FREEDOMS COLLIDE: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION IN RUSSIA IN COMPARATIVE PERSPECTIVE[1]

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In the last decade ethnic and religious contradictions became a matter of growing concern and the issue of preserving the balance between the rights and interests of different groups of people comes to the forefront. There are many examples when freedom of expression is in opposition to freedom of religion. Two recent cases, the cartoons in the Danish newspaper and the recent parody of the Prophet Mohammed, show the importance of this issue. However, the notion of manifestation of religious beliefs, which in the paper is considered primary as a part of freedom of expression, is also very problematic.

The paper considers models of coexistence of both freedoms adopted at the international level, in Europe and in Russia. The first chapter considers general approaches towards balancing of fundamental rights, including approaches of the Human Rights Committee and the European Court. The second chapter concentrates on the regulation of both freedoms in Russia, relevant international and domestic cases.

Key words: freedom of expression; freedom of religions; margin of appreciation; limitation; international standards.

1. Introduction

In the last decade when ethnic and religious contradictions became a matter of growing concern, the problem of preserving balance between rights and interests of different groups of people comes to the forefront. Indeed, how should we determine whether unalienable rights of some prevail over similar rights of others? The issue is particularly problematic when freedom of religion and freedom of expression are involved. Freedom of expression is one of the cornerstones of self-development, of

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realization of a person. At the same time freedom of expression is one of the most effective means the individual can use to protect oneself from governmental abuses. Freedom of religion is another fundamental right, the struggle for which has a long and complicated history. The importance of this right is highlighted, for instance, in the International Covenant on Civil and Political Rights, where freedom to hold religious beliefs is granted the status of a non-derogable right, *i.e.* an absolute right to which no limitations are allowed.[2]

There are many cases when freedom of expression collides with freedom of religion. Two striking examples, the cartoons in the Danish newspaper and various recent parodies of the Prophet Mohammed, show the importance of this matter.

The problem gets more complicated when political issues are involved. The most notable example is the situation with the Russian punk-band 'Pussy Riot' which split Russian society into two parts. On the one hand, orthodox believers claimed that the actions of the band in the Cathedral insulted their religious feelings. On the other, a lot of people consider the outrageous sentence rendered to the three girls an oppressive act which violates freedom of expression. This situation is a litmus test that has shown the public sentiment toward close relations between the Government and the Orthodox Church, their interpenetration and fusion.

The issue of mutual relations and mutual limitations which exercise of freedom of expression and freedom of religion impose on each other is crucial, especially in light of the effort to build Russian civil society on Constitutional principles of democracy and law-bound state, in which human rights are proclaimed to be the primary value.

This article is limited to analysis of legislative framework and court practice concerning freedom of religion and freedom of expression. Possible collisions between both freedoms and other fundamental rights are not covered by the paper. Also inner regulation of subjects within the Russian Federation is not considered in the article; division of competence in the Federation is a matter of structure rather than rights.[3]

The first chapter of this paper considers general approaches toward constitutional interpretation of conflicting fundamental rights. It also analyses international standards inspired by the International Bill of Rights and developed by the UN Human Rights Committee [hereinafter HRC]. The third section of the first chapter

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[2] Int'l Covenant on Civil and Political Rights, Art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984), at <http://www.refworld.org/docid/4672bc122.html> (accessed Juny 17, 2014) [hereinafter Siracusa Principles]. *See also* Organization of American States (OAS), *American Convention on Human Rights, 'Pact of San Jose, Costa Rica,'* Art. 9, Nov. 22, 1969, <http://www.refworld.org/docid/3ae6b36510.html> (accessed Juny 17, 2014).

[3] Конституция Российской Федерации [*Konstitutsiya Rossiiskoi Federatsii* [Constitution of the Russian Federation]] [hereinafter *Konst. RF*], Art. 71 (Russ.).

addresses the general approach of the European Court of Human Rights [hereinafter Eur. Ct. H.R.], the most progressive body in Europe which develops standards of human rights protection, toward balancing of the fundamental rights. The second chapter studies relations between freedom of expression and freedom of religion in the Russian Federation. It examines reception of the international standards, their development in accordance with national constitutional tradition, and problems arising when cases, where both freedoms are involved, are considered by domestic courts.

2. General Approach and International Standards of Treatment of the Conflict between Freedom of Expression and Freedom of Religion

2.1. Preliminary Remarks

2.1.1. Freedom of Religion and Freedom of Expression in Constitutional Interpretation

In order to establish the meaning and content of fundamental rights and to find balance between them it is necessary to use a particular method of constitutional interpretation. Constitutional interpretation is understood, generally, as a logical operation which helps to define the meaning of a constitutional provision, *i.e.* the meaning and content of the provisions dealing with freedom of expression and freedom of religion.[4]

For the purpose of this paper I will briefly consider the following approaches to constitutional interpretation in relation to the conflict of rights, that of John Rawls, Jurgen Habermas, John Hart Ely, and Ronald Dworkin.

John Rawls claims that when there is a conflict between fundamental liberties, 'they must be mutually adjusted'[5] while a balancing test is not applicable.[6] Moreover, Rawls writes that fundamental liberties may not be denied on such grounds as national security or proportionality between two evils;[7] they can only be restricted 'solely for the sake of one or more other basic liberties.'[8] According to this approach, when there is a clash between interests of, say, religious groups one of which is dominant in the society and another is a minority, the government may not apply the balancing test between the rights of both groups since it will denigrate the

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[4] *See* Georges Burdeau et al., Droit constitutionnel 69 (23th ed., LGDJ 1993); Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union 7 (Intersentia 2011).

[5] Conflicts between Fundamental Rights 33, 191 (Eva Brems, ed.) (Intersentia 2008).

[6] *Id.*

[7] John Rawls, Political Liberalism 295 (Columbia University Press 1993).

[8] *Id*.

core meaning of liberty.[9] Following this logic, the decision of the Eur. Ct. H.R. in *Otto Preminger Institut v. Austria* is incorrect.[10] Instead Rawls offers the model of regulation of the fundamental liberties. The Government must establish certain frames and rules in accordance to which fundamental rights should be realised. Thus, in Rawls' view a conflict between fundamental rights would be impossible. This approach is not without advantages as it allows eradication of the negative aspect of the balancing test. However, from the perspective of individual, it is good only when the government is not abusing its regulative power.

Jurgen Habermas is also very sceptical towards balancing. According to him, balancing is a deprivation of rights of their 'constitutional power.'[11] The solution he offers is that courts (constitutional courts) should find a right which is most suitable for the case and decide the case solely on the ground of this right.[12]

The next approach is a value judgement offered by John Hart Ely. This doctrine is opposite to the two described above. Ely's main idea is that neither the original meaning of the text of the Constitution, the historical context of incorporation of fundamental rights in the Constitution, nor an interpretation by the legislature can be a sufficient exposition of rights.[13] Thus it is for a constitutional court to interpret constitutional provisions concerning fundamental rights and, most importantly, this interpretation should be given in accordance with the 'democratic will-formation.'[14] Hence according to Ely in the conflict of fundamental rights a right which contributes more to the establishment of the democratic will of the people will prevail.[15]

The last concept is the moral reading of the Constitution argued for by Ronald Dworkin.[16] This implies that the constitutional text 'must be understood in the way that their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on [governmental] power.'[17] Consequently, when there is a conflict between fundamental rights of the same value, an interpreter must take into account the real moral value of these rights and somehow balance it from the point of view of their social significance.

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9 Rawls, *supra* n. 7, at 310–11.

10 The case is discussed in more detail in the third section of this chapter.

11 Conflicts between Fundamental Rights, *supra* n. 5, at 84.

12 *Id*. at 85.

13 John H. Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1980).

14 Conflicts between Fundamental Rights, *supra* n. 5, at 92.

15 *See also* Aharon Barak, Proportionality: Constitutional Rights and Their limitations (Cambridge University Press 2011).

16 *See* Ronald Dworkin, Law's Empire 45–86 (Harvard University Press 1986).

17 Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 19 (Harvard University Press 1996) (*citing* Conflicts between Fundamental Rights, *supra* n. 5, at 92, 93).

It must be said that theories of constitutional interpretation are not limited to the theories described above. However, these theories illustrate the main approaches to the issue of the conflict of rights. Constitutional courts and international human rights courts when faced with the conflict of rights of the same importance have to choose a particular approach to cope with the problem. Methodologies that constitutional/human rights courts are prone to adopting differ. For example, the Constitutional Court of the Russian Federation uses a methodology which is similar to Dworkin's approach, while the Eur. Ct. H.R. applies the balancing test. The conflict between fundamental rights is difficult to solve on the following grounds: these rights are equal in their nature, they have the same level of protection, nearly the same guarantees; generally it is impossible to apply the test of proportionality when dealing with these rights, so the only applicable test is the *balancing test*.[18] Under the balancing test the Eur. Ct. H.R. understands its role to be 'weighing the rights in conflict against one another and affording a priority to the right which is considered to be of greater value.'[19]

On the one hand, all the theories of constitutional interpretation discussed above have their weak sides. But on the other hand, an interpreter is free to choose certain elements from each of these theories. However as the practice of both national and international judicial institutions shows the main method applicable to the interpretation of the conflict of rights is the balancing test, which is the main focus in the following sections.

2.1.2. Features of the Conflict of Rights

To address the conflict of rights we also have to take into account several notions which influence the treatment of these rights. Firstly, the real conflict between rights exists when these rights have the same level of protection, *i.e.* stated in the same legal documents, upheld by the same authorities, and what is more important, have the same level of judicial protection. When there is a conflict between a conventional right guaranteed by the European Convention of Human Rights and another interest (even legal one) which is not enshrined in the Convention, it is impossible to treat the situation as a conflict of rights.[20] Secondly, the conflict of rights changes when absolute rights are set against rights which can be subjected to limitations.[21] This leads to the conclusion that when there is a conflict, for example, between freedom

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[18] Nevertheless, the test *per se* is not a panacea since in any case its application would be vague.

[19] Conflicts between Fundamental Rights, *supra* n. 5, at 191.

[20] *See generally* Rawls, *supra* n. 7 (claiming that human rights may not be endlessly expanded because such an expansion has a negative effect on protection of 'really fundamental rights'). *See also* Conflicts between Fundamental Rights, *supra* n. 5, at 175–78.

[21] *Chahal v. U. K.*, no. 22414/93 (Eur. Ct. H.R., Nov. 15, 1996) (upholding the idea of hierarchy of norms in the Eur. Ct. H.R. practice).

to hold and to change certain beliefs (or so-called forum internum)[22] and freedom to express certain ideas, the latter will be limited.[23] But it is not the case when there is a clash between two rights which can be subjected to limitations, for example freedom to manifest religious beliefs and freedom of expression.

The conflict between freedom of expression and freedom to manifest religious beliefs usually takes two forms. The first one is when religious speech is offensive itself. For example, when Russian Orthodox believers protest against homosexuality or certain liberal freedoms, they allegedly violate non-discrimination provisions of the Constitution, and thus, abuse their right to free speech. And the second type is when the expression insults religious feelings. For example, in many pieces of contemporary art religious beliefs are interpreted in a possibly offensive way.[24]

When discussing the conflict between freedom of expression and freedom to manifest religious beliefs I have to address an overlap between the terms 'manifestation' and 'expression.' Generally international documents use the term 'manifestation' for the expression of religious beliefs.[25] Consequently, some commentators claim that 'manifestation' should be 'reserved' only for the expression of religious beliefs because it is a specific form of such an expression, a kind of *lex specialis*.[26] They develop this thought claiming that it implies special status and special protection, different from the protection guaranteed to ordinary expression.[27] The Eur. Ct. H.R. stressed in this respect in *Kokkinakis* that 'the exercise of the right to freedom of expression consists in the freedom to manifest one's religion or belief through worship, teaching, practice and observance, it is primary the right guaranteed by Art. 9 of the Convention.'[28]

From my point of view this approach is vague. How should one interpret the fact that, say, a person is a pacifist and he/she expresses some views, teaches or contributes leaflets? Is it a religious manifestation or an act 'purely' of expression? Or another example which will be discussed in the third chapter in more detail: how

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22 *See* Jim Murdoch, Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights (Council of Europe 2012), available at <http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb09_rightfreedom_en.pdf> (accessed Juny 17, 2014).

23 *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts. 9, 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

24 *See* W. Cole Durham, Jr., & Brett G. Schraffs, Law and Religion: National, International, and Comparative Perspective 183–84 (Wolters Kluwer 2010).

25 *See, e.g.,* ICCPR, Art. 18; ECHR, Art. 9.

26 Paul M. Taylor, Freedom of Religion: UN and European Human Rights Law and Practice 207 (Cambridge University Press 2005); Malcolm D. Evans, Religious Liberty and International Law in Europe 285 (Cambridge University Press 1997).

27 *Id.*

28 *Kokkinakis v. Greece*, ¶ 79, no. 14307/88 (Eur. Ct. H.R., May 25, 1993).

should one evaluate the wearing of the headscarf by Muslim women in Europe? Is it only a manifestation of religion? One can call it a political expression or otherwise. Once a political element or certain social significance is involved it is impossible to draw the line between 'manifestation' and 'expression.' Hence my main claim here is that 'manifestation' is covered by the scope of 'expression,' and, hence, the standards of protection applicable to both notions should be the same.[29]

2.2. International Law on the Conflict of Rights

The International Bill of Rights is the most universal means of human rights protection[30] which has its own approach towards balancing and limiting of fundamental rights. In this section I will consider the practice of the HRC concerning freedom of expression and freedom of religion.

Both freedoms are enshrined in the ICCPR. Article 18 states that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[31]

According to the ICCPR, freedom of expression:

> Shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[32]

Whereas Art. 18 states that freedom of religion *per se* cannot be restricted; it is only freedom to manifest religious beliefs that can be subjected to certain limitations.[33] This is the key covenantal difference between freedom of religion and freedom of

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[29] This approach is not generally recognised, for example Evans claims that any expression which is not connected with religious beliefs is protected under Art. 10 of the ECHR while the expression takes the form of religious manifestation and is protected under Art. 9 as a particular form of expression. However, Evans fails to prove that such type of expression has any specific features which make it so much different from the expression in the meaning of Art. 10. *See* Evans, *supra* n. 26.

[30] The International Bill of Human Rights is a common way of describing three documents: the Universal Declaration of Human Rights [hereinafter UDHR], ICCPR and the International Covenant on Economic, Social and Cultural Rights [hereinafter ECOSOC]. One can argue that different parts of the Bill have different natures. For example, the UDHR – is not a binding document for UN members. Another example is that ECOSOC is not ratified by the United States.

[31] ICCPR, Art. 18(1).

[32] *Id*. Art. 19(1).

[33] *Id*. Art. 18(3).

expression. While the first cannot be limited the latter can be (on the ground of the rights or reputation of others, national security, public order, public health and public morals).[34] It follows from the wording of the Covenant that the right to freedom of religion is logically divided into inner and external aspects,[35] while freedom of expression is always considered as having only external dimension. It is notable to compare this approach with the practice of the Eur. Ct. H.R. which recognises both external and inner aspects of freedom of expression.[36]

The HRC had several occasions to consider cases concerning the conflict between freedom of expression and freedom of religion was involved. In 2000 the HRC decided the case of *Raihon Hudoyberganova v. Uzbekistan*.[37] The author of a communication to the HRC was a student from Uzbekistan. In 1996 she joined the Islamic Affairs Department of the Tashkent State Institute. She claimed to be a practicing Muslim required to follow all the Islamic canons including wearing the Hijab. Within the following two years the university administration took measures limiting student's wearing of the garment and the freedom to manifest her beliefs. For example, access to praying rooms was limited and wearing of religious symbols at the university was prohibited. Ms. Hudoyberganova unsuccessfully challenged those measures in domestic courts. As a result, she applied to the HRC claiming that her rights under Arts. 18 and 19 of the ICCPR were violated.[38]

The HRC decided in favour of the author. It was found that freedom of religion includes freedom to wear religious symbols or religious clothes. Moreover, prohibition from wearing these symbols is illegal interference with the right to adopt and exercise religion. Also the HRC stressed that the Government did not show any compelling reasons for interference with the right.[39] Thus, a violation of Art. 18(2) of the ICCPR was found.

The reasoning of the HRC in the case was not clear. Firstly, and the most crucial from the methodological point of view, the HRC mixed two aspects of Art. 18. It found that freedom to manifest beliefs (external aspect) is an integral part of the

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34 ICCPR. Art. 19(2).

35 Raija Hanski & Martin Schein, Leading Cases of the Human Rights Committee 278 (Institute for Human Rights, Åbo Academi University Turku, 2007). *See also* Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary 412 (2nd ed., N.P. Engel 2005).

36 *Orban v. France*, no. 20985/05 (Eur. Ct. H.R., Jan.15, 2009).

However it does not necessarily mean that the inner aspect of the freedom of expression can preclude the Court from finding limitation proportionate (for example in the hate-speech case of *Norwood* (*Anthony Norwood v. United Kingdom*, no. 23131/03 (Eur. Ct. H.R., Nov. 16, 2004)) the Court found that limitation of the speech reflected beliefs of the applicant was permissible).

37 *Raihon Hudoyberganova v. Uzbekistan*, CCPR/C/82/D/931/2000 (Human Rights Comm., Nov. 5, 2004).

38 ¶¶ 2.1–2.5, 3.

39 *Id*. at ¶ 6.2.

freedom to adopt religion. Thus the treaty body granted these rights the same level of protection, whereas it is clear from the text of the ICCPR it is not so.[40] Secondly, the Committee disregarded the state's margin of appreciation in the case of prohibition of religious symbols in public. According to the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, Uzbekistan had a right to limit certain conventional rights for the sake of public order.[41] In this case the limitation was possible to explain with the secular nature of the state. It illustrates difference of approaches of the Eur. Ct. H.R. and the HRC. While the first one constantly applies the doctrine of margin of appreciation including cases of religious expression, the latter is not inclined to apply this doctrine.

Article 19(3) of the ICCPR permits only two types of limitations on freedom of expression, *i.e.* 'respect of the rights or reputations of others; and for the protection of national security or of public order *(ordre public),* or of public health or morals.'[42] In any case limitations should be necessary and proportionate.[43] In the case of Malcolm Ross, which concerned a Canadian teacher who was fired by the Government on the grounds that he had published certain materials stirring up religious hatred, the HRC found that limitations were necessary to protect the interests of believers.[44]

The HRC in its 102nd session adopted General Comment No. 34, where among other issues it explained its approach towards correlation between Art. 18 and Art. 19 of the ICCPR.[45] The HRC recognised that freedom of expression and freedom of religion have much in common, and expression can be guaranteed *inter alia* by Art. 18.[46] The Committee also addressed the most controversial issue: freedom of expression and blasphemous laws:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, section 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, section 3.

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40 *See* Siracusa Principles, *supra* n. 2.

41 *Id*. at ¶ 22.

42 ICCPR, Art. 19(3).

43 UN Human Rights Comm., General Comment No. 34: Freedoms of Opinions and Expressions (Art. 19), ¶¶ 33–34, 102nd Sess., U.N. Doc. CCPR/C/GC/34 (2011), at <http://www.unhcr.org/refworld/docid/4ed34b562.html> (accessed Juny 17, 2014).

44 *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997 (Human Rights Committee, Oct. 26, 2000), at <http://www.unhcr.org/refworld/docid/3f588efc0.html> (accessed Juny 17, 2014).

45 General Comment No. 34, CCPR/C/GC/34, *supra* n. 43.

46 *Id*. at ¶ 4. It is a positive development because in its previous cases the Committee was usually silent about intercourse of both freedoms.

The HRC reiterated that restrictions or limitations of free speech in favour of one or another religion are absolutely impermissible. Moreover, it is inconsistent with the ICCPR to prohibit criticism of religious leaders, or to prohibit commentaries interpreting religion and faith.[47] This notion is relevant for the second chapter of this paper.

Hence, the practice of the HRC toward interrelation of freedom of religion and freedom of expression has two main aspects significant for the current research. Firstly, the HRC does not make a deep analysis when it gives an interpretation to obligations of states under Art. 18, in particular provisions concerning freedom to believe and freedom to manifest beliefs (whereas the HRC approach to consider freedom to manifest religious beliefs as a way of realization of freedom of expression should be welcomed). The second important detail is that the HRC formulated a clear test for impermissibility of limitations in favour of a particular religion, religious leader or doctrine.

The last statement is significant from a comparative perspective. The Eur. Ct. H.R. has not developed the same standard. In several of its cases the Strasbourg Court protected religions[48] or beliefs of a particular group,[49] which in those cases could be considered as a disproportional limitation of the artistic expression, or even as a discrimination of one religion (religious group) in favour of the other. This practice would be addressed in more detail in the next section.

The HRC's understanding of the guarantee of freedom of expression through the means of Art. 18 is crucial for defining international standards in this field. However, the HRC did not go so far as to recognise freedom of religion as an integral part of freedom of expression.[50] From my point of view, that recognition would be a great step forward and would help to design universal judicial standards and approaches to both these rights and it would be a universal mechanism of justiciability of possible collisions between these rights. However, once we decide to consider freedom of religion as an aspect of freedom of expression, another problematic issue arises here: what are acceptable limitations toward religious speech. Although there are no clear standards toward these limitations, in principle they could be divided into four groups:[51]

1) prohibition of proselytism;

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47 General Comment No. 34, CCPR/C/GC/34, *supra* n. 43, at ¶ 48; *see also* Evelyn M. Asward, *To Ban or Not to Ban Blasphemous Videos*, 44 Geo. J. Int'l L. 1313 (2013).

48 *E.g., Wingrove v. the United Kingdom*, no. 17419/90 (Eur. Ct. H.R., Nov. 25, 1996) (holding that the government legitimately restricted demonstration of the movie with the aim to protect the Anglican Church).

49 *E.g., Otto Preminger Institute v. Austria*, no. 13470/87 (Eur. Ct. H.R., Sep. 20, 1994) (allowing for the protection of religious feeling of the majority of the population of Tyrol).

50 For further details concerning two theories of understanding of freedom of religion as a right of expression or as a right of identity *see* Anat Scolnicov, The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights 194–218 (Routledge 2011).

51 *Id.* at 194–95.

2) inner regulation within a religious group, prohibiting certain expression of its members (this issue will not be addressed later in this article, because the object of the research is limited by state regulation);

3) prohibition of blasphemy speech;

4) prohibition of religious hate speech.

This international standard is applicable both on the level of the State-Parties to the ICCPR and it also can be found in the case-law of the Eur. Ct. H.R. that is addressed in the next section.

2.3. General Approach of the Eur. Ct. H.R. towards the Conflict of Rights

Cases concerning freedom of religion and freedom of expression constitute a fair share of the jurisprudence of the Eur. Ct. H.R. In every case the later applies the following test: the interference must be prescribed by law,[52] it must pursue a legitimate aim,[53] the interference must be necessary in a democratic society,[54] *i.e.* there should be a pressing social need and the measures employed by the state must be proportionate to the aim sought.[55]

As to the freedom of expression (including freedom of the press, freedom of artistic expression etc.) the Eur. Ct. H.R. established the following:[56]

– the Court 'must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient," and whether the measure taken was "proportionate to the legitimate aims pursued";'[57]

– the Court takes into account the role which the press has in a democratic society, the role of 'public watchdog,' contribution of the press into political debates, solving of questions of political importance;[58]

– it is not for the Court to establish methods of the press' work;[59]

– freedom of expression implies that information which shocks, provokes and is disturbing also has the right to be delivered;[60]

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52 *See Foka v. Turkey*, no. 28940/95 (Eur. Ct. H.R., June 24, 2008).

53 *See Gorzelik and others v. Poland,* no. 44158/98 (Eur. Ct. H.R., Dec. 20, 2001).

54 *Handyside v. the United Kingdom*, ¶ 49, no. 5493/72 (Eur. Ct. H.R., Dec. 7, 1976).

55 *See Vajnai v. Hungary*, no. 33629/06 (Eur. Ct. H.R., Oct. 8, 2008).

56 *Mosley v. the United Kingdom*, no. 48009/08 (Eur. Ct. H.R., May 10, 2011) (citing criteria by the Eur. Ct. H.R.).

57 *See UJ v. Hungary*, no. 23954/10 (Eur. Ct. H.R., July 19, 2011); *Chauvy v. France*, ¶ 70, no. 64915/01 (Eur. Ct. H.R., June 29, 2004).

58 *See Financial Times Ltd. and Ors. v. the United Kingdom*, ¶ 59, no. 821/03 (Eur. Ct. H.R., Dec. 15, 2009); *De Haes and Gijsels v. Belgium*, ¶ 37, no.19983/92 (Eur. Ct. H.R., Feb 24, 1997).

59 *See Times Newspapers Ltd. v. the United Kingdom (nos. 1 and 2)*, ¶ 42, nos. 3002/03 and 23676/03 (Eur. Ct. H.R., March 10, 2009); *Jersild v. Denmark*, ¶ 31, no. 15890/89 (Eur. Ct. H.R., Sept. 23, 1994).

60 *See Gündüz v. Turkey*, no. 35071/97 (Eur. Ct. H.R., Dec. 4, 2003); *Handyside v. the United Kingdom*, no. 5493/72 (Eur. Ct. H.R., Dec. 7, 1976).

– the Court makes a distinction 'between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations.'[61]

The relevant Eur. Ct. H.R. standards in relation to the freedom of religion can be summarised as follows:[62]

– the Court believes that freedom to exercise religious beliefs is one of the foundations of a democratic society;[63]

– the usual approach toward limitations on freedom to manifest religious beliefs: 'any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims;'[64]

– the Court stresses the necessity for the Contracting Parties to be neutral and impartial as concerns treatment of religions;[65]

– for an act to 'count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief;'[66]

– the Court leaves to the States a quite wide margin of appreciation for defining whether interference is necessary in a democratic society.[67]

All the standards described above are applied by the Strasburg Court when it deals with cases where there is a conflict between fundamental rights. When requirements towards these cases are strict enough the Eur. Ct. H.R. has to apply balancing approach[68] towards both freedoms. And this application is not always proper and reasonable which will be illustrated by the case analysis that follows.

The first case addressed is the case concerning prohibition of the movie 'Visions of Ecstasy' in *Wingrove v. The United Kingdom.* Mr. Wingrove, the applicant, was a film director who directed the respective movie. The movie told a story about the life of a nun who experienced powerful ecstatic visions of Jesus. The film was submitted to

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61 *Mosley v. the United Kingdom*, *supra* n. 55, at ¶ 114.

62 *Eweida v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10 (Eur. Ct. H.R., Jan. 15, 2013) (citing the criteria by the Eur. Ct. H.R.).

63 *See Kokkinakis v. Greece*, *supra* n. 28, ¶ 31.

64 *Eweida v. the United Kingdom, supra* n. 62, at ¶ 80; *see also Leyla Sahin v. Turkey*, ¶ 105, no. 44774/78 (Eur. Ct. H.R., Nov 10, 2005).

65 *See Bayatyan v. Armenia* [GC], ¶ 110, no. 23459/03 (Eur. Ct. H.R., July 7, 2011); *Jakóbski v. Poland,* ¶ 44, no. 18429/06 (Eur. Ct. H.R., Dec. 7, 2010); *Anoussakis v. Greece*, ¶ 47, no. 18748/91 (Eur. Ct. H.R., Sep. 26, 1996).

66 *Eweida v. the United Kingdom*, *supra* n. 62, at ¶ 82.

67 *See Otto Preminger Institute v. Austria*, *supra* n. 49, at ¶ 47; *Şahin v. Turkey, supra* n. 64, at ¶ 110.

68 It is interesting that even among the judges of the Eur. Ct. H.R. there is no a uniform approach towards tests which should be applied when two fundamental rights are involved: the problem is whether application of the proportionality test is appropriate to such cases or not. It is generally recognized, however, that the balancing test is the best solution.

the British Board of Film Classification for a license to exhibit. The Board rejected the application on the ground that the movie could be offensive to religious feelings.[69]

The case touched upon the issue of blasphemy. The Eur. Ct. H.R. in its decision found no violation of Mr. Wingrove's right of freedom of artistic expression. Firstly, the Eur. Ct. H.R. stressed that there was no universal European understanding of what constituted blasphemy: 'national authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence.'[70] Then the Eur. Ct. H.R. held that the interference with the applicant's rights was legitimate as it was aimed at protection of interests of Christians.[71] The main argument of the Strasburg Court was that the blasphemy law in principle did not prohibit views or statements which were contrary to religious doctrine but the law prohibited (restricted) the manner in which such an expression was made.[72] The last argument was connected to the possibility that the movie could have been widely distributed once it appeared on a market.

The second case is *Otto Preminger Institut v. Austria*. The applicant association intended to screen the film 'Das Liebeskonzil' ('Council in Heaven'). The public prosecutor initiated suspension of the movie screening on the basis of criminal offence of disparaging religious precepts. The applicant lost the case in national courts on the ground that there could be a 'severe interference with religious feelings caused by the provocative attitude of the film outweighed the freedom of Art.'[73]

Similar to the previous case, here the Eur. Ct. H.R. found no violation. Firstly, the Eur. Ct. H.R. reiterated that states had a certain margin of appreciation when there was a matter of protection of public order and the interest of the society.[74] Secondly, the Eur. Ct. H.R. took into account the fact that the Roman Catholic religion was the dominant religion in the Tyrol region. When the movie was banned from screening, the Austrian authorities were preventing offensive effect of it on religious feelings of the Tyroliennes.[75] And the last argument of the Eur. Ct. H.R. was that Art. 10 could not have been interpreted as prohibiting forfeiture of the movie.[76]

Both cases have attracted a lot of criticism[77] since the Eur. Ct. H.R. had afforded a wide margin of appreciation to the States in balancing two fundamental rights.

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69 *Wingrove v. the United Kingdom*, *supra* n. 48.

70 *Id*. at ¶ 41.

71 *Id*. at ¶ 45.

72 *Id*. at ¶ 57–58.

73 *Otto Preminger Institute v. Austria, supra* n. 49.

74 *Id.* at ¶ 55.

75 *Id.* at ¶ 56.

76 *Id.* at ¶ 57.

77 *See* Sir Patrick Elias & Jason Coppel, *Freedom of Expression and Freedom of Religion: Some Thoughts on the Glenn Hoddle Case*, in Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams 51–63 (Jack Beatson & Yvone Crips, eds.) (Oxford University Press 2000).

Article 9 states that '[e]veryone has the right to freedom of thought, conscience and religion . . .'[78] There is nothing in the text of the said Article that grants religions themselves certain rights. But in both cases the Eur. Ct. H.R. took the position of protecting religions.[79] The Strasbourg Court departed from protection of religious freedom and moved out of the conventional frames towards protection of religious feelings. Moreover, in these judgments the Eur. Ct. H.R. belittled the protection of artistic freedom. I argue that potentially they can have negative consequences in the 'Pussy Riot' case that is now pending before the Eur. Ct. H.R.

Now I turn to the discussion of permissible limitations on freedom to manifest religion. The first issue here is the notion of legal certainty.[80] In several of its decisions the Eur. Ct. H.R. upheld prohibition of proselytism,[81] while the formulation of the law prohibiting these actions was vague. Later the Eur. Ct. H.R. changed its approach and applied stricter scrutiny in relation to the nature of a state's act in question.[82] It is also important that the Eur. Ct. H.R. upheld the ban on advertisements of a sect on a private commercial radio station.[83] In the latter case the Strasburg Court upheld a prohibition because of the impact of this way of exercise of freedom of expression towards the public which was found to be very significant since the translation was available for everyone. Thus the case provides an example where both freedom to manifest religion and freedom of expression were limited at the same time.

Concluding this part of the paper, I have to admit that in spite of the fact that there are certain international and regional standards regarding the interaction between freedom of expression and freedom of religion, international regulation is not complete and uniform. Because of practical reasons international treaty bodies and human rights tribunals leave to the states a wide margin of appreciation which, from my point of view, is not necessarily the best solution. One of the problems which will be discussed in the next chapter is the secular nature of the state as a ground of limitation of the right. This ground is not stated in international documents, yet both the HRC and the Eur. Ct. H.R. used it as a justification for states' actions. The additional problem is the silence of human rights bodies towards procedural aspects of the conflict between rights. This lacuna complicates the protection of the fundamental rights in question.

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78 ECHR, Art. 9.

79 *See Wingrove v. the United Kingdom*, *supra* n. 48 (dissent).

80 *See* Paul M. Taylor, Freedom of Religion: UN and European Human Rights law and Practice, 294 (Cambridge University Press 2005).

81 *See Larissis and Others v. Greece*, no. 140/1996/759/958–960 (Eur. Ct. H.R., Feb. 24, 1998).

82 *See Hasan and Chaush v. Bulgaria*, no. 30985/96 (Eur. Ct. H.R., Oct. 26, 2000).

83 *Murphy v. Ireland*, no. 44179/98 (Eur. Ct. H.R., Dec. 3, 2003); *see also* Taylor, *supra* n. 80, at 309.

3. Freedom of Religion and Freedom of Expression in the Russian Federation

3.1. National Regulation in Russia

It is undisputable that freedom of expression (and freedom of the press being its part) and freedom of religion are fundamental constitutional values.[84] These rights are related and may both cooperate or conflict with each other. Nevertheless, in today's Russia an attitude of the authorities and, in particular, the legislature towards these freedoms is not the same. In the light of the recent amendments in legislation[85] one may conclude that the state favours freedom of religion over freedom of expression instead of providing an equal treatment for both.

In the first part of this chapter I study the inner regime of freedom of religion and freedom of expression in Russia. The second part is devoted to the analysis of the Eur. Ct. H.R. decisions rendered in cases brought against Russian authorities.

The Russian Constitution of 1993 establishes that the 'Russian Federation is a secular state.[86] No religion may be established as a state or obligatory one' and 'religious associations shall be separated from the State and shall be equal before the

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[84] *See* Norman Doe, Law and Religion in Europe: A Comparative Introduction 157 (Oxford University Press 2011).

[85] *See* Федеральный закон от 29 июня 2013 г. № 136-ФЗ «О внесении изменений в статью 148 Уголовного кодекса Российской Федерации и отдельные законодательные акты Российской Федерации в целях противодействия оскорблению религиозных убеждений и чувств граждан» // Собрание законодательства Российской Федерации. 2013. 1 июля. № 26. Ст. 3209 [*Federal'nyi zakon ot 29 iyunya 2013 g. No. 136-FZ 'O vnesenii izmenenii v stat'yu 148 Ugolovnogo kodeksa Rossiiskoi Federatsii i otdel'nye zakonodatel'nye acty Rossiyskoi Federatsii v tselyakh protivodeistviya oskorbleniyu religioznykh ubezhdenii i chuvstv grazhdan' // Sobranie zakonodatel'stva Rossiiskoi Federatsii. 2013. 1 iyulya. No. 26. St. 3209* [*Federal Law of 29 June 2013 No. 136-FZ on Amendments to Article 148 of the Russian Federation Criminal Code and Certain Legislative Acts of the Russian Federation in the Aim of Protecting Religious Convictions and Feelings of Citizens against Insults*, 2013(26) Collection of Legislation of the Russian Federation, Art. 3209]].

[86] Secular tradition in the Russian Federation is not that long as, for example, in France (1958 French Constitution, Art. 1; Michel Troper, *Sovereignty and Laïcité*, 30(6) Cardozo L. Rev. 2561, 2561–74 (2009). Russia proclaimed itself a secular state with the adoption of the first Russian Constitution in 1918 (Конституция (Основной Закон) РСФСР [*Konstitutsiya (Osnovnoi Zakon) RSFSR* [Constitution (Fundamental Law) of the RSFSR]] (adopted by the 5th All-Russia Congress of Soviets 10 July 1918), Art. 13; English version is available at <http://www.departments.bucknell.edu/russian/const/18cons01.html#chap05> (accessed Juny 17, 2014)). However, secularism in Russia during the soviet times took different forms than it had in France. The USSR was an atheistic state, where temples were being destroyed, priests were being killed. From this perspective the religious renaissance which occurs now in Russian society is astonishing. *See* Irina Budkina, *Religious Freedom since 1905 – Any Progress in Russia?*, 26(2) Religion in Eastern Europe 24 (2006); Vladimir Fedorov, *Religious Freedom in Russia Today*, 50(4) The Ecumenical Review 449–60 (1998); Dr. Nicolas K. Gvozdev, *Religious Freedoms – Russian Constitutional Principles: Historical and Contemporary*, 2001 BYU L. Rev. 511; Tatyana Titova, *Precarious Future for Half-finished Taganrog Mosque*, 2000 Keston News Service. On the relations between the Orthodox Church and human rights *see*: John A. McGuckin, *The Issue of Human Rights in Byzantium*, in Christianity and Human Rights: An Introduction 173–189 (John Witte, Jr., & Frank S. Alexander, eds.) (Cambridge University Press 2010).

law.'[87] In 1997 the federal statute on 'On Freedom of Truth and Religious Union'[88] was adopted by the State Duma. The statute has been an object of persistent criticism.[89] Firstly, the preamble of the statute proclaims special ties with the state and a special role of the Christian Orthodox Church in the Russian Federation.[90] This provision is a clear deviation from the Constitutional provision about separation and equality of all religious organisations from the state. At the same time the law established very strict conditions for the registration of a new religious organisation.[91] However, comparative researches demonstrate that usually states have a wide margin of appreciation within this sphere.[92]

The current situation in the Russian Federation concerning the relationships between the state and the Orthodox Church is strongly criticised.[93] However, in the Universal Periodic Review of 2013 it was noted that within the last years the emphasis in relations between confessions and the state has shifted. It was noted that the Russian Government patronises 'nation's privileged "traditional religions" while discriminating the others.'[94] Moreover, discriminative practice of the Russian authorities towards different confessions was considered by the Eur. Ct. H.R.[95]

The Russian Constitution states that '[e]veryone shall be guaranteed the freedom of ideas and speech.'[96] The main sources of regulation of the issue are the federal statutes 'On the Media'[97] and 'On Information, Technologies and Protection of

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87 *Konst. RF*, Art. 14 (Russ.).

88 Федеральный закон от 26 сентября 1997 г. № 125-ФЗ «О свободе совести и религиозных объединениях» // Собрание законодательства Российской Федерации. 1997. 29 сент. № 39. Ст. 4465 [*Federal'nyi zakon ot 26 sentyabrya 1997 g. No. 125-FZ 'O svobode sovesti i o religioznykh ob'edineniyakh' // Sobranie zakonodatel'stva Rossiiskoi Federatsii. 1997. 29 sent. No. 39. St. 4465* [*Federal Law of 26 September 1997 No. 125 on the Freedom of Conscious and Religious Associations*, 1997(39) Collection of Legislation of the Russian Federation, Art. 4465]] [hereinafter *Federal'nyi zakon o svobode sovesti*].

89 *E.g.*, Budkina, *supra* n. 86.

90 *Federal'nyi zakon o svobode sovesti*, *supra* n. 88, the preamble.

91 *Id*. Art. 11.

92 Johan D. van der Vyver, *Freedom of Religion and Other Human Rights*, in Tore Lindholm et al., Facilitating Freedom of Religion and Belief: A Deskbook 104–5 (Martinus Nijhoff Publishers 2004).

93 *See* На глазах у россиян государство и церковь сближаются [*Na glazakh u rossiyan gosudarstvo i tserkov' sblizhayutsya* [*The Russians See How the State and the Church Are Getting Closer*]], Inopressa (Nov. 1, 2012), <http://inopressa.ru/article/01Nov2012/nytimes/orthodox.html> (accessed June 17, 2014).

94 Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, U.N. Doc. No. A/HRC/WG.6/16/RUS/3 (Jan. 28, 2013).

95 *E.g.*, *Jehovah's Witnesses of Moscow and Ors. v. Russia*, no. 302/02 (Eur. Ct. H.R., June 10, 2010).

96 *Konst. RF*, Art. 29 (Russ.).

97 Федеральный закон от 1 декабря 1995 г. № 191-ФЗ «О государственной поддержке средств массовой информации и книгоиздания Российской Федерации» [*Federal'nyi zakon ot 1 dekabrya*

Information.'[98] The legal regulation in this field is in conformity with international standards. Nevertheless, enforcement of these normative provisions by courts and the executive is very controversial.[99]

In recent years the situation with regulation, proposed amendments and court practice dealing with constitutional rights and freedoms became an issue of big public concern.[100] The Criminal Code of the Russian Federation (the only source of criminal law in Russia) does not contain the crime of blasphemy as such. However, after amendments to the Criminal Code from 29th of June of 2013 it *de facto* became possible to bring people to account for a blasphemous speech. Article 148 of the Code before the amendment contained a prohibition of 'illegal obstruction of the activity of religious organizations or of the performance of religious rites.'[101] Now the wording of the article has drastically changed. It is prohibited to 'commit public acts which express disrespect for society and are committed to insult the religious feelings of believers.'[102] Paragraph 2 of this article implies more severe punishment for committing these actions in the places which are designed for religious rites and ceremonies.

From the first sight these amendments have a purely positive goal – to protect feelings of *believers* from intolerance and hooliganism.[103] But there are several concerns in respect of this initiative. Firstly, the amendment protects only religious

1995 g. 'O gosudarstvennoi podderzhke sredstv massovoi informatsii i knigoizdaniya Rossiiskoi Federatsii' [Federal Law of 1 December 1995 No. 191-FZ on the State Support of the Mass Media and Book-Publishing in the Russian Federation]]. English version available at <http://www.democracy.ru/english/library/laws/eng_1991-1/index.html> (accessed June 17, 2014).

98 Федеральный закон «Об информации, информатизации и защите информации» [*Federal'nyi zakon 'Ob informatsii, informatizatsii i zashchite informatsii'* [Federal Law of 1 February 1995 No. 24-FZ on Information, Informatisation, and the Protection of Information]]. English version available at <http://www.fas.org/irp/world/russia/docs/law_info.htm> (accessed June 17, 2014).

99 The situation with freedom of expression during Russian history was probably even sadder than the situation with the relationships between the state and religion. After a short period of relative freedom of speech, freedom of the press in the period of 1917 – beginning of the twenties in the XXth century was replaced by totalitarian control over the press and freedom of expression. The situation started to change with the policy of *glasnost'* announced by Gorbachev.

100 *See* «Панк-молебен» год спустя: жалоба в ЕСПЧ и просьба о милосердии [*'Pank-moleben' god spustya: zhaloba v ESPCH i pros'ba o miloserdii* [*'Punk-preying' One Year Later: Application to the Eur. Ct. H.R. and Ask for Mercy*]], RBK (Febr. 21, 2013), <http://top.rbc.ru/politics/21/02/2013/846146.shtml> (accessed June 17, 2014).

101 Уголовный кодекс Российской Федерации [*Ugolovnyi kodeks Rossiiskoi Federatsii* [Criminal Code of the Russian Federation]], Art. 148. An old version of the text is available at <http://www.russian-criminal-code.com/PartII/SectionVII/Chapter19.html> (accessed June 17, 2014).

102 Федеральный закон от 29 июня 2013 г. № 136-ФЗ [*Federalnyi zakon ot 29 iyunya 2013 g. No. 136-FZ* [Federal Law of 29 June 2013 No. 136-FZ]] (my translation).

103 Though in the Code there is another article (Art. 213(b) which prohibits hooliganism committed on the religious grounds).

feelings, while feelings of atheists or adepts of other systems of values are not covered by the norm. It was stressed by *Art. 19* that such an amendment does not protect all citizens. Instead it secures well-being of major religions, primarily the Russian Orthodox Church.[104] The criticism here is based on the norms of international law which do not protect religions as such.[105] Moreover, there is a well-established practice of states' abolishing criminal sanctions for defamation of religions.[106] Thus the provision in question is not universal in its application and is not in conformity with international law standards.

The second issue is vague wording of the amendment. The provision protects religious feelings without explaining what constitutes these feelings. Quite often religious feelings are said to be offended by such phenomena as divorce, homosexuality, *etc.* That means that the said provision may guard 'values' that are not shared by the majority of contemporary societies. And the provision may lead to punishment for advocating ideas which are contrary to religious doctrines. The third problem is limitations of free expression. The law criminalizes not real activities, but ideas 'without requiring proof that a prohibited outcome was intended or likely as a consequence of that expression.'[107] The law potentially creates an atmosphere where any critics would be impermissible as violating someone's religious feelings. Under the Eur. Ct. H.R. standards[108] it can lead to a chilling effect on the media and civil society.

The last concern here is para. 2 of Art. 148. The provision is based on a real case which needs to be discussed in more detail. The most striking example of relationships between freedom of expression and freedom of religion of the last years is the 'Pussy Riot' case.

Pussy Riot is a Russian feminist punk band which was created as a response to the current political situation in Russia and which was very critical towards the Government, the Prime-Minister and at the time of events described below a candidate for the presidency Mr. Putin, and the Russian Orthodox Church. In late 2011 – beginning 2012 the band carried out several performances in various public areas in Moscow such as the Red Square, a subway station, roof of a tram, *etc.* For their actions members of the Pussy Riot were arrested and fined under provisions

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104 Legal Analysis. Russia: Draft Amendment to the Criminal Code Aimed at Countering Insult of Religious Beliefs, Article 19 (May 8, 2013) [hereinafter Article 19 Report], <http://www.article19.org/resources.php/resource/3729/en/russia:-draft-amendment-to-the-criminal-code-aimed-at-countering-insult-of-religious-beliefs#sthash.kiR1Ryyi.dpuf> (accessed June 17, 2014).

105 *See* General Comment No. 34, CCPR/C/GC/34, *supra* n. 43.

106 *See* Parliamentary Assembly of the Council of Europe, *Towards Decriminalisation of Defamation*, Resolution 1577 (2007), at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm> (accessed June 17, 2013).

107 Article 19 Report, *supra* n. 104, at 15.

108 *See* sect. 1.3 above.

of the Code of Administrative Offences. As a reaction to the strengthening of ties between the Government and the Orthodox Church, in particular when Patriarch Kirill supported Mr. Putin, the band recorded a song 'Punk Prayer – Virgin Mary, Drive Putin Away.' The first performance of the song took place in Epiphany Cathedral in Moscow on 18 February 2012. It is important that no complaint to the police was made in relation to that performance.

Three days later, on 21 February 2012 five members of the Pussy Riot attempted to perform the 'Punk Prayer' from the altar of the Christ the Saviour Cathedral in Moscow. The media was invited to make the action public. However the attempt to perform was unsuccessful because the Cathedral security forced the band out and stopped the performance, which lasted only about one minute. According to the facts submitted to the ECtHR 'on 21 February 2012 a deputy director general of the private security company Kolokol-A, Mr. O., complained to the head of the Khamovnikiy district police department in Moscow of "a violation of the public order" by a group of unknown individuals in Christ the Saviour Cathedral.' On 24 February criminal proceedings were instituted. Cathedral stuff members stated that their religious feelings were offended by the performance. On 14 March 2012 the detention orders in respect of three members of the band became final and since then the girls were imprisoned until two were released in the end of 2013 (Ms. Samutsevich was released earlier).

On 17 August 2012 the girls were found guilty and sentenced to two years' imprisonment. It was held that that 'the applicants' choice of venue and their apparent disregard for the Cathedral's behavioural rules had demonstrated their animosity towards the feelings of Orthodox believers, and that the religious feelings of those present in the cathedral had therefore been offended. While also taking into account the video recording of the song 'Punk Prayer – Virgin Mary, Drive Putin Away,' the District Court rejected the applicants' arguments that their performance had been politically, not religiously motivated, stating that the applicants had not made any political statements during their performance on 21 February 2012. Later in 2012 the videos of band's performances posted on their webpage on *YouTube* were found extremist by the court.[109]

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[109] The information is given according to the facts from the communicated case by the Eur. Ct. H.R.: *Mariya Vladimirovna Alekhina and Others v. Russia*, no. 38004/12 (Eur. Ct. H.R. lodged on 19 June 2012). *See also* Human Rights' Foundation, *Russia's Violation of the Right to Freedom of Expression: The Case of the Punk Rock Band Pussy Riot*, Legal Report (Aug. 16, 2012), <http://humanrightsfoundation.org/uploads/Pussy-Riot-Case-Report-08-16-2012.pdf> (accessed June 17, 2014); summary of the process in English: Geraldine Fagan, *Russia: Pussy Riot, blasphemy, and freedom of religion or belief*, Forum 18 News Service (Oct. 15, 2012), <http://www.unhcr.org/refworld/docid/5087d9b42.html> (accessed June 17, 2014); Freedom under Threat: Clampdown on Freedoms of Expression, Assembly and Association in Russia 42 (Amnesty International 2013), available at <http://www.amnesty.org/en/library/asset/EUR46/011/2013/en/d9fb0335-c588-4ff9-b719-5ee1e75e8ff5/eur460112013en.pdf> (accessed June 17, 2014).

The process illustrates the approach of the Russian judiciary toward balancing fundamental rights. In the case, the Russian courts found that the action was motivated by religious intolerance, which offended religious feelings of Orthodox believers. The Court analysed only the objective element of the *corpus delicti,* whereas the subjective element was totally ignored. The Court failed to establish the aim of the performance. As NGOs[110] correctly observed, the act of expression was politically motivated. It was totally within the scope of protection under Art. 10 of the ECHR and Art. 19 of the ICCPR. The issue raised by the performance had a great social value and contributed to a political debate – the situation when limitation of such an expression would be disproportional interference by the authorities.[111]

Here we move back to the para. 2 of Art. 148 which was introduced by the legislature as a response to actions of the punk-band. Thus, in addition to concerns which were indicated above, I have to admit the casuistic nature of the provision, its specification toward a particular class of actions, and, consequently, disproportionality.

The 'Pussy riot' case is just one of the examples of the situation with freedom of expression in the Russian Federation. However, in terms of this paper it is more interesting that limitations of freedom of expression were inspired by religious motives. It is a question of time which development this approach will take. But it is quite obvious that a number of applications to the European Court will increase.

3.2. Russian Cases before the Eur. Ct. H.R.

There are few cases in the Eur. Ct. H.R. against Russia concerning mutual limitations of freedom of expression and freedom of religion, though there are a number of cases where both rights were discussed in the context of Russia. Primarily these cases concern issues of national security or proselytism. In the end of 2013 the case of *Mariya Vladimirovna Alekhina and Others v. Russia* was communicated by the Strasburg Court – this case is going to be the first case against the Russian Federation where mutual limitations of freedom of expression and freedom of religion will be considered. However we still can consider certain standards and approaches which the Eur. Ct. H.R. applies toward cases originating from Russia in the field mentioned.

The European Convention does not contain such a limitation as national security as a ground for restrictions of freedom of religion or freedom to manifest religion.[112] Thus, the reliance of Russian authorities on this ground is not valid. This was found

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110 *See* Fagan, *supra* n. 109; *Russia: Prison sentences for Pussy Riot violate freedom of expression*, Article 19 (Aug. 21, 2012), <http://www.article19.org/resources.php/resource/3418/en/russia:-prison-sentences-for-pussy-riot-violate-freedom-of-expression> (accessed June 17, 2014).

111 *See* sect. 1.3 above.

112 ECHR, Art. 9.

by the Eur. Ct. H.R. in its case *Nolan and K. v. Russia*.[113] The applicant was a US citizen who came to Russia as a missionary of the Unification church in 1994. In 2002 after travelling to Cyprus the applicant was refused entry to the territory of Russia. The decision of Russian authorities was motivated by reasons of national security since in the 'Concept of the National Security' there was a provision which stated that 'the national security of the Russian Federation includes also the protection of its spiritual and moral heritage.'[114] Mr. Nolan applied to the Eur. Ct. H.R. claiming *inter alia* that his right to express his religious beliefs was violated by the Russian authorities.

The Court found that the Government failed to provide sufficient grounds that the activities of the applicant constituted a risk to national security.[115] Next, the Court reiterated that applicable limitations 'must be narrowly interpreted' and 'their enumeration is strictly exhaustive.'[116] And Art. 9 does not contain such a ground for limitation as national security. Hence there was a violation of the applicant's right to manifest his religion.[117]

The case is significant in the context of Russia, where national security often serves as a ground for justification of human rights limitations. The Eur. Ct. H.R. approach is based on international norms is another guarantee for individuals.

From the time of *Wingrove* and *Otto-Preminger* more than 15 years have passed, but the Strasburg Court still follows this line of cases. However, one can detect signs of positive changes. For example, in the case *I.A. v. Turkey*[118] which did not overrule previous practice of the Court but showed a discussion among the Eur. Ct. H.R. judges: dissenters claimed that now it is time to overrule *Wingrove*.[119]

I would like to discuss the case of *Jehovah Witnesses v. Russia*.[120] The Association of Jehovah Witnesses has a long history in Russia, but officially registered for the first time only in 1992. Later, beginning from 1995 the organisation started facing difficulties with re-registration in Moscow. The decision of the authorities was based on the grounds that proselytism of the members of the association violates the rights and interests of others: '[it] was necessary to prevent [the association] from breaching the rights of others, inflicting harm on its members, damaging their health and impinging on the well-being of children.'[121]

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113 *Nolan v. Russia*, no. 2512/04 (Eur. Ct. H.R., Feb. 12, 2009).

114 Durham, *supra* n. 24, at 238.

115 *Nolan v. Russia*, *supra* n. 113, at ¶¶ 69–72.

116 *Id*. at ¶ 73.

117 *Id*.

118 *I.A. v. Turkey*, no. 42571/98 (Eur. Ct. H.R., Dec. 13, 2005).

119 *Id*.

120 *Jehovah Witnesses v. Russia*, no. 302/02 (Eur. Ct. H.R., Nov. 21, 2010).

121 *Id*. at ¶ 206.

In 2010 the Eur. Ct. H.R. found that rights of the applicant community were violated by the authorities' actions and ordered compensation. Whereas the Strasburg Court reiterated that in principle the limitation of the freedom to manifest religion on the ground of protection of the rights of others is permissible, in the current case these limitations were disproportionate. The Court was not convinced by the arguments of Russian government that members of the community interfere in the family affaires of its members, that they violate constitutional rights to privacy and free choice of occupation.[122] Next, the Eur. Ct. H.R. paid attention to the proselytism argument. It found that the inference of the Russian court, that the methods of the community were violent, was a 'conjecture.'[123]

The last significant case in the field is the case of *Kasymahunov and Saybatalov v. Russia*.[124] In 2003 the Supreme Court of the Russian Federation banned Hizb ut-Tahrir al-Islami (The Party of Islamic Liberation) as it was recognised to be a terrorist organisation. The organisation's activities were prohibited within the territory of Russia. In 2004 the applicants, who were members of the organisation, were arrested. They were accused of being members of the Hizb ut-Tahrir al-Islami and were charged with aiding and abetting terrorism. The applicants *inter alia* complained that their conviction for the membership of Hizb ut-Tahrir al-Islami had violated their freedom of religion, expression and association.[125]

In this case the Strasburg Court found a violation of Art. 7 which I will not discuss here. However there was no violation either of Art. 9 or of Art. 10 of the ECHR. The Court said that it was not disputed by the applicants that they were engaged in distributing of leaflets and recruiting of new members to their organisation. But the 'organisation cannot benefit from the protection of Arts. 9, 10 and 11 of the Convention because of its anti-Semitic and pro-violence statements, in particular statements calling for the violent destruction of Israel and for the banishment and killing of its inhabitants and repeated statements justifying suicide attacks in which civilians are killed. The Court has held that Hizb ut-Tahrir's aims are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life.'[126] The Eur. Ct. H.R. established that the organisation's goals were not peaceful and were not aimed solely at promotion of certain beliefs and expression of certain religious ideas, but 'Hizb ut-Tahrir's literature advocated and glorified warfare in the form of jihad, a term which was mainly used in its meaning of "holy war," to establish the domination of

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122 *Jehovah Witnesses v. Russia*, *supra* n. 120, at ¶¶ 109–27.

123 *Id*. at ¶ 130.

124 *Kasymahunov v. Russia*, no. 26261/05 and 26377/06 (Eur. Ct. H.R., Mar.14, 2013).

125 *Id.*

126 *Id.* at ¶ 106.

Islam. Some of the documents in question also stated that it was permissible to kill any citizen of enemy States, among which [was] named Russia.'[127]

The Strasburg Court noted that the Government had the right to ban the organisation because 'the activities of Hizb ut-Tahrir are not limited to promoting religious worship and observance in private life of the requirements of Islam. They extend outside the sphere of individual conscience and concern the organisation and functioning of society as a whole. Hizb ut-Tahrir clearly seeks to impose on everyone its religious symbols and conception of a society founded on religious precepts.'[128] Thus the applicants were seeking to use freedom of expression and freedom of religion in a way which was contrary to the European Convention and the applicants' complaints were incompatible with the conventional provisions.

The European Court in *Kasymahunov and Saybatalov* clearly established that limitations of both freedom of expression and freedom of religion, are permissible when the aim of the expression and manifestation in question leave the sphere of internal beliefs and pursue goals which are contrary to values of the Convention. Thus the borderline between internal aspect of freedom of expression and freedom of religion, which could not be a subject of restraint, and external aspect, limitations of which in some narrow circumstances is permissible, was established. This can be considered as a standard for the future similar cases in and against Russia and, of course, the case of Pussy Riot which will be decided by the Eur. Ct. H.R. in a couple of years.

4. Conclusion

This paper has considered the problem of mutual relationships and possible limitations between freedom of expression and freedom of religion. While under international law limitations towards freedom of religion *per se* are impermissible, international instruments allow restrictions of the right to manifest religious beliefs. The right to manifest religious beliefs is a right which lies on the border between freedom of religion and freedom of expression, which is why it raises legal problems concerning the treatment of this right. In this paper I attempted to consider the right to manifest one's religion as a part of freedom of expression with all the standards applicable to protection of freedom of expression. The application of the same standards will protect rights of religious groups which express their position, for example, through wearing religious garments.

In Russia freedom to manifest religious beliefs faces certain problems and is not always treated properly. There are many domestic cases and cases of the Eur. Ct. H.R. where priority was given to the secular nature of states instead of protection of the freedom of religious expression. This was done due to the very

[127] *Kasymahunov v. Russia, supra* n. 124, at ¶ 107.

[128] *Id.* at ¶ 112.

wide margin of appreciation which states possess as concerns treatment of these rights. In international law and in the practice of the Strasburg Court limitations are permissible on the ground of protection of the rights and interests of others, public order, health and morals, and public safety. At the same time limitations of the religious manifestation are impermissible on the ground of national security.

The second main problem is the defamation of religions. In Russia such a crime as defamation of religions officially does not exist, however there are domestic cases and even a new trend in legislative policy which introduces such an offence *de facto*. This practice is inspired *inter alia* by the case law of the Eur. Ct. H.R., which in a number of its decisions recognised the right of states to proscribe certain speech, including artistic speech, which is able to offend religious feelings. The problem is getting more serious with the Renaissance of religions occurring all over the world. This makes it more difficult to apply the balancing test towards fundamental rights in question.

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