves to Russian history, there is abundant evidence that very often, and for very many people, other things were of greater importance than freedom."[147] However, though the magnified effects of the New Law have been devastating, are criminal, and must be vociferously condemned, the New Law's introduction and acceptance in Russia may be more than mere apathy or even antagonism toward the principles of international human rights.

The Note attempted to offer an alternate approach—that customary law informs current Russian legal practices including the formation of the New Law. The New Law's origins are rooted in popular opinion as evinced by its many precursors in the provinces. The New Law may not violate the European Convention because the European Court has not exclusively applied its exceptions pertaining to the restriction of rights to exclude acknowledging a member country's unique social history. Furthermore, national identity, sovereignty and autonomy present compelling contextual arguments for considering the New Law as a reflection of traditional national culture, which needs to be analyzed in equal proportion to the Russian Federation's other international commitments. Finally, customary law is a protected human right under various international agreements; and such protection may extend to the New Law if it can be proven that is it a product of genuine Russian indigenous law.

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[146] *Order More Important Than Human Rights, Most Russians Say*, MOSCOW TIMES (Dec. 22, 2014), http://www.themoscowtimes.com/news/article/order-more-important-than-human-rights-most-russians-say/513774.html.

[147] Ferdinand Feldbrugge, *Nicholas Timasheff's Views on the Role of Freedom in Russian History*, 35 REV. CENT. & EAST EUR. L. 1, 3 (2010).