

WE'RE HERE, WE'RE QUEER, AND WE'RE HERE TO STAY:
ZHDANOV AND OTHERS V. RUSSIA AND THE STATE OF
EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS ON
QUEER RIGHTS AGAINST RUSSIA

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I. INTRODUCTION

In 2010, the European Court of Human Rights (ECHR) issued its first judgment against the Russian federation concerning queer¹ rights² in *Alekseyev and Others v. Russia* (2010).³ The ECHR held that Russia violated the applicant's right to freedom of association under Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention)⁴ and illegally discriminated against the applicants based on their queer status in violation of Article 14 of the Convention.⁵ In *Alekseyev* (2010), the City of Moscow prevented the applicants and other queer rights advocates from hosting a pride march in support of queer rights.⁶ Nine years later, the ECHR faced yet another challenge under Article 11 and 14 of the Convention in *Zhdanov and Others v. Russia*, where various Russian registration agencies, and subsequently, the Russian courts, disallowed a group of applicants from registering queer non-profit organizations and public associations within the Russian State.⁷ In essence, nine years after the Court found that Russia violated Article 11 and 14 of the Convention for discriminatory practices against members of the queer community, Russia—relying on the same arguments they have used in past cases—is still ignoring the Court's rulings and its obligations under the Convention.

This Note seeks to provide a framework for the Court's holding in *Zhdanov* to demonstrate the state of ECHR jurisprudence on queer rights and Russia's resistance to implementing ECHR judgments on queer rights. It will also explore whether there is an effective way to bring Russia into compliance with the judgments of the Court. Specifically, Part II of this Note will examine the case of

¹ For this Note, I have decided to use the word "Queer" in place of the acronym LGBTQ+ (which stands for Lesbian, Gay, Bisexual, Transsexual, Queer) because it is a recently reclaimed term which is inclusive of the entire LGBTQ+ community. While many people, especially older generations, appropriately see the term as a slur, more recent generations of LGBTQ+ persons have reclaimed the term as a non-gendered term to refer to the community in which they belong. Keeping with this trend, I have decided to use the term as such here. See Susan D. James, *Gay Man Says Millennial Term 'Queer' Is Like the 'N' Word*, ABCNEWS (Nov. 12, 2013, 3:42 PM), <https://abcnews.go.com/Health/gay-man-millennial-term-queer-word/story?id=20855582>.

² Kristen L. Thomas, Note, *We're Here, We're Queer, Get Used to It: Freedom of Assembly and Gay Pride in Alekseyev v. Russia*, 14 OR. REV. INT'L L. 473, 474 (2012).

³ Please note there is more than one case entitled *Alekseyev and Others v. Russia* which is why I include the year in order to distinguish them.

⁴ Commonly referred to as the European Convention of Human Rights.

⁵ Thomas, *supra* note 2.

⁶ *Id.*

⁷ *Zhdanov and Others v. Russia*, Apps. Nos. 12200/08, 35949/11, 58282/12 ¶¶ 1, 3, (July 16, 2019), <http://hudoc.echr.coe.int/eng?i=001-194448>.

Zhdanov and Others v. Russia. Part III will explain Russia's joining of the Council of Europe and ratification of the Convention and the current tension between Russia and the ECHR. Finally, Part IV will analyze whether Russia can be brought to comply with the Court's judgments on queer rights and offer a possible solution to bring Russia into compliance, concluding that the most optimal approach is continued internal advocacy.

II. THE CASE OF ZHDANOV AND OTHERS V. RUSSIA

This section of the Note sets out the Court's judgment in *Zhdanov and Others v. Russia*. Part A introduces the relevant background information that led Russia to ratify the Convention and submit itself to the Court's jurisdiction. Part B outlines the relevant domestic law, while Part C details the relevant international law. Part D describes the relevant factual and procedural history of the case, and finally, Part E lays out the ECHR's holding.

A. Background of Russian Ratification of the Convention

Russia ratified and acceded to the Convention in 1998.⁸ At the time, Russia was seeking membership in the Council of Europe, which had adopted the Convention in 1950 and created the ECHR.⁹ Russia applied for membership in the Council in 1992 and was invited to join in 1996.¹⁰ In joining the Council of Europe, Russia had to ratify the Convention and subject itself to the jurisdiction of the ECHR.¹¹ Many Council of Europe member states voiced concern over Russia's admission out of the fear it would lower the Council's standards due to the lack of protections for human rights in Russia.¹² Other member states hoped that admitting Russia and other Eastern European states would bring Russian law and the laws of the newly admitted states within the standards of the Council of Europe and the Convention.¹³

As a part of the accession agreement Russia signed when joining the Council of Europe, Russia promised to ratify the Convention and Protocols 1, 2, 4, 7 and

⁸ Rachel M. Fleig-Goldstein, Note, *The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments*, 56 COLUM. J. TRANSNAT'L L. 172, 173 (2017).

⁹ *Id.* at 186; The European Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁰ Fleig-Goldstein, *supra* note 8, at 186.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 187.

11.¹⁴ Russia also promised to recognize Article 46 of the Convention, which provides that “[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”¹⁵ Additionally, Russia agreed to change its domestic law in order to be consistent with the standards of the Council of Europe.¹⁶ Russia has fulfilled or partially fulfilled some of its promises, but not all of them.¹⁷ However, the reforms enacted by Russia were only made after long delay or were enacted without a change in practice by the Russian Government.¹⁸

B. Relevant Domestic Law

One must first understand the applicable law in order to understand the facts which brought *Zhdanov* to the ECHR. First, the Court examined relevant domestic law—specifically, the Constitution of the Russian Federation.¹⁹ Article 30 § 1 of the Russian Constitution guarantees the right to association and the right to form trade unions to protect certain interests, while also guaranteeing the freedom to actively publicly associate.²⁰ Article 13 § 4 states, “Public associations shall be equal before the law”; however, Article 13 § 5 provides that:

The creation and activities of public associations whose aims and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited.²¹

Those were the two articles of the Russian Constitution that the Court found appropriate to highlight before elaborating on the specific Russian statutes involved in the case.

¹⁴ *Id.*

¹⁵ The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19, Nov. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁶ Fleig-Goldstein, *supra* note 8, at 187.

¹⁷ *Id.* at 188.

¹⁸ *Id.*

¹⁹ *Zhdanov*, ¶ 54.

²⁰ KONSTITUTSHIA ROSSIĬSKOĬ FEDERATSII [RF] [CONSTITUTION] Dec. 12, 1993, art. 30 §1(Russ.); *Zhdanov*, ¶ 54.

²¹ KONSTITUTSHIA ROSSIĬSKOĬ FEDERATSII [RF] [CONSTITUTION] Dec. 12, 1993, art. 13 §1(Russ.); *Zhdanov*, ¶ 55.

The Court first set out the provisions of the Non-Profit Organizations Act.²² Article 2 § 2 describes the purposes for which a non-profit can be registered.²³ In particular, the law states that non-profit organizations can be formed for the purpose of “protecting the rights and legitimate interests of citizens”²⁴ Under Article 3 § 1, legal entity status is acquired from the moment of registration with the state. This registration permits the non-profit organization to possess certain rights, including property ownership and participating in judicial proceedings as a named party.²⁵ Under Article 13.1, registration of a non-profit organization is subject to Russian Federal Law and the decision of a federal executive body.²⁶

Pursuant to Article 23.1 § 1 of the Non-Profit Organizations Act, an application for registration can be denied in any one of three cases: (1) If the articles of association do not meet the standards under Russian law; (2) If the registration documents are “incomplete or defective”; and (3) If the name of the organization is “insulting to the moral, national or religious feelings of citizens.”²⁷ The registration authority has *discretion*, however, to permit an applicant to fix any defects with the registration documents.²⁸ The Act also provides that registration decisions are appealable and that further applications can be submitted after the rejection of a former application.²⁹

The Court examined the Public Association Act (PAA) as well,³⁰ which comprises the requirements for the registration of a public association. Moreover, PAA § 3 provides that public associations may register with the state and act with legal entity status or act without registering and without acquiring legal entity status.³¹ PAA § 7 bars the creation of a public association “whose aims or activities are extremist,” and PAA § 23 permits denial of an application for registration of a public association for the same reasons listed in the Non-Profits Organization Act under § 23.³² PAA § 27 states that public associations may

²² *Zhdanov*, at ¶ 56–60.

²³ Федеральный закон от 12 января 1996 г.” О некоммерческих организациях” [Federal Law of January 12, 1996 “On Non-Profit Organizations”] Федеральные законы [The Federal Laws] 1996, Federal Law No. 7-FZ.; *Zhdanov*, ¶ 56.

²⁴ *Zhdanov*, ¶ 56.

²⁵ Федеральный закон от 12 января 1996 г.” О некоммерческих организациях” [Federal Law of January 12, 1996 “On Non-Profit Organizations”] Федеральные законы [The Federal Laws] 1996, Federal Law No. 7-FZ.; *Zhdanov*, ¶ 57.

²⁶ *Zhdanov*, ¶ 57.

²⁷ Федеральный закон от 12 января 1996 г.” О некоммерческих организациях” [Federal Law of January 12, 1996 “On Non-Profit Organizations”] Федеральные законы [The Federal Laws] 1996, Federal Law No. 7-FZ.; *Zhdanov*, ¶ 58.

²⁸ *Zhdanov*, ¶ 58.

²⁹ Федеральный закон от 12 января 1996 г.” О некоммерческих организациях” [Federal Law of January 12, 1996 “On Non-Profit Organizations”] Федеральные законы [The Federal Laws] 1996, Federal Law No. 7-FZ.; *Zhdanov*, ¶ 59.

³⁰ *Zhdanov*, ¶ 61–66.

³¹ *Id.* ¶ 61.

³² *Id.* ¶ 62, 65.

“defend their rights and the rights of their members before the State and municipal authorities,” and if they are registered and possess legal-entity status, they may directly participate “in the decision-making process of the State and municipal authorities.”³³

Under the Russian Suppression of Extremism Act (RSEA), “extremist activity” includes the “forcible change to the foundations of the constitutional system and violation of the integrity of the Russian Federation” and the “incitement of social, racial, ethnic or religious discord.”³⁴ In defining an “extremist organization,” the RSEA provides that this classification requires a judicial tribunal to have ruled either that the organization or association should be dissolved or that its activity is prohibited because such activity is considered “extremist.”³⁵ According to RSEA, organizations or associations may be dissolved or banned if they advance “extremist activity” that has the potential to create a real risk of societal damage.³⁶

The ECHR then outlined the provisions of two additional Russian laws. Under the Family Code, Article 12 suggests marriage is between only a man and a woman.³⁷ The State Language Act provides that when using the Russian Language as the State language, the comingling of terms or expressions that “are incompatible with the modern academic norms of the language” is prohibited unless there is no “adequate equivalent” in the Russian language.³⁸

C. Relevant International Law

Article 11 § 1 of the Convention provides that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”³⁹ Article 11 § 2 states:

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

³³ *Id.* ¶ 66.

³⁴ *Id.* ¶ 67.

³⁵ *Id.*

³⁶ *Id.* ¶ 68.

³⁷ *Id.* ¶ 69.

³⁸ *Id.* ¶ 70.

³⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.⁴⁰

These sections are the essential provisions which protect freedom of association and assembly under the Convention and bind parties to enforce and ensure these rights. These provisions are also the basis of the claims associated with *Zhdanov* as brought to the ECHR.

The applicants brought other claims against Russia under Article 14 of the Convention, which concerns discrimination.⁴¹ Article 14 maintains 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.”⁴² This provision justifies the applicants’ claim that the denial of registration not only violated their right to freely associate, but that in the denial of that right, Russia also discriminated against them in violation of the Convention.

The Court was also compelled to examine Article 35 of the Convention because of actions committed by one of the parties bringing the case prior to the judgment of the Court.⁴³ Article 35 § 3(a) of the Convention states, “The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that . . . the application is . . . an abuse of the right of individual application.”⁴⁴ The Russian Government invoked this Article, alleging that the party made demeaning comments about the judges of the Court after the rejection of one of his claims.⁴⁵ The Russian Government asserted that his actions were a violation of Article 35, and therefore, his application was inadmissible.⁴⁶

Finally, the Court acknowledged relevant Council of Europe documents. The relevant document in this case was a 2010 recommendation, adopted by the Council of Europe, that addressed the freedom of association and sexual orientation and gender identity.⁴⁷ The document stated:

Member states should take appropriate measures to ensure, in accordance with Article 11 of the Convention, that the right to freedom of association can be effectively enjoyed without

⁴⁰ *Id.*

⁴¹ *Zhdanov*, ¶ 167.

⁴² Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴³ *Zhdanov*, ¶ 76.

⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_ENG.pdf; *Zhdanov*, ¶ 16.

⁴⁵ *Zhdanov*, ¶ 77.

⁴⁶ *Id.*

⁴⁷ *Id.* ¶ 74.

discrimination on grounds of sexual orientation or gender identity; in particular, discriminatory administrative procedures, including excessive formalities for the registration and practical functioning of associations, should be prevented and removed; measures should also be taken to prevent the abuse of legal and administrative provisions, such as those related to restrictions based on public health, public morality and public order.⁴⁸

The recommendation asserts that members should not only support the activities of organizations seeking to defend the human rights of queer persons, but also that members-states should consult with these organizations to enact policies that will promote the human rights of queer persons.⁴⁹ Considering that the Council of Europe adopted the Convention and the recommendation, the recommendation weighs on Russia's obligations under the Convention.

D. Facts and Procedural History

The *Zhdanov* case arose from three applications against Russia under Article 34 of the Convention.⁵⁰ Article 34 of the Convention provides the right to any person, non-governmental organization, or group of people to apply for relief the Court if they believe they are victims of a violation of the Convention by one of the countries party to the Convention.⁵¹ Under Article 25(1) of the Convention, the parties to the Convention cannot impede any person from applying to the ECHR.⁵² The applicants in *Zhdanov* comprised four Russian nationals and three Russian non-profits, and the applications were filed in 2008, 2011, and 2012 respectively.⁵³ All three applications alleged violations of the freedom of association and discrimination in violation of the Convention.⁵⁴ The applicants in the third application to the Court also alleged a violation of their right of access to a court.⁵⁵

⁴⁸ The Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity ¶ 9 (2010), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf40a.

⁴⁹ *Id.* ¶ 11–12.

⁵⁰ *Zhdanov*, ¶ 1.

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁵² *Id.*

⁵³ *Zhdanov*, ¶ 1.

⁵⁴ *Id.* ¶ 3.

⁵⁵ *Id.*

i. The First Application: Mr. Aleksandr Zhdanov (Regional Public Association "Rainbow House")

After the city of Tyumen, Russia, refused to permit a gay pride march, Aleksandr Zhdanov applied to register a regional public association, named "Rainbow House," in June 2006.⁵⁶ Rainbow House's goal was to defend the rights of queer persons.⁵⁷ The registration authority commissioned an expert opinion from a Russian agency.⁵⁸ The study found that the likely activities of Rainbow House would "destroy the moral values of society" and that it would "undermine the sovereignty and territorial integrity of the Russian Federation by decreasing its population."⁵⁹ The study further found that the actions of Rainbow House would be "propaganda of non-traditional sexual orientation" that would "attempt[] to increase the number of such citizens by converting those who, without such propaganda, would have retained a traditional sexual orientation," and therefore constituted "extremist activities."⁶⁰ The local registration authority denied Rainbow House's registration, basing its decision on the findings of the expert report and adding that Rainbow House's "activities might infringe the rights and freedoms of others, jeopardise the constitutionally protected institutions of family and marriage and encourage social and religious hatred and enmity."⁶¹ The registration authority also concluded that Rainbow House was an "extremist organization" by citing to the report's reasoning, which concluded that Rainbow House's "propaganda" of non-traditional sexual orientation would essentially make people queer.⁶²

On appeal, Zhdanov, challenging the local registration authority's decision, argued that only a judicial ruling could declare an organization an extremist organization.⁶³ He also disputed the local registration authority's conclusions, claiming that Rainbow House's goal was to "promote homosexuality or gay marriage."⁶⁴ Zhdanov contended the purpose of Rainbow House was to only "defend the rights of homosexuals and to promote tolerance of diversity."⁶⁵ Zhdanov then asserted that the conclusion of the local registration authority constituted sexual orientation discrimination.⁶⁶ Following several appeals, the local registration authority's decision was upheld as "lawful, well reasoned and justified"⁶⁷ by

⁵⁶ *Id.* ¶ 9, 10.

⁵⁷ *Id.* ¶ 10.

⁵⁸ *Id.* ¶ 12.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* ¶ 14.

⁶² *Id.* ¶¶ 12, 14.

⁶³ *Id.* ¶ 16.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* ¶¶ 19.

subsequent administrative authorities and courts, which merely adopted the local registration authority's reasoning.⁶⁸

In May 2007, while litigation concerning the first attempt to register Rainbow House was on appeal, Zhdanov resubmitted an application for registration.⁶⁹ In June 2007, the local registration authority rejected the application again for the same substantive reasons it rejected the first application, plus for application process violations.⁷⁰ In addition to citing the "extremist nature" of Rainbow House's activities, the local registration authority also cited technical errors for rejecting the application.⁷¹ These technical oversights included not stapling the application, a typo, and a deficiency in the definition for the procedure of appointing one of the governing bodies.⁷²

Zhdanov immediately appealed the local registration authority's determination and requested that the decision rejecting the second application be declared unlawful.⁷³ Meanwhile, for reasons which are unclear, on an unspecified date, the local registration authority commissioned two more expert opinions from two separate Russian legal institutes.⁷⁴ One non-binding opinion concluded that the activities of Rainbow House may threaten the rights of heterosexual citizens and constitutes propaganda that could promote social discord, threaten Russian national security and territorial integrity, and increase the number of homosexuals.⁷⁵ The second non-binding opinion found that Rainbow House was an extremist organization because the name 'Rainbow House' "was insulting to the moral, national and religious feelings of citizens," and the activities of the associations could provoke violence.⁷⁶ The second expert opinion also deemed Rainbow House an extremist organization because (1) it sought to protect the rights of people of a "non-traditional sexual orientation," which could include pedophiles, and (2) the association's goal of supporting persons with HIV/AIDS would violate those person's right to confidentiality.⁷⁷ Finally, it concluded that Rainbow House's mission to defend queer rights would interfere with the right of private life under the Russian Constitution and that interference with private life, even for its protection, was unconstitutional.⁷⁸

On subsequent appeals, the local registration authority's decision to reject the second application was upheld as lawful, and there was no violation of the freedom of association because Rainbow House could continue to function

⁶⁸ *Id.* ¶¶ 17–20.

⁶⁹ *Id.* ¶ 21.

⁷⁰ *Id.* ¶ 22.

⁷¹ *Id.* ¶ 23.

⁷² *Id.* ¶ 22.

⁷³ *Id.* ¶ 23.

⁷⁴ *Id.* ¶ 24.

⁷⁵ *Id.* ¶ 25.

⁷⁶ *Id.* ¶ 26.

⁷⁷ *Id.*

⁷⁸ *Id.*

unregistered.⁷⁹ Also on appeal, the Court found that Rainbow House had not been declared an extremist organization, but that its activities were of an extremist character and therefore not compliant under Article 23.1 § 1 of the Non-Profit Organizations Act, which governs the registrations of non-profit organizations.⁸⁰ It was further held that Rainbow House's articles of association contained provisions that indicated extremism.⁸¹ The rejection of Rainbow House's registration was also upheld because Rainbow House's actions could "undermine the foundations of the family and marriage" in violation of the Russian Constitution.⁸² On appeal, the Court finally determined that Zhdanov could reapply if he corrected the problems in the articles of association; however, subsequent reapplications were rejected in May and November 2010 for the same reasons despite changes to the applications.⁸³

ii. The Second Application: Mr. Nikolay Alekseyev (Autonomous Non-Profit Organization "Movement for Marriage Equality")

Nikolay Alekseyev founded the Movement for Marriage Equality in November 2009 seeking to advocate for marriage equality and the promotion of queer rights particularly through legislating same-sex marriage.⁸⁴ He attempted to register the association in December 2009 with the local registration service in Moscow.⁸⁵ The Moscow registration service rejected the application for registration finding violations of the Non-Profit Organization Act, the Family Code, as well as technical violations.⁸⁶ Alekseyev immediately appealed the decision.⁸⁷ He contended that the decision of the Moscow registration authority violated his freedom of association under the Russian Constitution and the Convention and further asserted that the reasons for rejecting the application for registration were erroneous and unlawful.⁸⁸

On appeal, a Russian lower court dismissed the complaint, finding that the objectives of the Movement for Marriage Equality were "incompatible with basic morality," and that legalization of same-sex marriage would undermine "the conceptions of good and evil . . . and result in a decrease in the birth rate."⁸⁹

⁷⁹ *Id.* ¶ 27.

⁸⁰ *Id.*

⁸¹ *Id.* ¶ 29.

⁸² *Id.*

⁸³ *Id.* ¶ 30.

⁸⁴ *Id.* ¶ 32.

⁸⁵ *Id.* ¶ 33.

⁸⁶ *Id.* at ¶ 34.

⁸⁷ *Id.* ¶ 35.

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 36.

It further concluded that promoting the legalization of same-sex marriage was contrary to “established morality,” as the Family Code provided that marriage was between a man and woman, and that the Code sought to protect the ideals of “family, motherhood and childhood.”⁹⁰ Finally, the court held that there was no violation of Russia’s obligations under the Convention because “the right to marry was to be exercised in accordance with national laws.”⁹¹ Alekseyev appealed again, but the lower court’s decision was affirmed.⁹²

iii. The Third Application: Mr. Nikolay Alekseyev, Mr. Kirill Nepomnyashchiy, and Aleksandr Naumchik (Regional Public Sports Movement “Sochi Pride House”)

In October 2011, Niklay Alekseyev, along with Kirill Nepomnyashchiy and Aleksandr Namchik, also founded a public movement called “Sochi Pride House.”⁹³ The goal of the organization was to promote queer rights in the sports context and to create a forum for discussion of those rights in sports during the Sochi Olympic Games.⁹⁴ The three men submitted an application of registration to the local registration authority.⁹⁵ The authority refused to register Sochi Pride House for a variety of technical issues, including that the name contained words which did not exist in Russian in violation of § 1(6) of the State Language Act, and that the articles of association did not indicate Sochi Pride House’s association type.⁹⁶

In December 2011, the three men challenged the decision of the local registration authority in the local district court.⁹⁷ Their challenge had two grounds: First, they contended that it was common practice to use words from other languages in the name of associations to give the associations original names and that there were other associations with the words “pride” and “house” in their names.⁹⁸ Second, they pointed out that paragraph 1.1 of their articles of association prescribed that the Sochi Pride House was a “public movement.”⁹⁹ Using almost identical reasoning from the court decisions involving the refusal to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* ¶ 37.

⁹³ *Id.* ¶ 39.

⁹⁴ *Id.*

⁹⁵ *Id.* ¶ 40.

⁹⁶ *Id.* ¶ 41.

⁹⁷ *Id.* ¶ 42.

⁹⁸ *Id.* The three applicants presented official data which indicated that there were eleven registered associations which contained the word “pride” in their name, and there were forty registered associations which contained the word “house” in their name.

⁹⁹ *Id.*

register the Movement for Marriage Equality, the local district court upheld the decision of the registration authority and dismissed the suit.¹⁰⁰ The parties were not present for the pronouncement of the judgment and the judgement was mailed to them.¹⁰¹

The parties appealed the judgment.¹⁰² On appeal, the three men argued that the denial of registration amounted to discrimination, and because sexual orientation was not a matter of choice, the actions of Sochi Pride House would not increase the number of homosexuals.¹⁰³ The court returned the appeal citing that both the short form and the full appeal were received outside of the one-month timeline allowed for appeals.¹⁰⁴ The parties then appealed the denial of the appeal.¹⁰⁵ The appellate court merely ruled that the decision of the lower court to be “lawful, well reasoned and justified.”¹⁰⁶

E. The Court's Judgment

The Court initially examined the Russian Government's claim that Alekseyev abused the right of individual application in violation of Article 35 of the Convention; therefore, his application was inadmissible.¹⁰⁷ In evaluating the Convention and the Court's jurisprudence, the Court found Alekseyev's application inadmissible.¹⁰⁸ Under the Court's standards, Article 35 is applied to find an application inadmissible in two situations: (1) when the petition is based on untrue facts or (2) “where an applicant used particularly vexatious, contemptuous, threatening or provocative language in his communication with the Court,” including when it is directed toward the judges.¹⁰⁹ In explaining these two situations, the Court also noted that Article 35's application was not restricted to just those two instances; rather, Article 35 could apply in any situation where an applicant's conduct was “manifestly contrary to the purpose of the right of individual application.”¹¹⁰ For instance, in *The Georgian Labour Party v. Georgia*,¹¹¹ the Court found “vexing manifestations of irresponsibility and a frivolous attitude towards the Court,” could lead to the rejection of an application.¹¹²

¹⁰⁰ *Id.* ¶ 43.

¹⁰¹ *Id.* ¶ 44.

¹⁰² *Id.* ¶ 46.

¹⁰³ *Id.* ¶ 48.

¹⁰⁴ *Id.* ¶¶ 49–50.

¹⁰⁵ *Id.* ¶ 51.

¹⁰⁶ *Id.* ¶ 52.

¹⁰⁷ *Id.* ¶ 77.

¹⁰⁸ *Id.* ¶ 85–86.

¹⁰⁹ *Id.* ¶ 80.

¹¹⁰ *Id.* ¶ 81.

¹¹¹ *The Georgian Labour Party v. Georgia*, App. No. 9103/04 (2007).

¹¹² *Zhdanov*, ¶ 81 (citation and punctuation omitted).

Prior to the Court's proceedings in *Zhdanov*, the Court ruled on another case in 2018, *Alekseyev and Others v. Russia*, where Alekseyev was one of the applicants.¹¹³ The Court, however, rejected Alekseyev's non-pecuniary damages claim.¹¹⁴ In its claim, the Russian Government did not cite particular statements nor did it provide the Court with the exact social media accounts.¹¹⁵ The Russian government only told the Court that the social media accounts were hosted by Instagram and VKontakte.¹¹⁶ In looking up Alekseyev's accounts, the Court observed statements about the ECHR and its judges that were "virulently and personally offensive and threatening."¹¹⁷ Alekseyev posted pictures of the judges with captions like "alcoholic" and "drug addict," stated that he wished the judges "would 'snuff it as soon as possible like dogs,'" and then threatened to torture the judges with vodka, among other degrading comments.¹¹⁸

Considering that these accounts had thousands of followers, the Court determined that they were meant for "the widest possible circulation" and that Alekseyev was trying to "harm and tarnish the image and reputation of the [Court] and its members."¹¹⁹ In response, the ECHR sent Alekseyev a letter stating that his pending applications before the Court may be ruled inadmissible if he continued making his comments.¹²⁰ Alekseyev stated that those accounts were not his personal accounts, but he never denied making the statements.¹²¹ Following the letter, new statements were published describing the Court "as 'a rubbish heap' and calling its judges 'European corrupt scum and homophobic.'"¹²²

The Court first held that these new statements could be appropriately connected with the *Zhdanov* proceedings because of the warning letter written to Alekseyev that stated these threatening remarks may be considered in the judgement.¹²³ The Court further reasoned that by continuing to publish these comments after the warning letter, Alekseyev showed "disrespect to the very institution to which he had applied for the protection of his rights" and that "it is unacceptable to seek the protection of a court in which the applicant has lost all trust."¹²⁴ The Court held that Alekseyev's actions "constitute[d] 'a vexing manifestation of irresponsibility and a frivolous attitude towards the Court', amounting to contempt" and violated Articles 34 and 35 of the Convention.¹²⁵ Therefore, his applications were "declared inadmissible as an abuse of the right of

¹¹³ *Alekseyev and Others v. Russia*, Apps. Nos. 14988/09 and 50 others, (2018).

¹¹⁴ *Zhdanov*, ¶ 77.

¹¹⁵ *Id.* ¶ 82.

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 83.

¹¹⁸ *Id.*

¹¹⁹ *Id.* ¶ 84 (citation omitted).

¹²⁰ *Id.*

¹²¹ *Id.* ¶ 82.

¹²² *Id.* ¶ 84.

¹²³ *Id.*

¹²⁴ *Id.* ¶ 85.

¹²⁵ *Id.*

application.”¹²⁶ However, the Court held that while Alekseyev’s applications had been declared inadmissible, it could still examine the merits of his application to the extent that they were brought up by the other applicants including the Movement for Marriage Equality.¹²⁷

In addressing the applicants’ Article 11 claim, the ECHR found that the Russian government had illegally denied the applicants their right to freedom of association.¹²⁸ The Court first noted that forming organizations to advance a collective interest was an essential aspect of the freedom of association.¹²⁹ It further observed that “[t]he harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.”¹³⁰ When restricting the freedom of association, such limitations must be used “sparingly,” and that “only convincing and compelling reasons can justify restrictions on that freedom.”¹³¹ In order for a restriction to be upheld, it must meet the definition of “necessary” as prescribed in Article 11, paragraph 2 of the Convention; however, the Court noted the narrowness of this exception, which is coupled “with rigorous European supervision.”¹³²

As Article 11, paragraph 2 sets out, the only time a restriction can be placed on the freedom of association is when the restriction is “prescribed by law and [is] 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.”¹³³ In determining whether there is a violation of Article 11, the Court must determine whether the interference with the right “was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient.’”¹³⁴ The Court must also find that the national authorities appropriately applied standards that conform with the Convention.¹³⁵

In applying the legal standards to the facts, the Court first determined that interference occurred with the freedom of association because the denial of registration for a non-profit like Movement for Marriage Equality meant that the organization could not exist under Russian law.¹³⁶ As for public associations such as Rainbow House and Sochi Pride House, under Russian law the denial of registration meant that they could exist, but could not exercise rights granted to organizations with legal entity status, such as the right to own property or the

¹²⁶ *Id.* ¶ 86.

¹²⁷ *Id.*

¹²⁸ *Id.* ¶ 164–65.

¹²⁹ *Id.* ¶ 138.

¹³⁰ *Id.* ¶ 139.

¹³¹ *Id.* ¶ 140.

¹³² *Id.* (citation omitted).

¹³³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

¹³⁴ *Zhdanov*, ¶ 141.

¹³⁵ *Id.*

¹³⁶ *Id.* ¶ 143.

right to carry out media campaigns.¹³⁷ For all three organizations, the denial of registration denied each entity certain rights which restricted the right to freedom of association for the applicant-organizations and their applicant-founders.¹³⁸

The ECHR quickly disposed of any assertions by the Russian government that registration irregularities were the reason why the registration applications were denied determining that the aims of the organizations were “a decisive role in the decisions to refuse their registration.”¹³⁹ In determining whether the interference was prescribed by law, the Court determined the interference with the freedom of association was based in the Non-Profit Organizations Act and the Public Associations Act.¹⁴⁰ The Court then summarized the aims Russia asserted as legitimate for restricting the freedom of association in this case:

[T]o protect society’s moral values and the institutions of family and marriage; to protect Russia’s sovereignty, safety and territorial integrity, which they considered to be threatened by a decrease in the population caused by the activities of LGBT associations; to protect the rights and freedoms of others; and to prevent social or religious hatred and enmity, which in their view could be incited by the activities of LGBT associations and which might lead to violence. The Court will assess whether the refusals to register the applicants’ organisations served to advance those declared aims.¹⁴¹

Citing to *Bayev and Others v. Russia*,¹⁴² the ECHR reiterated that limiting debate on queer issues for the sake of protecting morals was *not* a legitimate aim and that “maintaining family values and the institution of marriage as the foundation of society” was compatible with social recognition of homosexuality.¹⁴³ In the alternative, the Court did maintain that under Article 12 and 14 of the Convention, read in light of Article 8, state-parties to the Convention were still permitted to restrict same-sex marriage because the Convention allows parties to define marriage.¹⁴⁴ However, the Court went on to state that this case did not involve whether Russia should legalize same-sex marriage; rather, it asked if the protection of morals was a legitimate reason under Article 11 of the Convention for the Russian government to restrict the advocacy for same-sex marriage and queer rights through a nonprofit entity and public associations.¹⁴⁵ Also, the Court

¹³⁷ *Id.*

¹³⁸ *Id.* ¶ 144.

¹³⁹ *Id.* ¶ 146.

¹⁴⁰ *Id.* ¶ 150.

¹⁴¹ *Id.* ¶ 151.

¹⁴² *Bayev and Others v. Russia*, App. Nos. 67667/09, 44092/12 (2017).

¹⁴³ *Zhdanov*, ¶ 152.

¹⁴⁴ *Id.* ¶ 153.

¹⁴⁵ *Id.*

found Russia's assertion that other European states had not legalized same-sex marriage as justification for its actions was irrelevant because "conferring substantive rights on homosexual persons is fundamentally different from recognizing their right to campaign for such rights."¹⁴⁶ The Court did find that "[t]here is no ambiguity about the other member States' recognition" and promotion of queer rights.¹⁴⁷ For these reasons, the ECHR held that "the protection of moral values or the institutions of family and marriage" were not legitimate reasons for restricting the freedom of association.¹⁴⁸

In reference to Russia's national security and public safety arguments, the Court reiterated that such principles must be interpreted restrictively.¹⁴⁹ Russia based its national security and public safety claims off of the assertion that the work of the organizations would violate its territorial sovereignty because the promotion of homosexuality would cause people to become queer, thus causing birthrates to fall and the population to decrease.¹⁵⁰ The Court responded by reiterating that it already held that there was no connection between the promotion of homosexuality and population levels.¹⁵¹ It also pointed out that the Russian Government had not presented any evidence of how an unfounded and theoretical population decrease would affect national security.¹⁵²

In further referencing the Russian government's arguments, the Court pointed out that that "it is the right not to be confronted with any display of same-sex relations or promotion of LGBT rights . . . that the national authorities sought to protect by refusing to register the applicant associations."¹⁵³ The Court rebuked Russia's arguments, stating, "the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions."¹⁵⁴ Additionally, the Court held that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority."¹⁵⁵ It further stated that if Russia's arguments were true, then "a minority groups rights to freedom of religion, expression, assembly and association would become merely theoretical rather than practical and effective as required by the Convention," and, for that reason, "[t]he Court has therefore consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority."¹⁵⁶ For those reasons, the Russian

¹⁴⁶ *Id.* ¶ 154.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* ¶ 155.

¹⁴⁹ *Id.* ¶ 156. (citing *Stoll v. Switzerland* [GC], App. No. 69698/01, § 54, ECHR 2007-V and *Dmitriyevskiy v. Russia*, App. No. 42168/06, § 86 (2017)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (citing *Bayev and Others v. Russia*).

¹⁵² *Id.*

¹⁵³ *Id.* ¶ 157.

¹⁵⁴ *Id.* ¶ 158 (citing *Bayev and Others v. Russia*, ¶ 81).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (citations omitted).

government declining to register these organizations was not a legitimate aim in protecting the rights of others.¹⁵⁷

However, the Court accepted the Russian government's contentions that allowing these organizations to operate would cause "social or religious hatred and enmity" which could lead to violence.¹⁵⁸ The Court stated, "social or religious hatred and enmity represents a danger for the social peace and political stability of democratic states and is likely to lead to violence."¹⁵⁹ Therefore, the Court held that Russia did have a legitimate aim in seeking to prevent disorder and the Court accepted that this was a legitimate reason for preventing the organizations from registering.¹⁶⁰

Since the Court did identify a legitimate aim, the Court had to determine whether the measures were a necessity to democracy.¹⁶¹ The Russian government claimed that it was protecting the organizations by preventing registration because they could be subject to violence from people who disapproved of homosexuality.¹⁶² The Court then addressed the fact that the Convention did not just impose a negative duty onto member states to not interfere with the freedom of association, but that it also imposed a positive duty "to secure the effective enjoyment of the right to freedom of association."¹⁶³ Having only a negative duty would be inconsistent with purpose of Article 11 of the Convention.¹⁶⁴ In its analysis, the Court observed that governmental authorities must protect the functioning of the right because otherwise those people who may have opposing views could threaten and invoke fear which would deter people with minority beliefs from expressing their opinions.¹⁶⁵ The Court stated that "[i]n a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right of association."¹⁶⁶

The Court found that the protection of minority rights is not a threat to "democratic society" despite causing tensions.¹⁶⁷ Furthermore, the Court stated that it was the duty of governmental authorities "to ensure that competing groups tolerate each other" and not to just remove the cause of the tensions.¹⁶⁸ The Court then held "that it was the duty of the Russian authorities to take reasonable and appropriate measure to enable the applicant organi[z]ations to carry out their activities without having to fear that they would be subjected to physical violence

¹⁵⁷ *Id.* ¶ 159.

¹⁵⁸ *Id.* ¶ 160.

¹⁵⁹ *Id.* (citations omitted)

¹⁶⁰ *Id.*

¹⁶¹ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 11, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁶² *Zhdanov*, ¶ 161.

¹⁶³ *Id.* ¶ 162.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citations omitted).

¹⁶⁷ *Id.* ¶ 163.

¹⁶⁸ *Id.*

by their opponents.”¹⁶⁹ It then listed off other ways the Russian government could have acted to allow the organizations to operate without causing disorder.¹⁷⁰ The Court then concluded that refusing to register the organizations was not “necessary in a democratic society” because the Russian government merely eliminated the source of tension by restricting the organization’s freedom of association.¹⁷¹ Therefore, there was a violation of Article 11 of the Convention.¹⁷²

The Court next turned to the applicants’ allegations that there had been a violation of Article 14 of the Convention.¹⁷³ Article 14 provides that the rights in the “Convention shall be secured without discrimination on any ground such as sex, race, colo[r], language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹⁷⁴ The nature of Article 14 can only be violated in conjunction with a violation of one or more of the other rights listed in the Convention.¹⁷⁵ Considering there was a violation of Article 11, the Court deemed it appropriate to analyze the Article 14 claims.¹⁷⁶ In order for there to be a violation of Article 14, “there must be a difference in the treatment of persons of relevantly similar situations,” and that difference of treatment must have “no objective and reasonable justification.”¹⁷⁷ Member states do have a narrow “margin of appreciation” in which they can identify situations where a difference of treatment is necessary, “but the final decision as to the observance of the Convention’s requirements rests with the Court.”¹⁷⁸

When examining whether there is a difference of treatment because of sexual orientation, the Court has held “that differences based solely on considerations of sexual orientation are unacceptable under the Convention.”¹⁷⁹ The Russian government argued that the applications for registration were not denied because of an organizations’ support for queer rights but because of irregularities with the registration documents.¹⁸⁰ However, the Court did not find this argument persuasive.¹⁸¹ Since the Court had already concluded that the “aim of promoting LGBT rights was a decisive factor leading to the decision to refuse” to register the organizations, the Court concluded that there was a difference of treatment

¹⁶⁹ *Id.* ¶ 164.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* ¶ 165.

¹⁷³ *Id.* ¶ 166.

¹⁷⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Apr. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁷⁵ *Zhdanov*, ¶ 167.

¹⁷⁶ *Id.* ¶ 168.

¹⁷⁷ *Id.* ¶ 178.

¹⁷⁸ *Id.* (citations omitted).

¹⁷⁹ *Id.* (citations omitted).

¹⁸⁰ *Id.* ¶ 174.

¹⁸¹ *Id.* ¶ 181.

based on sexual orientation.¹⁸² Since the Court had already concluded that no “reasonably or objectively justified” reason existed for refusing the registration of applications, there was also a violation of Article 14.¹⁸³ Upon finding violations of the Convention, the Court awarded monetary reparations to the applicants.¹⁸⁴

Russia’s payment of the judgment was due January 16, 2021, but as of the writing of this Note, Russia has not paid the Court’s judgment.¹⁸⁵ Zhdanov demonstrates Russia’s use of the same arguments to defend its anti-queer laws in the face of the ECHR. As evidenced in *Alekseyev and Others v. Russia*, the Russian courts continually find arguments against the anti-queer rights laws either invalid or unpersuasive. Russia’s persistence in ignoring the ECHR jurisprudence on queer rights is tied up with the recent tensions between Russia, the ECHR, and Council of Europe. As noted below, these tensions mean that *Zhdanov* will likely not be complied with and the state of the law in Russia concerning queer rights will remain the same.

III. RUSSIA’S RELATION WITH THE CONVENTION AND THE COUNCIL OF EUROPE

Section III of this Note focuses on where Russia currently stands in relation to the Convention and the Council of Europe. First, Part A addresses the founding of the Council of Europe and its adoption of the Convention. Part B discusses Russia’s joining the Council of Europe and its ratification of the Convention. Finally, Part C lays out the current tensions between Russia and the ECHR.

A. The Council of Europe and the Convention

The Council of Europe, founded in 1949 and headquartered in Strasbourg, France, is Europe’s primary human rights organization.¹⁸⁶ It is one of Europe’s oldest and largest organizations.¹⁸⁷ The Council is financed by the member states

¹⁸² *Id.* (citation omitted).

¹⁸³ *Id.* ¶ 182–83.

¹⁸⁴ *Id.* ¶ 188.

¹⁸⁵ COUNCIL OF EUROPE, INFORMATION RELATING TO PAYMENT AWAITED OR INFORMATION RECEIVED INCOMPLETE 27, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a9af7> (last visited Apr. 28, 2021).

¹⁸⁶ *About the Council of Europe*, COUNCIL EUR., <https://www.coe.int/en/web/yerevan/the-coe/about-coe> (last visited Nov. 16, 2019).

¹⁸⁷ *Id.*

who's contribution is based on population size and wealth.¹⁸⁸ The two main bodies of the Council of Europe are the Committee of Ministers and the Parliamentary Assembly.¹⁸⁹ The Committee of Ministers (the Committee) is the primary decision-making body of the Council of Europe, and while the Parliamentary Assembly monitors compliance of member states with their obligations to the Council of Europe, the Committee develops solutions to problems facing Europe.¹⁹⁰ In 1950, the Council of Europe adopted the Convention.¹⁹¹

In 1959, the Council of Europe established the European Court of Human Rights to implement the Convention.¹⁹² The Court normally awards compensatory damages through its judgments to parties who have suffered human rights violations under the Convention.¹⁹³ The Court may also "impose on the respondent state a requirement to eliminate violations, avoid their occurrence in the future, and restore the applicant's rights as they were before the violation (*restitutio in integrum*) by taking specific individual and general measures."¹⁹⁴

Under Article 46 § 1 of the Convention, all the parties to the Convention are bound by the judgments of the Court.¹⁹⁵ Article 46 § 2 provides that the Committee of Ministers shall oversee the execution of any of the Court's judgments.¹⁹⁶ In the event that the Committee of Ministers believes that a party to the Convention is refusing to abide by a judgment of the Court, then under § 4 of Article 46, the Committee of Ministers may refer the case to the Court to determine whether a party has violated its obligations under the Convention.¹⁹⁷ Finally, if the Court determines that a party is in violation of one of its obligations under the Convention, then pursuant to § 5 of Article 46, the Court refers the case back to the Committee to determine what measures to take against the violating party.¹⁹⁸

¹⁸⁸ *Id.*

¹⁸⁹ *Structure of the CoE*, COUNCIL EUR., <https://www.coe.int/en/web/yerevan/the-coe/structure-of-coe> (last visited Nov. 16, 2019).

¹⁹⁰ *Id.*

¹⁹¹ Convention for the Protection of Human Rights and Fundamental Freedom art. 59, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁹² *The European Court of Human Rights*, COUNCIL EUR., <https://www.coe.int/en/web/tbilisi/europeancourtofhumanrights> (last visited Sept. 7, 2020).

¹⁹³ Peter Roudik, *Russian Federation: Constitutional Court Allows Country to Ignore ECHR Rulings*, LIBR. CONG. (May 18, 2016), <https://www.loc.gov/law/foreign-news/article/russian-federation-constitutional-court-allows-country-to-ignore-echr-rulings/>.

¹⁹⁴ *Id.*

¹⁹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 46, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

B. Russia Joins the Council of Europe and Ratifies the Convention

In 1996, Russia joined the Council of Europe, and in 1998, it ratified the Convention.¹⁹⁹ It was an event of historical significance, as one of the great global superpowers who spent the Cold War battling the capitalist West had now joined an organization designed by capitalist Western Europe.²⁰⁰ In joining the Council of Europe and ratifying the Convention, Russia surrendered its ability to have the final say on human rights matters to the ECHR.²⁰¹ While both experts from the Council of Europe and the Russian government concluded that Russia did not objectively meet the criteria for membership in the Council of Europe, Council of Europe members thought that membership would promote human rights changes in Russia.²⁰² Effectively, the idea was that the Council of Europe and the Court “would provide both the necessary socialization and outside legal support for carrying out liberal judicial and other reforms in Russia” including major advancements in human rights.²⁰³ Today, Russia is the Council of Europe’s largest member state by population (143 million people) and contributes about ten percent of the Council of Europe’s budget.²⁰⁴

During this post-Soviet Union era, Russia also took a much more liberal approach toward integrating international law and human rights norms into its legal system.²⁰⁵ Russia’s 1993 Constitution provided that both norms of international law and international agreements are important parts of the Russian legal system.²⁰⁶ The 1993 Constitution also stated that if there was a conflict between Russia’s obligations under an international agreement and a Russian law, then the international agreement would prevail.²⁰⁷

C. Recent Tensions Between Russia and the ECHR

Unfortunately, twenty years later, Russia’s membership in the Council of Europe and acceptance of the Court’s jurisdiction has not prevented continued degradation of democracy and human rights in Russia.²⁰⁸ In July 2012, special

¹⁹⁹ Fleig-Goldstein, *supra* note 8, at 175.

²⁰⁰ Dmitri Bartenev, *LGBT Rights in Russia and European Human Rights Standards*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT 3* (Lauri Mälksoo & Wolfgang Benedek eds., 2017).

²⁰¹ *Id.*

²⁰² *Id.* at 4.

²⁰³ *Id.*

²⁰⁴ *Id.* at 11.

²⁰⁵ Fleig-Goldstein, *supra* note 8, at 179–80.

²⁰⁶ *Id.* at 180.

²⁰⁷ *Id.*

²⁰⁸ Bartenev, *supra* note 200, at 5.

rapporteurs, whose responsibilities included monitoring Russia's progress in fulfilling its obligations to the Council of Europe, submitted a report to the Parliamentary Assembly of the Council of Europe.²⁰⁹ The report concluded that Russia was "at a crossroads" where, in terms of democratic progress, it was unclear which direction Russia would go.²¹⁰ While an outpouring of cases to the Court from Russia demonstrates an acceptance of the Court by those applying to it for relief, "government officials have been less accepting of the [Court's] findings of violations against Russia."²¹¹

While Russia does pay most of the monetary judgments awarded to victims of human rights violations, this is not necessarily a good indication.²¹² Most experts and diplomats agree that the human rights situation in Russia has, in the aggregate, gotten worse.²¹³ As Lauri Mälksoo points out, Russia paying victim's compensation without substantive change is similar to the medieval European concept of paying money for one's sins, resulting in people continually committing them or committing more of them.²¹⁴

In June 2013, Russia passed its infamous "Gay Propaganda" law which outlawed the dissemination of content related to the "promotion of nontraditional sexual relations to minors."²¹⁵ In essence, the law bans "providing children access to information about LGBT people's lives."²¹⁶ The law also made amendments to three already existing laws.²¹⁷ One such amendment added a provision which provided that "in order to protect children from information 'harmful to their health, moral and spiritual development,' measures must be taken to protect them from propaganda relating to 'non-traditional sexual relationships.'"²¹⁸ However, protecting children is merely pretext for the law as legislative documents indicated that the law's main goal was to prevent queer activism and assemblies and was more or less a direct reaction to the ECHR's decision in *Alekseyev*.²¹⁹ The law was subsequently upheld by the Russian Constitutional Court in 2014.²²⁰

In June 2017, the ECHR determined that Russia's Gay Propaganda law was inconsistent with the Convention because it was discriminatory and violated the

²⁰⁹ Fleig-Goldstein, *supra* note 8, at 193.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Bartenev, *supra* note 200, at 28.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *No Support: Russia's "Gay Propaganda" Law Imperils LGBT Youth*, HUM. RTS. WATCH (Dec. 11, 2018), <https://www.hrw.org/report/2018/12/11/no-support/russias-gay-propaganda-law-imperils-lgbt-youth>.

²¹⁶ *Id.*

²¹⁷ Bartenev, *supra* note 200, at 336.

²¹⁸ *Id.*

²¹⁹ *Id.* at 360.

²²⁰ *Id.* at 339.

freedom of expression.²²¹ In *Bayev and others v. Russia*,²²² three men were fined for having non-violent demonstrations promoting homosexuality in front of a school and library under the propaganda law.²²³ The ECHR rejected all of the Russian government's arguments that justified the law on the basis of protecting morals, protecting family values, protecting public health, and protecting children.²²⁴ The Court actually declared that the dissemination of information relating to same-sex relations was educational to young people.²²⁵ In its judgment, the ECHR found that the "Gay Propaganda" law violated Article 14 of the Convention "because the legislation in question involved a predisposed bias toward the heterosexual majority against the homosexual minority and the government had not offered any convincing and weighty reasons justifying the difference in treatment."²²⁶ Despite this ruling, the law remains on the books, and in the fall of 2018, the first Russian teenager was charged with violating it.²²⁷

The biggest rebuke of the Court from Russia, however, came in December 2015 when federal legislation was passed which permitted the Russian Constitutional Court to declare judgments from an international tribunal inapplicable to Russia.²²⁸ The Constitutional Court of the Russian Federation is an independent court of constitutional review that has jurisdiction over all matters dealing with constitutional interpretation.²²⁹ The Constitutional Court in July 2015 stated that if there was an appropriate legal mechanism, the court "could deviate from its obligation to enforce an EC[t]HR judgment if this was the only possible way to avoid a violation of the fundamental principles and norms of the Russian Constitution."²³⁰ With the new law in place, in April 2016 the Constitutional Court declared a judgment of the ECHR on prisoner voting rights to be incompatible with the Russian Constitution and therefore impossible to implement.²³¹

This development in Russian law and how Russia addresses decisions from the ECHR is important because Russia's Constitutional Court has played a

²²¹ Sewell Chan, *Russia's 'Gay Propaganda' Laws are Illegal, European Court Rules*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/world/europe/russia-gay-propaganda.html>.

²²² *Bayev and Others v. Russia*, App. Nos. 67667/09, 44092/12, (2017).

²²³ Chan, *supra* note 221.

²²⁴ Global Freedom of Expression, *Case of Bayev and Others v. Russia*, COLUM. UNIV., <https://globalfreedomofexpression.columbia.edu/cases/case-bayev-others-v-russia/> (last visited Sept. 16, 2019).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Alex Cooper, 'Not Scared': Russian Teen Charged Under 'Gay Propaganda' Law Says He'll Keep Protesting, NBC NEWS (Aug. 14, 2018), <https://www.nbcnews.com/feature/nbc-out/not-scared-russian-teen-charged-under-gay-propaganda-law-says-n900566>.

²²⁸ Roudik, *supra* note 193.

²²⁹ *About the Court*, CONST. CT. RUSS. FED'N, <http://www.ksrf.ru/en/Info/Pages/default.aspx>. (last visited Nov. 16, 2019).

²³⁰ Roudik, *supra* note 193.

²³¹ *Id.*

significant role in implementing ECHR judgments.²³² In fact, more than fifty decisions of the Russian Constitutional Court have a basis in positions taken by the ECHR,²³³ and “[o]n many occasions the Russian [Constitutional Court] has explicitly affirmed that its interpretation of the Constitution takes into account legal findings of the ECHR in similar cases.”²³⁴ The Russian Constitutional Court has acknowledged in recent cases that are “testing implementation of ECHR judgments” that it has a duty “to find a lawful compromise with the ECHR.”²³⁵ The Russian Constitutional Court has also never questioned the an ECHR judgment on queer rights, and in fact the Russian Constitutional Court has cited to *Alekseyev* “to underline the importance of the right to freedom of assembly”²³⁶ However, the Gay Propaganda law remains in force and government actors still curtail queer advocacy.

While the Russian Constitutional Court’s action in the prisoner voting rights case established a powerful precedent, a law entered force in 2017 allowing certain prisoners to vote in federal and municipal elections.²³⁷ This law was passed after the Constitutional Court suggested that changes to the criminal system could allow for sanctions that do not terminate voting rights.²³⁸ Despite the Russian Constitutional Court’s rebuke of the ECHR’s judgment, the ECHR had actually suggested that the Russian Constitution could be interpreted so as to prevent a conflict between the Convention and the Russia Constitution.²³⁹ The passage of the law resulted in the Council of Ministers ending its supervision of Russia concerning compliance with ECHR’s judgement in September 2019.²⁴⁰

IV. CAN RUSSIA BE BROUGHT TO COMPLY WITH ECHR DECISIONS ON QUEER RIGHTS?

Section IV of this Note turns to the discussion of whether Russia can be brought into compliance with the ECHR’s judgments concerning queer rights. Part A discusses the importance of the *Zhdanov* case. Part B examines the viability of the Council of Europe and the ECHR taking affirmative action against Russia for its refusal to implement ECHR judgments on queer rights. Part C

²³² Bartenev, *supra* note 200, at 346.

²³³ Roudik, *supra* note 193.

²³⁴ Bartenev, *supra* note 200, at 346.

²³⁵ *Id.*

²³⁶ *Id.* at 347.

²³⁷ Department for the Execution of Judgments of the Court, *Russia Abolished Blanket Ban on Prisoners’ Voting*, COUNCIL EUR. (Sept. 26, 2019), <https://www.coe.int/en/web/execution/-/russia-abolished-blanket-ban-on-prisoners-voting>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

considers whether the ECHR should attempt to apply the Russian Constitution in its judgments to convince Russia to comply with ECHR judgments. Finally, Part D explains why domestic activism may be the best hope for advancing queer rights in Russia.

A. *The Importance of Zhdanov*

Zhdanov stands for a summary of the ECHR's jurisprudence on queer rights in reference to Russia. The case embodies the state of the law as it stands today and marks the position of the ECHR towards Russia's continued violations of queer persons' right to assembly and association. The case also provides an overview of the arguments Russia uses to defend its restrictions on queer rights and demonstrates how Russia has continued to use arguments that the ECHR has persistently discredited and found unpersuasive. As in *Bayev*, Russia advanced similar arguments of morality and protection of family values as grounds to interfere with queer person's freedom of assembly and association, but the ECHR, citing to *Bayev*, reminded Russia that those are not justifiable grounds for limiting the freedom of assembly and association.²⁴¹ The ECHR's language in *Zhdanov* remains dismissive of Russia's arguments and systematically disposes of each argument as insufficient to justify curtailing queer rights. *Zhdanov* also represents one of the most recent instances in decades of case law from the ECHR narrowing "any potential room for states to treat people differently because of their sexual orientation."²⁴² A pertinent question arises: How can the ECHR and the Council of Europe convince Russia to follow its obligations under the Convention to protect queer persons rights to freedom of association?

Following *Alekseyev* (2010), Russia had to submit action plans for implementing the decision to the Committee of Ministers.²⁴³ Russia has conveyed to the Committee of Ministers that it is acting to "ensure equal enjoyment of freedom of assembly by sexual minorities."²⁴⁴ Russia has emphasized to the Committee of Ministers that it is training judges to apply ECHR standards to sexual minorities.²⁴⁵ Of course, as *Zhdanov* and Russia's adoption of the Gay Propaganda law demonstrate, these efforts seem to only be rhetoric aimed at the Committee of Ministers and the Council of Europe.²⁴⁶ For this reason, the *Alekseyev* case

²⁴¹ *Zhdanov and Others v. Russia*, Apps. Nos. 12200/08, 35949/11, 58282/12, ¶ 151–53, (2019), <https://hudoc.echr.coe.int/fre#%20>; GLOBAL FREEDOM OF EXPRESSION, *supra* note 224.

²⁴² Bartenev, *supra* note 200, at 349.

²⁴³ *Id.* at 333.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

remains open as the Committee of Ministers continues to monitor its implementation.²⁴⁷

Zhandov is an important addition to ECHR case law because it is a reminder to Russia of its obligations under the Convention, harkening back to the *Alekseyev* (2010) decision. Since 2014, when the Gay Propaganda law was upheld by the Russian Constitutional Court, “the most egregious decisions upholding restrictions of” queer rights by Russian courts—relating to the freedom of assembly and expression—have been based on the Gay Propaganda law and the Russian Constitutional Court’s decision upholding the law.²⁴⁸ Russia’s refusal to implement ECHR decisions on queer rights has been recognized by some scholars as an indication of the very real possibility that queer rights will become “the major, if not the only, point of principle discord between the Council of Europe and Russia.”²⁴⁹

B. Attacking the Russian Constitutional Court and Punishing Russia

One major impediment to the ECHR and its judgments is the Russian Constitutional Court’s ability to declare ECHR judgments incompatible with the Russian Constitution and thus impossible to implement. “The Russian Constitutional Court held that if it determines that complying with an ECHR judgment would violate the Russian Constitution, then the ECHR judgement is ‘impossible’ to implement and the Russian government does not have to follow the judgment.”²⁵⁰ Russia’s establishment of this legal regimen to counter the ECHR is completely incompatible with Article 46 of the Convention. While the Russian Constitutional Court stated that it must still try to find a way to compromise with the ECHR, the Russian Constitutional Court has effectively declared itself superior to the ECHR.²⁵¹ As discussed above, the Russian Constitutional Court played an important role in ensuring that ECHR decisions were enforced by compelling lawmakers to amend laws or by even overturning its own past interpretations of the Russian Constitution to bring Russia into compliance with ECHR judgements.²⁵² Now, if the Russian Constitutional Court simply interprets the judgements of the ECHR as being incompatible with the Russian Constitution, Russia does not have to implement them. Thus, the Russian Constitutional Court can overrule the ECHR and Russia can entirely ignore its legal obligations under the Convention.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 345.

²⁴⁹ *Id.* at 349.

²⁵⁰ Roudik, *supra* note 193.

²⁵¹ Bartenev, *supra* note 200, at 346.

²⁵² Roudik, *supra* note 193; Bartenev, *supra* note 200, at 346.

In an opinion adopted by the Venice Commission of the Council of Europe²⁵³ in March 2016, the Commission found that the Russian Constitutional Court's newfound powers to overrule the ECHR were contradictory to Russia's legal obligations.²⁵⁴ The Venice Commission insisted that Russia should use dialogue instead of invoking unilateral measures to confront discontent with the Council of Europe and the ECHR.²⁵⁵ The Commission's opinion also stressed that Russia should amend the law and that the mere fact that the Russian Constitutional Court cannot amend the Constitution to be compatible with ECHR decisions itself is no excuse for refusing to implement ECHR decisions.²⁵⁶ The Venice Commission made clear the Council of Europe disproves of Russia's actions concerning the implementation of ECHR judgments; nevertheless, by subsequent action, Russia and the Russian Constitutional Court have ignored the Venice Commission and the Council of Europe by maintaining that Russia has a legal right to refuse to implement ECHR decisions for being incompatible with the Russian Constitution.²⁵⁷ One month after the Venice Commission's opinion was published, the Russian Constitutional Court exercised its new authority and declared, for the first time, an ECHR decision impossible to implement because of its incompatibility with the Russian Constitution.²⁵⁸

The Parliamentary Assembly of the Council of Europe could revoke Russia's voting rights in the Assembly as it did when Russia invaded Crimea in 2014.²⁵⁹ This move, however, led to Russia refusing to pay its funding contribution to the Council of Europe.²⁶⁰ The result was serious financial problems for the Council of Europe and the ECHR.²⁶¹ Council of Europe members also feared that the Council would have to deny Russian citizens the opportunity to apply to the ECHR for relief for human rights violations.²⁶² A compromise deal was

²⁵³ The Venice Commission (officially known as the European Commission for Democracy through Law) is an advisory body of the Council of Europe which gives legal advice to member states on how "to bring their legal and institutional structures into line with European standards." *The Venice Commission of the Council of Europe*, COUNCIL EUR., https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN (last visited Nov. 17, 2019).

²⁵⁴ Venice Commission, *Russian Law on Constitutional Court Incompatible with International Obligations, Must be Amended, Says Venice Commission*, COUNCIL EUR. (March 11, 2016), https://www.coe.int/en/web/portal/news-2016/-/asset_publisher/StE-Vosr24HJ2/content/russian-law-on-constitutional-court-incompatible-with-international-obligations-must-be-amended-says-venice-commission?inheritRedirect=false.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Roudik, *supra* note 193.

²⁵⁸ *Id.*

²⁵⁹ Mikhail Bushuev & Markian Ostapchuk, *Russia Withholds Payments to the Council of Europe*, DEUTSCHE WELLE (Mar. 1, 2018), <https://www.dw.com/en/russia-withholds-payments-to-the-council-of-europe/a-42792673>.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

subsequently pushed through in the Council of Europe in early 2019 to reinstate Russia's voting rights after Russia threatened to leave the Council of Europe; and human rights organizations argued that Russia's expulsion or departure from the Council would be disastrous for human rights in Russia.²⁶³ Thus, any attempt to limit Russian representation in the Council of Europe would result in a financially crippled Council of Europe, which would not only harm the mission of both the Council and the ECHR, but also Russian citizens who would not receive ECHR protection at all.

Russia has demonstrated an obvious unwillingness to act on outside criticism of its newly created legal regime, allowing its Constitutional Court to trump the ECHR as the state of affairs remains unchanged. The largest threat Russia's new legal regime poses to the ECHR system, however, is that it could "embolden other member states to take similar actions and establish their own procedures for rejecting ECHR judgments."²⁶⁴ Central and Eastern European states have expressed more conservative tendencies and expressed concern over the more liberal principles set forth by the ECHR, actualizing this threat to ECHR supremacy.²⁶⁵ In particular, Hungary and Poland's governments have recently been criticized for their more conservative stances.²⁶⁶ Tensions in Poland over queer rights have reached a boiling point as anti-queer actors both in the Polish Government and Society are in conflict with pro-queer rights activists.²⁶⁷

While the Council of Europe could focus its efforts on trying to get Russia to change its law, the Council and the ECHR should not do so at the expense of allowing other countries to take similar action. Instead, the Council of Europe and the ECHR should focus on a dialogue with Russia and concentrate political capital toward ensuring the conservative movements in other member states do not enact similar legal regimes, which could undermine the entire human rights system of the ECHR.

As discussed above, since taking affirmative action against Russia may push Russia out of the Council of Europe with detrimental effects to the Council and human rights, the best way to address the problems presented by the Russian Constitutional Court's authority to override ECHR is to maintain a dialogue with Russia while thwarting other countries from creating similar regimes. The Council of Europe can do very little in terms of sanctioning Russia while it is so willing to leave the Council; however, Russia was adamant about remaining in the Council following its invasion of Crimea and subsequent loss of its voting rights in the Parliamentary Assembly as a consequence of the invasion; this suggests it

²⁶³ *Council of Europe Restores Russia's Voting Rights*, DEUTSCHE WELLE (June 25, 2019), <https://www.dw.com/en/council-of-europe-restores-russias-voting-rights/a-49340511>.

²⁶⁴ Fleig-Goldstein, *supra* note 8, at 210.

²⁶⁵ Bartenev, *supra* note 200, at 12.

²⁶⁶ *See id.*

²⁶⁷ *See* Shaun Walker, Christian Davies, and Robert Tait, *Anti-LGBT Rhetoric Stokes Tensions in Eastern Europe*, GUARDIAN (Oct. 25, 2019), <https://www.theguardian.com/world/2019/oct/25/anti-lgbt-rhetoric-stokes-tensions-in-eastern-europe>.

still has an interest in being in rather than out of the Council.²⁶⁸ Therefore, the most optimal approach for now is to work with Russia. Yet, the Council of Europe *must* ensure that other member states do not proliferate Russia's actions.

C. The ECHR Could Apply the Russian Constitution to Support its Judgments

Another way the ECHR could ensure its judgments are implemented in Russia and not subsequently overruled by the Russian Constitutional Court is by changing the language of the judgments. As stated above, Russia's Constitution integrates international law and norms into its legal system.²⁶⁹ Literature on how to address the Russian Constitutional Court's recent move against ECHR judgments has suggested the ECHR use the Russian Constitution and the history around its adoption to justify the ECHR's judgments.²⁷⁰ Through this approach, Russia would be violating its own constitution in refusing to comply with ECHR judgments because the Russian Constitution "has integrated international legal principles and international human rights norms into its text."²⁷¹

Zhandov illustrates how the ECHR does not justify its decision by using domestic law. While the Court looks to domestic law to see if the violation of the Convention is grounded in the domestic law of the party, the ECHR only applies case law and the Convention when deciding the merits of a case. As *Zhandov* shows, the ECHR spends most of its time applying principles from past decisions. Most notably in *Zhandov*, *Bayev* was cited repeatedly. Thus, there is plenty of room for the Court to include an analysis of the Russian Constitution and its applicable principles to a case long before the Russian Constitutional Court can determine whether ECHR's judgment in the case is consistent with the Russian Constitution.

An initial problem with this approach is that the Russian Constitutional Court has already upheld the Gay Propaganda law as constitutional.²⁷² So, if the ECHR took the chance to argue in another judgment that the Gay Propaganda law was unconstitutional because it violates Russia's international obligations, such a decision would be futile because the Russian Constitutional Court has already decided the opposite. For the same reason, the Russian Constitutional Court is unlikely to try to direct lawmakers toward a compromise to bring Russia into compliance with cases such as *Bayev* and *Zhdanov* because the Constitutional

²⁶⁸ *Council of Europe and Russia Reach Tentative Compromise*, DEUTSCHE WELLE (May 5, 2019), <https://www.dw.com/en/council-of-europe-and-russia-reach-tentative-compromise/a-48771088>.

²⁶⁹ Fleig-Goldstein, *supra* note 8, at 179–80.

²⁷⁰ *Id.* at 185.

²⁷¹ *Id.*

²⁷² Bartenev, *supra* note 200, at 339–40.

Court has already declared restriction on queer rights to be constitutional. If the ECHR took such action, the state of affairs would be a stalemate because there would be a judgment by the ECHR in conflict with a judgment of the Russian Constitutional Court, a court that has *already* been given the authority to supersede the ECHR.

Moreover, Russia is not going to be interested in following interpretations of its constitution by a European court in Strasbourg—another issue in the ECHR trying to use the Russian Constitution to bring Russia into compliance. The President of the Russian Constitutional Court, Valerij Zorkin, has criticized the ECHR, in his academic capacity, for its overly liberal decisions.²⁷³ Zorkin has argued that the ECHR should consider social and cultural aspects of a country when making its ruling.²⁷⁴ Further, he has insisted that “issues relating to profound values forming the ‘moral and cultural code’ of a nation” comprise a nation’s “constitutional identity.”²⁷⁵ He is joined by other judges who “openly criticiz[e] ‘legislative novelties’ introduced in the majority of Western countries as ‘shocking’ and ‘directly violating fundamental religious commandments.’”²⁷⁶ These statements from Russian judges do not indicate that they would be willing to accept the interpretation of their Constitution by a foreign Court established by the West.

Finally, the ECHR using the Russian Constitution to justify its judgments is unworkable because it undermines the Court. As Article 46 of the Convention provides, all judgments of the ECHR are binding.²⁷⁷ The ECHR is supposed to have the final say on all matters under the Convention *without exception*.²⁷⁸ If the ECHR started to use domestic law to justify its decisions, it would take away from the principle that all that matters is the Convention and the ECHR’s case law which is what the parties to the Convention have agreed too. If the ECHR opened the door to applying domestic law to justify its decisions, nothing would be stopping a party to the Convention from amending their laws to weaken the judgment. Thus, the better option is for the ECHR to continue to only interpret and apply the Convention.

D. Activism

The state of queer rights in Russia seems hopeless. Any attempt by the Council of Europe or the ECHR to take a tougher stance on forcing Russia to comply

²⁷³ *Id.* at 348.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 347–48.

²⁷⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 11, Nov. 4, 1950, 213 U.N.T.S. 221.

²⁷⁸ Bartenev, *supra* note 200, at 3.

with its obligations under the Convention to defend queer rights is met with fierce resistance from Russia. As the recent situation concerning Russia's voting rights in the Parliamentary Assembly indicate, Russia may be willing to leave the Council of Europe altogether. Such a move would be detrimental to the Council and the ECHR, and as human rights organizations pointed out, Russia being out of the Council of Europe could decimate human rights in Russia entirely. Considering the inability of Council and the Court to act, queer rights are only going to be protected from internal change and external pressure from other entities.

As one scholar has pointed out, Russia "still cares about its image as a rule of law-based 'civilized state'" for reasons of "international prestige" and "foreign investment."²⁷⁹ However, "this consideration can no longer be taken for granted"²⁸⁰ because Russia still successfully negotiated a compromise to regain its voting rights and status in the Council of Europe despite facing sanctions from the West for its invasions and continued illegal occupation of Crimea.²⁸¹ In closing this deal, the German Foreign Minister "said the compromise would ensure 'millions of Russians the protection of the European Court of Human Rights.'"²⁸² Russia's willingness to negotiate a deal demonstrates a desire on Russia's part to remain a part of the Council and continue to submit itself to the jurisdiction of the ECHR.

The fact of the matter is that there is little the Council of Europe can do, and despite economic sanctions, Russia has continued to press forward. From ignoring the judgments of the ECHR to maintaining its presence in Crimea, Russia is ignoring pressure on all fronts from the West. Economic sanctions are a prime example of Russia's growing immunity to international pressure, as Russia continues to adapt to them.²⁸³

The best hope for queer rights and the right to assembly under the Convention ten years after *Alekseyev* appears to be continued internal activism. Actors like Mr. Alekseyev need to be wary, however, of their treatment of the ECHR as discussed in *Zhandov*.²⁸⁴ Although the Court is in a difficult position, *Zhandov* signifies that the ECHR and all its jurisprudence support the protection of queer rights under the Convention. The Court disciplining an applicant by dismissing an application for vile behavior and statements harms those who stand to gain from the ECHR's protection through its case law. Inevitably, there will be another judgment about queer rights in Russia, and *Zhandov* will be cited. Every

²⁷⁹ *Id* at 17.

²⁸⁰ *Id.*

²⁸¹ *Council of Europe Restores Russia's Voting Rights*, *supra* note 263.

²⁸² *Id.*

²⁸³ Dion Rabouin, *U.S. Sanctions are Losing Their Bite*, AXIOS (June 24, 2019), <https://www.axios.com/us-sanctions-russia-china-venezuela-effects-f9db1d84-b0ec-49b3-949f-020528f52ee6.html>.

²⁸⁴ *Zhdanov and Others v. Russia*, Apps. Nos. 12200/08, 35949/11, 58282/12 ¶ 76–86, (2019).

case expands and strengthens the Court's pro-queer rights jurisprudence. Unfortunately, the ECHR is limited on how far it can act to implement its judgments, so activists must work to change Russia from the inside out.

Of course, simply concluding that domestic activism is how to advance queer rights in Russia is easier said than done. Pro-queer rights organizations are finding it more difficult to act, as laws are passed curtailing their ability to operate in Russia.²⁸⁵ Activists in Russia also need the support of the international community.²⁸⁶ One way to support these organizations is to give them money for lawyers since activists are arrested merely for their peaceful demonstrations, which are permitted under the Convention. Another way governments can help is through their willingness to expand asylum and visas to queer persons who need to leave the country.²⁸⁷ Finally, if Russia does care about foreign investments, Western companies doing business in Russia should consider restricting investment in Russia until changes are made regarding its treatment of queer citizens.

V. CONCLUSION

The situation in Russia is bleak for queer rights. *Zhandov* is important because it summarizes the ECHR's position on queer rights under the Convention. The judgment in the case acknowledges that for all parties to the Convention, and therefore all members of the Council of Europe, *inter alia*, the protection of morality and family values is not a legitimate justification for limiting the rights of queer persons. The ECHR firmly stated to Russia that "[t]here is no ambiguity about" where the member states of the Council of Europe stand on queer rights and that member states should and do recognize and promote the rights of queer persons, especially the freedom of assembly and association.²⁸⁸ The Court acknowledges the vital role the freedom of assembly and association play in advancing minority positions. By curtailing these rights, queer activists are hindered from changing public opinion and challenging the government. Unfortunately, the state of affairs between the Council of Europe, the ECHR, and Russia is precarious at best. The Court must be careful not to allow the Russian Constitutional Court to undermine the human rights system under the Convention and the ECHR. At the same time, the Council is limited in the action it can take because an affirmative action against Russia may lead to a Russian exit from the Council, imperiling human rights in general in Russia. These situational

²⁸⁵ Irina Kosterina & Julia Bashinova, *LGBTI in Russia: History of Success, Opportunities and Challenges*, GREEN POL. FUND (Jun. 1, 2017), <https://www.boell.de/en/2017/05/29/lgbt-russia-history-success-opportunities-and-challenges>.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Zhandov*, ¶ 154.

problems between the ECHR, the Council, and Russia leaves any hope of change up to queer activists in Russia who are in a desperate situation as well.

Thus, ten years after *Alekseyev*, while the ECHR has remained firm in its acknowledgement of queer rights, the situation for queer rights in Russia has gotten worse. The only hope for meaningful change in Russia appears to be that activists somehow change the minds of a majority of Russians who then can challenge the government. Though European institutions appear to be unable to advance queer rights in Russia, queer activists are not going anywhere and will continue to advocate for their rights until they are acknowledged and protected in Russia.