

NOTE

KRISTEN L. THOMAS*

We're Here, We're Queer, Get Used to It: Freedom of Assembly and Gay Pride in *Alekseyev v. Russia*

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INTRODUCTION

In 2011, the European Court of Human Rights (the Court) issued its first judgment on a gay rights case from the Russian Federation. *Alekseyev v. Russia* resulted in a finding that the Russian government had violated Articles 11, 13, and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) when the city of Moscow banned the plaintiff, Nikolai Alekseyev, and other gay rights activists from holding a public demonstration in support of lesbian, gay, bisexual, and transgender (LGBT) rights in 2006, 2007, and 2008, specifically gay pride marches, rallies, and pickets. This ruling follows a recent trend in both the European Union and the United Nations of bold statements in favor of gay rights, and makes a strong case for LGBT rights of assembly.¹

I

UNSANCTIONED PRIDE, SANCTIONED HATE

In 2006, gay activists in Russia organized what they hoped would be the first gay pride parade in the Russian Federation. Organizers, including Nikolai Alekseyev (the plaintiff in this case) and his LGBT rights group, Gay Russia, chose May 27, 2006, as the date for a march and rally to support and promote the rights of Russia's LGBT community.² Beginning in February of that year, the local government

¹ The U.N. released its first ever report on LGBT human rights in December 2011. The report detailed the global battles facing sexual minorities, noting that "LGBT people are often targets of organized abuse from religious extremists, paramilitary groups, neo-Nazis, extreme nationalists and others, as well as family and community violence, with lesbians and transgender women at particular risk." *UN Issues First Report on Human Rights of Gay and Lesbian People*, UN NEWS CENTRE (Dec. 15, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40743>. U.N. Secretary-General Ban Ki Moon followed this up in March 2012 with a call to world leaders to protect gay rights during the U.N.'s first hearing on LGBT discrimination and violence. Michelle Garcia, *U.N. Secretary-Gen. Urges Global Gay Rights*, ADVOCATE.COM (Mar. 7, 2012, 5:17 PM), http://www.advocate.com/News/Daily_News/2012/03/07/UN_Secretary_Gen_Urges_Global_Gay_Rights/.

² May 27 was chosen specifically because it is the anniversary of the decriminalization of homosexuality in Russia. *See* *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, ¶ 6 (2010). Boris Yeltsin signed a bill repealing Article 121.1 of the Russian Criminal Code, which criminalized consensual sex acts between men, on April 29, 1993.

of Moscow began an informal campaign to prevent the parade and spread the idea that gay activists were provoking societal confrontations by promoting homosexuality. On February 16, the mayor's press secretary published a statement that the Moscow government would "not even consider allowing the gay parade to be held."³ Less than a week later, on February 22, the mayor himself, Yuri Luzhkov, was quoted by the news agency Interfax as saying he personally considered homosexuality to be "unnatural," and that he would impose a ban on gay pride parades and rallies to avoid "stir[ring] up society."⁴

On March 17, deputy mayor Liudmila Shvetsova, wrote to Mayor Luzhkov about the plans to hold the gay pride parade in Moscow.⁵ She informed him that the parade was, in her opinion, a threat to the health and morals of the people of Moscow, and cited a number of petitioners who protested open expressions of support of homosexuality.⁶ However, Shvetsova acknowledged that under Russian law—specifically the Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing (the Assemblies Act)—it was not possible to ban the event.⁷ She suggested that authorities ask to change the time or venue of the planned event, or use the possibility of the event becoming a public threat to stop it, and requested that the

LAURIE ESSIG, *QUEER IN RUSSIA* 13 (2009). Lesbian sex was not criminalized in the old criminal code; the new code only mentions homosexuality in relation to gay/lesbian rape, and the penalties are the same for "gay" rape as for "straight" rape. Immigration and Refugee Board of Canada, *Russia: Update to RUS13194 of 16 Feb. 1993 on the Treatment of Homosexuals* (Feb. 29, 2000), available at <http://www.unhcr.org/refworld/docid/3ae6ad788c.html>.

³ *Alekseyev* ¶ 7. The press secretary went on to say that Moscow's government "will not allow a gay parade to be held in any form, whether openly or disguised [as a human rights demonstration], and any attempt to hold any unauthorised action will be severely repressed." *Id.*

⁴ *Id.* ¶ 8.

⁵ HUMAN RIGHTS WATCH, *PRIDE AND VIOLENCE: A CHRONICLE OF THE EVENTS OF MAY 27, 2006 IN MOSCOW* 3 (2006) [hereinafter *PRIDE AND VIOLENCE*].

⁶ *Alekseyev* ¶ 9. Shvetsova stated in the memorandum that the planned event was "direct propaganda for immorality, insulting the honor and dignity of the overwhelming majority of Muscovites and inhabitants of Russia . . . [and] undermining the moral principles of the society." *PRIDE AND VIOLENCE*, *supra* note 5, at 3.

⁷ *Alekseyev* ¶ 9. In spite of her acknowledgement that the Assemblies Act could not prevent the rally as planned, and that homosexuality was in fact no longer a crime in the Russian Federation, Shvetsova stated that "propaganda in favor of [homosexuality and lesbianism], in particular by means of holding gay festivals and gay parades, can be considered propaganda for immorality, which may be forbidden by legislation in [the] future." *PRIDE AND VIOLENCE*, *supra* note 5, at 3.

mayor agree to develop an action plan to prevent any public or private actions towards organizing, promoting, or holding a gay pride event.⁸

Following this letter, the mayor issued instructions to local officials and prefects to “take concrete measures to prevent holding public and mass gay events in the capital,” including organizing a media campaign that would draw on objections from local citizens, religious leaders, and public organizations.⁹ In spite of the Moscow government’s machinations, Alekseyev and Gay Russia pushed forward with their plans to hold the rally. On May 15, the organizers submitted notice of the march, including the proposed date, time, and route, to the mayor.¹⁰ Despite the work of the organizers to ensure that local laws were followed when planning the march, the mayor refused permission to hold the rally on May 18, citing public safety grounds, specifically the “prevention of riots and protection of health, morals and the rights and freedoms of others.”¹¹ In the mayor’s opinion, the negative reaction of the community to homosexuality in general meant that the march “was therefore likely to cause a negative reaction and protests against the participants, which could turn into civil disorder and mass riots.”¹²

In response to the mayor’s refusal to allow them to demonstrate, the organizers submitted notice of a second protest, a picket of the decision to be held at Lubyanskaya Square, at the same date and time as the original march they planned. The next day, May 19, the organizers formally challenged the mayor’s decision in the Tverskoi District Court.¹³ Four days later, on May 23, the deputy prefect of the Moscow Central Administrative Circuit issued a refusal for the

⁸ *Alekseyev* ¶ 9.

⁹ PRIDE AND VIOLENCE, *supra* note 5, at 2.

¹⁰ In order to ensure compliance with local laws, organizers “undertook to cooperate with the law-enforcement authorities in ensuring safety and respect for public order by the participants and to comply with regulations on restriction of noise levels.” *Alekseyev* ¶ 11.

¹¹ *Id.* ¶ 12. Ironically, on the same day that the mayor issued his decision, Russia assumed the six-month chairmanship of the Council of Europe, “the continent’s principle body concerned with human rights.” PRIDE AND VIOLENCE, *supra* note 5, at 2. Despite a pledge by Russia’s foreign minister, Serey Lavrov, that Russia’s tenure as chair would be “devoted to openness,” the NGO Human Rights Watch found a “centralized campaign in the [Moscow] mayor’s office against any attempts to publicly show support” for Russia’s LGBT community. *Id.* As with Shvetsova’s March 17 letter, the objections to the rally by Russian citizens and religious groups were cited as a reason for the rejection.

¹² *Alekseyev* ¶ 12. In defense of his decision, Mayor Luzhkov cited “numerous petitions . . . by representatives of legislative and executive State bodies, religious denominations, Cossack elders and other individuals.” *Id.*

¹³ *Id.* ¶ 14; PRIDE AND VIOLENCE, *supra* note 5, at 4.

organizers' second requested rally, the Lubyanskaya picket.¹⁴ The rationale behind the second decision was the same as the first—a gathering of gay activists to promote LGBT rights was a threat to the public order of Moscow.

On May 25, the mayor again voiced his disapproval of both homosexuality and the efforts of gay activists to publicly promote gay rights, saying that people with sexual “deviations” should not publicly demonstrate and that Muscovites agreed with him: “I thank the citizens of Moscow as 99.9% of them in recent days also believe it is unacceptable to hold such parades.”¹⁵ The Moscow Pride Festival opened that same day, hosting both domestic and foreign participants in a two-day event of lectures and discussions leading up to the planned May 27 march. Activists and political figures came from around the world to participate, including the United Kingdom, Germany, Austria, France, the United States, Poland, Latvia, Moldova, and Belarus.¹⁶ The first event of the festival was a lecture by Merlin Holland, Oscar Wilde’s grandson. During Holland’s lecture, over a dozen people stood and began shouting “Russia free of faggots!” before spraying the audience with mace.¹⁷

The following day, May 26, saw a couple of significant events. First, the mayor’s opposition to both homosexuality and public expressions of gay rights was again quoted by Interfax, reiterating his firm opposition to allowing a gay pride parade to happen, and highlighting the objections of religious groups.¹⁸ More importantly, the Tverskoi District Court dismissed the complaint filed by Alekseyev and Gay Russia. In its rejection of the complaint, the court relied upon provisions in the Assemblies Act that addressed the responsibility of authorities to ensure the safety of planned events.¹⁹

¹⁴ *Alekseyev* ¶ 15.

¹⁵ PRIDE AND VIOLENCE, *supra* note 5, at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ The mayor was quoted as saying that no gay pride parade would happen as long as he was mayor. He went on to say that all three “major” faiths—Christianity (specifically the Russian Orthodox Church), Judaism, and Islam—opposed the events, which were unacceptable in Russia (unlike some “progressive” Western countries). *Alekseyev* ¶ 16. Interfax also quoted the mayor as saying: “That’s the way morals work. If somebody deviates from the normal principles [in accordance with which] sexual and gender life is organised, this should not be demonstrated in public and anyone potentially unstable should not be invited.” *Id.*

¹⁹ The court *did* acknowledge that the Assemblies Act permitted holding the planned rally, provided that administrative notice requirements were met, and prohibited the interference of organizers, authorities, or other individuals, with the free expression of

The court concluded that, under the Assemblies Act, Moscow officials' refusal to allow the event had legitimate grounds; that the onus was on the organizers to propose time, date, and venue changes; and that the organizers' right to hold public events had not been violated.²⁰ Alekseyev appealed the Tverskoi court's decision on the grounds that Article 12 of the Assemblies Act actually required *officials*, not organizers, to propose time, date, and venue changes for events. He also challenged the court's conclusion that the ban was justified on public safety grounds, arguing that any safety concerns could have been alleviated by providing police protection for participants in the event.²¹

In addition to the appeal, Alekseyev and other organizers decided to hold two events on May 27. The first was a march to place flowers at the Tomb of the Unknown Soldier in Aleksandrovskiy Garden at the Kremlin, in a bid to "express[] . . . opposition to nationalism and extremism."²² The second planned event was a vigil in front of a statue of Yuri Dolgoruky outside of City Hall to protest the mayor's ban.²³ At 2:30 p.m. on the 27th, Alekseyev and other organizers and attendants of the festival, totaling approximately fifteen people,²⁴ approached the gate to the Tomb and were met by approximately two to three hundred protestors, including "younger and older Orthodox and nationalist counter-protestors, and contingents of elderly women carrying crosses and icons."²⁵ There was a police presence at the Tomb, an estimated one hundred and fifty members of the special riot squad OMON (*Otriad Militsii Osobogo Naznacheniy*), but they only intervened to arrest Alekseyev for breaching the conditions for holding a public demonstration.²⁶ The protestors beat some of the

participants unless they contravened the parameters of the planned event or breached public order. *Id.* ¶ 17.

²⁰ *Id.*

²¹ *Id.* ¶ 18.

²² PRIDE AND VIOLENCE, *supra* note 5, at 4.

²³ *Id.*; *see also* Alekseyev ¶ 19.

²⁴ Alekseyev ¶ 20.

²⁵ PRIDE AND VIOLENCE, *supra* note 5, at 4–5.

²⁶ *Id.* at 5; *see also* Alekseyev ¶ 21. Alekseyev recounted the events to Human Rights Watch:

I saw a huge group of people gathered there, shouting "death to sodomites," "out of Russia," "we will not allow you to put things here, our grandfathers died fighting against people like you." I said, "My grandfather died fighting against your kind." I said to myself, I will not stop—I will go on. But the gate was closed. Then the police suddenly appeared out of nowhere. They began pushing all of us back from the gate. Then . . . several officers[] seized me from behind and started to shove me

participants while OMON detained the others; a number of protestors threw objects at the activists, including eggs, bottles, and rocks.²⁷

After the small group of LGBT activists withdrew from the Tomb to move towards the site of the second planned event, anti-gay protestors continued to battle both bystanders and police. Police arrested between twenty-five and fifty demonstrators, but the “vast majority . . . who had been engaged in violence remained at large.”²⁸ These protestors made their way towards the site of the planned picket, continuing to assault people they perceived to be gay rights supporters on the streets along the way. When the remaining gay activists arrived at City Hall, a large contingent of anti-gay demonstrators was already waiting for them, in addition to the violent group of protestors who were still chasing after them from the Tomb.²⁹ Amongst the protestors waiting at City Hall was Nikolai Kurianovich, a member of the Duma from the right-wing Liberal Democratic Party. Kurianovich stood upon the steps of the statue the gay rights activists planned their vigil around and warned the crowd that “Russia would become like ‘putrid America and dying Europe’ if it permitted the ‘gay mafia’ to triumph, and led the crowd in chanting ‘Gays and lesbians to Kolyma’—the Stalin-era prison camp.”³⁰ Local police were again present, but only to arrest gay rights activists, rather than the rabidly anti-gay crowd that surrounded them.³¹

from the square and through the crowd. They pushed me very violently through the square and put me in the [police] bus.

PRIDE AND VIOLENCE, *supra* note 5, at 5. British activist Peter Tatchell, who had been a participant in the Pride Festival and march to the Tomb, said of the violence they encountered: “We were immediately set upon by about 100 fascist thugs and religious fanatics who began pushing, punching and kicking us.” Rex Wockner, *Pride Moscow*, INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N (ILGA) (May 29, 2006), <http://ilga.org/ilga/en/article/812>.

²⁷ PRIDE AND VIOLENCE, *supra* note 5, at 5.

²⁸ *Id.*; see also Wockner, *supra* note 26.

²⁹ PRIDE AND VIOLENCE, *supra* note 5, at 6; *Alekseyev* ¶ 22.

³⁰ PRIDE AND VIOLENCE, *supra* note 5, at 6.

³¹ *Id.* One of the remaining organizers, Dimitri Makarov, approached a colonel with the police to ask for protection against the extremists, only to be arrested:

I showed him our application [to hold the demonstration], said this was a manifestation within the law. I asked him to defend the picketers against the extremists who controlled the square. He pointed to us and said to the officers, “Arrest them. Take them to the bus.” He said we had organized an unsanctioned demonstration! . . . I pointed out the demonstration of the nationalists that was already going on: I said, *that* is illegal, shouldn’t you stop that? The officers said, “We can’t, there is a deputy leading it.” I said, “What about the people standing there listening to him?” They said, “Well, they are listening to a deputy.”

During the fracas, several LGBT activists arrived and unfurled large rainbow flags in front of the statue, including an openly gay member of the German Bundestag, Volker Beck.³² The crowd immediately reacted with violence: skinheads surrounded the activists and ripped the flags away from them. A representative of Human Rights Watch was shoved to the ground. Beck and his partner were struck in the face with rocks and fists. Police intervened, but “instead of trying to separate the two groups they encircled all of them, crushing them tightly together and forming a close cordon within which the violence continued.”³³ A number of arrests were made, including both the violent counter-protestors and the non-violent LGBT demonstrators. A leader of Russia’s lesbian movement, Yevgenia Debrianskaia, was arrested while speaking to journalists about the violence. As she told Human Rights Watch:

I was appalled. I saw an unsanctioned demonstration, headed by a Duma parliamentarian, who was calling for gay people to be killed, and no one was disturbing him or interfering. . . . The journalists . . . turned their cameras to me. . . . I said, I came to exercise my civic responsibility, about the unfair ban on gay people. . . . The extremists started to throw things at me, rocks and bottles and soda. A policeman with three big stars on his shoulder broke through the journalists and told me my actions were illegal and I was under arrest.³⁴

Beck was also arrested, along with his partner; he later told the news agency Deutsche Presse Agentur that the security forces had not protected them, but prevented them from escaping the violence: “We were left without any protection.”³⁵

Reflecting on the event, activist Peter Tatchell placed a large part of the blame on Mayor Luzhkov, saying his “homophobia created the atmosphere which gave a green light to the fascists to attack the Moscow pride participants.”³⁶ Throughout the day a number of people

Id.

³² PRIDE AND VIOLENCE, *supra* note 5, at 6–7.

³³ *Id.* at 7.

³⁴ *Id.*

³⁵ Wockner, *supra* note 26. When the police realized who Beck was, they immediately released him and his partner, telling the men “they had only detained us for our own security!” PRIDE AND VIOLENCE, *supra* note 5, at 7.

³⁶ Wockner, *supra* note 26. In the aftermath of the violence, the director of Human Rights Watch’s LGBT Rights Program, Scott Long, also pinpointed Moscow officials as the catalyst of the violence: “The authorities in Moscow have endorsed discrimination and fostered an environment that allowed hatred to rise Instead of leading Muscovites to embrace equality, Mayor Luzhkov supported and promoted homophobia. Given this failure of leadership, the violent ending should surprise no one.” *Russia: Investigate*

were beaten, detained, arrested, and harassed by anti-gay demonstrators and police. Skinheads roamed the streets, tracking down any remaining gay activists (or people they thought to be supporters) to continue the violence and harassment, largely unchecked by police.³⁷ While it is unknown exactly how many arrests were made in connection with the events of May 27, Human Rights Watch was able to identify at least six LGBT supporters who were arrested, including organizers Alekseyev, Dmitri Makarov, and Alexei Kozlov, who were charged with organizing unsanctioned demonstrations.³⁸ Makarov has stated that he was also harassed by police at the station: “They threatened me too, saying . . . ‘[w]e’ll beat you with the legal code till you realize what an unsanctioned demonstration is.’”³⁹

Following the violence of May 27, Alekseyev and Gay Russia attempted to get the Russian court system to recognize their right to have their public assemblies sanctioned by local governments. Multiple court challenges were filed, and activists waited as their cases slowly worked through the Russian judicial system, hitting roadblock after roadblock, only to have the courts sustain the bans.⁴⁰

Attacks on Gay Pride March, HUMAN RIGHTS WATCH (June 2, 2006), <http://www.hrw.org/news/2006/06/01/russia-investigate-attacks-gay-pride-march>.

³⁷ PRIDE AND VIOLENCE, *supra* note 5, at 9. One French participant who was seriously injured, Pierre Serne, told Human Rights Watch about the difficulty in finding safe haven or help that day:

I was asking people on the streets to help me, asking where the police were. People avoided me. And when some skinheads saw that no one was doing anything, they started to follow me again. I saw two Russian photographers who were covering the event. I asked them to call the police. But the skinheads started chasing all three of us, mainly, though, after me. They began hitting me again. Then the police arrived, at last. . . . They arrested five of [the skinheads]. Then they took me to the bus. I was put in with the skinheads. . . . Those guys were just laughing in the bus, like the others on the street, as if they knew they had no fear of anything.

Id.

³⁸ *Id.*

³⁹ *Id.* at 10.

⁴⁰ On June 16, Alekseyev and Gay Russia decided to file another court challenge to the city’s prohibition of the City Hall picket. Five weeks later, on August 22, the Taganskiy District Court of Moscow dismissed the challenge on the grounds that public safety concerns justified the ban; Alekseyev immediately appealed. *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, ¶ 25 (2010). The Moscow City Court finally reviewed the pending appeal of the Tverskoi District Court’s May 26 decision upholding the ban on September 19; it found no fault with the lower court’s decision and upheld it as “justified in the circumstances.” *Id.* ¶ 26. Over two months passed before it reviewed the appeal of the Taganskiy District Court’s August 22 ruling, and it found no fault in that decision either. *Id.* ¶ 27.

The years since 2006 have seen similar attempts to organize pride rallies, and similar obstacles set up by the city to prevent them. In both 2007 and 2008, organizers submitted multiple requests and plans for a variety of gay pride events; every single request was rejected, ostensibly on the grounds of public safety.⁴¹ After three years of being prevented from obtaining relief by domestic courts, Alekseyev filed an application with the European Court of Human Rights, claiming violations of his rights under the European Convention. Every ruling the domestic courts had given subverted the constitutional rights of Alekseyev and other LGBT Russians, and, as the European Court of Human Rights would eventually rule, their human right to freely assemble without being subjected to discriminatory restrictions.

II

RELEVANT LAW

A. Domestic Laws

There are dual levels of domestic law at play in *Alekseyev*. The first is the Constitution of the Russian Federation, which guarantees Russians freedom of association and the right to peaceful assembly. Article 30 contains the right to association.⁴² Article 31 guarantees the right to peaceful assembly.⁴³ Article 55(3) provides for those freedoms to be restricted by federal laws under certain circumstances, such as the protection of public morals and the rights of others.⁴⁴

⁴¹ In 2007, Alekseyev and others attempted to organize a march similar to the one they had attempted in the previous year. The march and a picket (similar to the 2006 picket) were banned on the grounds of “public order, prevention of riots and protection of health, morals and the rights and freedoms of others.” *Alekseyev* ¶ 32. On May 27, after attempting to march to the mayor’s office to file petitions protesting the bans, a small number of activists, including Alekseyev, were detained for twenty-four hours for disobeying a lawful order. Both the District and City Courts upheld the city’s decisions, finding public safety concerns justified the bans. *Id.* ¶¶ 37–38. In 2008, organizers were particularly careful about complying with the city’s laws but still received denials of every one of their twenty-five requests. *Id.* ¶¶ 40–44. As in previous years, court challenges were filed in District and City Courts, but the government won each challenge. *Id.* ¶ 46.

⁴² See CONSTITUTION OF THE RUSSIAN FEDERATION, art. 30(1) (“Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. The freedom of activity of public association shall be guaranteed.”).

⁴³ *Id.* at art. 31 (“Citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets.”).

⁴⁴ *Alekseyev* ¶ 49. See also CONSTITUTION OF THE RUSSIAN FEDERATION, art. 55(3) (“The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of

The other level of domestic law is the Assemblies Act, which local officials used to justify the bans. The Assemblies Act was created with the aim of “ensuring realization of the constitutionally mandated right of citizens of the Russian Federation to peaceful assembly without weapons, to hold rallies, meetings, demonstrations, marches and picketing.”⁴⁵ The Act gives the organizer of a public event the right to hold public demonstrations—including marches—provided the organizer meets certain requirements.⁴⁶ Article 12 of the Assemblies Act governs the responsibilities of the executive authority. There is no provision in this section granting the government authority to outright ban a public event as long as the aforementioned requirements have been met. Officials are limited to proposing alternate venues, appointing a representative to assist organizers of the event, and taking on various tasks that help promote and maintain public order.⁴⁷ Article 18 actually prohibits executive interference in the rights of the participants except in certain circumstances: “The promoter of a public event, officials and other citizens shall have no right to prevent participants in the public event from expressing their opinion in a manner not violating the public order and rules of procedure for holding the public event.”⁴⁸

B. International Laws

Two aspects of international human rights law are necessary to understanding this case. The first is the widely recognized right to free assembly, the primary claim of Alekseyev before the European Court.⁴⁹ The right to assemble is guaranteed by multiple international

the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.”).

⁴⁵ Federal Law No. 54-FZ on Rallies, Meetings, Demonstrations, Marches and Picketing, June 19, 2004, available at <http://legislationline.org/documents/action/popup/id/4367> [hereinafter Assemblies Act].

⁴⁶ Assemblies Act at art. 5(3)(1). These requirements include notifying the executive authority of the planned event; notifying the authority of changes to the event within a specified period of time; ensuring compliance with any conditions for holding the event; ensuring that participants in the event maintain public order; and ensuring, to the extent possible, public order and the safety of citizens during the event. *Id.* at art. 5(4)(i)–(v).

⁴⁷ *Id.* at art. 12(1)(i)–(vii).

⁴⁸ *Id.* at art. 18(1).

⁴⁹ Three articles of the European Convention were at question in *Alekseyev*: (1) freedom of assembly and association, Article 11; (2) the right to an effective remedy, Article 13; and (3) the prohibition of discrimination, Article 14. Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005 [hereinafter European Convention]. The primary violation that *Alekseyev* sought relief for

instruments, most notably the Universal Declaration of Human Rights (UDHR), the European Convention, and the International Covenant for Civil and Political Rights (ICCPR).⁵⁰ The Charter of Fundamental Rights of the European Union (EU Charter) also guarantees the freedom of peaceful assembly and association. The second aspect is the stance of the international legal community on discrimination based on sexual orientation. A number of international instruments address both the importance of the right to free assembly and the pernicious effects of sexual orientation discrimination. State discrimination against sexual minorities has been studied, discussed, and generally condemned by the Committee of Ministers, the Council of Europe, and the EU Agency for Fundamental Rights; it has also been recognized by both the European Court of Human Rights and the European Court of Justice as a generally impermissible form of discrimination.

1. Freedom of Assembly

Aside from the UDHR and the European Convention, the ICCPR, to which Russia is a party, also contains the right of peaceful assembly:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order . . . the protection of public health or morals or the protection of the rights and freedoms of others.⁵¹

The EU Charter, which is the “first formal EU document to combine and declare all the values and fundamental rights . . . to which EU citizens should be entitled,” also contains a guarantee of the freedom

was the Article 11 right. The Article 13 claim was a result of the ineffectiveness of the Russian judicial system in respect to adjudicating the applicant’s claim in a timely manner. Article 14 is considered a “parasitic” right—finding an Article 14 violation is contingent upon finding violations of another article. *See generally* Rory O’Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 *LEGAL STUD.* 211, 212 (2009).

⁵⁰ *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 20(i), U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to freedom of peaceful assembly and association.”); European Convention, *supra* note 49, at art. 11; International Covenant on Civil and Political Rights, art. 21, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁵¹ ICCPR, *supra* note 50, at art. 21. Russia signed the treaty on March 18, 1968, and ratified it on October 16, 1973. *See Status of the ICCPR*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last updated Jan. 28, 2012).

of assembly and association.⁵² Article 12 of the Charter states: “Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters.”⁵³

Regardless of a wide recognition of the freedom of assembly, this right is not without limitations. Legitimate aims for restricting freedom of assembly can include national security; public safety; prevention of disorder or crime; protection of health or morals; and protection of the rights and freedoms of others.⁵⁴ However, under the European Convention, “restrictions should be (1) prescribed by law, (2) have a legitimate aim, and (3) be necessary in a democratic society to achieve those aims.”⁵⁵ The Court applies this three-part test after confirming that public authorities did in fact interfere with the rights in question.

In addition to the three-part test employed to determine if a restriction on assembly is legitimate, the Court has set some limits on what constitutes a legitimate aim.⁵⁶ Governments have an obligation to not only allow assemblies whose viewpoints they disagree with, but also an obligation to protect the people participating in those assemblies from violence.⁵⁷ The Organization for Security and Cooperation in Europe (OSCE) and the Office for Democratic Institutions and Human Rights (ODIHR) produced guidelines for states on how to guarantee and execute effective rights of free assembly, recognizing that “[t]he freedom of peaceful assembly can be an important strand in the maintenance and development of

⁵² *EU Charter of Fundamental Rights*, EU CHARTER, www.eucharter.org (last visited Mar. 28, 2012). The EU Charter became a binding part of EU Law when the Treaty of Lisbon came into force in December of 2009.

⁵³ Charter of Fundamental Rights of the European Union, art. 12(1), 2000 O.J. (C 364) 1 (Dec. 18, 2000) [hereinafter EU Charter]. Article 12(1) corresponds to Article 11 in the European Convention. See European Convention, *supra* note 49, at art. 11.

⁵⁴ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 72 (2d ed. 2011), available at http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf [hereinafter SEXUAL ORIENTATION DISCRIMINATION IN EUROPE].

⁵⁵ *Id.*

⁵⁶ For example, the “morality” exception does not give a state free hand to quell any public assembly it deems immoral. Authorities are still obligated to respect the right of assembly for people whose opinions or lifestyles they may find controversial or unwelcome.

⁵⁷ SEXUAL ORIENTATION DISCRIMINATION IN EUROPE, *supra* note 54, at 72–73.

culture, and in the preservation of minority identities.”⁵⁸ It extends the definition of “peaceful” assemblies to include those that “may annoy or give offence to persons opposed to the ideas or claims that a particular assembly is promoting,” a defense particular to states attempting to justify restrictions on LGBT rights to assembly.⁵⁹

2. *Sexual Orientation Discrimination*

Sexual orientation discrimination has recently become a cause of concern amongst many international bodies, especially within the European community. The Council of Europe—which consists of the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights, and the European Court of Human Rights—has been “extensively involved” in advocating for and protecting the right of assembly for LGBT persons.⁶⁰ In one notable example, Thomas Hammarberg, the Commissioner for Human Rights for the Council of Europe, issued a statement in response to the Moscow ban on May 26, 2006, the day before the riots. He classified the right to peaceful assembly as a “fundamental right[] in a democratic society [that] belong[s] to all people, not just the majority. A demonstration may annoy or give offence to persons opposed to the ideas or claims expressed, but this cannot be a reason to ban a peaceful gathering.”⁶¹

In 2010, the Committee of Ministers issued Recommendation CM/Rec(2010)5 on measures to combat discrimination on the grounds of sexual orientation or gender identity (Recommendation on Discrimination). Section III explicitly addresses freedom of expression and peaceful assembly in the context of sexual orientation discrimination: “Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity.”⁶² Article 15 calls upon member

⁵⁸ OSCE/ODIHR PANEL OF EXPERTS ON THE FREEDOM OF ASSEMBLY, GUIDELINES ON FREEDOM OF PEACEFUL ASSEMBLY 13 (2007) [hereinafter ODIHR GUIDELINES].

⁵⁹ *Id.*

⁶⁰ Ronald Holzhaecker, *State-Sponsored Homophobia and the Denial of the Right of Assembly in Europe* 19 (unpublished panel paper for the American Political Science Association, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643314.

⁶¹ Statement, Thomas Hammarberg, *Freedom of Assembly Belongs to All People* (May 26, 2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=1010053&Site=COE>.

⁶² Council of Europe Comm. of Ministers, Recommendation CM/Rec(2010)5 on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity

states to ensure that law enforcement protects peaceful gay rights demonstrators from any attempts to interrupt the free exercise of their right to assembly, and Article 16 asks member states to ensure that administrative and legal procedures are not used to ban peaceful LGBT assemblies.⁶³ The recommendation even goes so far as to ask public officials to use media to publicly condemn attempts to interfere with the lawful expression of the right to assemble by gay rights supporters.⁶⁴

In addition to the Recommendation on Discrimination, the Parliamentary Assembly has also passed a resolution on sexual orientation and gender identity discrimination. Resolution 1728 reaffirms that “[s]exual orientation and gender identity are recognised as prohibited grounds for discrimination.”⁶⁵ The Resolution, in addition to clarifying both the Council of Europe’s and the Court’s positions on sexual orientation discrimination, specifically addresses freedom of assembly and LGBT rights. Section six states that “[t]he Assembly is particularly concerned by the violation of the rights to freedom of assembly and freedom of expression for LGBT persons in a number of Council of Europe member states since these rights are pillars of democracy.”⁶⁶ Bans and attempted bans on gay rights demonstrations are illustrative of why the Parliamentary Assembly is concerned, and this is reiterated in Section 16.1.⁶⁷ The Resolution is also critical of the “overt or tacit support some politicians have given

§ III(14), 1081st Mtg. of the Ministers’ Deputies (Mar. 31, 2010), available at <https://wcd.coe.int/ViewDoc.jsp?id=1606669> [hereinafter Recommendation on Discrimination].

⁶³ *Id.* § III, arts. 15–16. Article 15 reads as follows:

Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.

Article 16 seems almost tailored as a response to Moscow’s approach to banning pride parades: “Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example *on grounds of public health, public morality and public order.*” *Id.* § III, art. 16 (emphasis added).

⁶⁴ *Id.* at art. 17.

⁶⁵ Parliamentary Assembly, *Discrimination on the Basis of Sexual Orientation and Gender Identity*, Resolution 1728 § 2, 17th Sitting (Apr. 29, 2010) [hereinafter Resolution 1728].

⁶⁶ *Id.* § 6.

⁶⁷ *Id.* § 16.1 (calling on member states to “ensure that the fundamental rights of LGBT people, including freedom of expression and freedom of assembly and association, are respected, in line with international human rights standards”).

to violent counter-demonstrations,” the potency of which was demonstrated in Moscow by the actions of Mayor Luzhkov and the Duma member Kurianovich.⁶⁸

There are some notable non-legal instruments that are taken into consideration by the Court and other international human rights bodies when deciding cases on sexual orientation discrimination. One is advice provided by the EU Agency for Fundamental Rights (FRA) in a recently published report on sexual orientation discrimination in EU member states. In that report, the FRA specifically noted the importance of pride events to LGBT persons, finding that “pride marches or similar gatherings and events constitute an important means through which LGBT persons exercise their right to freedom of assembly and freedom of expression.”⁶⁹ The FRA report highlights actions taken by the European Parliament to promote the recognition of LGBT rights of assembly,⁷⁰ and also makes recommendations on how local governments can facilitate that recognition. One recommendation that is particularly germane to the current case calls for eliminating the use of “public order” concerns as an excuse for officials to violate those rights.⁷¹

Another non-legal instrument is the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles). Drafted in 2006 by human rights law experts, the Yogyakarta Principles contain twenty-nine principles that discuss what rights are protected under international law with respect to sexual orientation and gender

⁶⁸ *Id.* § 6.

⁶⁹ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN THE EU MEMBER STATES 17 (2010), available at http://fra.europa.eu/fraWebsite/attachments/FRA-homophobia-synthesis-report-2011_EN.pdf.

⁷⁰ *Id.* at 19. The policies highlighted by the FRA are “[v]arious European Parliament resolutions adopted between 2006 and 2007” that found bans on Pride marches to “contravene the principles protected by the ECHR,” and a 2009 resolution on a Lithuanian law called the Protection of Minors Against the Detrimental Effects of Public Information. *Id.* The Lithuanian law contained language that effectively banned information on same-sex relationships, and the Parliament’s resolution “reaffirm[ed] the importance of the EU fighting against all forms of discrimination, including discrimination based on sexual orientation.” *Id.* at 18–19.

⁷¹ *Id.* (“Arguments regarding the preservation of ‘public order’ should not be used to impose undue restrictions on LGBT-related events and other manifestations of LGBT identities or relationships. Public authorities should ensure that homophobic counter-demonstrations do not hinder lawful LGBT events.”).

identity.⁷² Principle 20 contains the right to freedom of peaceful assembly and association, and is defined as follows:

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.⁷³

In addition to defining the freedom of assembly and association in the context of sexual orientation and gender identity discrimination, the Yogyakarta Principles detail positive obligations on states to ensure that these rights are realized and protected. These duties include ensuring that legislative and administrative measures protect LGBT rights of assembly, that adequate police protection is provided to demonstrators against potentially violent counter-demonstrators, and that these rights are not restricted on the grounds of public order, public morality, public health, and public security.⁷⁴ In *Alekseyev*, the Russian government is alleged to have violated every single one of these duties.

III LEGAL ARGUMENTS

A. The Allegations

The Court considered allegations that three rights of the European Convention were violated. Article 11(1), or the right to freedom of assembly, states that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the

⁷² David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT’L L. 821, 822, 833 (2010). Signatories to the Principles include notable human rights jurists, human rights treaty body members, UN Special Rapporteurs, law professors, and human rights activists. Two NGOs also participated: the International Commission of Jurists (ICJUR) and the International Service for Human Rights (ISHR). *Id.* at 840.

⁷³ INT’L COMM’N OF JURISTS, YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY, Principle 20 (Nov. 2006) [hereinafter YOGYAKARTA PRINCIPLES].

⁷⁴ *Id.* at Principle 20, §§ (A)–(E).

right to form and to join trade unions for the protection of his interests.”⁷⁵ Article 11(2) provides for exceptions to this right:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.⁷⁶

The Court’s primary question was centered on section two, asking whether the ban imposed by Mayor Luzhkov was in accordance with the law and “necessary in a democratic society” to protect the interests of any of the enumerated reasons.

In addition to Article 11, the Muscovite government was alleged to have violated Article 13, or the right to an effective remedy.⁷⁷ The alleged violation of this article stems from the Russian judicial system’s repeated refusal to recognize the claims of the applicant or ameliorate the harm of the bans, and from the statutory guidelines that made it impossible to receive a final decision on the ban before the event’s scheduled date. The Court was then asked to determine if the violations of Articles 11 and 13 were motivated by discrimination, which would be a violation of Article 14: “The enjoyment of 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.”⁷⁸

B. Russia’s Arguments

The Russian government’s argument revolved around three points: (1) the bans on the applicant’s public events are lawful; (2) the bans pursue legitimate aims; and (3) the bans are necessary in a democratic society. To bolster its first claim, the government pointed to the domestic legal instruments in question, the Constitution and the

⁷⁵ European Convention, *supra* note 49, at art. 11(1).

⁷⁶ *Id.* at art. 11(2).

⁷⁷ *Id.* at art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

⁷⁸ *Id.* at art. 14. The phrase “other status” has been interpreted to include a variety of grounds for protection, including marital status and sexual orientation. *See* O’Connell, *supra* note 49, at 13.

Assemblies Act. It argued that the inevitably violent confrontation between the activists and counter-demonstrators was a risk to public safety, and that these grounds were sufficient to justify banning the public event under Article 55 § 3 of the Constitution and Article 8(1) of the Assemblies Act.⁷⁹ The government also claimed to be operating within its margin of appreciation under Article 11(2), arguing for leeway when it comes to protecting the public during potentially volatile public events.⁸⁰ It claimed that the ban was the only way to maintain public order “because no other measure could have adequately addressed the security risks.”⁸¹

With respect to its second argument, the government claimed that it had three legitimate aims in banning gay pride demonstrations: (1) protecting public safety, (2) protecting morals, and (3) protecting the rights and freedoms of others.⁸² Its public safety concerns are well documented, though the violence came from the counter-demonstrators instead of the organizers and their supporters. To support its argument that it was acting in protection of morals, the

⁷⁹ Alekseyev v. Russia, Nos. 4916/07, 25924/08 and 14599/09, ¶ 57 (2010). Article 55 § 3 of the Constitution, *supra* note 49, reads:

The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.

Article 8(1) of the Assemblies Act reads: “A Public event may be carried out at any place suitable for the purposes of the given event provided the holding of such event creates no threat of collapse of buildings and structures or any other threat to the security of participants in the public event.”

⁸⁰ The “margin of appreciation” doctrine is analogous to judicial discretion; it is “based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions.” Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GERMAN L.J. 711, 711 (2007).

⁸¹ Alekseyev ¶ 58. The government also claimed that a ruling contrary to its domestic courts’ rulings would make the Court a “court of fourth instance.” The Fourth Instance Doctrine is meant to maintain a high level of deference to national court systems, and the Court will generally only question the rulings of a domestic court “where the interpretation by the national court is ‘arbitrary,’ or where it is a part of a Convention requirement that national law be complied with Even so, it is very exceptional for the Court to disagree with any decision by a national court on its interpretation and application of its own national law.” D.J. HARRIS, M. O’BOYLE, E.P. BATES & C.M. BUCKLEY, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 15 (2d ed. 2009).

⁸² See Paul Johnson, *Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v. Russia*, 11 HUM. RTS. L. REV. 578, 580 (2011).

government relied on the religiosity of the Russian people. It argued that promotion of homosexuality was “incompatible with the ‘religious doctrines for the majority of the population.’”⁸³ It supported this claim with the statements by local religious leaders and organizations condemning pride parades specifically, and homosexuality generally.⁸⁴ Allowing the gay pride parade to go forward would be an insult to religious Russians who object to homosexuality, the government argued; it would be a “terrible debasement of their human dignity.”⁸⁵ To buttress its religious protection claim, the government fell back on the guarantees of respect and protection of individual religious and moral beliefs found in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the ICCPR.⁸⁶

The government concluded its argument by disputing the idea that there was a consensus within the Council of Europe on the extent to which homosexuality was accepted in each country, a claim meant to

⁸³ *Alekseyev* ¶ 59.

⁸⁴ These statements came from the Orthodox Church, the Supreme Mufti for Russia, and the head of the Muslim authority of Nizhniy Novgorod, and ranged from threatening mass protests to calling for the stoning of homosexuals. *See Johnson, supra* note 82, at 581. The Orthodox Church protested the parade on the belief that it was sin-promoting propaganda. The Supreme Mufti promised that Muslims and other “normal” people would protest *en masse*. And the Muslim authority in Nizhniy Novgorod claimed that, “as a matter of necessity, homosexuals must be stoned to death.” *Id.*

⁸⁵ *Alekseyev* ¶ 59.

⁸⁶ *See ICCPR, supra* note 50, at art. 18(1) (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”). The ICESCR only references religious protection in the context of preventing religious discrimination in state fulfillment of its provisions: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . religion.” International Covenant on Economic, Social, and Cultural Rights (ICESCR), art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3. Reliance on this treaty to prove the point of religious discrimination is inapt, as none of the rights enumerated in the ICESCR are alleged to have been violated by the presence of a gay pride parade, let alone on religious grounds. The Russian government claimed that allowing gay pride parades would “breach the rights of those people whose religious and moral beliefs included a negative attitude towards homosexuality.” *Alekseyev* ¶ 60. It argued that “the democratic State must protect society from destructive influence on its moral fundamentals, and protect the human dignity of all citizens, including believers.” *Id.* In other words, allowing realization of LGBT Russians’ right to freely assemble would trample on the rights of religious Russians to have religiously rooted negative views on homosexuality; the Russian government saw itself as protecting the bulk of its population from having their religious rights encroached upon by a small portion of the population.

invoke the margin of appreciation doctrine.⁸⁷ It first argued for keeping expressions of homosexuality or LGBT support purely in the private sphere, such as clubs, bars, and entertainment facilities; the idea was that homosexuality was something that “involuntary spectators” should not be exposed to, especially children.⁸⁸ The government then claimed that because, in its opinion, Muscovites were not ready to accept gay pride parades or other public demonstrations of LGBT support, it was the duty of the Moscow government to “demonstrate sensitivity to the existing public resentment of any overt manifestation of homosexuality.”⁸⁹

C. Alekseyev’s Arguments

Every argument made by the Russian government was strongly contested by Alekseyev. There are three basic points that rebut every claim made by the government: (1) domestic law does not provide for an outright ban on public events, merely for proposed changes in date, time, or venue; (2) the government’s so-called “legitimate aims” for the bans are inapplicable; and (3) the bans are *not* necessary in a democratic society. The first point is supported by Article 8(1) of the Assemblies Act, which governs public events where there are safety concerns. There is no language in that section allowing officials to ban an event for public safety concerns; rather, they are required to suggest another venue.⁹⁰ Even if the Court had found that the

⁸⁷ The government wanted to demonstrate that there was a lack of agreement on the extent of LGBT rights throughout Europe that justified a wide margin of appreciation from the Court. Typically, when dealing with public morals issues, the Court “generally submits that Contracting States have a wide margin of appreciation, and defers to the national authorities’ judgments.” See Bakircioglu, *supra* note 80, at 717. A lack of a “uniform conception of morals provides a legitimate justification for the Court to evade its supervisory role.” *Id.* at 727.

⁸⁸ *Alekseyev* ¶ 61.

⁸⁹ *Id.* ¶ 62. It again referred to the numerous statements from religious groups, civic leaders, and Russian celebrities condemning the gay pride parade.

⁹⁰ *Id.* ¶ 64. Article 12(1)(2) states that the governing body, upon receipt of notice of a public event, is obligated “to deliver to the promoter of the public event, within three days from receipt of the notice . . . a well-motivated proposal to alter the place and/or time of holding the public event.” Assemblies Act, art. 12(1)(2). Even if the proposed public event has goals that are counter to the provisions of the Constitution of the Russian Federation, or defy administrative or criminal bans enacted by the government, the Assemblies Act only gives the governing body authority to “immediately give to the promoter of the public event a motivated caution in writing to the effect that the promoter and also other participants in the public event . . . may be held responsible as appropriate.” Assemblies Act, art. 12(2). Nothing in the Act provides for an outright ban on public events, regardless of their content or the manner in which they are held.

Assemblies Act provided for public safety bans, Alekseyev argued, the government failed to prove its case on the other two requirements in Article 8 § 2 of the European Convention: that the bans pursue legitimate aims and are necessary in a democratic society.

Alekseyev rejected all three legitimate aims put forward by the government to justify the bans. The first, public morals, was rejected because “the Government’s definition of ‘morals’ included only attitudes that were dominant in public opinion and did not encompass the notions of diversity and pluralism.”⁹¹ Additional arguments pointed out that the proposed activities were actually demonstrations in favor of civil liberties—a goal hardly considered morally objectionable by most—and that no “immoral” behavior, such as nudity or public sexual activity, had been planned for any of the events. The Court noted that the Russian government had not shown that any concrete harm to persons or society would result from the gay pride rallies. Alekseyev argued that, contrary to this notion of societal harm, “the events would have been of *benefit* to Russian society by advocating the ideas of tolerance and respect for the rights of the lesbian and gay population.”⁹²

In response to the government’s purported aim of protecting public safety and preventing disorder, Alekseyev pointed out that every planned march was intended to be peaceful. The government’s resistance rested on the assumptions of violence from counter-demonstrators. However, the Court noted that the government never assessed the scale of potential violence between demonstrators and counter-demonstrators, which undermined the government’s claim that it was unable to provide adequate security for the events.⁹³ While the Court does not mention any arguments made by Alekseyev to counter the government position that the protection of religious freedoms of a majority of its population was a legitimate aim for the ban, it does address this claim in its assessment of the case.⁹⁴

Finally, Alekseyev disputed the claim that the bans are necessary in a democratic society by referencing the Court’s established case law. Referring to the 2007 decision in *Bączkowski v. Poland*, the landmark case which found that administrative roadblocks that effectively ban gay pride parades can constitute Article 11 violations, the applicant

⁹¹ *Alekseyev* ¶ 65.

⁹² *Id.* (emphasis added).

⁹³ *Id.* ¶ 66. The government never submitted reasons why security was not possible at any of the rejected venues in the three years that the Court examined (2006–2008).

⁹⁴ For discussion on this point, see *infra* p. 124 and notes 99–100.

argued that “the mere possibility of confusing and even shocking part of society could not be regarded as a sufficient ground for such a sweeping measure as a total ban” on gay pride events.⁹⁵ Alekseyev argued that the values of a democratic society include pluralism, tolerance, and broadmindedness, and that bans on gay pride events like the ones in question are incompatible with these democratic characteristics. In his mind, the government not only discouraged participation in a process necessary to a democratic society (freedom of assembly), but had also encouraged the negative attitudes expressed by counter-demonstrators that the event organizers and their goals were immoral. This had the effect of “depriving the minority of a lawful right to hold a peaceful demonstration, a right that was inherent in a society striving to be democratic.”⁹⁶ This disapproval, and the concurrent violation of democratic aims, led to the government’s prohibition on what was essentially a lawful demonstration, and to its failure to protect the participants.

IV THE COURT’S ASSESSMENT

The Court immediately noted in its rationale that there is “no doubt” that the applicant’s Article 11 rights were interfered with by the Russian government; this point was actually conceded by both parties. The question the Court was considering was whether or not the bans were *justified*. It wasted no time in finding that there was no legitimate justification for the bans enacted by Moscow; consequently, the Court easily found that the Russian government had committed an unjustified Article 11 violation in banning the pride events. Referring back to its decision in *Bączkowski*, it noted that “the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a ‘democratic society.’”⁹⁷ The Court has found in the past that the hallmarks of a democratic society, as argued by Alekseyev, are pluralism, tolerance, and broadmindedness.⁹⁸ In the course of pursuing these aims, the Court has allowed the interests of individuals

⁹⁵ *Alekseyev* ¶ 67; *see also* *Bączkowski and Others v. Poland*, No. 1543/06, ¶ 64 (2007).

⁹⁶ *Alekseyev* ¶ 67.

⁹⁷ *Bączkowski* ¶ 61 (citations omitted).

⁹⁸ *Id.* ¶ 63. The Court put particular emphasis on pluralism, noting: “pluralism is . . . built on genuine recognition of, and respect for, diversity. . . . The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.” *Id.* ¶ 62 (citations omitted).

to be subordinated by those of a group: “[D]emocracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”⁹⁹

A. Public Safety

The Court then turned to the first of the three “legitimate aims” the Russian government claimed, public safety. A large part of the government’s evidence to defend this argument rested on the petitions presented from those religious and civil organizations that objected to the planned pride events.¹⁰⁰ In response to this argument, the Court referred to its previous case law, noting that Article 11 protects any public event that “may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote.”¹⁰¹ This protection imposes an affirmative duty upon governments to take “reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.”¹⁰² The Court found that the government failed in this duty, and that the petitions it presented in support of its public safety justification were, at least in part, “irrelevant to safety considerations.”¹⁰³

Despite this level of discretion, the Court emphasized that the mere presence of a risk is insufficient grounds for a ban; the government must show assessments of the potential scale of the violence, as well as steps taken to mitigate potential violence while still maintaining the

⁹⁹ *Alekseyev* ¶ 70 (citations omitted). This appears to be part of a broader argument rebutting the Russian government’s position that religious freedom of individuals and groups who oppose homosexuality justify the bans. One commentator has noted that the implication of this position is that “no matter how dominant a religion is in a society, faith should not assume any special status in balancing the protection of the Article 11 rights of homosexuals with the rights and freedoms of others.” Johnson, *supra* note 82, at 589.

¹⁰⁰ The Court pointed out that those petitions were not all of the same ilk. Some merely expressed disapproval of the pride events and homosexuality. Others expressed plans to demonstrate against the pride parade, and still others explicitly threatened violence if the parade was allowed. *Alekseyev* ¶ 72.

¹⁰¹ *Id.* ¶ 73 (citations omitted).

¹⁰² *Id.* (citations omitted). The first set of petitions presented carried no threats of violence or counterdemonstrations, and were thus “irrelevant.” *Id.* ¶ 74.

¹⁰³ Those petitions that carried threats of violence or counter-demonstrations were relevant insofar as security arrangements were concerned, an area where governments have been given relatively wide latitude. *Id.* ¶ 75 (“As a general rule, where a serious threat of a violent counterdemonstration exists, the Court has allowed the domestic authorities a wide discretion in the choice of means to enable assemblies to take place without disturbance.”).

rights of its LGBT citizens to demonstrate peacefully.¹⁰⁴ In this case, the Russian government failed to show any attempts to assess the potential violence of counter-demonstrations and create security plans to protect the pride parade, opting instead to just ban the event outright.¹⁰⁵ The Court rejected the government's argument that the violent threats necessitated a ban on the events, noting that if violent threats were truly a concern of the Moscow government, it would have prosecuted those responsible for making the threats.¹⁰⁶ Furthermore, regardless of the government's failure to adequately assess the risks involved in holding pride events, threats of violence should not automatically warrant a complete ban on pride parades: "[I]f every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion."¹⁰⁷ These factors were paramount in the Court's finding that the Russian government's bans were not justified by public safety concerns, but were in fact a secondary consideration to the government's concerns about public morals.

B. Public Morals

To support its conclusion that the government's primary concern was about public morals, the Court first pointed to the discriminatory statements made by government officials, specifically the mayor of

¹⁰⁴ *Id.*

¹⁰⁵ Even if the Muscovite government had done some assessment of the counter-demonstrations, the Court found that there was only a potential total of about one hundred protestors, a number that would hardly overwhelm the security forces of a city the size of Moscow. *Id.*

¹⁰⁶ Again, the Russian government did not make any attempt to take these steps. *Id.* ¶ 76. The Court noted that those who threatened violence against the pride participants, specifically the Muslim cleric from Nizhniy Novgorod who called for the stoning of homosexuals, avoided any culpability: "[I]t does not appear that the authorities in the present case reacted to the cleric's call for violence in any other way than banning the event he condemned." *Id.* The Court also pointed out that the government's ban not only avoided the issue of violence against LGBT participants, but also encouraged the confrontations with those who participated in the pride events: "By relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organizations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order." *Id.*

¹⁰⁷ *Id.* ¶ 77.

Moscow.¹⁰⁸ In addition to the mayor's own comments that celebrations of gay pride are "inappropriate," the government argued that pride events should be banned on principle, "because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults."¹⁰⁹ The government's objection on morality grounds was, in the Court's opinion, insufficient grounds for banning the events under public law, and was clearly disproportionate to either of the aims put forward by Russia.¹¹⁰

The Court reiterated the importance of freedom of peaceful assembly to promoting democratic principles in finding that Article 11 guarantees apply to all assemblies—except those with violent intentions on behalf of the organizers or that deny central tenets of a democratic society. Citing a previous decision in *Sergey Kuznetsov v. Russia*, the Court stated that "any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it."¹¹¹ Ultimately, the Court found that the planned pride events would not have risen to the level of controversy that the government claimed it would.¹¹² Additionally, the comments of Muscovite officials demonstrated that the primary concern was not the *behavior* of the participants, but their open identification as sexual minorities.

¹⁰⁸ The Mayor's comments that those who deviate from "normal principles in organizing one's sexual life" should not publicly display their "deviations," coupled with deputy mayor Shvetsova's remark that propaganda in favor of LGBT rights could be considered "propaganda for immorality," clearly show that concern for public morals was paramount to Moscow's government. PRIDE AND VIOLENCE, *supra* note 5, at 3.

¹⁰⁹ *Alekseyev* ¶ 78.

¹¹⁰ *Id.* ¶ 79. In fact, during the domestic proceedings, the government relied solely on public safety grounds as justification for the ban, while ignoring the public morality arguments that it would eventually make before the Court. *Id.*

¹¹¹ *Id.* ¶ 80 (citing *Sergey Kuznetsov v. Russia*, No. 10877/04, ¶ 45 (2008)). Underlying this point is the concept that conditioning minority rights on acceptance by the majority is counter to the foundational principles of the Convention. As the Court points out, if minority rights are contingent on majority approval, then minority rights of religion, expression, and assembly would be merely theoretical and not practical, as required by the European Convention. *Alekseyev* ¶ 81 (citations omitted).

¹¹² Both *Alekseyev* and the government acknowledge that there was no nudity or other graphic, obscene activities planned; the government also acknowledged that its condemnation of homosexuality was limited to expressions in the public sphere. *Id.* ¶ 82.

C. Margin of Appreciation

The Court also rejected the government's margin of appreciation argument, which rested on the theory that a lack of consensus in Europe on LGBT issues justified its approach to public expressions of homosexuality and support of gay rights. This rejection is not entirely surprising, given the Court's recent jurisprudence on the margin of appreciation doctrine in the context of LGBT rights.¹¹³ The Court referred to established case law that reflected a "long-standing European consensus" on a variety of matters concerning gay rights: decriminalization of consensual homosexual relations between adults, military service, and parental rights are just some examples.¹¹⁴ Regardless of the presence of consensus, it still requires authorities to not overstep this margin by acting "arbitrarily."¹¹⁵

The presence of general consensus in support of LGBT rights of assembly amongst member states led the Court to reject the government's margin of appreciation doctrine. The Court also reiterated its position that "any decision restricting the exercise of freedom of assembly must be based on an acceptable assessment of the relevant facts."¹¹⁶ Since the only factor that Moscow's government took into account before banning the pride events was public opposition and personal views on morals, it failed to meet this burden.¹¹⁷ This conclusion, combined with the Court's rejection of the

¹¹³ As one commentator has noted, despite some inconsistencies in application there has been a "progressive narrowing" of the margin of appreciation the Court grants states in respect to sexual orientation issues since the 1980s. Johnson, *supra* note 82, at 589. Johnson points out that the Court has relied on the presence of European consensus only in certain circumstances concerning gay rights. For example, the Court considered Europe's lack of consensus on same-sex marriage in allowing for a wide margin of appreciation in *E.B. v. France*, but did not consider the margin of appreciation doctrine at all in another case concerning same-sex adoption. *Id.* at 589–90.

¹¹⁴ *Alekseyev* ¶ 83. Despite this general consensus, there are still some areas where Europe is divided on the extent of LGBT liberty (specifically marriage), and the Court has generally allowed a wide margin of appreciation to countries on these issues.

¹¹⁵ *Id.* The Court emphasized that states' margin of appreciation "goes hand in hand with European supervision." This supervision defeated the Russian government's argument that the Court was acting as a court of fourth instance. See HARRIS ET AL., *supra* note 81. It also noted that any absence of European consensus was irrelevant in this case because there is a fundamental difference between conferring substantive rights on homosexuals (such as marriage) and recognizing their right to campaign for those substantive rights. No other member states are ambiguous on the right of homosexuals to openly identify as such, or prevent homosexuals from exercising rights of free assembly.

¹¹⁶ *Id.* ¶ 85.

¹¹⁷ As the Court took care to note, the mayor of Moscow and his government strived to keep homosexuality out of the public sphere based on the notion that homosexuality is a

government's alleged legitimate aims and margin of appreciation arguments, led the Court to conclude that the government's ban on LGBT-identified public events "did not correspond to a pressing social need and was thus not necessary in a democratic society," thereby violating Alekseyev's Article 11 rights.¹¹⁸

D. Other Violations

While the Article 11 violation was the thrust of this case, the Court also found that the government violated Alekseyev's right to an effective remedy under Article 13 of the European Convention, and did so with discriminatory purposes, a violation of Article 14.¹¹⁹ Article 13 was violated because the domestic courts and laws were structured to make a successful appeal on a ban effectively impossible.¹²⁰ For a remedy to be effective, there must be the

conscious, anti-social choice. Not only did the government fail to offer any evidence to justify this conclusion, but the Court pointed out that "[t]here is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or 'vulnerable adults.'" *Id.* ¶ 86.

¹¹⁸ *Id.* ¶¶ 87–88.

¹¹⁹ Article 13 of the Convention reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." European Convention, *supra* note 49, at art. 13. Article 14, governing the prohibition of discrimination, states that "[t]he 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 art. 14.

¹²⁰ For the Article 13 claim, Alekseyev argued that he was denied an effective remedy for the Article 11 violation because there was no procedure in place to guarantee him a final decision before the planned date of the march. The government countered this argument by pointing to available judicial remedies, some of which Alekseyev did not attempt to pursue. *Alekseyev* ¶¶ 90, 92. The government also argued that the event organizers waited too long before filing court and administrative challenges, casting doubt on Alekseyev's argument that a judicial remedy would not have been provided before the planned date of the events. Alekseyev responded by saying that he had filed the appeals as soon as he received the full text of the judgment; furthermore, he claimed that due to the notice provisions in the Assemblies Act and the sections of the Code of Civil Procedure concerning the entry of judgments into force, any first-instance judgments or appeals would necessarily become final only after the planned date of the events. Article 7(1) of the Assemblies Act holds that notices of public events must be submitted to the governing body "within the period not earlier than fifteen and not later than ten days prior to the holding of the public event." Notices for pickets must be submitted no later than three days of the event. Assemblies Act at art. 7(1). For example, the events planned for May 27, 2006, were banned by the first-instance court on May 26. There was no possible way to seek redress in a manner that would allow the events to proceed the following day. Any judicial decision overturning the ban would have been retrospective and, consequentially, futile towards remedying the damage of the ban. The Court sided with Alekseyev, relying

possibility of obtaining a ruling *before* the planned time of the event in question: “It is . . . important for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities . . . should act.”¹²¹ The Court easily found an Article 14 violation, referring to government officials’ own statements as evidence that bias was the driving force behind the bans.¹²² Because the Court had previously found that the main reason for the ban was government disapproval of public events aimed at promoting homosexuality, and because it found an undeniable link between officials’ discriminatory statements and the ban, it concluded that there had been unjustified discrimination against Alekseyev in the violation of his Article 11 right.¹²³

Ultimately, the Court found that Russia had violated all three of the Articles in question by illegally denying the right of Alekseyev to exercise his freedom of assembly, based on discriminatory purposes, and by not providing him with a timely, effective remedy.¹²⁴

on the idea that “the timing of public events is crucial for the organisers and participants.” *Alekseyev* ¶ 98. As mentioned in Part II, *supra* p. 102, Alekseyev and Gay Russia specifically scheduled pride for May 27 in order to mark the anniversary of the decriminalization of homosexuality in the Russian Federation.

¹²¹ *Alekseyev* ¶ 98.

¹²² Relying on Article 14 in conjunction with Article 11, Alekseyev alleged that the government violated his Article 11 rights because of his sexual orientation, saying that it was clear that the real reason for the ban was official disapproval of his moral standing. *Id.* ¶¶ 101, 105. Sexual orientation is covered under Article 14, as the Court found in *Kozak v. Poland* in 2010. “Furthermore,” the Court wrote in that opinion, “when the distinction in question operates in this intimate and vulnerable sphere of an individual’s private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of.” *Kozak v. Poland*, No. 13102/02, ¶ 92 (2010). The margin of appreciation afforded to states in the context of sexual orientation is narrow, and the principle of proportionality “does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances.” *Alekseyev* ¶ 108. As found by the Court and reiterated by the Council of Europe’s Parliamentary Assembly, “a difference in treatment is discriminatory if it has no objective and reasonable justification.” Resolution 1728, *supra* note 65, § 2. The government denied Alekseyev’s allegations, arguing that there was no discriminatory intent behind the ban. The government acknowledged the “existence” of sexual minorities and the necessity of addressing discrimination against LGBT Russians; however, it argued that “in view of their antagonistic relations with religious groups, it could prove necessary to place restrictions on the exercise of their rights.” *Alekseyev* ¶ 104.

¹²³ The Court also determined that the government had not provided any justification showing that the impugned distinction was compatible with Convention standards. *Id.* ¶ 109.

¹²⁴ The decision was issued October 21, 2010, and referred to the Grand Chamber of the European Court of Human Rights. The Grand Chamber rejected the referral request on April 11, 2011, thereby making the Court’s decision final. Press Release, European Court

Alekseyev requested €40,000 in non-pecuniary damages and approximately €17,500 in legal fees before both domestic courts and the European Court. The Court awarded Alekseyev the full amount of legal fees and €12,000 in damages, resulting in a €29,500 fine for the Russian government. While the government is expected to pay the fine, whether or not this case will have an impact on Russia's approach to LGBT rights, especially Article 11 rights, is yet to be seen, though recent developments have not been promising.¹²⁵

V IMPLICATIONS

There are three main issues to consider when assessing the implications of *Alekseyev* for Russia and for sexual minorities who are denied their rights under the European Convention. First, the ruling reinforces the strength of LGBT freedom of assembly in Europe. Second, the Court's decision represents a broadening understanding of gay rights in Europe. And third, the decision highlights the Russian government's contracting stance towards recognition of homosexuality and protection of LGBT rights. These three variables lead to the conclusion that while the Russian state may continue to restrict LGBT rights, especially those involving public assembly, the European Court is ready to defend the rights of sexual minorities in Russia, with the strong support of the Council of Europe and other European institutions.

A. LGBT Freedom of Assembly in Europe

The primary effect of *Alekseyev* is its explicit recognition of a human right to public assembly and association for sexual minorities. This stance is a continuation of the court's decision in *Bączkowski*, called the "most explicit statement on the obligation of states toward LGBT assemblies."¹²⁶ Explicit acknowledgement of sexual minority rights is especially important since the Convention does not mention

of Human Rights, Court's Judgment Concerning Repeated Unjustified Ban on Gay-Rights Marches in Moscow is Now Final (Apr. 15, 2011), *available at* http://www.echr.coe.int/echr/en/header/press/links/archived+news/archivesnews_2011.htm.

¹²⁵ Member states are required under the European Convention to comply with the decisions of the Court. *See* European Convention, *supra* note 49, at art. 46(1) ("Binding Force and Execution of Judgments.").

¹²⁶ Holzhaecker, *supra* note 60, at 18. *Bączkowski* is a case that "demonstrate[s] the Court's heightened awareness of the unacceptability of discrimination on grounds of sexual orientation and its greater readiness to scrutinize cases coming before it in this regard." HARRIS ET AL., *supra* note 81, at 598.

sexual orientation or gender identity as grounds of discrimination prohibited under Article 14 or Protocol No. 12.¹²⁷ The decision in *Alekseyev* reinforces the notion that the Court is ready, willing, and able to scrutinize cases of sexual orientation discrimination. Additionally, *Alekseyev* gives judicial effect to the Committee of Ministers' Recommendation on Discrimination.¹²⁸ Incorporating this recommendation into the Court's jurisprudence will only strengthen the position of LGBT persons claiming Article 11 violations under the European Convention.

B. Pride in Europe

The second notable aspect of the *Alekseyev* decision is its reflection of a growing understanding of LGBT rights in Europe, specifically the right of assembly. A 2011 report released by the Council of Europe's Commissioner for Human Rights noted that pride parades and other LGBT "cultural events" take place without problems in most member states.¹²⁹ Despite this widening recognition, pride participants in Eastern Europe face a higher risk of government prohibition and assault than in most countries in Western Europe. At least twelve member states have banned or created administrative impediments for pride or other cultural LGBT events, including Poland, Turkey, Ukraine, Lithuania, and, of course, the Russian Federation.¹³⁰ Aside from Russia, violence has been threatened or has

¹²⁷ See European Convention, *supra* note 49, at art. 14; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.1 (2000). Despite the absence of sexual orientation as a prohibited ground of discrimination, the European Court of Human Rights has recognized that Article 14 covers sexual orientation, and it is mentioned in the explanatory report to Protocol No. 12. Holzhaecker, *supra* note 60, at 19.

¹²⁸ Paul Johnson, *Russian Ban on Homosexual Propaganda Violates Human Rights*, JURIST (Dec. 1, 2011, 8:12 AM), <http://jurist.org/hotline/2011/12/paul-johnson-russia-lgbt.php>. As discussed in Part III, the Recommendation on Discrimination is a comprehensive approach to conferring affirmative obligations on states to protect sexual minorities from discrimination, with a number of provisions aimed specifically at protecting freedom of expression and peaceful assembly.

¹²⁹ *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 73. In July 2010, EuroPride in Warsaw became the first European-wide gay pride event held in Eastern Europe, drawing an estimated 8000 participants—a fitting transformation for the city where the *Bączkowski* case was born. Kamil Tchorek, *Warsaw's Gay Pride Reveals the Face of Modern Poland*, GUARDIAN (July 19, 2010), <http://www.guardian.co.uk/commentisfree/2010/jul/19/poland-gay-pride-warsaw>.

¹³⁰ *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 73–74. Another case concerning gay pride bans in Moldova is currently pending before the European Court of

erupted at gay pride events in Latvia, Hungary, Serbia, and Georgia; the Council of Europe has also documented violent attacks on pride parades in no less than fifteen member states, from Sweden to Ukraine, since 2004.¹³¹

C. Restrictions on LGBT Freedom in Russia

Even though the Court found multiple violations of Alekseyev's rights and fined the Russian government, LGBT Russians still struggle to have their voice heard without government interference or prohibition. Despite active gay communities in Moscow and St. Petersburg, the U.S. State Department has noted that "[s]ocietal animosity toward gays remain[s] strong."¹³² In June 2011, the European Parliament adopted a resolution at the EU-Russia Summit in Nizhny Novgorod that explicitly voiced disapproval for the

Human Rights. See *Genderdoc-M v. Moldova*, No. 9106/06 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394>.

¹³¹ *The Long March: Gay Rights in Eastern Europe*, ECONOMIST (Oct. 26, 2010), http://www.economist.com/blogs/easternapproaches/2010/10/gay_rights_eastern_europe. The Economist notes that attacks on gay pride events in Eastern Europe "are part of a broader trend that has seen politics lurch to the right across the continent in recent years." *Id.* See also *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 75. Violence at pride parades is still very much a concern in a number of Eastern European countries; at the 2010 Pride parade in Belgrade, Serbia, riots erupted when anti-gay demonstrators clashed with police, resulting in over 140 injuries. *Serbia Riots Leave Scores Injured*, AL JAZEERA (Oct. 11, 2010), <http://www.aljazeera.com/news/europe/2010/10/2010101015466495888.html>. In 2011, approximately 10,000 anti-gay demonstrators attacked about 200 LGBT activists and allies in Split, Croatia. *Croatia: Don't Force Change in Pride March Route*, HUMAN RIGHTS WATCH (May 31, 2012), <http://www.hrw.org/news/2012/05/31/croatia-don-t-force-change-pride-march-route>. Ukrainian gay rights activists cancelled the planned 2012 pride parade after threats of violence from anti-gay demonstrators, as well as assaults on activists themselves. *Ukraine: Investigate Brutal Attack on Gay Activist*, HUMAN RIGHTS WATCH (June 26, 2012), <http://www.hrw.org/news/2012/06/26/ukraine-investigate-brutal-attack-gay-activist>.

¹³² U.S. STATE DEP'T, 2010 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RUSSIA (Apr. 8, 2011), available at <http://www.state.gov/documents/organization/160474.pdf> [hereinafter STATE DEP'T REPORT]. The report cites a number of hate crimes against gays in Russia over the past few years, focused largely around public pride events, including the kidnapping of Alekseyev by Muscovite security personnel. One gay Muscovite who recently obtained asylum in the United States because of sexuality-based persecution faced in Russia spoke with *The Moscow Times* about how difficult it was to be a known homosexual in Russia: "I participated in a nonsanctioned gay-pride parade at Vorobyovy Gory . . . It was ruthlessly suppressed. Participants were arrested. Those who were not arrested, myself included, were left bleeding, bruised and swollen." Nikola Krastev, *Why a Gay Muscovite Sought, and Won, U.S. Asylum*, MOSCOW TIMES (Aug. 15, 2012), <http://www.themoscowtimes.com/news/article/why-a-gay-muscovite-sought-and-won-us-asylum/466605.html>.

continuing ban on gay pride parades in spite of the Court's ruling, saying that the Parliament:

Regrets that, contrary to Russia's obligations as a member of the Council of Europe to uphold freedom of assembly, peaceful citizens' gatherings continue to be banned and violently dispersed, including a gay pride march in Moscow for the sixth consecutive year, disregarding a final ruling¹³³ made in April 2011 by the European Court of Human Rights.

Regardless of the Parliament's position, Russia (and particularly Moscow) has continued to restrict LGBT assemblies, as well as other rights. The Moscow government has refused to recognize the substance of the Court's ruling in *Alekseyev* and continues to ban gay pride parades; in fact, the most recent attempt to hold a gay pride demonstration—in May 2012—ended in the arrest of about forty demonstrators from both sides, including Alekseyev.¹³⁴ After Mayor Luzhkov was removed from his post by then-President Dmitri Medvedev in late 2010, gay rights activists had hoped that the new mayor, Sergei Sobyenin, would take a softer line on pride parades than his predecessor.¹³⁵ However, Mayor Sobyenin explicitly stated in November 2011 that he would not allow gay pride parades to be held in Moscow, because Muscovites would oppose the event and their opinion “had to be ‘respected.’”¹³⁶ Other government officials have been more vehement in their opposition to gay pride events. In response to attempts to organize a pride march, the governor of the

¹³³ *European Parliament Resolution of 9 June 2011 on the EU-Russia Summit* (June 9, 2011), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0268+0+DOC+XML+V0//EN&language=EN> [hereinafter EU-Russia Resolution]. See also Intergroup on LGBT Rights, *European Parliament Calls on Russia to Authorise Gay Prides* (June 9, 2011), <http://www.lgbt-ep.eu/parliamentary-work/european-parliament-calls-on-russia-to-authorise-gay-prides/>.

¹³⁴ Alexander Tikhomirov, *Moscow Gay Pride Protests Blocked by Russia Police*, HUFFINGTON POST (May 27, 2012), http://www.huffingtonpost.com/2012/05/27/moscow-gay-pride-protests_n_1548992.html?s=1026401.

¹³⁵ See Simon Shuster, *Moscow's Mayor Fired: A Win—and a Risky Move—for Medvedev*, TIME (Sept. 28, 2010), <http://www.time.com/time/world/article/0,8599,2022106,00.html>.

¹³⁶ *Moscow Mayor Pledges No Gay Pride Parades on His Watch*, RIA NOVOSTI (Nov. 24, 2011), <http://en.ria.ru/society/20111124/169012089.html>. While Sobyenin initially approved the event in late 2010, he reversed course in early 2011 and Moscow Pride was once again banned. See Ben Aris, *New Moscow Mayor Says Yes to Protest*, TELEGRAPH (Dec. 2, 2010), <http://www.telegraph.co.uk/sponsored/russianow/society/8177000/New-Moscow-mayor-says-yes-to-protest.html>.

Tambov Region responded: “Tolerance?! Like Hell! Faggots should be torn apart. And their pieces should be thrown in the wind.”¹³⁷

The freedom of assembly is not the only right that has been restricted in the context of LGBT Russians in recent years. There has been significant attention to a new law in St. Petersburg purporting to prevent “homosexual propaganda,” which has largely been seen as an attempt to stifle gay expression. The law penalizes “public actions directed at the propaganda of sodomy, lesbianism, bisexuality and transgenderism among minors” with fines of up to USD 17,000, and defines homosexual propaganda as “the targeted and uncontrolled dissemination of generally accessible information capable of harming the health and moral and spiritual development of minors.”¹³⁸ Aside from the well-known instances of LGBT discrimination in Russia, the U.S. State Department noted more common occurrences of discrimination in its annual human rights report:

[T]he majority of gays hide their orientation due to fear of losing their jobs or their homes, as well as the threat of violence. . . . Medical practitioners . . . limit or deny gay and lesbian persons health services due to intolerance and prejudice. According to recent studies, gay men faced discrimination in workplace hiring practices. Openly gay men were targets for skinhead aggression; police often failed to respond out of indifference.¹³⁹

Additionally, LGBT Russians who attempt to use the European Court of Human Rights face potential harassment: “Amnesty International and other human rights groups reported past reprisals against applicants to the court, including killings, disappearances, and intimidation. According to press reports and human rights NGOs, as of September 2009 at least six applicants to the ECHR had been killed or abducted.”¹⁴⁰

¹³⁷ *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 57.

¹³⁸ Michael Schwartz, *Anti-Gay Law Stirs Fear in Russia*, N.Y. TIMES, Feb. 29, 2012, at A14.

¹³⁹ STATE DEP’T REPORT, *supra* note 132, at 83. For additional information on hate crimes against sexual minorities in Russia, see Russian LGBT Network, *Discrimination and Violence Against Lesbian and Bisexual Women and Transgender People in Russia*, 8–9 (Shadow Report submitted for the 46th CEDAW Session) (July 12–30, 2010), http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/LGBTNetwork_RussianFederation46.pdf.

¹⁴⁰ STATE DEP’T REPORT, *supra* note 132, at 21.

CONCLUSION

Ultimately, the Court's decision will likely have little impact on local and regional governments, as evidenced by the actions in Moscow, St. Petersburg, and Krasnodar. However, *Alekseyev* is an important case within the broader context of LGBT human rights. It marks the first decision on gay rights in Russia from the European Court of Human Rights, continues the tradition of European recognition of LGBT rights to assembly and association that was started in *Bączkowski*, and explicitly finds a human right to assembly for sexual minorities attempting to express this right through gay pride events. Although the Russian Federation's actions since the Court's decision was finalized have demonstrated its unwillingness to recognize the rights of LGBT Russians to publicly express themselves, this decision strengthens the Court's jurisprudence on gay rights, giving Russian activists a stronger platform from which to fight the government's continued violations. In the meantime, Nikolai Alekseyev continues to fight for LGBT rights, defying Russian authorities with bold, public expressions of support for equality: "I don't want to wait any more for my freedoms or civil rights as a gay man."¹⁴¹

¹⁴¹ Aris, *supra* note 136.

