

# ***Bože, Zarja chrani!*** **Political Protest and Incitement to Religious Hatred in Russia in the Light of the “Pussy Riot” ECtHR Case**

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European Court of Human Rights, 17 July 2018, *M.A. v. Russia*, app. 38004/12

In the “Pussy Riot” case (*Mariya Alekhina and others v. Russia*, app. 38004/12, 17 July 2018), the European Court of Human Rights strengthens its pro political speech line of conduct. With the exception of a partly dissenting opinion, the Court found Russian authorities had overstepped their margin of appreciation in condemning the three applicants for the offence of hooliganism motivated by religious hatred and of propaganda of extremist materials. The present essay aims, by analyzing the Russian authorities conduct, to raise pertinent questions about European standards for anti-extremism legislation.

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## **Keywords**

Freedom of speech, European Court of Human Rights, Political speech, Margin of appreciation, Pussy Riot

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## **1. Introduction**

In 2012, Ms Mariya Vladimirovna Alekhina, Ms Nadezhda Andreyevna Tolokonnikova and Ms Yekaterina Stanislavovna Samutsevich, members of the feminist punk group called “Pussy Riot”, were condemned for the offence of hooliganism motivated by religious hatred and for posting extremist materials on *Youtube*. This case (so called *Pussy Riot* case) has been analyzed and sentenced by the European Court of Human Rights “*Pussy Riot*” case (*Mariya Alekhina and others v. Russia*, app. 38004/12, 17 July 2018).

The aim of the present essay consists at discussing the outcome of case in particularly with reference to the exercise of freedom of (political) expression and to the ban against what is considered “extremism” in Russia. The analysis will consider three main aspects: first, the right to participate effectively in the trial court proceedings and to receive practical and effective legal assistance; second, the interplay between the freedom of political expression and the protection of religious feelings in Europe; finally, the meaning of the concept of ‘extremism’, both in Russia and under the juridical framework of the European Convention of Human Rights

It is important to consider that nowadays Russia is characterized by an increasing alteration of the democratic regime. The mix between democratic and authoritarian elements which form the identity of the Russian government made the authors peak about a “different”, “uncertain” or “incomplete” democracy<sup>1</sup>. Numerous reports carried out by international institutions outline the inefficiency and the undetermined independence of the Russian judiciary<sup>2</sup>. The European Court of Human Rights (ECtHR) has had the possibility to rule on Russian matters many times in the past years and to set up a specific and settled case-law on violation of fair trial proceedings, degrading treatments and breaching of the freedom of expression (see *infra*). However, the importance of the instant case lies in the attempt of the Russian authorities to achieve the repression of political speech by labeling it as mere hate speech and “social extremism.” For the ECtHR, the main thrust of the case lies in the political dimension of free speech. The ECtHR considered the reasons given by the Russian government to be deficient and inadequate.

## **2. The incriminating fact and the investigation: desecration of the throne and the altar**

The feminist group Pussy Riot has been founded in Russia in 2011. The group’s main aim consists in staging unauthorized performances in order to bring to the fore public opinion on women, LGBT, or other minorities rights and, more generally, sensitive political matters. One of the biggest group’s target is embodied in the Russian authorities’ approach on fundamental and civil rights. In February 2012, in response to the public support and endorsement provided by Patriarch Kirill to Vladimir Putin policy, three group members decided to perform a protest song – called *Virgin Mary, Drive Putin Away* - in two different Orthodox churches. Few days later, on the 18<sup>th</sup> February, the action was carried out at the Epiphany Cathedral in the district of Yelokhovo in Moscow: «wearing brightly colored balaclavas and dresses, they entered the cathedral,

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<sup>1</sup> On the features of the Russian semi-authoritarian regime and the subservient function of the judiciary, see, for the Italian academic community, R. Tarchi, *Sistema delle fonti e poteri normativi dell’Esecutivo in una forma di governo iper-presidenziale: il caso della Federazione Russa*, in *Osservatorio sulle fonti*, 3, 2018, particularly 22 ss. See also M. Ganino *Appunti e spunti per una ricerca di diritto costituzionale su Paesi “altri”*, in M. D’Amico-B. Randazzo (eds.), *Alle frontiere del diritto costituzionale. Scritti in onore di Valerio Onida*, Milan, 2012, 830 ss.

<sup>2</sup> See R.J. Terrill, *World Criminal Justice Systems: A Comparative Survey*, London, 2012; [Freedom House, Democracy in Crisis \(Report 2018\)](#).

## **Note a sentenza - Sezione Europa Corte europea dei diritti dell'uomo**

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set up an amplifier, a microphone and a lamp for better lighting and performed the song while dancing» (§12 of the instant judgment). A few days later they decided to re-play the protest in Moscow's Christ the Saviour Cathedral. No service had taking place during the performance but, unlike the previous action, few a moments after the performance began, Cathedral security staff arrived and pushed the artists out from the church building. On the same day, the deputy director general of the church's private security company reported the episode to the police complaining that both the song's lyrics and the church break-in itself represented outrageous and insulting behavior contrary to public order and insulted the feelings of the church's members.

The lyrics of the song:

«Virgin Mary, Mother of God, drive Putin away  
Drive Putin away, drive Putin away  
Black robe, golden epaulettes  
Parishioners crawl to bow  
The phantom of liberty is in heaven  
Gay pride sent to Siberia in chains  
The head of the KGB, their chief saint,  
Leads protesters to prison under escort  
So as not to offend His Holiness  
Women must give birth and love  
Shit, shit, holy shit!  
Shit, shit, holy shit!  
Virgin Mary, Mother of God, become a feminist  
Become a feminist, become a feminist  
The Church's praise of rotten dictators  
The cross-bearer procession of black limousines  
A teacher-preacher will meet you at school  
Go to class - bring him cash!  
Patriarch Gundayev believes in Putin  
Bitch, better believe in God instead  
The girdle of the Virgin can't replace rallies  
Mary, Mother of God, is with us in protest!  
Virgin Mary, Mother of God, drive Putin away  
Drive Putin away, drive Putin away».

The police began criminal proceedings on the 24<sup>th</sup> February 2012 and arrested the three group members the following day. The District Court, fully endorsed by the Moscow City Court (the Appeal Bench for the region of Moscow), decided, confirmed and repeatedly extended the custody of the women until the 12<sup>th</sup> of January 2013<sup>3</sup>.

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<sup>3</sup> Both the District and the City Court dismissed the arguments the applicants put forward pertaining to their family situation (the first two applicants had young children), the fragile health of the second applicant. In doing that, the district court also refused to accept personal written sureties given by fifty-seven individuals, including famous Russian actors, writers, film producers, journalists, businessmen, singers and politicians (see § 26 of the instant case).

Investigators ordered expert opinions to determine whether the video taken during the above-mentioned action was motivated by religious hatred or deemed an attack on the religious feelings of Orthodox believers. In the first two reports, commissioned by a State expert bureau and issued on the 2nd April and 14<sup>th</sup> May 2012 respectively, five experts answered in the negative. Specifically, the experts concluded that the applicants had not been violent or aggressive, had not called for violence in respect of any social or religious group nor had they targeted or insulted any religious group. A third expert opinion was subsequently requested by the investigators (with the likely intention to produce an entirely different response). This latter commission, indeed, concluded that the performance had been motivated by religious hatred (§ 29).

## **2.1. Trial and decisions of the national authorities**

Outlining the progress of hearings and the conditions the women had been subjected on the days of the hearings is important in the case at hand, as it constitutes one of the main complaints from the applicants. Prison conditions, transport procedures, difficulty of communication and refusal of addressing the issue of confidential consultations between the women and their lawyers before, during and after the trial (§§ 36-46) were some of the complaints brought to the attention of the European Court of Human Rights. During the trial the women were enclosed in a glass box: to communicate with the lawyers they used a small window; police officers were constantly positioned between the glass and the lawyers<sup>4</sup>.

On the 17<sup>th</sup> of August 2012 the Khamovnicheskiy District Court found the three women guilty under Article 213 § 2 of the Russian Criminal Code for the crime of “hooliganism for reasons of religious hatred and enmity”. In particular, the Russian court claimed that the women had offended the feelings of a large group of people and had «incited feelings of hatred and enmity and therefore violate the constitutional basis of the State» (§ 52, citing the District Court words). The Court also found that they committed the crime in a group and acted premeditatedly. The Court explicitly and categorically rejected the applicants’ arguments that their performance had been politically rather than anti-religiously motivated on the argument that the performers did not make any explicit political statement. Witnesses (church attendants, worshippers and the third expert report<sup>5</sup> had been considered sufficient evidence to condemn them.

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<sup>4</sup> After the trial the police took back in the prison the applicants at night, when all the visitors, including the lawyers, were not allowed (§ 33).

<sup>5</sup> The first and the second reports were rejected by the Court. The District Court refusal as well to hear different experts or the same experts who had drafted the incriminating reports. In § 50 is quoted a passage of the Russian Court’s judgment that states: «[the first two expert reports] cannot be used by the court as the basis for conviction as those reports were received in violation of the criminal procedural law as they relate to an examination of the circumstances of the case in light of the provisions of Article 282 [and not Article 213]. Moreover, the expert opinions [...] lack any reference to the methods used during the examinations, [...] exceeded the limits of the questions put before them; they gave answers to questions which were not mentioned in the [investigators’] decisions ordering; [...] do not provide a linguistic and psychological analysis of the lyrics of the song performed in Christ the Saviour Cathedral».

The witness evidence was hardly substantiated, nor was it open to dispute<sup>6</sup>. Given this finding, the group members were sentenced to two years imprisonment.

On the 10<sup>th</sup> of October 2012, the Moscow City Court decided on the appeals by upholding the judgment from the 17<sup>th</sup> of August 2012 as far as it concerned the first two applicants; however, it partially amended it in respect of the third applicant, who was released on probation.

On the 8<sup>th</sup> of November 2013 the Ombudsman submitted an application for supervisory review to the Supreme Court.

On the 4<sup>th</sup> of April 2014, following a Supreme Court order of reviewing the case, the Moscow City Court reviewed the case, but it upheld the findings. It only reduced each applicant's sentence to one year and eleven months jail.

## **2.2. The ban of the “extremist” video on the Internet: out of sight out of mind**

Meanwhile the three women were condemned, a parallel procedure was instituted by the Zamoskvoretskiy Inter-District Prosecutor. The public Prosecutor ordered «to limit access to the material in question by installing a filter to block the IP addresses of websites where the recordings had been published» (§ 72). The accusation found her statement on the assumption of the extremist nature of the videos' contents.

According with the Russian Court, the Pussy Riot's video was deemed to achieve some actions listed in Sections 1, 12 and 13 of the Suppression of Extremism Act<sup>7</sup> and in Section 10(1) and (6) of the Federal Law on Information, Information Technologies and the Protection of Information<sup>8</sup>, four in particular: 1) “the stirring up of social, racial, ethnic or religious discord”; (2) “propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion”; (3) “violations of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic affiliation or attitude to religion”; and (4) “public appeals to carry out the above-mentioned acts or the mass dissemination of knowingly extremist materials, and likewise the production or storage thereof with the aim of mass disse-

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<sup>6</sup> The District Court found the expert report «detailed, well founded and scientifically reasoned [...] The defendants' hatred and enmity were demonstrated in the court hearings, as was seen from their reactions, emotions and responses in the course of the examination of the victims and witnesses» (The above Russian Court's declaration are cited in the §§ 51-52 of the present decision).

<sup>7</sup> Section 1(1) of Federal Law no. 114-FZ on Combatting Extremist Activity of 25 July 2002 defines, among the others way, as follows: «the stirring up of social, racial, ethnic or religious discord”; “the propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion»; Section 13 of the same Act states that «The use of public communication networks to carry out extremist activity is prohibited».

<sup>8</sup> Section 10(1) and (6) of Federal Law no. 149-FZ on Information, Information Technologies and the Protection of Information of 27 July 2006, as in force at the material time, provided as follows: «The distribution of information directed towards propaganda for war, the stirring up of national, race or religious hatred and hostility and other information whose distribution is subject to criminal or administrative responsibility shall be banned».

mination”. However, the court does not explain why the video can be placed in those categories. It simply accepts (and relies upon) the expert report and the prosecutor’s argument. On the one hand, the scientific examination, defining the video as “extremist”, basically provided, in essence, a legal qualification of it; on the other hand, the public accusation claimed that the dissemination of material of an extremist nature disrupts social stability and creates a threat of damage to the life, health and dignity of individuals.

Accordingly, the video content on the group web site (namely the video-recordings of 6 of their performances uploaded on it, of *Riot in Russia, Putin Wet Himself; Kropotkin Vodka; Death to Prison, Freedom to Protest; Release the Cobblestones* and *Punk Prayer – Virgin Mary, Drive Putin Away*) has been declared extremist.

### **3. The findings of the Court: the proceedings provisions of the Convention**

On June 2012<sup>9</sup> the applicants pleaded before the Court of Human Rights to complain on the basis of a breach of their rights under Articles 3, 5 §3, 6 and 10 of the Convention. Article 3 (prohibition of torture or degrading treatments), Article 5 (right to liberty) specifically protecting, under § 3, the right to have a trial within a reasonable time or to be released pending the trial and Article 6 stating the right to fair trial, are all aimed to guarantee the respect of minimum proceeding standards of the trial.

The applicants contested in particular the condition of transport to and from the hearing room (no breakfast, delays, overcrowded police transport vans, impossibility to communicate freely and privately with the lawyers during and after the hearings, etc.) and the use of a glass box during the hearing (see § 2 of the present essay). The ECtHR stated that ill-treatment did not fall within the scope of Article 3 of the Convention, as the treatment «must attain a minimum level of severity» (§ 141). In the actual case, the European judges, despite having taken into consideration the Government allegation that the practice of placing defendants behind special barriers exists in several European Countries<sup>10</sup>, recognized the condition in the courtroom as degrading and considered that the concrete manner in which the inmates were publicly exposed (armed officers and police-dogs surrounding the box, etc.) overstepped the minimum level of severity required by the Convention (see *Yaroslav Belousov v. Russia*, nos. 2653/13 and 60980/14, 4 October 2016).

For the same reasons, the Court considered the effectiveness of the defense had been limited, in open violation of Article 6 §§ 1 and 2 of the Convention; in fact, both the *difficulty* to communicate effectively with the lawyer and the *impossibility* to challenge the

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<sup>9</sup> The Government raised a plea of non-exhaustion with the respect to the complaints. The Court overcame the Government’s objections finding that the rule of exhaustion of domestic remedies in this case cannot be called. Basically, the Court found that the Russian legal system did not provide an effective remedy that could be used to prevent the alleged violation or its continuation and provide applicants with adequate and sufficient redress in connection with a complaint about inadequate conditions of detention (§§ 132, 165, 248).

<sup>10</sup> See *Svinarenko and Shadnev v. Russia*, apps. 32541/08 and 43441/08 (2014).

incriminating expert reports represented restrictions neither necessary nor proportionate (§ 172)<sup>11</sup>.

Finally, it was argued that there were no valid reasons to keep them in custody. The European Court of Strasbourg believed that the Russian authorities failed to address specific facts to justify the imprisonment and did not consider valuable alternative preventive measures (§ 158)<sup>12</sup>. On the same violation of Article 5, para. 3, the Court provided a wide range of ECHR's precedents involving Russia<sup>13</sup>.

### **3.1 The violation of the freedom of expression**

The last complaint made by the applicants concerned the limitation of their freedom of expression. This is the substantial core of the case. Under Article 10, the inmates complained about the two different proceedings they had been involved in: on one hand, they criticize the decision to imprison for having performed. In this respect, they contested both the accusation (alleging that their action was not offensive) and the provisional detention (alleging that those measures had been illegitimate or at least excessive in relation to their conduct). On the other hand (b), only Ms Alekhina and Ms Tolokonnikova complained about the courts banning access to their videos on the Internet considered "extremist". Each aspect required its own exposition.

#### **3.1.1 The offensive nature of the performance**

Firstly, the Court accepted that a reaction to the applicants' performance on account of their breaching the rules of conduct in a place of religious worship might have been warranted; however, the judges reminded (once more) that, from a general point of view, Article 10 («one of the essential foundations of a democratic society») is applicable «not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb» (§ 197). The Court did not hesitate in defining the women's behavior as a sign of «their disapproval of the political situation in Russia» (§212) and by doing that it recognized a wider margin of operability to their actions.

As is known, in order for an interference to be justified under Article 10, it must be "prescribed by law", pursue one or more of the legitimate aims listed in the second

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<sup>11</sup> Consistent with this opinion see, among other judgments, *Kudła v. Poland*, app. 30210/96 (2000), § 82 ss. and *Yaroslav Belousov v. Russia*, cited in the text above, § 125.

<sup>12</sup> The Government maintained that the decision of keeping the women in custody was carefully weighed with all the relevant factors, including, among the other, the applicants' personal characteristics, the gravity of the offences the difficult to locate their concrete residence and the attempt, made by the third applicant, to mislead the investigation by at first having provided a false name to the investigator.

<sup>13</sup> *Mamedova v. Russia*, app. 7064/05 (2006); *Pshevecherskiy v. Russia*, app. 28957/02 (2007); *Shukhardin v. Russia*, app. 65734/01 (2007); *Belov v. Russia*, app. 22053/02 (2008); *Aleksandr Makarov v. Russia*, app. 15217/07 (2009); *Logvinenko v. Russia*, app. 44511/04 (2010); and *Valeriy Samoylov v. Russia*, app. 57541/09 (2012).

paragraph of that provision and be “necessary in a democratic society”. In that regard, the interference not only has to respond to a pressing social need, but it also has to be proportionate to the nature of the criminal act<sup>14</sup>. In the view of the judges, the domestic authorities failed to prove the third requirement. The lyrics of the incriminating song (*Virgin Mary, Drive Putin Away*) and the context of their performance were not aimed to incite violence or to justify violence, hatred or intolerance, purpose which would have been the only acceptable reasons, according to the international standards, for restricting the applicants’ right to freedom of expression in the form of a criminal sanction (§ 223). In the view of the judges, the domestic authorities’ statements were merely declarative and not relevant because they did not consider the whole context in which the performance was taking place: the applicants’ manner of dress and the non-respectful behaviour have to be considered in the light of the real nature of the conduct. The latter has been considered «peaceful and non-violent» by the Court (§ 227).

Therefore, for the same reasons, the criminal sanction itself (namely the two-years imprisonment) was considered to be exceptionally severe in relation to their conduct and was therefore considered a sort of illegitimate deterrent effect on the exercise of their freedom of expression (§ 227)<sup>15</sup>.

Accordingly, the Court concluded that the applicants’ convictions had not been “necessary in a democratic society” and was therefore in violation of Article 10.

### **3.1.2 The extremist nature of the uploaded video**

The second and crucial point of the case is represented by the judicial proceeding banning the applicants’ video-recordings on the Internet. According to the applicants, the definitions of “extremism”, “extremist activity” and “extremist materials” contained in the statutory basis for the interference (*i.e.* Section 1(1) and (3) and Section 13(3) of the Suppression of Extremism Act) were too broad. The Government, on the contrary, referred to a Russian Constitutional Court decision (Ruling no. 1053-O of 2 July 2013) which had refused to find the above-mentioned Sections unconstitutional for allegedly lacking precision in the definitions of “extremist activity” and “extremist materials” (§ 256).

After having found not manifestly ill-founded and admissible the women’s application, the judges of Strasburg refused to stress whether the interference was “prescribed by law” within the meaning of Article 10, leaving the question open (and clearly avoiding the problematic). The judges preferred to dwell only on the concept whether the interference was “necessary in a democratic society” to justify their final decision. In that latter perspective, the Court stressed that the District Court condemned the

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<sup>14</sup> On the importance of the nature and severity of the penalty in evaluating the proportionality of the interference, see *Ceylan v. Turkey*, app. 23556/94 (1999), § 37; *Tammer v. Estonia*, app. 41205/98 (2001), § 69; and *Skatka v. Poland*, app. 43425/98 (2003); *E.S. v. Austria*, app. 38450/12 (2018).

<sup>15</sup> On the danger to create a so-called chilling effect, the Court itself cites *Jersild v. Denmark*, app. 15890/89 (1994), § 34; *Brasilier v. France*, app. 71343/01 (2006), § 43; *Morice v. France*, app. 29369/10 (2015), § 176; and *Reichman v. France*, app. 50147/11 (2016), § 73.

women by relying on the report made by the expert hired by the public accusation, lacking any analysis of that and any reasoning to specify which particular elements of the videos were problematic and why. The Russian judges, merely endorsing the overall linguistic experts' findings, «made no attempt to conduct their own analysis of the videos in question». Moreover, the report had gone far beyond language issues and had provided, in essence, a legal classification of the videos. This legal definition has been utilized *sic et simpliciter* by the Court. In the ECtHR words: «domestic court can never be in a position to provide “relevant and sufficient” reasons for an interference with the rights guaranteed by Article 10 of the Convention without some form of judicial review based on a weighing up of the arguments put forward by the public authority against those of the interested party» (§ 267).

### **3.2 The judicial dissenting opinion**

The judgment found a partly dissenting opinion. Judge María Elósegua agreed on the violation of Article 5, para. 3, Article 6, para. 1, Article 6, para. 3, as well as Article 10 (on account of the extremist nature of the banned material), but she disagreed both on violation of Article 3 (in her view the special control measures adopted during the trial were justified) and of Article 10 (she believed the women did abuse of the freedom of expression by offending the religious feeling of the Orthodox believers and for that reason their conduct did not deserved protection under this Article). Although she recognized that the action could not be classified as incitement to religious hatred, she outlined its provocative and disrespectful im. The latter did not justify the means they used to express their political opinion (invasion of a church) and therefore it did harm the dignity of the Christian believers. She reasoned that, even if «the domestic courts failed to adduce relevant and sufficient reasons to justify [in terms of proportionality] the criminal conviction and prison sentence imposed», «these facts could have been punished by means of an administrative or civil sanction».

## **4. Some considerations**

The need to interfere at the lowest level in the margin of appreciation of a Member State is a coherent way to proceed, particularly in the most sensitive topics such as the present one. Instead of “speaking their mind” fully and debating the merit of the case, the judges, in order to reach their specific outcomes, employ technical arguments. However, this approach did not hold them back from facing some relevant questions, even if mostly in form of *obiter dicta*.

Firstly, the Court outlined the political nature of the performances (§§ 205 and 212)<sup>16</sup>

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<sup>16</sup> Where, respectively, it stated «In the case at hand, the applicants, members of a punk band, attempted to perform their song *Punk Prayer – Virgin Mary, Drive Putin Away* from the altar of Moscow’s Christ the Saviour Cathedral as a response to the ongoing political process in Russia» and «The applicants wished to draw the attention of their fellow citizens and the Russian Orthodox Church to their disapproval of the political situation in Russia».

in order to recognize a broader margin of operability for the women's actions. In fact, the protection afforded by the European Court of Human Rights (ECtHR) for restrictions on political speech or debates on questions of public interest is broader than those applied for mere commercial, scientific or artistic expression, a *Weltanschauung* or a simple individual value judgment<sup>17</sup>.

Secondly, it has been remarked that the political freedom of expression can be expressed through artistic conducts as well<sup>18</sup>.

This approach strips any legal basis from the Russian authorities' assessment that insisted on the hate crime theory. The bias-motivated offense is, in fact, a crime where a perpetrator targets a victim because of his (or her) membership in a certain social group, race, religion, etc. The abuse of political utterance is, by its very nature, hardly ascribable to a hate crime, where conduct requires the existence of some very specific, both objective and psychological, elements<sup>19</sup>. The symbolic *ethos* at the base of the reasons of these two expressions are ultimately very different: from one part an attempt (albeit illegal) to restore pluralism, from the other part a value, intolerant judgment.

This approach seems to reflect the general ECtHR « policy » on the matter: according with recent case-law, «*L'inclusion dans le discours de haine d'un acte qui, comme celui reproché en l'espèce aux requérants [i.e. burning a picture of the Spanish royal family], est l'expression symbolique du rejet et de la critique politique d'une institution et l'exclusion qui en découle du champ de protection garanti par la liberté d'expression impliqueraient une interprétation trop large de l'exception admise par la jurisprudence de la Cour*»<sup>20</sup>. This conclusion seems to suggest that political expression, even when it is an abuse of the right itself, does not fall within the scope of the incitement to hatred.

#### 4.1 More considerations: the controversial Russian anti-extremist legislation as a limit for the freedoms

From a general point of view, it is how fundamental liberties are entrenched and limited which reveals the very essence of the interplay between the State and its citizen.

<sup>17</sup> See, *Baka v. Hungary*, app. 20261/12 (2016), § 159; *Satakunnan Markkinapörssi Oy and Satamedia Oy*, app. 931/13 (2017), § 167; *Sekmadienis Ltd. v. Lithuania*, app. 69317/14 (2018), § 73; *ES v. Austria*, app. 38450/12 (2018), §§ 37 and 42, which all outlined that if the statements touch a matter of indisputable public interest in a democratic society and (potentially) can give rise to a public debate, the limits of acceptable criticism are wider.

<sup>18</sup> See *Tatár and Fáber v. Hungary*, apps. 26005/08 and 26160/08 (2012), § 36; *Murat Vural v. Turkey*, app. 9540/07 (2014), §§ 54-56.

<sup>19</sup> On the relationship between hate crime and terrorism A.H. Cordesman, *Terrorism and Hate Crimes: Dealing with All of the Threats from Extremism*, Center for Strategic and International Studies; A.T. Turk, *Sociology of terrorism*, in *Annual Review of Sociology*, 30, 2004, 271 ss.; B. Perry, *In the Name of Hate. Understanding the Hate Crimes*, London, 2001. *Contra*, C.E. Mills-J.D. Freilich-S.M. Chermak, *Extreme Hatred: Revisiting the Hate Crime and Terrorism Relationship to Determine Whether They Are "Close Cousins" or "Distant Relatives"*, in *Crime & Delinquency Journal*, 63(10), 2015, 1191 ss., who conclude that hate crime and terrorism may be more akin to close cousins than distant relatives. In any case the two phenomena are not alike.

<sup>20</sup> See *Stern Taulats et Roura Capellera c. Espagne*, app. 51168/85 and 51186/15 (2018), § 38, released in French.

The degree of extension (or compression) of the freedom of expression - cornerstone of democracy and of all other fundamental liberties - may be taken as a marker of the nature of the Constitutional design it is enshrined in. Therefore, discussing how the freedom of expression is enforced in Russia, led us to outline how Russian authorities are particularly active in defining a specific idea of the society's *ethos*. This *ethos* is particularly characterized by the limits to the traditional Constitutional freedoms.

It is well known that not every impediment is - *per se* - an infringement of liberty. On the contrary, the idea of absolute liberty is inconsistent with the aim and the spirit of liberty itself. Liberty foresees “duties and responsibilities” for its own implementation<sup>21</sup>. Every fundamental rights protection system envisages internal pathological dynamics and therefore limitation criteria to its liberties that are consistent and, as far as possible, pragmatic. However, in Russia these limitations are often a tool to limit the State ideological opponents' freedom of expression<sup>22</sup>. The problem of a selective and seemingly arbitrary enforcement of the extremist legislation, is openly discussed in an international context<sup>23</sup>. The legal basis for that restriction is the already-mentioned *Federal Law on Combating Extremist Activity* (“Extremist Act” or also “the Law”), enacted in 2002, in order to respond to (alleged) escalating problems of ethnic and nationalist violence<sup>24</sup>. This statute, amongst other things, codifies a definition of “extremism,” prohibits advocacy of extreme political positions, and imposes liability on organizations that do not disavow the “extremist” statements of their members. However, extremism in the Russian legislation is a blurry concept. The Extremist Act does not set down general characteristics of extremism as a concept. Instead, the Law lists a very diverse array of actions that are deemed to constitute “extremist activity” or “extremism”. Some of these definitions, whose content is recognized to be too vague, are providing the authorities and the judges the necessary power to persecute extreme views and actions which simply diverge from social norms and rules and there are not associated with violence.

A critic of the Russian law on extremism has been conducted, among other institu-

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<sup>21</sup> This formula, contained in the second part of Article 10, is commonly recalled in every decision regarding the freedom of expression, see, among other, *Otto-Preminger-Institut v. Austria*, app. 13470/87 (1994); *Murphy v. Ireland*, app. 44179/98 (2003); *İ.A. v. Turkey*, app. 42571/98 (2005); *Sekmadienis v. Lithuania*, cit. Among these obligations, in the context of religious beliefs, the ECtHR case law has included the «duty to avoid expressions that are gratuitously offensive to others and profane» The anti-extremist legislation in Russia principal targets are ideological opponents

<sup>22</sup> A. Verkovsky, *Inappropriate Enforcement of Anti-Extremist Legislation in Russia in 2017*, in *SOVA*, April 2018. The Russian government is currently waging a campaign to allow the authorities to have broader margin of appreciation in judging freedom of speech matters. See N. Duffy, *Internet freedom in Vladimir Putin's Russia: The noose tightens*, in *American Enterprise Institute*, January 2015.

<sup>23</sup> J. B. Gross, *Russia's War on Political and Religious Extremism: An Appraisal of the Law “On Counteracting Extremist Activity”*, in *BYU Lawyer Review*, 2, 2003, 717 ss., in particular 735, notes «Ironically, while the rise in neo-Nazi violence served as the most visible justification for the adoption of the Extremism Law, law enforcement appears to have partnered up with members of such nationalist movements in certain instances in order to fight other groups which are arguably extremists». See again A. Verkovsky, *Inappropriate Enforcement of Anti-Extremist Legislation in Russia*, cit.

<sup>24</sup> In 2017, Russian anti-extremist and anti-terrorist legislation was supplemented with new norms that restricted the rights of offenders convicted under the relevant articles of the Criminal Code. Those changes, for obvious legal reasons (*tempus regit actum*), don't concern the object of the present essay.

tions, by the Venice Commission which in its Opinion no. 660/2011 on the *Draft of the Federal Law on Combating Extremist Activity of the Russian Federation* considered the Law “problematic”, on account of its broad and imprecise wording. The Commission is particularly concerned by the basic notions defined by the Law (such as the definition of “extremism”, “extremist actions”, “extremist organizations” or “extremist materials”) that give too wide discretion in its interpretation and application, thus leading to arbitrariness. The definitions contained in the legal provision «too broad, lacking clarity and open to different interpretations» as well as «rather imprecise» (see §§ 31 and 49 of the Opinion)

Besides, the definition does not require “violence” as a reference and that is inconsistent with the international conventions guidelines<sup>25</sup>.

## **4.2. How to limit? Established criteria in order to adopt the extremist legislation at the European level**

For what concerns the allegation of extremism in this particular circumstance (which affected the possibility to share six Pussy Riot’s videos on the Internet), it is important to remark that, in the perspective of safeguarding the State margin of appreciation, the ECtHR avoided both to determine whether the interference was in “accordance with the law” and whether the legal provision itself was in accordance with international standards. It also did not explicitly establish whether the nature of the behavior should have been considered as extremist. The Court decided to «leave the question open» (§ 258) and simply noted that the domestic courts had failed to *justify* the measure. The European Court pursued the “easiest path” and avoided a narrower one<sup>26</sup>. However, in many passages some interpretative questions - although at the abstract level - has been highlighted in order to find reasonable guidelines in the matter. Therefore, this sentence seems to translate the general principle into clear and consistent evaluation parameters to frame whether one may lawfully apply the anti-extremist legislation.

First, the legal provisions cannot be vague in order for the norm to be accessible to the person concerned and foreseeable - to a reasonable degree - as to its effects<sup>27</sup>. No need to foresee specific cases where requested, but definition must be consistent and,

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<sup>25</sup> The Shanghai Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001, at Article 1 § 3 provides the following definition of Extremism: «Extremism is an act aimed at seizing or keeping power through the use of violence or at violent change of the constitutional order of the State, as well as a violent encroachment on public security, including the organization, for the above purposes, of illegal armed formations or participation in them and that are subject to criminal prosecution in conformity with the national laws of the Parties».

<sup>26</sup> A very similar question has been posing at the Court one month later, in *Ibragim Ibragimov and Others v. Russia*, apps. 1412/08 and 28621/11 (2018). The case concerned anti-extremism legislation in Russia and a ban on publishing and distributing Islamic books considered extremist. As the Court did in the present case, also in *Ibragimov* found the Russian courts had not justified why the ban had been necessary and avoided to rule on the consistency of legal provisions with the Convention (see §§ 80-86).

<sup>27</sup> See, among the major authorities, *Ganęda v. Poland*, app. 26229/95 (2002), § 39; *Maestri v. Italy*, app. 39748/98 (2004), § 30; and *Delfi AS v. Estonia*, app. 64569/09 (2015), § 120. See also Venice Commission, Opinion app. 660/2001 (mentioned above).

as much as it possible, precise.

Secondly, any speech or behavior is deeply dependent on the context in which it is considered. Any assessment shall be conducted taking into account the specific context in which the utterance has taken place. In the case on the hand, the Government, in its defense, basically emphasized the video-performance's manners, explaining that the Pussy Riot's raid had not been deemed extremist for the ideas or opinions that it might have been seeking to impart, whether political or religious, but for the form in which that had been done. On the contrary, in its judgment, the Court seemed to consider more relevant the context than the content of the (musical) speech (§ 226: «no analysis was made of the context of their performance»). The General Policy Recommendation no. 15 on Combating Hate Speech adopted by the European Commission against Racism and Intolerance (8 December 2015) contains some examples of specific circumstances in order to determine the context evaluation: (a) whether or not there are already serious tensions within society to which this hate speech is linked); (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders); (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination); (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate); (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a “live” event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination). All these circumstances, in the view of the Court, have to be weighted in the final judicial outcome.

The third main criterion is represented of the necessity that the action called, directly or indirectly, for violence or that represented a justification of violence, hatred or aggressive intolerance. We already mentioned the critic to the Russian *Extremist Law* drafted by the Venice Commission which deplored the absence of “violence” as a qualifying element of “extremism” or “extremist activity” (see §§ 31, 35 and 36 of the Opinion). According with the ECtHR's case-law to define extremism is not to be considered the mere “aim” of the action/speech, as an element from the context, but also the tools, the way to pursue that aim. Something that reminds the Hoffmansthal's “way” in dealing with the matter of life: «in the How, there lies the whole difference»<sup>28</sup>. This three law-drafting and interpretation rules - it is easy to argue – pursue the main scope to avoid to qualified certain forms politically or ideologically motivated offences to be classified as extremist.

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<sup>28</sup> In the von Hoffmansthal Rosenkavalier's piece (I Act), one of his character - the Marschallin - claims: «in dem “Wie”, da liegt der ganze Unterschied».

## 5. Final remarks

In the present brief essay, we aimed to outline how easy is in Russia to classified “political motivated speeches or actions” under the label of “disregarding of (Orthodox) religious feelings”. The Pussy Riots’s aim was not to hit the Church, but to hit, only indirectly, the political power which was explicitly supported by that. We think, however, that the dissenting opinion question is still pending: whether the action context and concrete aim of the women could have justified the complete sacrifice of another fundamental right, as the freedom of religion.

Strike a fair balance between, on the one hand, the protection of religious feelings and, on the other hand, the right to the freedom of expression could be a difficult task. In Putin’s Russia, where sacred and profane are strictly connected, this challenge can be even more complicated. Where the protection of a fundamental right (the freedom of expression) goes to infringes another fundamental right (the freedom of religion), the judgment would require strong reasons to entirely abdicate one of the clashing right. Amongst these reasons the Court clearly contemplate the severity of the Russian Courts decisions and its risk to disincentive this kind of protests by creating a chilling effect<sup>29</sup>. This gave the ECtHR the justification to emphasize the value of the freedom of expression and to overshadow the right to the Orthodox believers not to feel harmed in their belief<sup>30</sup>. Once again, that demonstrated the importance for the ECtHR to take in consideration extra-judicial factors in its own “policy of law”.

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<sup>29</sup> Namely the inhibition or discouragement of the legitimate exercise of our natural and legal rights by the threat of legal sanction See L. Kendrick, *Speech, Intent and Chilling Effect*, in *Wm. & Mary L. Rev.*, 54, 2012-2013, 16 ss.

<sup>30</sup> It’s important to remark that the ECtHR case law is not always consistent. An opposite conclusion, for instance, has been reached in the very recent *E.S. v. Austria*, cit. Basing from a very similar applicant’s motivation, a much less invasive applicant’s conduct and a complete absence of recognized offended victims, the Court stressed that called Mohammed a “paedophile” had no impact on public debate and constituted a disparage of Islam. See A. Gatti, *Freedom of Expression and Protection of Religious Peace in Europe: Considerations on E.S. v. Austria ECHR case law*, in *Revista General de Derecho Publico Comparado*, 24, 2018.