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# **TOWARD A LEGISLATIVE SOLUTION TO THE GROWING HIV/AIDS EPIDEMIC IN RUSSIA: A CASE FOR EXPANDED HEALTH PRIVACY**

**Carrie C. Gage<sup>†</sup>**

*Abstract:* The Russian Federation faces one of the fastest growing rates of Human Immunodeficiency Virus (“HIV”) infection in the world. In 1995, Russia adopted comprehensive legislation addressing HIV and the disease caused by this virus, Acquired Immune Deficiency Syndrome (“AIDS”). The legislation prohibited discrimination based on HIV infection and provided access to medical care for people living with HIV/AIDS. Having recognized that Injecting Drug Users involved in sex work will likely act as a bridge to the general population, the Russian government has recently taken greater steps to curb transmission. Russia has moved to decriminalize the distribution of hypodermic needles for prevention of infectious diseases and has committed to increasing HIV/AIDS funding. Given the Russian government’s recent dedication of additional funding to combat HIV/AIDS, this Comment seeks to identify potential barriers to HIV/AIDS prevention in existing Russian law. In both testing and treatment, inadequate protection of private health information may discourage individuals from learning their HIV status and seeking treatment. As such, an effective legislative solution to Russia’s growing epidemic must include greater protections for health privacy. Comprehensive health privacy legislation in the United States may provide a framework for enhancing existing health privacy protections for individuals living with HIV/AIDS in Russia. Despite differences between the legal systems of Russia and the United States, Russian law, like American law addressing health privacy, should clarify the statutory right to health privacy, the remedies tied to the violation of that right, and the path to legal redress for the right’s infringement.

## **I. INTRODUCTION**

“If the [Russian] leadership continues to pay only lip service to the issue [of HIV/AIDS] . . . then the consequences . . . will be devastating to . . . society, to family formation, to the military, to productivity of labor, [and] to continued growth of the gross domestic product.”<sup>1</sup> Russia faces one of the fastest growing rates of Human Immunodeficiency Virus (“HIV”) infection in the world.<sup>2</sup> The HIV epidemic there has been characterized by “explosive outbreaks among vulnerable populations . . . .”<sup>3</sup> Between 1997

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<sup>1</sup> Peter Finn, *HIV/AIDS in Russia May Be Triple Official Rate*, WASH. POST, Jan. 13, 2005, at A2 (quoting MURRAY FESHBACH & CRISTINA M. GALVIN, *HIV/AIDS IN RUSSIA – AN ANALYSIS OF STATISTICS* (Woodrow Wilson Int’l Ctr. for Scholars, 2005)).

<sup>2</sup> WHO, SUMMARY COUNTRY PROFILE FOR HIV/AIDS TREATMENT SCALE-UP: RUSSIAN FEDERATION (2005), [http://www.who.int/hiv/HIVCP\\_RUS.pdf](http://www.who.int/hiv/HIVCP_RUS.pdf).

<sup>3</sup> Catherine M. Lowndes et al., *Conditions for Widespread Heterosexual Spread of HIV in the Russian Federation: Implications for Research, Monitoring and Prevention*, 14 INT’L J. DRUG POL’Y 45, 49

and 2005, the number of officially registered HIV positive individuals in Russia ballooned from 3623 to 327,899.<sup>4</sup> While estimates vary, it is likely that one million Russians (over one percent of the population) are infected.<sup>5</sup> At the current rate of infection, more than fourteen million Russians could be infected with HIV by the year 2020.<sup>6</sup>

In 1995, the Russian Federation adopted comprehensive legislation prohibiting discrimination based on HIV infection or Acquired Immune Deficiency Syndrome (“AIDS”).<sup>7</sup> Because of the potential for Injecting Drug Users (“IDUs”) to act as a bridge to the general population,<sup>8</sup> the Russian government has begun to take greater legislative steps to stem the epidemic, and, in 2006, committed greatly increased funds to HIV/AIDS prevention and treatment.<sup>9</sup>

Yet more than ten years after the passage of comprehensive HIV/AIDS legislation, Russians living with HIV/AIDS continue to face discrimination based on their health status.<sup>10</sup> Knowledge that HIV test results will remain confidential may encourage individuals to get tested.<sup>11</sup> Conversely, a lack of adequate protection for private health information may discourage individuals from learning their health status and seeking treatment. While Russian law provides protections for health privacy—which may include information related to HIV infection—the parameters of such protections are largely undefined in the law.<sup>12</sup>

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(2003). An epidemic is classified as “an outbreak of disease among members of a specific population that exceeds the extent of occurrence of the disease normally found in that population.” Marc Kusnitz, *Epidemic*, 2 GALE ENCYCLOPEDIA OF SCIENCE 1498, 1498 (K. Lee Lerner & Brenda Lerner eds., 2004). A single case of an unexpected disease can indicate an epidemic. S. Ryan Johansson, *Epidemics*, 1 ENCYCLOPEDIA OF POPULATION 302, 302 (Paul Demeny & Geoffrey McNicoll eds., 2003). Generally, “[e]pidemic diseases break out, reach a peak, and subside . . .” *Id.*

<sup>4</sup> WHO, *supra* note 2, at 1.

<sup>5</sup> *To Slow AIDS in Russia, Treat HIV-Positive Addicts, Stanford Study Says*, BUS. WIRE, Nov. 9, 2006 [hereinafter *To Slow AIDS in Russia*].

<sup>6</sup> Erika Niedowski, *Russia Resists Needle Swap: Officially, Exchanges ‘Taboo’ in Nation With High HIV Rate*, KNIGHT RIDDER TRIB. BUS. NEWS, Jul. 9, 2006.

<sup>7</sup> See *Sobranie Zakonodatel’sstva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 14, Item 1212 (“Federal Law No. 38-FZ of March 30, 1995 on the Prevention of the Incidence of the Human Immunodeficiency Virus (HIV) Disease in the Russian Federation”) [hereinafter *Omnibus HIV/AIDS Legislation*].

<sup>8</sup> See Tim Rhodes et al., *HIV Transmission and HIV Prevention Associated with Injecting Drug Use in the Russian Federation*, 15 INT’L J. DRUG POL’Y 1, 2 (2004) (noting emerging evidence of the stabilization of infection among IDUs rates, together with increased sexual transmission).

<sup>9</sup> WHO, *supra* note 2, at 1.

<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> See Sheri D. Weiser et al., *Routine HIV Testing in Botswana: A Population-Based Study on Attitudes, Practices, and Human Rights Concerns*, 3 PLOS MED. 1013, 1018 (2006).

<sup>12</sup> See *infra* Part IV.

Given the Russian government's recent dedication to combating the spread of HIV/AIDS, this Comment seeks to identify potential barriers to HIV prevention in Russian law. Part II of this Comment examines how social stigma related to drug use and to HIV infection in Russia has hindered voluntary HIV testing and concludes that additional protections for health status may encourage individuals to seek care.<sup>13</sup> Part III contends that because the perceived privacy of health-related information may encourage HIV testing which, in turn, may reduce transmission, Russian law related to HIV/AIDS should contain strong protections for health privacy. Part IV argues that Russian law expressly protects the right to health privacy, but contends that conflict in existing law leaves the parameters of health privacy uncertain. Part V establishes that a lack of clear remedies for violations of health privacy exacerbates the unclear parameters of health privacy protection. Part VI compares Russian laws protecting health privacy to comprehensive health privacy legislation in the United States, the Health Insurance Portability and Accountability Act ("HIPAA").<sup>14</sup> It concludes that, despite jurisdictional and institutional differences between the United States and Russia, Russian law should, like HIPAA, clarify the statutory right to health privacy, the remedies tied to the violation of that right, and the path to legal redress for the right's infringement.

## II. SOCIAL AND GOVERNMENTAL FACTORS HAVE CONTRIBUTED TO THE SPREAD, AND HAVE HINDERED TREATMENT, OF HIV/AIDS IN RUSSIA

Various social factors, including injection drug use, have contributed to the spread of HIV/AIDS in Russia.<sup>15</sup> Against this social background, the Russian government has historically allocated little money to HIV/AIDS care,<sup>16</sup> and legislative enactments have impeded treatment of IDUs.<sup>17</sup> Yet a recent increase in funding for HIV/AIDS indicates heightened governmental attention to the growing epidemic.<sup>18</sup>

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<sup>13</sup> This Comment assumes that individuals who seek care will have access to treatment. While HIV care is already guaranteed under Russian law, currently the need for antiretroviral ("ARV") therapy greatly exceeds availability and, as of 2004, less than 3% of those in need of ARV therapy were receiving it. *See* WHO, *supra* note 2, at 1.

<sup>14</sup> *See* 42 U.S.C. § 1320(d-2)-(d-7) (2000).

<sup>15</sup> *See infra* Part II.A-B.

<sup>16</sup> *See infra* Part II.C.

<sup>17</sup> *See infra* Part II.D.

<sup>18</sup> *See infra* Part II.E.

A. *Social Factors Have Aided HIV/AIDS Transmission and Impacted Disease Progression*

Various social factors have impacted HIV transmission and disease progress in Russia.<sup>19</sup> Sex work has played an increasingly important role in transmission, especially due to widespread lack of condom use.<sup>20</sup> The spread of HIV/AIDS has also been linked to conditions of the Russian penal system which, by 1998, held about one million people.<sup>21</sup> Because prisons may house many thousands of infected and non-infected individuals together,<sup>22</sup> “[they] are likely to serve as ‘incubators’ in which the virus will spread rapidly.”<sup>23</sup> By 2001, HIV was twenty-six times as prevalent within the prison population as within the general public.<sup>24</sup> Finally, the co-occurrence of other infectious diseases has complicated Russia’s growing HIV epidemic.<sup>25</sup> For example, poverty and unemployment have contributed to rapid growth in Tuberculosis (“TB”) in Russia.<sup>26</sup> In turn, TB is a leading cause of mortality for people living with HIV/AIDS.<sup>27</sup>

But most importantly, HIV transmission in Russia is linked to injection drug use. The current epidemic is concentrated among IDUs,<sup>28</sup> with approximately ninety percent of infections associated with injection drug use.<sup>29</sup> After the fall of the Soviet Union, accessible borders led to a “boom of illegal markets,” particularly in narcotics.<sup>30</sup> Russia now has between 1.5 and 3.5 million IDUs.<sup>31</sup> Consequently, any program to reduce HIV transmission in Russia should target this population.<sup>32</sup>

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<sup>19</sup> See David E. Powell, *The Problem of AIDS, in RUSSIA’S TORN SAFETY NETS: HEALTH AND SOCIAL WELFARE DURING THE TRANSITION* 123, 128-32 (Mark G. Field & Judyth L. Twigg eds., 2000).

<sup>20</sup> See *id.* at 128.

<sup>21</sup> *Id.* at 130.

<sup>22</sup> William E. Butler, *Injecting Drug Use and HIV: Harm-Reduction Programs and the Russian Legal System, in RULING RUSSIA: LAW, CRIME, AND JUSTICE IN A CHANGING SOCIETY* 205, 206 (William Alex Pridemore ed., 2005).

<sup>23</sup> Powell, *supra* note 19, at 130.

<sup>24</sup> ANATOLY VINOKUR ET AL., *THE WORLD BANK, WORLD BANK TECHNICAL PAPER NO. 510, THE TB AND HIV/AIDS EPIDEMICS IN THE RUSSIAN FEDERATION* 33 (2001).

<sup>25</sup> See A. Van Rie et al., *TB and HIV in St. Petersburg, Russia: A Looming Catastrophe?* 9 INT’L J. OF TUBERCULOSIS & LUNG DISEASE 740, 740 (2005).

<sup>26</sup> *Id.* at 740.

<sup>27</sup> *Id.* at 742.

<sup>28</sup> WHO, *supra* note 2, at 1.

<sup>29</sup> Rhodes et al., *supra* note 8, at 2.

<sup>30</sup> Letizia Paoli, *The Price of Freedom: Illegal Drug Markets and Policies in Post-Soviet Russia*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 167, 168 (2002); see also Butler, *supra* note 22, at 207 (noting that between 1993 and 2001, the conviction rate for narcotics crimes may have increased by as much as 500 percent).

<sup>31</sup> WHO, *supra* note 2, at 1.

<sup>32</sup> See *To Slow AIDS in Russia*, *supra* note 5.

*B. The Stigma Surrounding HIV Infection Impedes Treatment*

Discriminatory attitudes in Russia toward HIV infection act as a barrier to treatment. In Russia, discrimination against people living with HIV/AIDS is common.<sup>33</sup> Among the general public, there is a lack of knowledge of the basic facts of HIV/AIDS transmission,<sup>34</sup> and a generalized fear of contracting the disease.<sup>35</sup> Likewise, ignorance about the spread of HIV/AIDS is widespread among health professionals in Russia.<sup>36</sup> The Russian Chief Sanitary Doctor, Gennady Onishchenko, calls discrimination “[t]he main obstacle in the fight against AIDS.”<sup>37</sup> According to Onishchenko, discrimination has resulted in economic losses for Russia, because HIV positive youth are often “categorized as outcasts.”<sup>38</sup> In a 2006 study of HIV infection in Russia, researchers concluded that addressing stigma is essential to encouraging testing and combating the disease.<sup>39</sup>

*C. HIV/AIDS Policy Has Focused on Untargeted Testing Rather than Treatment*

Resources for treatment of individuals living with HIV/AIDS in Russia vary widely,<sup>40</sup> and health care professionals often lack access to new drugs.<sup>41</sup> While the World Health Organization (“WHO”) recommends that countries allocate five percent of their Gross Domestic Product (“GDP”) to health care, Russia allocates less than three percent.<sup>42</sup> Thus, in 2005, fewer than one percent of those currently infected with HIV in Russia, about five thousand patients, received antiretroviral (“ARV”) therapy,<sup>43</sup> drug regimens which disrupt the progression of HIV.<sup>44</sup>

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<sup>33</sup> HUMAN RIGHTS WATCH, LESSONS NOT LEARNED: HUMAN RIGHTS ABUSES AND HIV/AIDS IN THE RUSSIAN FEDERATION 13 (2004).

<sup>34</sup> *Id.*; see also Y. Balabanova et al., *Stigma and HIV Infection in Russia*, 18 AIDS CARE 846, 850 (2006) (noting that in a recent study of attitudes towards HIV infection in Russia, a participant explained, “I know how to protect myself. Use condoms, be careful on the buses, don’t touch handrails.”).

<sup>35</sup> Powell, *supra* note 19, at 132.

<sup>36</sup> See *id.* at 124.

<sup>37</sup> *Russia Suffering Great Economic Losses Due to Discrimination Against HIV-Infected*, DAILY NEWS BULL., Dec. 8, 2006, at 1 [hereinafter *Russia Suffering Great Economic Losses*].

<sup>38</sup> *Id.*

<sup>39</sup> Balabanova et al., *supra* note 34, at 846.

<sup>40</sup> Powell, *supra* note 19, at 136-37.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 132.

<sup>43</sup> *To Slow AIDS in Russia*, *supra* note 5.

<sup>44</sup> UNAIDS, *Antiretroviral Therapy*, [http://www.unaids.org/en/Issues/Prevention\\_treatment/antiretroviral\\_therapy.asp](http://www.unaids.org/en/Issues/Prevention_treatment/antiretroviral_therapy.asp) (last visited Mar. 19, 2007).

While governmental contribution to health care has been relatively small, the Russian government has traditionally focused on HIV screening.<sup>45</sup> Twenty million people were screened for HIV infection each year between 1991 and 1999.<sup>46</sup> Many of these individuals were subject to mandatory screening.<sup>47</sup> Not only can such untargeted screening of healthy individuals “squander[]” public funds,<sup>48</sup> but data derived from screening may be ambiguous.<sup>49</sup> For example, such generalized screening “may . . . underestimate the true proportion of at-risk populations infected, as [it] may cover non-injectors and populations at lower risk . . . .”<sup>50</sup> In addition, data derived from such screening related to HIV prevalence, or the total number of cases of disease,<sup>51</sup> are “poor at detecting changes in” the rate of infection, and, thus, are also poor at signaling “changes in the course of the epidemic . . . .”<sup>52</sup> Therefore, while Russian “mass surveillance” represents a “traditional [approach to] infectious disease control,”<sup>53</sup> and while testing is essential to provision of effective treatment,<sup>54</sup> more targeted surveillance of defined high-risk groups could better elucidate the dynamics of HIV transmission in Russia.<sup>55</sup>

*D. The Status of Harm Reduction Programs in Russia Remains Uncertain, Discouraging IDUs’ Access to Treatment*

In addition to focusing on screening rather than treatment of HIV/AIDS, the Russian government has promoted inconsistent policy toward needle exchange programs. Between thirty and forty percent of Russian IDUs may share needles within a four week period.<sup>56</sup> International studies have demonstrated a decreased risk of syringe-sharing among

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<sup>45</sup> Powell, *supra* note 19, at 136.

<sup>46</sup> VINOKUR ET AL., *supra* note 24, at 38.

<sup>47</sup> Powell, *supra* note 19, at 136.

<sup>48</sup> David A. Grimes & Kenneth F. Schulz, *Uses and Abuses of Screening Tests*, 359 LANCET 881, 881 (2002).

<sup>49</sup> See Lowndes et al., *supra* note 3, at 55.

<sup>50</sup> *Id.* (noting that in 2000, official HIV prevalence of registered IDUs in Russia was only 5%, a number much lower than that derived from clinical studies).

<sup>51</sup> John M. Last, *Incidence and Prevalence*, 2 ENCYCLOPEDIA OF PUBLIC HEALTH 609, 609 (Lester Breslow ed., 2002).

<sup>52</sup> Lowndes et al., *supra* note 3, at 55-56.

<sup>53</sup> *Id.* at 55.

<sup>54</sup> See *infra* Part III.

<sup>55</sup> See Lowndes et al., *supra* note 3, at 56-57.

<sup>56</sup> Rhodes et al., *supra* note 8, at 11.

participants in needle exchange programs.<sup>57</sup> Such programs are considered a method of “harm reduction” intended to limit the damage caused by drug use.<sup>58</sup> Yet, while a recent amendment to the Russian Criminal Code legalizes needle exchanges where needles are distributed to deter infectious disease,<sup>59</sup> the Ministry of Health has yet to issue guidelines for distribution of needles.<sup>60</sup> As such, needle exchanges have not yet been incorporated into law, a move which could require changes to as many as two dozen legal enactments.<sup>61</sup>

In the absence of such regulations, officials have refused to promote,<sup>62</sup> and law enforcement authorities have often impeded,<sup>63</sup> needle exchange programs. Harassment by police in such contexts contributes to risky behavior of IDUs.<sup>64</sup> For example, a 2006 study demonstrated that Russian IDUs who had attempted to utilize needle exchange programs were often discouraged because of arrests of participants.<sup>65</sup> By 2004, there were approximately seventy-five needle exchange programs operating in Russia.<sup>66</sup> As of 2006, only sixty programs were in operation,<sup>67</sup> perhaps a result of inconsistent policy toward harm reduction.

*E. Recent Policy Changes Indicate Heightened Governmental Acknowledgement of the HIV/AIDS Epidemic*

While the Russian government has historically allocated limited resources to HIV/AIDS treatment, the last five years have been a period of increased advocacy.<sup>68</sup> Recently, President Vladimir Putin referred to HIV/AIDS in Russia as “an acute problem, [requiring] the attention of all

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<sup>57</sup> *Id.* at 8 (citing e.g., F.I. Bastos & S. Strathdee, *Evaluating the Effectiveness of Syringe Exchange Programs*, 51 SOC. SCI. & MED., 1771 (2000); D. Des Jarlais et al., *HIV Incidence Among Injection Drug Users in New York City Syringe-Exchange Programs*, 348 LANCET 987 (1996)).

<sup>58</sup> Niedowski, *supra* note 6.

<sup>59</sup> *Id.* at 1; see *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2003, No. 50, Item 4848, art. 230 (“Federal Law No. 162-FZ of 2003 on Introducing Amendments and Additions into the Criminal Code of the Russian Federation”) [hereinafter *Criminal Code Amendments*].

<sup>60</sup> Niedowski, *supra* note 6.

<sup>61</sup> Butler, *supra* note 22, at 219 (noting that, while harm-reduction centers often distribute bleach and teach clients to sterilize needles, the distribution of bleach in Russia requires a license.)

<sup>62</sup> Niedowski, *supra* note 6.

<sup>63</sup> VINOKUR ET AL., *supra* note 24, at 39.

<sup>64</sup> HUMAN RIGHTS WATCH, *supra* note 33, at 18.

<sup>65</sup> Balabanova et al., *supra* note 34, at 849.

<sup>66</sup> HUMAN RIGHTS WATCH, *supra* note 33, at 17.

<sup>67</sup> Niedowski, *supra* note 6.

<sup>68</sup> Terry Murray, *Fending Off Another Africa: A Look at Emerging HIV Hotspots*, 42 MED. POST 18 (2006).



sectors of society.”<sup>69</sup> In line with such rhetoric, the government appears poised to promote new HIV/AIDS policy. A Federal Program on AIDS currently being developed by the Ministries of Health and Social Development “is expected to reflect significant adjustments of the national response . . . .”<sup>70</sup> The Russian government has also taken steps in regional leadership in fighting the spread of HIV/AIDS. In 2006, Russia hosted an Eastern European regional meeting on HIV/AIDS.<sup>71</sup> Finally, the government has committed to increasing HIV/AIDS funding.<sup>72</sup> In 2006, President Putin allocated over one hundred million dollars for HIV/AIDS treatment and prevention, a twenty-fold increase over previous allotments.<sup>73</sup> Through both national and international funds, Russian authorities expect to treat approximately 30,000 people in the next year.<sup>74</sup>

Such steps indicate that the government recognizes “HIV . . . is poised to begin spreading quickly through the general population.”<sup>75</sup> According to the director of the Russian Federal AIDS Centre in Moscow, because the number of deaths from HIV/AIDS is still small, this might be “the last opportunity to prevent further spread of HIV infection and to prevent the generalization of the epidemic in Russia.”<sup>76</sup>

### III. BECAUSE HIV/AIDS AND DRUG USE ARE HIGHLY STIGMATIZED IN RUSSIA, INCREASED HEALTH PRIVACY MAY ENCOURAGE TREATMENT

Despite the Russian government’s increased funding for HIV/AIDS prevention, policy should take into account the specific factors necessary for prevention and treatment of HIV/AIDS in Russia. Provision of appropriate health services is essential to the treatment of HIV/AIDS.<sup>77</sup> In particular, ARV therapy may reduce the likelihood that an infected individual will

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<sup>69</sup> UNAIDS, *Russian Federation*, [http://www.unaids.org/en/Regions\\_Countries/Countries/russian\\_federation.asp](http://www.unaids.org/en/Regions_Countries/Countries/russian_federation.asp) [hereinafter UNAIDS, *Russian Federation*].

<sup>70</sup> *Id.*

<sup>71</sup> Dore Hollander, *Russia Owns Up to HIV*, 38 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 124, 124 (2006).

<sup>72</sup> WHO, *supra* note 2, at 1.

<sup>73</sup> *Id.*

<sup>74</sup> *Russia Suffering Great Economic Losses*, *supra* note 37, at 1; *see also* UNAIDS, *Russian Federation*, *supra* note 69 (noting that the total expected budget for 2007 is double that of 2006 with “[t]he total state budget increas[ing by] more than US \$400 million, adding to the substantial funds” of international donors).

<sup>75</sup> Hollander, *supra* note 71, at 124.

<sup>76</sup> Murray, *supra* note 68 (internal citation omitted).

<sup>77</sup> Peter Aggleton et al., *HIV/AIDS and Injecting Drug Use: Information, Education, and Communication*, 16S INT’L J. DRUG POL’Y S21, S22 (2005).

transmit HIV.<sup>78</sup> Ultimately, providing effective treatment requires testing individuals for HIV infection.<sup>79</sup> Effective HIV testing is thus of “paramount” importance in the treatment and prevention of HIV/AIDS.<sup>80</sup>

Yet encouraging testing may entail requiring strong protections for health privacy. The perceived privacy of health-related information may increase voluntary behaviors—such as seeking testing—which, in turn, may reduce transmission. A recent study in Botswana found that individuals that held “stigmatizing attitudes” towards HIV infection were less likely to seek testing.<sup>81</sup> The study also identified knowledge that the results would remain confidential as one of the most common facilitating factors in an individual’s decision to be tested.<sup>82</sup>

Similarly, confidentiality concerns unique to IDUs may act as a barrier to accessing treatment. Early access to drug treatment may prevent future cases of HIV infection associated with injection drug use.<sup>83</sup> Yet Russian IDUs who access state treatment facilities must officially register with the facility, which can lead to restrictions on employment and increased social stigma.<sup>84</sup> Drug treatment centers may share the names of registered IDUs with the police.<sup>85</sup> Thus, fears of a lack of confidentiality associated with treatment can pose a significant barrier to accessing care in Russia.<sup>86</sup>

Assuming that testing will lead to treatment and that increasing treatment may reduce HIV/AIDS transmission rates, Russian policy should specifically encourage at-risk individuals to seek HIV testing. Because health information is especially sensitive,<sup>87</sup> and because individuals living with HIV/AIDS in Russia face particular stigma based on health status—

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<sup>78</sup> See Julio S G Montaner et al., *The Case for Expanding Access to Highly Active Antiretroviral Therapy to Curb the Growth of the HIV Epidemic*, 368 LANCET 531, 531 (2006) (noting that highly active antiretroviral therapy (HAART), a type of ARV therapy, has been shown to reduce the viral load of HIV positive study participants, and that increased viral load predicts increased HIV transmission).

<sup>79</sup> Stuart Rennie & Frieda Behets, *Desperately Seeking Targets: The Ethics of Routine HIV Testing in Low-Income Countries*, 84 BULL. WORLD HEALTH ORG. 52, 52 (2006).

<sup>80</sup> UNAIDS/WHO, *UNAIDS/WHO Policy Statement on HIV Testing*, <http://www.who.int/hiv/pub/vct/en/hivtestingpolicy04.pdf> (last visited Dec. 29, 2006); see also Don C. Des Jarlais et al., *Interventions to Reduce the Sexual Risk Behavior of Injecting Drug Users*, 16S INT’L J. DRUG POL’Y, S59, S61 (2005) (noting that studies of IDUs “show[] that [those] who learn that they are HIV-positive greatly increase their use of condoms . . .”).

<sup>81</sup> Weiser et al., *supra* note 11, at 1013.

<sup>82</sup> *Id.* at 1018.

<sup>83</sup> Natalia Bobrova et al., *Barriers to Accessing Drug Treatment in Russia: A Qualitative Study Among Injecting Drug Users in Two Cities*, 82 DRUG & ALCOHOL DEPENDENCE S57, S57 (2006).

<sup>84</sup> *Id.* at S59.

<sup>85</sup> *Id.* at S60.

<sup>86</sup> See *id.* at S59-60.

<sup>87</sup> LISA M. BOYLE & DAVID M. MACK, *HIPAA: A GUIDE TO HEALTH CARE PRIVACY AND SECURITY LAW*, 1:2 (5th ed. 2006).

and, in many cases, drug use—policy should promote the protection of individual health information.

#### IV. WHILE RUSSIAN LAW PROTECTS HEALTH INFORMATION, THE PARAMETERS OF HEALTH PRIVACY ARE UNCLEAR

The Russian Constitution, the highest source of domestic law,<sup>88</sup> guarantees the right to personal privacy.<sup>89</sup> While it is unclear whether the constitutional protection of privacy impliedly includes *health* privacy, express protections in Russian and international law provide such a statutory right.<sup>90</sup> Despite these express statutory protections of health privacy, laws specifically related to HIV/AIDS and narcotics provide only minimal health privacy protections.<sup>91</sup> Current statutory limitations on health privacy in Russian HIV/AIDS and narcotics laws are overbroad and, because health privacy protections in existing legislation conflict, the parameters of privacy protection remain unclear.

##### A. *Russian and International Laws Provide Privacy Protections for Health-Related Information*

Because the Russian Constitution expressly protects personal information,<sup>92</sup> it may impliedly protect information pertaining to health. Yet, regardless of whether health privacy is constitutionally protected, Russian and international law provide an express statutory right to health privacy.<sup>93</sup>

##### 1. *Russian Domestic Law Protects Health-Related Information*

Articles 23 and 24 of the Russian Constitution provide basic protections for personal privacy that could be construed to protect health-related information.<sup>94</sup> Under Article 23(1), “[e]veryone shall have the right to the inviolability of private life, personal and family secrets . . . .”<sup>95</sup> And, under Article 24(1) “[t]he collection, keeping, use[,] and dissemination of information about the private life of a person shall not be allowed without

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<sup>88</sup> WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION, 10 (3rd ed. 2004).

<sup>89</sup> Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] arts. 23-24.

<sup>90</sup> See *infra* Part IV.A.

<sup>91</sup> See *infra* Part IV.B.

<sup>92</sup> See Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] arts. 23(1), 24(1).

<sup>93</sup> See *infra* IV.A.

<sup>94</sup> See Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] arts. 23(1), 24(1).

<sup>95</sup> *Id.* art. 23(1).

his or her consent.”<sup>96</sup> This idea of “private life” entails “the functioning of the individual in the special areas of family, social, personal and intimate relations” including the “certainty of entrusting one’s personal and family secrets with . . . a doctor . . . .”<sup>97</sup> Thus, information about personal health, such as a diagnosis, could qualify as information pertaining to “private life” under Article 23(1).

But while the scope of the constitutional right to privacy remains uncertain, the statutory right to health privacy is clear. Several Russian statutes reportedly based on the Constitution expressly protect health information. For example, two laws enacted in 2006, a law related to personal data<sup>98</sup> (“Law on Personal Data”) and a law on “Information, Informational Technologies, and Protection of Information,”<sup>99</sup> expressly protect personal information. Under the Law on Personal Data, the collection, use, and dissemination of personal data related to health is generally prohibited.<sup>100</sup> Likewise, under a law regarding health protection, (“Law on Health Protection”) doctors are obligated to keep “medical secrets.”<sup>101</sup> Such “medical secrets” include “[i]nformation about . . . requesting medical aid, [a] person’s state of health, the diagnosis of his illness, and other data received during his observation and treatment . . . .”<sup>102</sup> Notably, under the Law on Health Protection, patients have an express personal right to the privacy of such information.<sup>103</sup>

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<sup>96</sup> Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution]; see also BURNHAM ET AL., *supra* note 88, at 248 (noting that Article 56(3) lists those rights not subject to any limitation, including those granted under Articles 23(1) and 24).

<sup>97</sup> Igor Petrukhin, *The Judicial Protection of the Constitutional Rights and Freedoms in Russia: Myths and Realities*, in JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 25, 41-42 (Mark Gibney & Stanislaw Frankowski eds., 1999).

<sup>98</sup> See Sobranie Zakonodatel’sstva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 31 (Part I), Item 3457 (“Federal Law No. 152-FZ of July 27, 2006 on Personal Data”) [hereinafter Law on Personal Data].

<sup>99</sup> See Sobranie Zakonodatel’sstva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 31 (Part I), Item 3448 (“Federal Law No. 149-FZ of July 27, 2006 on Information, Informational Technologies and Protection of Information”).

<sup>100</sup> Law on Personal Data, *supra* note 98, art. 10(1).

<sup>101</sup> See Vedomosti S’ezda Narodnykh Deputatov Rossiiskoi Federatsii I Verkhovnogo Soveta Rossiiskoi Federatsii [Ved. RF] [Bulletin of the Congress of the People’s Deputies of the Russian Federation and Supreme Council of the Russian Federation] 1993, No. 30, p. 1318, art. 60 (“Fundamentals of the Legislation of the Russian Federation on Health Protection No. 5487-1 of July 22, 1993”) [hereinafter Law on Health Protection].

<sup>102</sup> *Id.* art. 61.

<sup>103</sup> See *id.* art. 30(6).

## 2. *International Law Protects Health-Related Information*

In addition to express statutory protections for health privacy, international law provides broad, but undefined, protections for health-related information. Article 15(4) of the 1993 Russian Constitution directly incorporates treaties, customary international law, and “generally recognized principles and norms of international law.”<sup>104</sup> And, under Article 15(4) of the Constitution, treaty law preempts inconsistent domestic law.<sup>105</sup>

Russia is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Human Rights Convention” or “Convention”),<sup>106</sup> which impliedly provides for privacy of health information. The European Court of Human Rights (“ECHR”) has construed the Human Rights Convention’s guarantee of the “right to respect for . . . private and family life”<sup>107</sup> as including medical information.<sup>108</sup> The ECHR has noted that “the protection of personal data, particularly medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life . . . . Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention.”<sup>109</sup> Because international legal instruments signed by Russia are incorporated into Russian law, the protection of personal data under Russian law includes a broad right to the protection of medical data.

### B. *Russian Laws Related to HIV/AIDS and Narcotics Provide Limited Protections for Information Related to Health Status*

In contrast to clear statutory protections for health privacy in domestic and international law, Russian legislation specifically related to HIV/AIDS and narcotics offer limited protection for health information.<sup>110</sup>

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<sup>104</sup> William F. Flanagan, *HIV/AIDS and Human Rights in Russia: Compliance and the Rule of Law*, 39 OSGOODE HALL L.J. 39, 58 (2001) (arguing that this “broad reference” incorporates new developments in international law, “including decisions of competent international bodies . . .”).

<sup>105</sup> *Id.*

<sup>106</sup> See Council of Eur., *Convention for the Protection of Human Rights and Fundamental Freedoms: Member States of the Council of Europe*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=3/21/2007&CL=ENG> (last visited Mar. 21, 2007).

<sup>107</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>.

<sup>108</sup> See *M. S. v. Sweden*, 28 Eur. Ct. H.R. 313, 337 (1997).

<sup>109</sup> *Id.*

<sup>110</sup> See *infra* Part IV.B.

# 1. *HIV/AIDS Laws Provide Weak Protection for Health Privacy*

The federal law on HIV/AIDS prevention, “On the Prevention of the Incidence of the Human Immunodeficiency Virus (HIV) Disease in the Russian Federation” (“Omnibus HIV/AIDS Legislation”),<sup>111</sup> provides for only limited confidentiality of health-related information.

First, by allowing for extensive mandatory HIV testing, the Omnibus HIV/AIDS Legislation limits the rights of individuals to make confidential decisions about health. The legislation broadly defines the categories of people subject to the law as “[d]onors of blood, biological liquids, organs and tissues,”<sup>112</sup> and “workers of particular trades, production units, enterprises, institutions and organizations, whose list is approved by the Government of the Russian Federation.”<sup>113</sup> Regulations issued in 1995 require that individuals who perform medical examinations, and who diagnose and treat people with HIV/AIDS, are subject to such tests.<sup>114</sup> Still, the otherwise vague language of the law may authorize extensive testing of undefined groups,<sup>115</sup> leaving fewer individuals with the right to make confidential decisions about health.

Second, in contrast to the Law on Health Protection,<sup>116</sup> the Omnibus HIV/AIDS Legislation does not require that individuals administering such tests keep results confidential. Instead, the law gives individuals the *choice* to seek confidentiality and does not presume it.<sup>117</sup> Under the law, where either governmental or private institutions administer voluntary tests, individuals *may request* that those results remain anonymous.<sup>118</sup> Thus, in contrast to the Law on Health Protection,<sup>119</sup> the Omnibus HIV/AIDS Legislation does not expressly require confidentiality of test results of individuals who fail to make such requests.<sup>120</sup>

<sup>111</sup> Omnibus HIV/AIDS Legislation, *supra* note 7.

<sup>112</sup> *Id.* art. 9(1).

<sup>113</sup> *Id.* art. 9(3).

<sup>114</sup> Flanagan, *supra* note 104, at 61.

<sup>115</sup> VINOKUR ET AL., *supra* note 24, at 38 (noting that vague terms have caused concern about potential human rights abuses resulting from “[l]ack of information about the law on the part of testing personnel and the person to be tested . . .”).

<sup>116</sup> See Law on Health Protection, *supra* note 101, art. 60.

<sup>117</sup> Omnibus HIV/AIDS Legislation, *supra* note 7, art. 8.

<sup>118</sup> *Id.* art. 8.

<sup>119</sup> See Law on Health Protection, *supra* note 101, art. 60.

<sup>120</sup> HUMAN RIGHTS WATCH, *supra* note 33, at 11; see also Omnibus HIV/AIDS Legislation, *supra* note 7, art. 9 (neglecting to include protections for confidentiality). But see Rossiiskaia Gazeta, Nov. 9, 1995, art. 14 (“Decision of the Government of the Russian Federation No. 1017 of October 13, 1995 on Approving the Rules for Carrying out an Obligatory Medical Examination to Reveal the Virus of the Acquired Immune Deficiency Syndrome in Man (the HIV-Infection)”) (noting that “[m]edical workers and

## 2. *Narcotics Laws Fail to Effectively Protect Health Information*

Like the Omnibus HIV/AIDS Legislation, Russian narcotics legislation lacks strong protections for health privacy. A 1998 law, "On Narcotic Agents and Psychotropic Substances,"<sup>121</sup> ("Narcotics Law") criminalizes possession and use of illicit drugs<sup>122</sup> and authorizes compulsory examination<sup>123</sup> and registration of drug users.<sup>124</sup> Under the law, treatment of drug users is authorized "only at the institutions of the state and in the municipal public health systems."<sup>125</sup> Such provisions arguably conflict with protections for health information delineated in the Law on Health Protection.<sup>126</sup> Furthermore, it is unclear whether protections granted under the Law on Health Protection would override the limits placed on health privacy under the Narcotics Law. Thus, because there is no express right to health privacy in the Narcotics Law, the provisions authorizing compulsory treatment and registration threaten individuals' health privacy.

Similarly, recent amendments to the Criminal Code neglect to provide effective privacy protection. As noted above, amendments to the Criminal Code allow for needle exchanges where needles are distributed in order to curb infectious disease.<sup>127</sup> Yet, the Ministry of Health has yet to issue guidelines for distribution of needles.<sup>128</sup> Without such regulations, federal legislation does not clearly define the connection between drug use and HIV/AIDS. A lack of regulations means a lack of effective protection of the health status of individuals with HIV/AIDS seeking treatment for drug use.

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other persons made aware of the results of the examination through their official or professional duties *shall be obliged* to keep this information secret.") (emphasis added).

<sup>121</sup> See *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 2, Item 219 ("Federal Law No. 3-FZ of January 8, 1998 on Narcotic Agents and Psychotropic Substances").

<sup>122</sup> *Id.* art. 59.

<sup>123</sup> *Id.* art. 44 (noting that a "person, with respect to whom there are sufficient grounds to believe that he suffers from narcomania, is in the state of narcotic intoxication, or has consumed a narcotic agent without a doctor's prescription, may be sent for a medical examination.").

<sup>124</sup> *Id.* art. 56.

<sup>125</sup> *Id.* art. 55(2).

<sup>126</sup> See Law on Health Protection, *supra* note 101, art. 61.

<sup>127</sup> Niedowski, *supra* note 6; see also Criminal Code Amendments, *supra* note 59, art. 230 ("The operation of this Article shall not extend to instances of popularization, for the purpose of preventing HIV infection and other dangerous infectious diseases, of appropriate tools and equipment usable for consumption of narcotic drugs and psychotropic substances, where these deeds have been committed by approbation of the executive bodies in charge of health care . . .").

<sup>128</sup> Niedowski, *supra* note 6.

C. *Current Permissible Disclosures of Health Information Are Overbroad and Statutory Protections Are in Conflict*

Limits on the protection of health information in current legislation are overbroad. First, while the right to health privacy is clearly protected by statute,<sup>129</sup> if this right is derived from the constitutional right to privacy, the right is not subject to restriction. The Russian Constitution permits the restriction of individual rights as required for the “protection of the fundamental principles of the constitutional system, morality, [and] health . . . .”<sup>130</sup> Yet specific constitutional rights, including the right to privacy, may be not limited.<sup>131</sup> Thus, if health privacy is implicit in the constitutional right to privacy, limits on that right in existing law may be invalid.

Second, the means chosen for the restriction of even a statutory right must be proportionate to the threat posed by the exercise of that right.<sup>132</sup> As the Russian Constitutional Court has noted with regard to such proportionality, “norm[s] should be formally defined, exact, sharp, and clear, not allowing an expanded interpretation of the limitations established . . . .”<sup>133</sup>

Current restrictions on health privacy under Russian statutes are disproportionate responses to the threats posed by the exercise of the right. For example, the authorization of mandatory HIV testing under the Omnibus HIV/AIDS Legislation<sup>134</sup> is a disproportionate response to the threat of transmission of disease. The annual testing of millions of people<sup>135</sup> may not effectively target those at risk of infection or elucidate the dynamics of the epidemic.<sup>136</sup> In particular, more targeted screening of well-defined groups could lead to a greater understanding of the Russian HIV epidemic and allow the design of more effective interventions.<sup>137</sup> Similarly, limits on health privacy under the Law on Health Protection are disproportionate to the threat posed by confidentiality. Under the law, “medical secrets” may be

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<sup>129</sup> See *supra* Part IV.A.1.

<sup>130</sup> Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 55(3).

<sup>131</sup> *Id.* art. 56(3).

<sup>132</sup> BURNHAM ET AL., *supra* note 88, at 249.

<sup>133</sup> *Id.*, *supra* note 88, at 250 (quoting Sabranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2003, No. 44, Item 4358 (“On Provisions of the Federal Statute ‘On the Basic Guaranties of Election Rights and of the Right to Participate in a Referendum of Citizens of the Russian Federation.’”).

<sup>134</sup> Omnibus HIV/AIDS Legislation, *supra* note 7, art. 9.

<sup>135</sup> VINOKUR ET AL., *supra* note 24, at 38.

<sup>136</sup> See Lowndes et al., *supra* note 3, at 56.

<sup>137</sup> *Id.* at 56-57; see also *supra* Part II.C.



released in the case of “a threat of the spread of infectious diseases, mass poisoning, or contagion”<sup>138</sup> or “when there are grounds for the belief that an injury to the health of a person has been inflicted as the result of illegal actions.”<sup>139</sup> Because HIV infection could be a “threat of the spread” of an infectious disease, and because suspected injection drug use could be a basis for believing that injury resulted from illegal behavior, the law might widely allow the release of any information related to HIV infection despite the fact that not all incidences of HIV infection are likely to result in the further spread of infectious disease.

Finally, even if current limits on health privacy are not overbroad, conflicts in existing law leave the parameters of health privacy protection unclear. For example, under the Law on Health Protection, unless an exception applies, it is “impermissible to disclose information that makes up a medical secret,” including diagnosis.<sup>140</sup> But under the Omnibus HIV/AIDS Legislation, where voluntary tests are administered, individuals must *request* that results remain anonymous.<sup>141</sup> This suggests that the Law on Health Protection’s presumption of confidentiality conflicts with the apparent opposite presumption under the Omnibus HIV/AIDS Legislation—that it is the patient’s responsibility to ensure confidentiality. Such conflicts ultimately obscure the parameters of the statutory right.

#### V. REMEDIES IN CURRENT RUSSIAN LAW DO NOT PROVIDE SUFFICIENT PROTECTION OF HEALTH PRIVACY

While remedies may promote compliance with law, a lack of precise remedial measures leaves individuals’ rights uncertain.<sup>142</sup> Vague remedial measures and an uncertain path to legal redress for violations of health privacy create greater ambiguity with regard to the scope of the statutory right.<sup>143</sup>

##### A. *Clear Remedies Deter Future Violations of Law*

Rights may be less valuable if not accompanied by effective remedies.<sup>144</sup> This is because remedies ideally “redress [a] wrong by creating

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<sup>138</sup> Law on Health Protection, *supra* note 101, art. 61(2).

<sup>139</sup> *Id.* art. 61(5).

<sup>140</sup> *Id.* art. 61.

<sup>141</sup> Omnibus HIV/AIDS Legislation, *supra* note 7, art. 8.

<sup>142</sup> *Infra* Part V.A.

<sup>143</sup> *See infra* Part V.B-C.

<sup>144</sup> *See* Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 COLUM. J. TRANSNAT’L L. 515, 525 (2000).

the situation that would have existed had the wrong not occurred.”<sup>145</sup> Effective remedies may also result in deterrence, whereby punishment influences the behavior of potential actors.<sup>146</sup> Remedies are assumed to have deterrent quality “because rational actors weigh the anticipated costs of transgressions against the anticipated benefits.”<sup>147</sup> Finally, remedies are believed to promote future compliance.<sup>148</sup>

Remedies may be in the form of restitution, or, where restitution is not feasible, compensation.<sup>149</sup> Where compensation is utilized, “every legal system should strive for certainty in calculating damages to avoid under- or over-compensating a victim” because “arbitrariness in awards undermines respect for the law . . . .”<sup>150</sup> In this way, certainty in remedies can reinforce rule of law: clarity “implies that society administers justice by fixing standards that individuals may determine prior to controversy and that reasonably guarantee all individuals like treatment.”<sup>151</sup>

## B. *Vague Remedies for Breaches of Health Privacy Under Russian Law Fail to Promote Compliance*

Current laws related to HIV/AIDS and privacy provide vague remedies for violations.<sup>152</sup> Such unclear remedies likely do not effectively deter breaches of confidentiality.<sup>153</sup> And, though international law provides a private right of action for the violation of health privacy, available international legal remedies are not likely to deter future violations.<sup>154</sup>

### 1. *Russian Law Provides Vague Remedies for Breaches of Health Privacy*

Various sources of Russian law provide remedies for breaches of privacy generally, yet such remedies do not clearly apply to breaches of *health* privacy. First, sources of law that expressly relate to health neglect to specify which types of violations merit specific liability. For example, the Omnibus HIV/AIDS Legislation and the Law on Health Protection provide

<sup>145</sup> JAMES M. FISCHER, UNDERSTANDING REMEDIES 2 (2d ed. 2006).

<sup>146</sup> DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 13 (2d ed. 2005).

<sup>147</sup> *Id.*

<sup>148</sup> Wolcher, *supra* note 144, at 524.

<sup>149</sup> SHELTON, *supra* note 146, at 9.

<sup>150</sup> *Id.* at 20. *But see id.* at 21 (noting that, in the case of human rights violations, “compensation as a remedy should not diminish consideration of the need for other kinds of redress.”).

<sup>151</sup> *Id.*

<sup>152</sup> *Infra* Part V.B.1.

<sup>153</sup> *Infra* Part V.B.2.

<sup>154</sup> *See* SHELTON, *supra* note 146, at 9.

for disciplinary, administrative, and criminal liability,<sup>155</sup> but do not define what constitutes a breach of the law, or which type of breach would result in a penalty.

Second, while the Russian Criminal Code,<sup>156</sup> Administrative Code,<sup>157</sup> and Civil Code<sup>158</sup> provide for clear remedial action for the violation of the right to privacy generally, these enactments do not explicitly pertain to *health* information. For example, under the Criminal Code, “[i]llegal . . . spreading of information about the private life of a person . . . without his consent,” may be punished by a fine of up to two hundred thousand rubles, by the income of a person for up to eighteen months, or by compulsory labor for up to 180 hours.<sup>159</sup> While sanctions under the law are clear, they may not apply to violations of health privacy. Similarly, the Civil Code provides a remedial right associated with violations of personal non-property rights—including the right to personal privacy.<sup>160</sup> In particular, Article 151 of the Civil Code grants courts the authority to impose monetary compensation for violations of personal privacy rights.<sup>161</sup> While the Civil Code leaves the scope of potential violations and of possible monetary fines undefined, it authorizes courts to consider “the extent of the culprit’s guilt” as well as “the depth of the physical and moral sufferings” of the victim.<sup>162</sup> If *privacy* includes *health* privacy, violations of confidentiality could warrant a penalty under Article 151. However, this interpretation is unclear from the plain language of the Code.<sup>163</sup>

Because laws referencing health privacy do not clarify how remedies should be applied, and because clear remedies for violation of privacy do not expressly relate to health privacy, the scope of remedies for violations of health privacy remain unclear. As such, current laws likely do not effectively deter breaches of health privacy.<sup>164</sup>

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<sup>155</sup> Omnibus HIV/AIDS Legislation, *supra* note 7, art. 24; Law on Health Protection, *supra* note 101, art. 61.

<sup>156</sup> Ugolovnyi Kodeks [UK] [Criminal Code] art. 137(1).

<sup>157</sup> Kodeks RF ob Administrativnykh Pravonarusheniakh [KOAP] [Code of Administrative Violations] arts. 13(11)-(13).

<sup>158</sup> Grazhdanskii Kodeks [GK] [Civil Code] art. 150.

<sup>159</sup> Ugolovnyi Kodeks [UK] [Criminal Code] art. 137(1).

<sup>160</sup> *See* Grazhdanskii Kodeks [GK] [Civil Code] art. 150.

<sup>161</sup> *See id.* art. 151; *see also* BURNHAM ET AL., *supra* note 88, at 371 (noting that Article 1064 allows courts to impose both economic and non-economic damages, and generally provides for the full compensation of harm by the person who has willfully or negligently caused such harm).

<sup>162</sup> Grazhdanskii Kodeks [GK] [Civil Code] art. 151.

<sup>163</sup> Furthermore, the author knows of no judicial opinions interpreting the scope of this article.

<sup>164</sup> *See* SHELTON, *supra* note 146, at 20 (noting that, in general, “arbitrariness in [remedies] undermines respect for the law . . .”).

2. *Though International Law Grants a Private Right of Action for Violations of Health Privacy, It Likely Does Not Promote Deterrence*

The Russian Constitution guarantees the right to appeal to international bodies for the protection of human rights upon exhaustion of local remedies.<sup>165</sup> Yet such a right does not promote future compliance with Russian domestic laws related to health privacy.

The Human Rights Convention provides only limited individual remedies. Under Protocol 9 to the Human Rights Convention, to which Russia is a party,<sup>166</sup> individuals have a private right of action for Convention violations.<sup>167</sup> However, under the Convention, the ECHR does not have the remedial power to order a state to change its laws.<sup>168</sup> While Russia's laws related to health privacy have not been tested before the ECHR,<sup>169</sup> the court would lack the power to bring the law into compliance with international legal obligations. Thus, while an *individual* may obtain legal redress through the ECHR, a judgment proclaiming a breach of confidentiality would likely not deter future breaches involving different individuals.<sup>170</sup>

C. *Inadequacies in the Russian Judicial and Regulatory Systems Leave Individuals Without Access to Remedial Measures*

In addition to a lack of predictable remedies for breaches of rights related to health privacy, individuals with HIV/AIDS in Russia lack a consistent means of achieving redress.<sup>171</sup> Access to justice implies that existing procedures are "capable of redressing the harm . . . inflicted."<sup>172</sup>

<sup>165</sup> Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 46(3).

<sup>166</sup> See Council of Eur., *Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=140&CM=7&DF=5/4/2007&CL=ENG> (last visited May 4, 2007); see also Protocol No. 9 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 6, 1990, Europ. T.S. No. 140, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Word/140.doc> [hereinafter Protocol No. 9], *superseded by* Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* May 11, 1994, Europ. T.S. No. 155, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Word/155.doc> [hereinafter Protocol No. 11].

<sup>167</sup> Wolcher, *supra* note 144, at 551; Protocol No. 9, *supra* note 166, art. 5; Protocol No. 11 *supra* note 166, art. 34.

<sup>168</sup> Wolcher, *supra* note 144, at 552.

<sup>169</sup> See BURNHAM ET AL., *supra* note 88, at 245 (noting that in the ten decisions involving Russia before the court by 2004, all went against Russia and most dealt with "procedural failures.").

<sup>170</sup> But see *id.* at 234-35 (noting that, while few cases from Russia have been brought before the European Court of Human Rights, the 2001 Criminal Procedure Code allows for the reopening of a previously decided case based on the ruling of the European Court) (citing *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2001, No. 52 (part I), Item 1921, art 413 (4)(2)).

<sup>171</sup> See *infra* Part V.C.1.

<sup>172</sup> SHELTON, *supra* note 146, at 9.

But in Russia the overlapping jurisdiction of courts and executive bodies leave the path to redress uncertain.<sup>173</sup>

1. *The Jurisdictional Reach of Russian Courts Obscures the Path to Redress*

While the Russian Constitution explicitly grants citizens the right to seek remedies before a court,<sup>174</sup> it is unclear which courts have jurisdiction to hear claims based on violations of health privacy.

The structure and function of the Russian judiciary creates this uncertainty. The courts of the Russian judiciary are divided into three parallel branches.<sup>175</sup> While the three branches comprise a single system,<sup>176</sup> the courts' overlapping jurisdiction threatens their authority.<sup>177</sup> Currently, two branches of the judiciary may interpret the same law differently.<sup>178</sup> Alternatively, courts charged with a particular duty by law may altogether neglect to fulfill that function.<sup>179</sup> For example, while the Constitutional Court is the only Court with the legal authority to analyze the constitutionality of enactments,<sup>180</sup> under the current system, "it is not clear that the referral of all constitutional issues is mandatory."<sup>181</sup> Finally, the effect of precedent in the Russian legal system is unclear.<sup>182</sup> While the Supreme Court of the Russian Federation can issue "explanations" of the law as direction for lower courts, jurists have long debated the legal effects of such decisions, in particular, whether they constitute normative legal sources.<sup>183</sup>

<sup>173</sup> See *infra* Part V.C.1-2.

<sup>174</sup> Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 46(1).

<sup>175</sup> Peter Krug, *Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 BROOKLYN J. INT'L L. 1, 6 (2006) (noting that the three courts include the Constitutional Court, courts of general jurisdiction, and "arbitrazh" (commercial courts)).

<sup>176</sup> W.E. BUTLER, RUSSIAN LAW 154 (Oxford University Press, 1999).

<sup>177</sup> Pamela Jordan, *Russian Courts: Enforcing the Rule of Law? in BUILDING THE RUSSIAN STATE: INSTITUTIONAL CRISIS AND THE QUEST FOR DEMOCRATIC GOVERNANCE* 193, 195 (Valerie Sperling ed., 2000).

<sup>178</sup> BURNHAM ET AL., *supra* note 88, at 51.

<sup>179</sup> See *id.* at 98.

<sup>180</sup> Marat Salikov, *Russia's Transition to Democracy: Constitutional Justice and the Protection of Civil Liberties*, 24, in *THE FUTURE OF FREEDOM IN RUSSIA* (William Vanden Heuvel ed., 2000). The Constitutional Court has jurisdiction over legislation such as federal laws, acts of the President, acts of the State Duma, and acts of the Russian Federation. BUTLER, *supra* note 176, at 157. The Court may also consider alleged violations of constitutional rights of citizens, and may interpret the Constitution. *Id.*

<sup>181</sup> BURNHAM ET AL., *supra* note 88, at 98.

<sup>182</sup> See Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, 37 VA. J. INT'L L. 725, 735 (1997).

<sup>183</sup> See *id.*

The overlapping jurisdiction of courts also threatens the path to consistent legal redress for violations of health privacy. For example, an individual might be able to sue in either the Supreme Court or the Constitutional Court for violations of health privacy. The Supreme Court of the Russian Federation is the highest court of general jurisdiction,<sup>184</sup> with appellate jurisdiction over all legal disputes not assigned to the other judicial branches.<sup>185</sup> The Supreme Court hears civil, criminal, and administrative cases,<sup>186</sup> and has issued decisions regarding rights to privacy protected under the Russian Constitution<sup>187</sup> and the Civil Code.<sup>188</sup> Alternately, because the Constitutional Court may consider alleged violations of constitutional rights of citizens or the constitutionality of federal laws,<sup>189</sup> a suit challenging the constitutionality of limits to health privacy in existing statute could be brought before the Constitutional Court. Such unresolved jurisdiction renders courts unable to consistently redress violations of health privacy.

## 2. *The Lack of a Central Authority Governing Health-Related Information Leaves Remedies Uncertain*

Finally, individuals lack a clear administrative remedy for violations of health privacy under existing law. While current laws appear to contemplate a shared role for courts and executive bodies to hear complaints related to privacy, these laws neglect to specify designated executive bodies for such hearings.<sup>190</sup> For example, the Law on Health Protection states that individuals injured by state institutions may appeal to state bodies but neglects to name any particular state body.<sup>191</sup> Similarly, the Administrative Code delegates the trial of administrative offenses related to breaches of privacy to unspecified “[b]odies exercising state supervision over

<sup>184</sup> BUTLER, *supra* note 176, at 161.

<sup>185</sup> See Krug, *supra* note 182, at 726-30.

<sup>186</sup> BUTLER, *supra* note 176, at 161. The Supreme Court can initiate review of lower court decisions. See Krug, *supra* note 182, at 733-34.

<sup>187</sup> See, e.g., Rossiiskaia Gazeta [Ros. gaz.] Dec. 28, 1995, pt. 14 (“Decision of the Plenum of the Supreme Court of the Russian Federation No. 8 of October 31, 1995 on Particular Issues of Application of the Constitution of the Russian Federation by Courts When Administering Justice”).

<sup>188</sup> See, e.g., Biulleten’ Verkhovnogo Suda Rossiiskoy Federatsii [BVS] [Bulletin of the Supreme Court of the Russian Federation], 2005, No. 4, pt. 8 (“Resolution of the Plenary Session of the Supreme Court of the Russian Federation No. 3 of February 24, 2005 on Judicial Practice in Cases on the Protection of Citizens’ Honour [sic] and Dignity, as Well as of Citizens’ and Legal Entities’ Business Reputation”).

<sup>189</sup> BUTLER, *supra* note 176, at 157.

<sup>190</sup> See Law on Health Protection, *supra* note 101, art. 69; Law on Personal Data, *supra* note 98, art. 23.

<sup>191</sup> Law on Health Protection, *supra* note 101, art. 69.

communication.”<sup>192</sup> Likewise, the Law on Personal Data authorizes an unnamed executive body to hear complaints based on misuse of general personal information.<sup>193</sup> Finally, while the State Sanitary and Epidemiological Service of the Ministry of Health and Social Development is authorized to try public health offenses,<sup>194</sup> the Ministry’s authority does not expressly include offenses related to health privacy. In effect, no law clearly defines the path to legal redress before an executive body for violations of health privacy.

#### VI. A LAW AUTHORIZING AGENCY OVERSIGHT AND CLARIFYING REMEDIAL MEASURES PROVIDES A FRAMEWORK FOR CHANGE IN RUSSIA

The United States’ comprehensive health privacy law provides insight for legislative change in Russia. In 1996, the United States enacted comprehensive health privacy legislation, the Health Insurance Portability and Accountability Act (“HIPAA”).<sup>195</sup> The legislation and accompanying regulations protect personal health information, are enforced by a dedicated office within a federal agency, and specify clear remedial measures for violations of health privacy.<sup>196</sup> While comparisons to foreign health privacy law must be undertaken with careful consideration of the specific limitations of the Russian legal system, Russia should, like the United States, further clarify the statutory right to health privacy, the remedies tied to the violation of that right, and the path to legal redress for the right’s infringement.<sup>197</sup>

##### A. *The HIPAA Clearly Defines and Provides Mechanisms for Redress of Violations of Health Privacy*

Unlike Russian Law related to health privacy, HIPAA and accompanying regulations clearly define the parameters and appropriate disclosures of protected health information.<sup>198</sup> HIPAA provides guidelines for the promulgations of standards related to privacy,<sup>199</sup> and provides for clear remedial action.<sup>200</sup>

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<sup>192</sup> Kodeks RF ob Administrativnykh Pravonarusheniakh [KOAP] [Code of Administrative Violations] art. 23.44(2)(2).

<sup>193</sup> See Law on Personal Data, *supra* note 98, art. 23.

<sup>194</sup> Kodeks RF ob Administrativnykh Pravonarusheniakh [KOAP] [Code of Administrative Violations] art. 23.13(1).

<sup>195</sup> BOYLE & MACK, *supra* note 87, at 4:1; see generally 42 U.S.C. § 1320(d-2)-(d-7) (2000).

<sup>196</sup> See *infra* Part VI.A.

<sup>197</sup> See *infra* Part VI.B.

<sup>198</sup> See *infra* Part VI.A.1.

<sup>199</sup> See *infra* Part VI.A.2.

<sup>200</sup> See *infra* Part VI.A.3.

# 1. *The HIPAA Defines Permissible Uses of Personal Health Information*

The HIPAA provides comprehensive protection of health information<sup>201</sup> and provides for the preemption of less stringent state privacy laws.<sup>202</sup> As such, HIPAA creates a “‘floor’ of privacy protection rather than a ‘ceiling,’” with a general baseline of uniformity.<sup>203</sup> A major principle of the related regulations “is to define and limit the circumstances in which an individual’s protected health information may be used or disclosed by covered entities.”<sup>204</sup> HIPAA covers entities that handle personal health information<sup>205</sup> and expressly authorizes the regulation of “individually identifiable health information,” including “oral, written, or otherwise recorded information that is created or received by an employer, health care provider, health plan, or health care clearinghouse” relating to personal health.<sup>206</sup> Identifiable information, otherwise known as “protected health information”<sup>207</sup> (“PHI”) includes information relating to an individual’s physical or mental health condition, to the provision of health care to the individual, or to the payment for health care that could reasonably be used to identify the individual.<sup>208</sup> Thus, information related to HIV infection status qualifies as PHI.<sup>209</sup>

The regulations accompanying HIPAA (“Privacy Standards”) allow limited disclosures of PHI. A covered entity may disclose PHI: 1) to the individual; 2) for treatment and payment; 3) where there is an implied opportunity to agree or object to use; 4) incident to otherwise permitted uses and disclosures; 5) for the public interest; and 6) for limited research.<sup>210</sup> In the case of disclosures for the public interest, specific limitations apply so as to balance an individual’s interest in personal privacy and the public need for information.<sup>211</sup> For example, in the case of disclosure of PHI for public health activities, a covered entity may disclose PHI only to limited named

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<sup>201</sup> BOYLE & MACK, *supra* note 87, at 4:8.

<sup>202</sup> *Id.* at 4:7-8.

<sup>203</sup> *Id.* at 5:3; *see also* 42 U.S.C. § 3120(d-7) (2000).

<sup>204</sup> OCR PRIVACY BRIEF: SUMMARY OF THE HIPAA PRIVACY RULE 4 (2003) [hereinafter OCR PRIVACY BRIEF] (citing 45 C.F.R. § 160.103 (2003)) (emphasis added), available at <http://www.hhs.gov/ocr/privacysummary.pdf>.

<sup>205</sup> BOYLE & MACK, *supra* note 87, at 4:14 (noting that such entities include “hospitals, . . . mental health and addiction facilities, . . . research universities, [and] public health agencies . . .”).

<sup>206</sup> *Id.* at 4:15; *see also* 42 U.S.C. § 1320(d) (2000).

<sup>207</sup> 45 C.F.R. § 160.103.

<sup>208</sup> OCR PRIVACY BRIEF, *supra* note 204, at 3-4 (citing 45 C.F.R. § 160.103).

<sup>209</sup> *See* Edward J. Rohn et al., *How Do Social-Psychological Concerns Impede the Delivery of Care to People with HIV? Issues for Dental Education*, 70(10) J. DENTAL EDUC. 1038, 1039 (2006).

<sup>210</sup> OCR PRIVACY BRIEF, *supra* note 204, at 4-5 (citing 45 C.F.R. § 164.502(a)(1)).

<sup>211</sup> *Id.* at 6.



groups including public health authorities authorized to collect information for controlling disease.<sup>212</sup> To avert a serious threat to public safety, covered entities may disclose PHI to someone whom they believe can avert the threat.<sup>213</sup> Finally, covered entities must develop and utilize procedures to limit disclosures.<sup>214</sup>

Like HIPAA, Russian law related to health privacy contemplates appropriate uses and disclosures of health information; yet, unlike HIPAA, Russian law provides broad exceptions for disclosure. Under Russian law, information constituting a “medical secret” may be disclosed: 1) for treatment; 2) where there is a threat of the spread of infectious disease; 3) at the request of a court; 4) when aiding a minor; and 5) where injury to a person may have resulted from illegal action.<sup>215</sup> While such disclosures are similar to those permitted under HIPAA, unlike HIPAA, Russian law does not limit to *whom* such information may be disclosed. Nor does the law provide guidance as to *which* personal information may be disclosed. Instead, the law appears to leave such questions to the discretion of the health care provider or the party seeking the information. As such, for example, the exception for disclosure in the case of the threat of the spread of infectious disease<sup>216</sup> could leave individuals with HIV/AIDS vulnerable to unlimited disclosure of information pertaining to their health status.

2. *While Both Russian Law and HIPAA Delegate Rulemaking Authority to Administrative Bodies, Russian Law Lacks Clear Guidelines for Promulgation of Standards*

Both HIPAA and Russian law provide for agency oversight of regulations related to public health. Yet Russian law lacks clear guidelines with respect to the promulgation of health privacy regulations.

The HIPAA authorizes the Secretary of the Department of Health and Human Services (“DHHS”) to submit recommendations to Congress regarding the appropriate uses of PHI.<sup>217</sup> The resulting Privacy Standards must clarify the rights of individuals with respect to health privacy, procedures through which individuals are able to exercise those rights, and which disclosures of such information are allowed or required.<sup>218</sup> Originally,

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<sup>212</sup> 45 C.F.R. § 164.512(b).

<sup>213</sup> OCR PRIVACY BRIEF, *supra* note 204, at 8 (citing 45 C.F.R. § 164.512(j)).

<sup>214</sup> 45 C.F.R. § 164.514(d-3).

<sup>215</sup> Law on Health Protection, *supra* note 101, art. 61.

<sup>216</sup> *Id.* art. 61(2).

<sup>217</sup> Pub. Law 104-191, 110 Stat. 2033 § 264(a) (1996) (codified at 42 U.S.C. § 1320(d-2) (2000)).

<sup>218</sup> *Id.* § 264(b)(1)-(3).

HIPAA authorized DHHS to issue final regulations governing the use of PHI if Congress had not enacted privacy legislation within three years of the enactment of HIPAA.<sup>219</sup> Because Congress did not enact such legislation within three years, DHHS developed a final rule, subject to public notice and comment.<sup>220</sup>

Similar to provisions under HIPAA, Russian legislation authorizes the promulgation of standards that affect health. Yet, while various Russian executive bodies are authorized to promulgate regulations relating to health or privacy, none of the bodies are specifically authorized to draft or promulgate *health privacy* regulations. For example, the Ministry of Health and Social Development is responsible for elaborating policy related to public health in general<sup>221</sup> and HIV prevention in particular,<sup>222</sup> and for submitting drafts of proposed legislation to the government.<sup>223</sup> The Ministry is not expressly authorized to adopt rules related to *health* privacy. Likewise, the Law on Personal Data authorizes an executive body to submit proposed legislation to the government relating to privacy,<sup>224</sup> but does not mandate that such proposals include those related to *health* privacy.

### 3. *Unlike Remedies Available Under Russian Law, HIPAA Provides Clear Remedies for Breaches of Health Privacy*

While remedies available for breaches of privacy under Russian law are unpredictable, HIPAA and the Privacy Standards provide clearly defined remedial measures. The HIPAA Privacy Standards seek to promote compliance among covered entities.<sup>225</sup> And, HIPAA does not provide for a private right of action for individuals harmed by failures of compliance.<sup>226</sup> Rather, a person who is a victim of conduct proscribed by HIPAA may file a written complaint with the Secretary of DHHS through the Office for Civil Rights.<sup>227</sup> The Secretary has the discretion to investigate and to impose civil

<sup>219</sup> *Id.* § 264(c)(1).

<sup>220</sup> OCR PRIVACY BRIEF, *supra* note 204, at 1-2.

<sup>221</sup> Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2004, No. 15, Item 1445, pt. 1(1) ("Decision of the Government of the Russian Federation No. 153 of April 6, 2004 'Issues of the Ministry of Public Health and Social Development of the Russian Federation'" [hereinafter Law on the Ministry of Public Health]; *see also* BURNHAM ET AL., *supra* note 88, at 15 (noting that federal agencies may issue normative regulations under their general competency based on legislative delegation).

<sup>222</sup> Omnibus HIV/AIDS Legislation, *supra* note 7, art. 15.

<sup>223</sup> Law on the Ministry of Public Health, *supra* note 221, pt. 3(3).

<sup>224</sup> *See* Law on Personal Data, *supra* note 98, art. 23(3)(8).

<sup>225</sup> OCR PRIVACY BRIEF, *supra* note 204, at 17 (citing 45 C.F.R. § 160.304).

<sup>226</sup> BOYLE & MACK, *supra* note 87, at 4:16.

<sup>227</sup> *Id.* at 4:26. The Office of Civil Rights operates ten regional offices with roughly 200 investigators assigned to investigate civil rights and HIPAA violations. *Id.* at 9:1.

or criminal penalties.<sup>228</sup> Primary enforcement is carried out through the investigation of complaints.<sup>229</sup>

HIPAA provides for both civil and criminal penalties.<sup>230</sup> The law provides for civil penalties when “the failure to comply [with the statute] was due to reasonable cause and not willful neglect.”<sup>231</sup> Each violation may result in a \$100 civil penalty; civil penalties are capped at \$25,000 per person or entity per year for any specific violation.<sup>232</sup> The United States Department of Justice enforces HIPAA’s criminal penalties upon receipt of complaints from DHHS.<sup>233</sup> Criminal penalties result where “a person knowingly and in violation” of HIPAA, discloses PHI.<sup>234</sup> The maximum penalty is exacted for offenses “committed with the intent to sell, transfer, or use individually identifiable health information for commercial advantage,” for which an individual can be sentenced to ten years in prison and fined \$250,000.<sup>235</sup>

Alternately, while violations of health privacy under Russian law may involve civil, criminal, or administrative penalties, the path to legal redress and the parameters of such liability remain unclear. First, while the Law on Personal Data authorizes an executive body to grant injunctions against the misuse of information<sup>236</sup> and to appeal to a court on behalf of a victim of a violation,<sup>237</sup> the law neglects to name such a body or to designate an agency in charge of health-related violations. Second, both the Omnibus HIV/AIDS Legislation and the Law on Health Protection provide for various types of remedies, yet do not specify what constitutes a breach or which type of breach would result in a specific penalty.<sup>238</sup> Third, remedies for violations of privacy under the Criminal Code<sup>239</sup> and Civil Code<sup>240</sup> do not clearly relate to health information or define the scope of liability for violations of health privacy. In effect, vague provisions in existing law likely provide inadequate remedies to deter future breaches of confidentiality.

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<sup>228</sup> *Id.* at 2:26-27.

<sup>229</sup> *Id.* at 9:1.

<sup>230</sup> 42 U.S.C. § 1320(d-5)-(d-6) (2000).

<sup>231</sup> *Id.* § 1320(d-5).

<sup>232</sup> *Id.*

<sup>233</sup> BOYLE & MACK, *supra* note 87, at 9:13 (noting, however, that the Department of Justice has brought only one criminal action for violations of the HIPAA privacy provisions).

<sup>234</sup> 42 U.S.C. § 1320(d-6).

<sup>235</sup> *Id.*

<sup>236</sup> Law on Personal Data, *supra* note 98, arts. 23(3)-(4).

<sup>237</sup> *Id.* art. 23(5).

<sup>238</sup> Omnibus HIV/AIDS Legislation, *supra* note 7, art. 24; *see* Law on Health Protection, *supra* note 101, art. 61.

<sup>239</sup> Ugolovnyi Kodeks [UK] [Criminal Code], art. 137(1).

<sup>240</sup> Grazhdanskii Kodeks [GK] [Civil Code], art. 150.

B. *The HIPAA Provides a Framework for Stronger Health Privacy in Russia*

Because monetary considerations alone would likely hinder the implementation of a comprehensive system modeled after HIPAA in Russia,<sup>241</sup> wholesale adoption of legislation like HIPAA in Russia is likely unfeasible. Still, while taking into account the institutional and legal differences between the United States and Russia, Russian law should, like HIPAA, clarify the statutory right to health privacy, the remedies tied to the violation of that right, and the path to legal redress for the right's infringement.

1. *Russian Law Should Provide Clear Rights to Health Privacy*

Like the regulations accompanying HIPAA, Russian law should further elucidate permissible and impermissible uses of health information. Russian legislation provides protection of the fact that a person has requested treatment, of medical diagnosis, and of data regarding treatment.<sup>242</sup> Yet such explicit protections conflict with the limited protections for diagnosis in the Omnibus HIV/AIDS Legislation<sup>243</sup> and leave health care providers and government bodies with great discretion in the protection of health information. Reconciling protections in existing legislation in order to clarify and expand the right to health privacy may grant health care providers less discretion in protecting health information and may, in turn, encourage individuals to learn their HIV status.<sup>244</sup>

Clarifying the right to health privacy entails clarifying responsibility for the promulgation of legislation related to that right. Like HIPAA, Russian law should require the drafting and proposal of regulations related to health privacy by a single named body. While HIPAA grants DHHS the authority to promulgate regulations related to health privacy, Russian law should require that health privacy standards be proposed by an executive

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<sup>241</sup> HIPAA compliance continues to be extremely expensive for private and public entities. See Kathryn E. Artnak & Margaret Benson, *Evaluating HIPAA Compliance: A Guide for Researchers, Privacy Boards, and IRBs*, 53 NURSING OUTLOOK 79, 82 (2005). In 2005, the cost of compliance and enforcement on the health care industry was estimated at between three and forty-three billion dollars. *Id.* At a single institution, Johns Hopkins, compliance may cost two million dollars annually. David S. Friedman, *HIPAA and Research: How Have the First Two Years Gone?* 141(3) AM. J. OPHTHALMOLOGY 543, 546 (2006). Such costs may include training thousands of staff people to understand the privacy regulations. *Id.* Based on the limited funding historically available for treatment, it is unclear whether Russia could institute and enforce such potentially costly reforms.

<sup>242</sup> Law on Health Protection, *supra* note 101, art. 61.

<sup>243</sup> Omnibus HIV/AIDS Legislation, *supra* note 7, art. 8(2).

<sup>244</sup> See Weiser et al., *supra* note 11, at 1018.

body but be enacted by Parliament. Generally, Russian federal bodies have the power to issue normative regulations based on general delegation or by ad hoc delegation of the legislature.<sup>245</sup> The Ministry of Health, for example, may submit drafts of federal laws to the government, and may independently adopt normative acts on a variety of specific subjects—none of which currently relates to health privacy.<sup>246</sup>

Because of the sometimes loosely defined scope of administrative authority in Russian law,<sup>247</sup> Russian legislation related to health privacy should leave limited discretion to an executive body. For example, enactment of the relevant rules for health privacy could be drafted by the Ministry of Health because of that agency's experience with health policy, but enacted only through statute, that is, by Parliament,<sup>248</sup> in order to ensure that infringement on health privacy is minimal.<sup>249</sup>

## 2. *Russian Law Should Provide Clear Remedies for Violations of the Right to Health Privacy*

To promote compliance, Russian law, like HIPAA, should encompass clear remedial measures. Changes to Russian law must, however, take into account the backdrop of Russia's civil law system.<sup>250</sup> In particular, such changes to existing remedies would likely have to be applied to various Russian legal codes. Current laws related to HIV/AIDS and privacy allow the imposition of administrative, criminal, and civil responsibility,<sup>251</sup> therefore implicating the Administrative, Criminal, and Civil Codes. While these codes allow for various types of remedial measures, they also provide for similar remedies. For example, the violation of privacy entails possible imposition of fines under each of the codes.<sup>252</sup> As such, current code provisions related to privacy leave great discretion to the judge or agency hearing a case in the ordering of remedies. Such ambiguity should be limited by amending the codes to provide more explicit direction to judges

<sup>245</sup> *Id.* at 15.

<sup>246</sup> See Law on the Ministry of Public Health, *supra* note 221, art. 5.

<sup>247</sup> See BURNHAM ET AL., *supra* note 88, at 611 (noting that where not strictly defined, "the delegation of lawmaking authority may be misused").

<sup>248</sup> See *id.* at 611-12.

<sup>249</sup> See *id.* at 249.

<sup>250</sup> See *id.* at 9.

<sup>251</sup> See, e.g., Omnibus HIV/AIDS Legislation, *supra* note 7, art. 24.

<sup>252</sup> Cf. Kodeks RF ob Administrativnykh Pravonarusheniakh [KOAP] [Code of Administrative Violations] art. 13.14 (noting that disclosures of information by a person who has access to the information by virtue of his or her profession "shall entail the imposition of an administrative fine . . . in the amount of from five to ten times the minimum wage"); Grazhdanskii Kodeks [GK] [Civil Code] art. 151; Ugolovnyi Kodeks [UK] [Criminal Code] art. 137(1).

and agencies as to specific types of remedies applicable to particular violations of health privacy.

3. *Changes in Law Should Clarify Legal Processes for Redressing Violations*

In addition to clarifying the parameters of health privacy and the remedies available for its violation, law related to health privacy should present a clear path for legal redress. Overlapping jurisdiction of the courts and the lack of a specifically designated administrative body to handle health privacy complaints renders the path to redress unclear. In light of potential problems of individual citizens accessing courts, clear agency oversight, as under HIPAA, could provide an alternative to traditional courts as a means of securing a remedy.

Current Russian law related to personal privacy already authorizes both a private right of action<sup>253</sup> and initiation of action by agencies.<sup>254</sup> A law specifically related to health privacy should maintain this system. Unlike under HIPAA, the existence of a private right of action may be essential. In the context of the overlapping jurisdiction of the Russian legal system, where privacy rights have long been uncertain,<sup>255</sup> a private right may be an important incentive to encourage seeking redress. *Actual* individual recoveries under the law could discourage future violations.

VII. CONCLUSION

Existing Russian law allows broad exceptions for the disclosure of private health information and fails to provide a clear remedial path for those whose rights to privacy have been violated. Because of a lack of predictable remedies for violations of health privacy, Russian law likely does not promote compliance. In turn, a lack of compliance with existing privacy protections means that individuals likely to suffer stigma related to drug use or HIV/AIDS will not seek governmental assistance. To encourage individuals traditionally subject to discrimination to seek HIV testing, the Russian Federation should clarify and reconcile existing protections for health privacy.

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<sup>253</sup> Law on Personal Data, *supra* note 98, art. 17(1).

<sup>254</sup> *Id.* art. 3(5).

<sup>255</sup> See PRIVACY INT'L, PRIVACY AND HUMAN RIGHTS 2003: RUSSIAN FEDERATION, <http://www.privacyinternational.org/survey/phr2003/countries/russianfederation.htm> (last visited Nov. 18, 2007).

As comprehensive health privacy legislation, HIPAA provides a framework for change in Russian law. The clear definitions and remedial actions for violations of health privacy under HIPAA provide a model of greater protections for individuals living with HIV/AIDS in Russia. In particular, to promote HIV/AIDS treatment, Russian law should further clarify the statutory right to health privacy, the remedies tied to the violation of that right, and the path to legal redress for the right's infringement.