
INTERNATIONAL LAW — HUMAN RIGHTS — EUROPEAN COURT OF HUMAN RIGHTS HOLDS THAT RUSSIA MUST GIVE LEGAL RECOGNITION TO SAME-SEX COUPLES. — *Fedotova v. Russia*, App. No. 40792/10 (July 13, 2021).

The relationship between Russia and the European Court of Human Rights (ECtHR) has been “turbulent” since Russia entered the Council of Europe in 1996.¹ At the time, critics questioned the wisdom of admitting Russia given its poor record of democracy and human rights.² In 2015, cracks deepened when Russia’s Constitutional Court held that ECtHR decisions conflicting with the constitution could not be implemented.³ In 2020, the Russian Constitution was amended to, among other changes, codify the primacy of the constitution over international agreements in the case of conflict.⁴ The amended constitution also defined a state interest in protecting heterosexual marriage.⁵ Recently, the relationship between Russia and the ECtHR was put to the test⁶ in *Fedotova v. Russia*,⁷ which held that Russia has a positive obligation to give legal recognition and protection to same-sex couples.⁸ While *Fedotova* lands in a challenging political context, there is still opportunity for the decision to be implemented, opening the door to meaningful improvement in the lives of LGBTQ people in Russia and Eastern Europe.

In 2009, Rene Fet⁹ and his partner Irina Shipitko tried to marry in Moscow by applying to register their union.¹⁰ Two other same-sex couples applied to marry in St. Petersburg in 2013.¹¹ They were denied

¹ William E. Pomeranz, *Uneasy Partners: Russia and the European Court of Human Rights*, HUM. RTS. BRIEF, Spring 2012, at 17, 17; see also Sergey Marochkin, *ECtHR and the Russian Constitutional Court: Duet or Duel?*, in RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT 93, 123–24 (Lauri Mälksoo & Wolfgang Benedek eds., 2018); Wolfgang Benedek, *Russia and the European Court of Human Rights: Some General Conclusions*, in RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT, *supra*, at 385, 399.

² See Pomeranz, *supra* note 1, at 19.

³ Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iyula 2015 g. [Ruling of the Russian Federation Constitutional Court of July 14, 2015] ROSSIISKAIA GAZETA [ROS. GAZ.] July 27, 2015.

⁴ KONSTITUTSIYA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 79.

⁵ *Id.* art. 72.

⁶ Dmitri Bartenev, *Will Russia Yield to the ECtHR? Fedotova and Others v. Russia: Yet Another Test Case*, VERFASSUNGSBLOG (July 16, 2021), <https://verfassungsblog.de/will-russia-yield-to-the-ecthr> [<https://perma.cc/SK6C-KV9Y>].

⁷ App. No. 40792/10 (July 13, 2021), <http://hudoc.echr.coe.int/eng?i=001-211016> [<https://perma.cc/CKA2-TN22>], *appeal docketed* by Grand Chamber for April 2022.

⁸ *Id.* ¶¶ 55–56.

⁹ Fet, who is transgender, was pursuing a same-sex union with Shipitko at the time of the ECtHR proceedings. Dmitri Volchek, “*Mi zhdali etogo resheniya 12 let*”. *ESPC h i odnopolie soyuzi v Rossii*, RADIO SVOBODA (July 14, 2021), <https://www.svoboda.org/a/my-zhdali-etogo-resheniya-12-let-espch-i-odnopolie-soyuzi-v-rossii/31356967.html> [<https://perma.cc/KLG6-NU7Q>].

¹⁰ *Fedotova* ¶ 5.

¹¹ *Id.*

on the ground that Article 1 of the Russian Family Code describes marriage as a “voluntary marital union between a man and a woman.”¹² Fet and Shipitko contested the decision, arguing that their marriage application complied with the Family Code¹³ and that their right to marry was protected by the Russian Constitution and European Convention.¹⁴ The Tverskoy District Court dismissed their claim,¹⁵ and the Moscow City Court affirmed, concluding that “the absence of an explicit ban on same-sex marriage could not be construed as State-endorsed acceptance.”¹⁶ The Gryazi Town Court similarly rejected the claims of the other couples. Drawing on the *Case of E. Murzin*,¹⁷ where the Constitutional Court found no right to same-sex marriage, the Gryazi court held that same-sex marriage contradicts “national and religious traditions[,] . . . the State’s policy of protecting family, motherhood and childhood, [and] the ban on the propaganda of homosexuality.”¹⁸ The couples appealed to the ECtHR.

The ECtHR found a violation of the European Convention.¹⁹ The court unanimously held that Russia’s failure to legally recognize same-sex couples violates their right to private and family life under Article 8.²⁰ The court explained that Article 8 imposes a positive obligation on states to “ensure effective respect for” private and family life.²¹ In assessing compliance, the court balances the “competing interests of the individual and of the community as a whole.”²² Although states “enjoy a certain margin of appreciation” — or discretion — in implementing positive obligations, “where a particularly important facet of an individual’s . . . identity is at stake,” the margin of appreciation is narrow.²³

¹² *Id.* ¶ 6 (citing SEMEĬNYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [SK RF] [Family Code] art.1 § 3).

¹³ Article 14 lists circumstances precluding marriage but does not discuss partners’ gender as a potential barrier. SK RF art.14.

¹⁴ *Fedotova* ¶ 9.

¹⁵ *Id.* ¶ 10.

¹⁶ Postanovlenie Moskovskogo Gorodskogo Suda ot 21 yanvarya 2010 g. [Ruling of the Moscow City Court of Jan. 21, 2010].

¹⁷ Opredelenie Konstitutsionnogo Suda RossiĬskoĬ Federatsii ot 16 noyabrya 2006 g. [Decision of the Russian Federation Constitutional Court of Nov. 16, 2006] GARANT.RU Mar. 2, 2007.

¹⁸ *Fedotova* ¶ 15 (quoting Reshenie Gryazinskogo Gorodskogo Suda ot 2 avgusta 2013 g. [Decision of the Gryazi Town Court of Aug. 2, 2013] SUDACT.RU).

¹⁹ *Id.* ¶ 56.

²⁰ *Id.* Judges Lemmens, Serghides, Dedov, Elósegui, Seibert-Fohr, Roosma, and Zünd joined the opinion. Article 8 of the European Convention states:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society . . . for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention on Human Rights art. 8, Nov. 4, 1950, E.T.S. No. 5.

²¹ *Fedotova* ¶ 44.

²² *Id.* ¶ 46.

²³ *Id.* ¶ 47.

As for individual interests, *Fedotova* emphasized same-sex couples are “just as capable as different-sex couples of entering into committed relationships” and, therefore, are “relevantly similar . . . as regards their need for formal acknowledgment and protection.”²⁴ Yet it noted that Russian law has only one form of recognizing relationships — marriage — from which same-sex couples are excluded.²⁵ Without recognition, same-sex couples lack important rights such as inheritance of a partner’s property after death, testimonial privilege, and hospital visitation.²⁶ This “creates a conflict between [couples’] social reality . . . and the law, which fails to protect the most regular of [their] ‘needs.’”²⁷

At the same time, *Fedotova* found that popular disapproval of same-sex relations was not a countervailing community interest.²⁸ In *Oliari v. Italy*,²⁹ the ECtHR’s first decision finding a right to recognition, the court alluded to Italy’s changing norms to explain why it had to recognize same-sex unions.³⁰ Drawing a contrast with Italy, the Russian government submitted statistics showing that in 2015, 20% of the Russian population believed “homosexuals [are] dangerous people who should be isolated from society” and that 80% opposed same-sex marriage.³¹ Nevertheless, the court concluded that the right found in *Oliari* applied to Russia.³² While acknowledging that “popular sentiment may play a role in the Court’s assessment” in the context of “social morals,” the court underscored that “[i]t would be incompatible with the underlying values of the Convention . . . if the exercise of Convention rights by a minority group were made conditional on” acceptance “by the majority.”³³

Protection of heterosexual marriage was not a countervailing interest either. Although the court characterized “protection of ‘traditional marriage’” in Russia’s revised constitution as “in principle [a] weighty and legitimate interest,” it found no conflict between marriage and same-sex recognition.³⁴ Because recognizing same-sex unions “does not prevent

²⁴ *Id.* ¶ 48 (citing, among others, *Oliari v. Italy*, App. No. 18766/11 ¶¶ 165, 192 (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265> [<https://perma.cc/33RM-QUQQ>]).

²⁵ *Id.* ¶ 51.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ¶¶ 52–55.

²⁹ App. No. 18766/11 (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265> [<https://perma.cc/UW8L-VB33>].

³⁰ *Id.* ¶ 186. *Oliari* noted that Italy’s Constitutional Court had itself raised the need to regulate the rights of same-sex partners, and that surveys showed that the majority of Italians believed that same-sex partners should enjoy the same rights as married couples. *Id.* ¶¶ 105, 144, 181.

³¹ *Fedotova* ¶ 35.

³² *See id.* ¶¶ 50, 52.

³³ *Id.* ¶ 52 (citing, among others, *Bayev v. Russia*, App. No. 67667/09, ¶ 70 (June 20, 2017), <http://hudoc.echr.coe.int/eng?i=001-174422> [<https://perma.cc/PTY6-TU89>]).

³⁴ *Id.* ¶ 54.

different-sex couples from entering marriage, or enjoying [its] benefits,” recognition poses no risk to different-sex marriage.³⁵

Russia, *Fedotova* concluded, must recognize same-sex couples to address the “serious daily obstacles” they face.³⁶ However, the court stopped short of articulating a right to marriage, focusing instead on legal protections such as inheritance and testimonial rights.³⁷ At the same time, it held that the form of recognition — whether “partnership, civil union, or civil solidarity act” — lies within Russia’s margin of appreciation, “taking into account [Russia’s] specific social and cultural context.”³⁸ Because it found a violation of Article 8, the court declined to consider whether Russia also violated the prohibition of discrimination under Article 14.³⁹ Finally, the court ordered no damages, concluding that judicial recognition of the violation provided just satisfaction.⁴⁰

Fedotova established a universal right to recognition for same-sex couples in Europe that is independent of public approval.⁴¹ The ECtHR became the second international human rights court to state such a right, following the Inter-American Court’s 2018 advisory decision to Costa Rica.⁴² Now, Russia must decide how *Fedotova* will be implemented.⁴³ While the decision faces formidable political obstacles, its potential should be measured not only by the ability to inspire legislative reform, but also by subtler shifts in judicial behavior and public opinion.

Fedotova has not been kindly received by some members of the Russian political establishment.⁴⁴ But the decision should be understood in the broader context of the relationship between Russia and the

³⁵ *Id.*

³⁶ *Id.* ¶ 51.

³⁷ *See id.*

³⁸ *Id.* ¶ 56.

³⁹ *Id.* ¶ 57.

⁴⁰ *Id.* ¶ 61.

⁴¹ Paul Johnson, *Russia Must Legally Recognise Same-Sex Relationships Says European Court of Human Rights*, ECHR SEXUAL ORIENTATION BLOG (July 14, 2021), <http://echrso.blogspot.com/2021/07/russia-must-legally-recognise-same-sex.html> [<https://perma.cc/KGK3-85AU>]; Giulio Fedele, *The (Gay) Elephant in the Room: Is There a Positive Obligation to Legally Recognise Same-Sex Unions After Fedotova v. Russia?*, EJIL:TALK! (July 23, 2021), <https://www.ejiltalk.org/the-gay-elephant-in-the-room-is-there-a-positive-obligation-to-legally-recognise-same-sex-unions-after-fedotova-v-russia/> [<https://perma.cc/F5ER-FBQG>].

⁴² Gender Identity, and Equality and Non-discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 199 (Nov. 24, 2017).

⁴³ *Fedotova* did not specify implementation demands, so the Committee of Ministers, supervising implementation, has discretion. Nevertheless, Article 46 of the Convention requires Russia to take measures compatible with the “conclusions and spirit” of the judgment. *Mammadov v. Azerbaijan*, App. No. 15172/13, ¶ 186 (May 29, 2019), <http://hudoc.echr.coe.int/eng?i=001-193543> [<https://perma.cc/TVV9-3ZUZ>] (citing European Convention on Human Rights, *supra* note 20, art. 46, § 1).

⁴⁴ The Speaker of the Duma suggested that the judges who decided *Fedotova* should resign because they sought to legalize same-sex marriage “in essence contrary to national law.” *Volodin predlozhit sudyam ESPCh uyti v otstavku iz-za priziva k RF priznat odnopolie braki*, TASS (July

ECtHR, which is characterized by a surprising degree of cooperation.⁴⁵ In the majority of cases, Russia pays victims of human rights abuses as required by the court,⁴⁶ including 1.1 billion rubles in 2019 alone.⁴⁷ And, although systemic reforms are limited, especially on political issues like protest restrictions, there appears to be some will to remedy more neutral questions of prison conditions and criminal procedure.⁴⁸

Russia's judiciary has been the branch most favorable to implementation of ECtHR decisions.⁴⁹ For most of Russia's time in the Council of Europe, the Constitutional Court "correctly referred to ECtHR judgments and used them in its decisions . . . reflect[ing] its general aspiration to remedy the situation in line with Strasbourg law."⁵⁰ After holding that conflict with the constitution precludes implementation of ECtHR judgments, the Constitutional Court found conflict in only two of the more than 1,112 decisions against Russia.⁵¹ First, responding to *Anchugov v. Russia*,⁵² which barred blanket prohibitions on prisoner voting, the court concluded that the constitution's plain text⁵³ excludes prisoners from the franchise.⁵⁴ Nevertheless, it took some steps to implement the spirit of *Anchugov* by successfully pressing the Duma to create nonprison penalties that preserve voting rights.⁵⁵ Second, likely

13, 2021, 14:26), <https://tass.ru/obschestvo/11896367> [<https://perma.cc/T78B-7323>]. The President's Press Secretary said that *Fedotova* cannot be enforced under the constitution. *Peskov zazayavil, chto Konstitutsiya RF ne pozvolayet vipolnit reshenie ESPCh po odnopolim brakam*, TASS (July 13, 2021, 10:28 AM), <https://tass.ru/obschestvo/11894725> [<https://perma.cc/Q4J9-72QH>].

⁴⁵ Marochkin, *supra* note 1, at 123.

⁴⁶ Lauri Mälksoo, *Introduction: Russia, Strasbourg, and the Paradox of a Human Rights Backlash*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT*, *supra* note 1, at 3, 5.

⁴⁷ *Rossiya viplatila 1.1 mlrd rubley po resheniyam suda v Strasburge v 2019 godu*, VEDOMOSTI (July 20, 2020, 19:57), <https://www.vedomosti.ru/society/articles/2020/07/20/834987-rossiya-viplatila-bolee> [<https://perma.cc/QMF6-KV6P>].

⁴⁸ See COUNCIL OF EUR., COMM. OF MINISTERS, SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, 2020, at 22, 25–26, 33 (2021), <https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8> [<https://perma.cc/3359-ZP89>].

⁴⁹ See Marochkin, *supra* note 1, at 123.

⁵⁰ *Id.*

⁵¹ This number was calculated by adding the number of judgments against Russia in 2016–2020. See *Reports*, EUR. CT. HUM. RTS., <https://www.echr.coe.int/Pages/home.aspx?p=court/annualreports> [<https://perma.cc/3VAV-G2AR>] (annual reports including violations by state).

⁵² App. No. 11157/04 (July 4, 2013), <http://hudoc.echr.coe.int/eng?i=001-122260> [<https://perma.cc/BH5E-MXEM>].

⁵³ Article 32(3) states: "[C]itizens currently incarcerated" shall be "[d]eprived of the right to elect and be elected." KONST. RF, *supra* note 4.

⁵⁴ Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 aprelya 2016 g. [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016] ROS. GAZ. May 5, 2016.

⁵⁵ See *id.*; Council of Eur., Comm. of Ministers, *Communication from the Russian Federation Concerning the Anchugov and Gladkov Group of Cases v. Russian Federation*, ¶¶ 4–7, at 3–5, Doc No. DH-DD(2019)740 (2019), [https://hudoc.exec.coe.int/eng?i=DH-DD\(2019\)740E](https://hudoc.exec.coe.int/eng?i=DH-DD(2019)740E) [<https://perma.cc/29NU-6MKD>].

for pragmatic reasons, the court blocked a 1.9 billion euro judgment in *Yukos v. Russia*,⁵⁶ the largest sum awarded in the ECtHR's history.⁵⁷

Fedotova, however, creates little financial burden, and the Constitutional Court will be hard-pressed to find a conflict based on the constitution's plain language.⁵⁸ Article 72 protects marriage as a different-sex institution but creates no bar to alternative forms of same-sex recognition.⁵⁹ Neither do other parts of the constitution express hostility toward LGBTQ people. On the contrary, the Constitutional Court has recognized that, in theory, the constitution prohibits discrimination based on sexual orientation, albeit in a decision upholding the gay propaganda law.⁶⁰ The court might draw inspiration from Hungary, which has a nearly identical different-sex marriage provision in its constitution,⁶¹ but allows same-sex partnerships.⁶² Indeed, although Hungary recently enacted its own version of Russia's propaganda law,⁶³ same-sex couples still enjoy "all the tax, social, labor and immigration" benefits of marriage.⁶⁴ If the Constitutional Court does not find a conflict with the constitution, then, under Russian law, *Fedotova* must be implemented.⁶⁵

⁵⁶ Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 yanvarya 2017 g. [Ruling of the Russian Federation Constitutional Court of Jan. 19, 2017] ROS. GAZ. Feb. 3, 2017.

⁵⁷ Conor McCarthy, *The ECtHR's Largest Ever Award for Just Satisfaction Rendered in the Yukos Case*, EJIL:TALK! (Aug. 15, 2014), <https://www.ejiltalk.org/the-ecthrs-largest-ever-award-for-just-satisfaction-rendered-in-the-yukos-case> [https://perma.cc/88ME-JLW7].

⁵⁸ Ilia Savelev, *Political Homophobia and European Court of Human Rights: Russia Is Called to Protect Same-Sex Unions*, JURIST (Aug. 18, 2021, 2:00 AM), <https://www.jurist.org/commentary/2021/08/ilia-savelev-homophobia-ecthr-russia-same-sex> [https://perma.cc/N7TJ-98MN].

⁵⁹ KONST. RF, *supra* note 4.

⁶⁰ Bartenev, *supra* note 6 (citing Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 23 sentyabrya 2014 g. [Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014] ROS. GAZ. Oct. 3, 2014). The Constitutional Court found that the propaganda law is not discriminatory because it properly balances the rights of gays and lesbians with the rights of minors, but emphasized that the law should be read narrowly. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 23 sentyabrya 2014 g.

⁶¹ "Hungary shall protect the institution of marriage as the union of a man and a woman" MAGYARORSZÁG ALAPTÖRVÉNYE [The Fundamental Law of Hungary], Alaptörvény, art. L § 1.

⁶² HÁTTÉR SUPPORT SOC'Y FOR LGBT PEOPLE & HUNGARIAN LGBT ALL., REGISTERED PARTNERSHIP: GUIDE FOR GAY AND LESBIAN COUPLES 2 (2011). Montenegro similarly recognizes same-sex partnerships despite a constitutional ban. Compare Martijn Mos, *The Anticipatory Politics of Homophobia: Explaining Constitutional Bans on Same-Sex Marriage in Post-Communist Europe*, 36 EAST EUR. POL. 395, 396 (2020), with Donald Padgett, *Montenegro Is Latest Country to Recognize Same-Sex Unions*, OUT (July 2, 2020, 11:27 AM), <https://www.out.com/weddings/2020/7/02/montenegro-latest-country-recognize-same-sex-unions> [https://perma.cc/RD7B-JUJ5].

⁶³ Jennifer Rankin, *Hungary Passes Law Banning LGBT Content in Schools or Kids' TV*, THE GUARDIAN (June 15, 2021, 11:06 AM), <https://www.theguardian.com/world/2021/jun/15/hungary-passes-law-banning-lgbt-content-in-schools> [https://perma.cc/6JNN-P3ZX].

⁶⁴ HÁTTÉR SUPPORT SOC'Y FOR LGBT COUPLES & HUNGARIAN LGBT ALL., *supra* note 62, at 2.

⁶⁵ The Constitutional Court has recognized that ECtHR judgments are binding on Russia and that, by joining the Council of Europe, Russia "pledged to bring law enforcement, including judicial

What might implementation look like? Even if *Fedotova* does not inspire legislative change in the short term, it could shift judicial behavior. Take, for example, *Bayev v. Russia*.⁶⁶ There, the court found that Russia's so-called gay propaganda law, which barred advocating for gay rights in the earshot of minors, violated the right to freedom of expression and nondiscrimination.⁶⁷ Although the law remains on the books, Russian courts have become increasingly reluctant to enforce it. Before *Bayev*, in 2016, about 67% of those charged with propaganda were convicted.⁶⁸ But by 2019, the conviction rate fell to 20%.⁶⁹ Explaining these low conviction rates, Alexander Belik of the Russian LGBT Network observed that the majority of courts "continue to follow the ECtHR's decision in *Bayev v. Russia*."⁷⁰ The propaganda law still serves as pretext for denying event permits for Pride.⁷¹ Yet *Bayev* suggests that even where a decision fails to inspire needed legislative change, it can yield incremental improvement in the courts. If, in the wake of *Fedotova*, same-sex couples continue to be denied recognition by the legislature, the judiciary may begin to acknowledge their claims.

In this regard, it is notable that a conservative Putin nominee, Judge Dedov, joined the majority in *Fedotova*, despite his vocal dissent in *Bayev*,⁷² suggesting that *Fedotova* has some appeal for those who, like Judge Dedov, fear encroachment on Russian values.⁷³ Judge Dedov argued that *Bayev* "[d]id not take seriously . . . that 'heterosexuality' could create any values" and was unwilling to engage in "dialogue with the Russian Constitutional Court."⁷⁴ His reversal in *Fedotova* suggests that he found this decision more persuasive. *Fedotova's* moderate stance

practice, into full conformity" with the Convention. Marochkin, *supra* note 1, at 94 (quoting Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 25 yanvarya 2001 g. [Ruling of the Russian Federation Constitutional Court of Jan. 25, 2001], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2001, No. 7, Item 700).

⁶⁶ App. No. 67667/09 (June 20, 2017), <http://hudoc.echr.coe.int/eng/?i=001-174422> [<https://perma.cc/PTY6-TU89>].

⁶⁷ *Id.* ¶¶ 84, 92.

⁶⁸ Pavel Merzlikin, *Samarskuyu aktivistku sudyat za repost statey v Guardian i Buzzfeed*, MEDUZA (Sept. 15, 2017, 9:07 AM), <https://meduza.io/feature/2017/09/15/samarskuyu-aktivistku-sudyat-za-repost-statey-the-guardian-i-buzzfeed-ee-obvinyayut-v-gey-propagande> [<https://perma.cc/LXX6-3DET>].

⁶⁹ *V 2019 godu sudi rassmotreli rekordnoe kolichestvo del "o propogande," ROSSIYSKAYA LGBT-SET*, <https://old.lgbtnet.org/ru/newseng/v-2019-godu-sudy-rassmotreli-rekordnoe-kolichestvo-del-o-propagande> [<https://perma.cc/84T6-W66H>].

⁷⁰ *Id.*

⁷¹ See Council of Eur., Comm. of Ministers, *1331st meeting, 4–6 December 2018 (DH)* (Dec. 6, 2018), <https://rm.coe.int/09000016808f002a> [<https://perma.cc/8QJS-CJGU>].

⁷² *Bayev*, at 36–45 (Dedov, J., dissenting).

⁷³ See Mikhail Antonov, *Formalism, Realism and Conservatism in Russian Law* 145 n.472 (Dec. 18, 2019) (Ph.D. dissertation, Leiden University), <https://scholarlypublications.universiteitleiden.nl/access/item%3A2981968/view> [<https://perma.cc/G348-ECPH>].

⁷⁴ *Bayev*, at 42 (Dedov, J., dissenting).

on same-sex marriage may have assuaged his concerns by acknowledging Russia's marriage amendments and its "specific social and cultural context" as appropriate to shaping the form of same-sex recognition.⁷⁵ The decision's restraint may similarly make it palatable to the judges on the Constitutional Court who share Judge Dedov's philosophy.

Public opinion may overlap with judicial reception: support for LGBTQ rights is growing in Russia, and the government seems to be losing appetite for homophobic rhetoric. Consider the official statistics Russia offered in *Fedotova*.⁷⁶ Between 2015 and 2021, the share of the population viewing gays and lesbians as dangerous people who should be isolated fell from 20% to 11%.⁷⁷ Conversely, the share of those who do not distinguish among people based on sexual orientation rose from 22% to 31%.⁷⁸ Same-sex marriage remains unpopular, with 75% disapproval.⁷⁹ But a 2019⁸⁰ independent study by Levada suggests 47% of Russians believe LGBT citizens should enjoy equal rights, up from 39% in 2013.⁸¹ One explanation is that "the government is no longer appealing to the homophobic sentiments of the population."⁸² If true, both the public and state officials may be increasingly receptive to *Fedotova*.

While *Fedotova* faces formidable challenges, its failure to inspire change is not a foregone conclusion. How the decision plays out will be a valuable test for the power of human rights courts to influence authoritarian states. Yet its potential should be gauged not only by the ability to inspire LGBTQ-friendly legislation but also by subtler wins in domestic courts and shifts in public opinion. Outside Russia, couples in the Council of Europe states that do not yet recognize same-sex unions⁸³ now have the power to sue, and win, at the ECtHR. And in states that have codified restrictions on same-sex marriage in their national constitutions,⁸⁴ *Fedotova* maintains the possibility of a more equal future.

⁷⁵ *Fedotova* ¶ 56.

⁷⁶ *Id.* ¶ 35.

⁷⁷ *Odnopolie braki: tabu ili novaya norma?*, RUSSIAN PUB. OP. RSCH. CTR. (July 23, 2021), <https://wciom.ru/analytical-reviews/analiticheskii-obzor/odnopolye-braki-tabu-ili-novaya-norma> [https://perma.cc/XXA5-49QD].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ This comment does not cite to Levada's 2021 study because it was conducted through in-home interviews and is likely to have been adversely affected by COVID-19.

⁸¹ LEVADA CTR., OBSHESTVENNOE MNENIE - 2019, at 110 (2019), <https://www.levada.ru/cp/wp-content/uploads/2020/02/OM-2019.pdf> [https://perma.cc/5VTG-FKWV].

⁸² *Id.*

⁸³ These are Turkey, Latvia, Lithuania, Ukraine, Armenia, Georgia, Azerbaijan, Poland, Slovakia, Bulgaria, Romania, Moldova, Bosnia and Herzegovina, North Macedonia, Serbia, and Albania. Camille Cottais & Martin Pavard, *The State of Gay Rights Around the World*, GROW (May 2, 2021), <https://www.growthinktank.org/en/the-state-of-gay-rights-around-the-world#&gid=1&pid=1> [https://perma.cc/P7C3-KWE3].

⁸⁴ Of the countries that do not recognize same-sex unions, these are Bulgaria, Lithuania, Moldova, Armenia, Georgia, Ukraine, Serbia, Latvia, Slovakia, and Poland. Mos, *supra* note 62, at 396.