



Human Rights Foundation

Russia's Violation of the Right to Freedom of Expression:

The Case of the Punk Rock Band Pussy Riot

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A. Background

a. Who is Pussy Riot?

Pussy Riot is a Russian feminist punk rock group with 10 members, all women between the ages of 20 and 33. The group was formed in 2011 in response to then-prime minister Vladimir Putin's decision to run for president. The band campaigns for women's rights, political freedom, and reform of the Russian justice system. They are known for wearing eccentric costumes: brightly colored balaclavas, tights and miniskirts. The group presented an anti-Putin performance in the middle of Red Square in January 2012. One month later, in February, they filmed themselves performing a "Punk Prayer" protest on the altar of the Cathedral of Christ the Savior in Moscow.

b. Status of freedom of expression in Russia

While the Constitution of the Russian Federation provides for freedom of speech¹, and the International Covenant on Civil and Political Rights and the European Convention on Human Rights—Russia being a signatory to both—guarantee the right to freedom of expression², reports continue to cast doubt on the ability and/or the willingness of the Russian government to fully protect these rights.

According to Article 19, a London-based nonprofit human rights organization, "media, journalists, [and] opposition groups are silenced" and the "Russian public is deprived of its right to information and debate on matters of public importance."³ Examples of this include the murder of journalists, repression of peaceful demonstrations, and criminal sentences in freedom of expression cases.⁴

In 2011, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Special Rapporteur) stated in his report that he "remain[ed] deeply concerned that journalists, human rights defenders and member of

¹ Constitution of the Russian Federation, Art. 29, Dec. 12, 1993.

² International Covenant on Civil and Political Rights, Art. 19, Dec. 16, 1966; European Convention on Human Rights, Art. 10, Nov. 4, 1950.

³ "Russia: Continued Violations of the Right to Free Expression," pg. 1, ARTICLE 19, July 2007, available at www.article19.org/data/files/pdfs/publications/russia-foe-violations.pdf.

⁴ Id. pgs. 1-5.

political opposition groups continue[d] to face harassment, intimidation and attacks, including smear campaigns against prominent Government critics.”⁵

According to the United States Department of State 2010 Human Rights Report on Russia, “restrictions on political competition and interference in local and regional elections in ways that restricted citizens’ right to change their government continued”; “arbitrary detention and politically motivated imprisonments were problems”; and “the government controlled many media outlets and infringed on freedoms of speech and expression, pressured major independent media outlets to abstain from critical coverage, and harassed and intimidated some journalists into practicing self-censorship.”⁶

Since Putin’s inauguration on May 7, 2012—his third term as president—the parliament “has passed new laws restricting street protests,” “special forces have raided the homes of activists involved in demonstrations,” and “top officials have started advocating censorship of Internet content.”⁷

B. Chronology of events

On February 21, 2012, members of the Russian rock group Pussy Riot performed a song known as “Punk Prayer” from the altar of the Cathedral of Christ the Savior in Moscow in protest of an endorsement of Putin’s presidency by the leader of the Russian Orthodox Church. The song’s lyrics asked the Virgin Mary to “drive away Putin,” and contained very critical language—including profanity—against the stance of the government and the church with regard to different social and political issues in Russia.

The original, unedited version of the performance can be seen on YouTube.⁸ The entirety of the song was not sung because the women were asked to leave after less than a minute into their performance. However, after the event, they edited their presence in the church, mixed it with music and lyrics at a studio and uploaded it to YouTube.⁹ It is not

⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Addendum, Summary of cases transmitted to Governments and replies received, A/HRC/17/27/Add.1, pg. 274, May 27, 2011.

⁶ “2010 Human Rights Report: Russia,” Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, Apr. 8, 2011, available at www.state.gov/j/drl/rls/hrrpt/2010/eur/154447.htm.

⁷ Simon Shuster, “Russia’s Pussy Riot Trial: A Kangaroo Court Goes on a Witch Hunt,” Time World, Aug. 2, 2012, available at www.world.time.com/2012/08/02/russias-pussy-riot-trial-a-kangaroo-court-goes-on-a-witch-hunt/.

⁸ See YouTube video, here: www.youtube.com/watch?v=grEBLskpDWQ&noredirect=1.

⁹ See YouTube video, here: <http://www.youtube.com/watch?v=ALS92big4TY>.

clear what parts of the intended lyrics were chanted while at the church. The full lyrics of the song are:

St. Maria, Virgin, Drive away Putin
Drive away! Drive away Putin!
(end chorus)

Black robe, golden epaulettes
All parishioners are crawling and bowing
The ghost of freedom is in heaven
Gay pride sent to Siberia in chains

The head of the KGB is their chief saint
Leads protesters to prison under escort
In order not to offend the Holy
Women have to give birth and to love

Holy shit, shit, Lord's shit!
Holy shit, shit, Lord's shit!

(Chorus)
St. Maria, Virgin, become a feminist
Become a feminist, Become a feminist
(end chorus)

Church praises the rotten dictators
The cross-bearer procession of black limousines
In school you are going to meet with a teacher-preacher
Go to class - bring him money!

Patriarch Gundyaev believes in Putin
Bitch, you better believed in God
Belt of the Virgin is no substitute for mass-meetings
In protest of our Ever-Virgin Mary!

(Chorus)
St. Maria, Virgin, Drive away Putin
Drive away! Drive away Putin!
(end chorus)

On March 3, the night before the presidential election, two members of Pussy Riot—Nadezhda Tolokonnikova, 22, and Maria Alyokhina, 24—were arrested. On March 15, Yekaterina Samutsevich, 29, was also arrested. The three women were arrested as suspects in the crime of hooliganism motivated by religious hatred. In early June, formal indictments charging hooliganism motivated by religious hatred were filed against the women in a criminal court.

As defined under Article 213 of the criminal code of the Russian Federation, hooliganism is “a gross violation of the public order manifested in patent contempt of society and attended: by the use of weapons or articles used as weapons; by reason of political, ideological, racial, national or religious hatred” and “shall be punishable by compulsory works for a term of 180 to 240 hours, or by corrective labour for a term of one to two years, or by deprivation of liberty for a term of up to five years.”¹⁰ The same action,

committed by a group of persons by previous concert, or by an organized group, or connected with resistance to a representative of authority or to any other person who fulfills the duty of protecting the public order or who suppresses violation of the public order - shall be punishable by deprivation of liberty for a term of up to seven years.¹¹

The indictment by the prosecutor general's office in Moscow accused the women of “appearing in the Russian Orthodox Church's main church, Christ the Saviour Cathedral, inflicting significant damage on holy Christian values, encroaching on sacredness of sacraments, and ignoring calls by the church's candle-bearer to stop sacrilege.”¹² The indictment also stated that the band “unlawfully entered the enclosed space in the church designed for holy religious rites, thus blasphemously humiliating the Russian Orthodox Church's centuries-long traditions.”¹³ Criminal prosecution rested on the argument that the performance incited religious hatred. Ten witnesses said they suffered “moral damage” as a result and were considered victims in the court proceedings, as is standard in Russia.¹⁴

¹⁰ Criminal Code of The Russian Federation, Part II, Section IX, Chapter 24: Crimes against Public Security, Art. 213: Hooliganism, Jan. 1, 1997, available at www.wipo.int/wipolex/en/text.jsp?file_id=202465.

¹¹ *Id.*

¹² Jennifer Glasse, “Russia jails Pussy Riot punk rockers,” Aljazeera, July 26, 2012, available at www.aljazeera.com/indepth/features/2012/07/2012724135242870681.html.

¹³ *Id.*

¹⁴ Ellen Barry & Andrew Roth, “Punk Band Feels Wrath of a Sterner Kremlin,” NYTimes, July 20, 2012, available at www.nytimes.com/2012/07/21/world/europe/russias-prosecution-of-punk-band-signals-a-shift.html.

Throughout April, May, and June, the three defendants were repeatedly denied bail and on July 20, a Moscow court ruled that the three women were to remain in pre-trial detention for an additional six months. The trial started on July 30, 2012. On August 3, Putin asked the court to show leniency for the three women. While he criticized their performance he said he “did not think they should be judged too harshly.” At the close of trial, the Prosecution asked for a sentence of three years imprisonment. On August 17, Moscow’s Khamovnichesky District Court found the three women guilty of hooliganism motivated by religious hatred and sentenced them to two years in prison. The three had already spent more than five months in pretrial detention which, according to Russian legislation¹⁵, is the equivalent of ten months in prison. If the decision is confirmed in appeal, they will be due for release at the beginning of 2014.

C. Freedom of expression standard under the European Convention on Human Rights

a. The standard

Article 10 of the European Convention on Human Rights states that everyone has the right to freedom of expression.¹⁶ This includes the freedom “to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”¹⁷ This right may be subject to restrictions prescribed by law and:

necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁸

According to the European Court of Human Rights (ECHR) case law, “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. . . .”¹⁹ This freedom is applicable “not only to

¹⁵ Criminal Code of The Russian Federation, Part I, Section III, Chapter 10: Imposition of Punishment, Art. 72.

¹⁶ European Convention on Human Rights, Art. 10, Nov. 4, 1950.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Case of *Balsyte-Lideikiene v. Lithuania*, App. No. 72596/01, para. 74, Eur. Ct. H.R., Feb. 4, 2009.

'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."²⁰ However, the ECHR has also stated that "it may be considered necessary . . . to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions', or 'penalties' imposed are proportionate to the legitimate aim pursued."²¹

According to the ECHR, an interference with freedom of expression will be a violation of Article 10 unless it is (1) prescribed by law; (2) pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10; and (3) is necessary in a democratic society for achieving such aim(s).²²

i. Same standard at the universal level

The same test adopted by the ECHR to assess whether there has been a violation of the freedom of expression is used at the universal level. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) states that everyone shall have the right to hold opinions without interference and to freedom of expression, including the "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."²³ This right to freedom of expression is subject to certain restrictions, but these must be provided by law and necessary for the respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals.²⁴

In 2001, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression adopted a joint statement on the restrictions of freedom of expression, stating that any interference with freedom of expression must be (1) provided by law; (2) serve a legitimate aim as set out in international law; and (3) be necessary to achieve that aim.²⁵ This implies that "any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or

²⁰ *Id.*

²¹ Case of *Gunduz v. Turkey*, App. No. 35071/97, para. 40, Eur. Ct. H.R., Dec. 4, 2003. (In this case, there was no hate speech because the applicant did not call for violence).

²² Case of *Balsyte*, *supra* note 18, at para. 71.

²³ International Covenant on Civil and Political Rights, Art. 19, Dec. 16, 1966.

²⁴ *Id.*

²⁵ Dr. Agnes Callamard, "Expert meeting on the links between Articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence," UN HCHR, Oct. 2-3, 2008, available at www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf.

other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate safeguards against abuse.”²⁶

Special Rapporteur Frank La Rue has stated that “mechanisms for criticism, particularly of political leaders, were deemed important so that leaders were held to account” and that freedom of expression “was not limited to statements considered appropriate or beneficial.”²⁷ Similarly, the United Nations Human Rights Committee stated that the right to freedom of expression “includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.”²⁸

b. Interference must be prescribed by law

According to established ECHR case law, when determining whether the restriction was prescribed by law, it must not only have a basis in domestic law, but also assess the quality of the law.²⁹ According to the ECHR, “the law should be both adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual. . . to regulate his conduct.”³⁰ The ECHR added that citizens must be able “to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”³¹

c. Interference must pursue a legitimate aim

Under the European standard, legitimate aims include interests of national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, prevention of the disclosure of

²⁶ *Id.*

²⁷ “Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights: ‘Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, Report’”, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/10/31/Add.3, Jan. 16, 2009.

²⁸ *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, para. 6.7, Human Rights Committee, Mar. 29, 2005.

²⁹ *Case of Sanoma Uitgevers B.V. v. The Netherlands*, App. No. 38224/03, para. 81, Eur. Ct. H.R., Sept. 14, 2012.

³⁰ *Id.*

³¹ *Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy*, App. No. 38433/09, para. 141, Eur. Ct. H.R., June 7, 2012.

information received in confidence, or maintaining the authority and impartiality of the judiciary.³²

In a case regarding the prevention of disorder, the ECHR reiterated that “the national authorities have a wide discretion in determining the appropriate measures to be taken for the prevention of disorder at an assembly.”³³ It stated that:

when the right to freedom of expression is exercised in the context of political speech through the use of symbols, utmost care must be observed in applying any restrictions . . . it is only by a careful examination of the context that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society.³⁴

In an ECHR case assessing the legitimate aim of the protection of the rights of others, it was stated that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions.³⁵ State authorities are in a better position to give an opinion on the content of these requirements with regard to the rights of others as well as on the “‘necessity’ of a ‘restriction’ intended to protect from such material those whose deepest feelings and convictions would be seriously offended.”³⁶ However, the ECHR did add that European supervision “is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material.”³⁷ The ECHR was also clear that “there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest.”³⁸

³² European Convention on Human Rights, Art. 10, sec. 2, Nov. 4, 1950.

³³ Case of *Fáber v. Hungary*, App. No. 40721/08, para. 47, Eur. Ct. H.R., July 24, 2012.

³⁴ *Id.* at para. 36.

³⁵ Case of *Wingrove v. The United Kingdom*, App. No. 17419/90, para. 58, Eur. Ct. H.R., Nov. 25, 1996.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

i. Similar requirements of legitimate aim at the universal levels

Under the universal standard, legitimate aims include the protection of the rights and reputations of others, protection of national security or public order, or of public health or morals.³⁹

Under this standard, it is not enough to simply state that the interference with the freedom of expression was committed in the name of one or more of these legitimate aims. For example, when dealing with the legitimate aim of protection of public security and order, in a UN Human Rights Committee case, the defendant argued that the State party did not specify what part of his statements threatened public security and public order and for what reasons.⁴⁰ He argued that “a general reference to public security and public order does not justify the restriction of his freedom of expression.”⁴¹ The Committee determined that “the State party [failed] to specify the precise nature of the threat” that the defendant allegedly posed.⁴²

d. Interference must be necessary

When determining if interference with freedom of expression is necessary to achieve a legitimate aim or purpose, the ECHR must determine if there is a pressing social need for this restriction, if the interference in issue is “proportionate to the legitimate aims pursued,” and whether the reasons given by the national authorities to justify it are “relevant and sufficient.”⁴³

i. Pressing social need

The ECHR has stated that national authorities are in a better position to assess if there is a pressing social need than the Court itself.⁴⁴ However, while the ECHR contends that “Contracting States have a certain margin of appreciation in assessing whether such a need exists,” it nevertheless “goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent

³⁹ ICCPR, Art. 19, sec. 3(a)(b).

⁴⁰ Jong-Kyu Sohn v. Republic of Korea, Communication No. 518/1992, Human Rights Committee, July 19, 1995.

⁴¹ *Id.* at para. 8.3.

⁴² *Id.* at para. 10.4.

⁴³ Case of Balsyte, *supra* note 18, at para. 77.

⁴⁴ Case of Krone Verlag GMBH v. Austria, App. No. 27306/07, para. 49, Eur. Ct. H.R., June 19, 2012.

court.”⁴⁵ This margin of appreciation is reduced when “what is at stake is not a given individual’s purely ‘commercial’ statements, but his participation in a debate affecting the general interest”⁴⁶

When determining whether a pressing social need exists, each case must be looked at independently and judged on its own set of facts and circumstances. The ECHR takes into consideration whether the measures taken are proportionate to the legitimate aims pursued and whether the reasons adduced by the national authorities to justify interference are relevant and sufficient.⁴⁷

ii. Proportionality

In determining whether a restriction was “proportionate to the legitimate aim pursued,” in the Case of Kar and Others v. Turkey, in which the applicants uttered some words in a play that “might have been regarded as offensive by certain members of the armed forces and were held by the trial court to constitute incitement to hatred and enmity,” the ECHR stated that it was important to reiterate that Article 10 “applies not only to ‘information’ or ‘ideas’ which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb the State or any sector of the population.”⁴⁸

According to the ECHR:

offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult; but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the Court, style constitutes part of communication as a form of

⁴⁵ Case of Hertel v. Switzerland, App. No. 25181/94, para. 46, Eur. Ct. H.R., Aug. 25, 1998.

⁴⁶ *Id.* at para. 47.

⁴⁷ For example, in the Case of Dudgeon v. the United Kingdom, the ECHR held that there was no pressing social need to make private homosexual acts criminal offences because there was “no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.” Case of Dudgeon v. the United Kingdom, App. No. 7525/76, para. 60, Eur. Ct. H.R., Oct. 22, 1981.

⁴⁸ Case of Kar and Others v. Turkey, App. No. 58756/00, para. 47, Eur. Ct. H.R., May 3, 2007.

expression and is as such protected together with the content of the expression.⁴⁹

The ECHR also takes into consideration whether the offensive expression is a value judgment or opinion, as opposed to a defamatory statement of fact, as well as whether the expression is a matter of public interest.⁵⁰

In the Case of Kar and Others v. Turkey, the ECHR observed that Article 10 included the freedom of artistic expression and that “those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.”⁵¹ The ECHR also examined the medium through which the applicant’s statements were made and determined that because it was within the context of a play which was only staged on eight occasions, its limited potential impact was a relevant factor.⁵²

According to the ECHR, the “nature and severity of the penalties imposed are also factors to be taken into account”⁵³ In the Case of Kar and Others v. Turkey, the ECHR took into consideration the severity of the imposed sentence of five years and six months imprisonment and concluded that the conviction of the applicants and the harsh sentences imposed on them were “disproportionate to the aim pursued and . . . therefore not ‘necessary in a democratic society.’”⁵⁴

In regards to proportionality, the ECHR has also reiterated that “the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.”⁵⁵

⁴⁹ Case of Tusalp v. Turkey, App. No. 32131/08, para. 48, Eur. Ct. H.R., May 21, 2012

⁵⁰ Case of UJ v. Hungary, App. No. 23954/10, para. 23, Eur. Ct. H.R., July 19, 2011. “In each case the Court therefore attempts to identify the applicant’s intention: was he or she seeking to inform the public about a matter of general interest? If so, the Court generally finds that the impugned interference was not necessary.” Expert Seminar: Combating Racism While Respecting Freedom of Expression, Organized by The European Commission Against Racism and Intolerance, Council of Europe, Nov. 16-17, 2006.

⁵¹ Case of Kar, supra note 47, at para. 45.

⁵² Id. at para. 46.

⁵³ Id. at para. 48.

⁵⁴ Id. at paras. 48 & 49.

⁵⁵ Balsyte, supra note 18, at para. 81.

ii (a). Similar requirements of proportionality at the universal level

The UN Human Rights Committee has stated that “the requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value.”⁵⁶ As stated in its General Comment 10, “the restriction must not put the very right itself in jeopardy.”⁵⁷

The Committee has stated that the proportionality test must link liability to the intent of the accused or to the tendency of the speech to incite that of which he is accused.⁵⁸ The Committee has also said that the power given to State parties to restrict freedom of expression “must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive.”⁵⁹

iii. Relevant and sufficient reasons

The ECHR has stated that “in considering the reasons adduced to justify the measures, the Court will give due account to the fact that the national authorities had the benefit of direct contact with all of the persons concerned.”⁶⁰ This margin of appreciation is not unlimited however and “the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10, and moreover, that they relied on an acceptable assessment of the relevant facts . . .”⁶¹

In the Case of *Ozgur Gundem v. Turkey*, the ECHR held that it did not find relevant and sufficient reasons for interference in an author's freedom of expression and the resulting criminal conviction and penalties.⁶² The ECHR concluded that the interference was not justified because it was found that “the article was factual and of public interest

⁵⁶ *Robert Faurisson v. France*, Communication No. 550/1993, para. 8, Human Rights Committee, Nov. 8, 1996.

⁵⁷ *Id.*

⁵⁸ *Id.* at para. 9.

⁵⁹ *Id.* at para. 8, individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring).

⁶⁰ *Case of M.A.K. and R.K. v. The United Kingdom*, App. No. 45901/05, para. 68, Eur. Ct. H.R., Mar. 23, 2010.

⁶¹ *Case of Mouvement Raëlien Suisse v. Switzerland*, App. No. 16354/06, para. 48, Eur. Ct. H.R., July 12, 2012.

⁶² *Case of Ozgur Gundem v. Turkey*, App. No. 23144/93, para. 61, Eur. Ct. H.R., Mar. 16, 2000.

and that it contained no element of incitement to violence or overt support for the use of violence”⁶³

D. Examination of Russia's interference with Pussy Riot's freedom of expression vis-à-vis the European standard of freedom of expression

By analyzing each component of the European standard of freedom of expression, it is evident that Russia has violated that standard in the Pussy Riot case.

a. Interference was not prescribed by law

Three members of the band Pussy Riot were charged and found guilty of hooliganism motivated by religious hatred. As defined under the criminal code of the Russian Federation, hooliganism is “a gross violation of the public order manifested in patent contempt of society and attended: by the use of weapons or articles used as weapons” or “by reason of political, ideological, racial, national or religious hatred.”⁶⁴

In assessing the “quality of the law” in the present case, the defendants could not have reasonably foreseen the consequences of their actions. In addition to the vagueness of the language “gross violation of the public order manifested in patent contempt for society,” the defendants’ actions did not involve the use of weapons or any type of violence. In regards to the charge of motivation by religious hatred, the defendants themselves have stated that their “goal was political protest in artistic form. There was no hate, not a drop.”⁶⁵ They were neither attempting to incite hatred toward any religious group, nor were they attempting to promote one religion over another. They were publicly protesting what, in their opinion, was the inappropriate relationship between the Russian government and the church. Under international law, they have this right to publicly criticize their government without fear of interference or punishment.

The defendants most certainly could not have foreseen a sentence of two years imprisonment, especially as there are laws in place under the administrative code of the Russian Federation to deal with “disorderly conduct” and “violating the established procedure for arranging or conducting a meeting, rally, demonstration, procession or picket,” both of which are punishable by an administrative arrest for a maximum of 15

⁶³ Id.

⁶⁴ Criminal Code of The Russian Federation, *supra* note 10.

⁶⁵ Khristina Narizhnaya, *Pussy Riot Trial Nears Verdict in Moscow*, Rolling Stone, Aug. 7, 2012, available at www.rollingstone.com/music/news/pussy-riot-trial-nears-verdict-in-moscow-20120807.

days, as well as a law regarding “insulting religious feelings of citizens” which is punishable by an administrative fine.⁶⁶

Therefore, in respect to the charge of hooliganism motivated by political hatred, the defendants could not have foreseen—to a degree that was reasonable in the circumstances—the consequence of two years imprisonment for exercising their right of freedom of expression. The “quality of the law,” therefore, is not sufficient to say that the interference with the defendants’ freedom of expression was prescribed by law.

b. Interference did not pursue a legitimate aim

It is unclear in this case what precise legitimate aim the government was pursuing when it arrested the three defendants, incarcerated them for six months, charged them under Russia’s criminal code, and asked for a sentence of three years imprisonment. The prosecution charged the defendants with hooliganism motivated by religious hatred, but its evidence of religious hatred was that the defendants inflicted “significant damage on holy Christian values.” It is not enough to make a general reference to a legitimate aim, as this would make arbitrary or excessive restrictions of freedom of expression on the basis of allegedly blasphemous material easier to justify. The prosecution has not clearly or specifically defined the precise nature of the threat the defendants posed.

Furthermore, the prosecution’s case focused almost entirely on the religious aspects of the case and ignored the political motives. This may be in part because governments have wider discretion when dealing with religious convictions in the context of restricting freedom of expression, but there is little scope for these same restrictions when dealing with political speech and/or questions of public interest. The defendants were not protesting anyone’s religious convictions, but were objecting to the current political climate in their own country. When the defendants sang that “Patriarch Gundyayev believes in Putin,” and the “belt of the Virgin is no substitute for mass-meetings,” they were referring to the head of the Orthodox Church supporting Putin’s candidacy for President and his alleged statement that Christian people should not go to political rallies.⁶⁷

⁶⁶ Code of Administrative Offences of the Russian Federation, Section II, Chapter 20: Administrative Offenses Encroaching upon Public Order and Security, Arts. 20.1 & 20.2; Chapter 5: Administrative Offences Encroaching Upon Citizens’ Rights, Art. 5.26.2, “Insulting Religious Feelings of Citizens or Desecration of Articles, Marks and Emblems Relating to the World Outlook Symbols Thereof, July 1, 2002.

⁶⁷ Alexey Eremenko, “Life Without God: Non-Believers in Post-Soviet Russia,” Russia Profile.org, June, 26, 2012, available at www.russiaprofile.org/culture_living/60417/print_edition/.

Consequently, the government failed to identify and specify a legitimate aim in restricting the defendants' freedom of expression.

c. Interference was not necessary

Even if it could be argued that the interference in this case was prescribed by law and pursued a legitimate interest, it was not necessary to achieve a legitimate purpose.

i. No pressing social need

While it may be true that in certain cases Russia's government is in a better position to evaluate what is and what is not a pressing social need, the restriction taken must still be in line with European human rights standards regarding freedom of expression. The defendants' expression, which was meant to highlight the lack of separation of church and state in modern day Russian politics, was in the general interest, and therefore the Russian government had a smaller margin of appreciation in assessing whether there was a pressing social need to interfere.

Even if the Russian government was able to identify a pressing social need for its interference within this smaller margin, it would still need to meet the rest of the "necessary" criteria; that it provide relevant and sufficient reasons and justify the proportionality of the response. Here, that response consisted of the arrest and continued detainment of the defendants for nearly six months, as well as the filing of criminal charges against them with a possible seven year prison sentence as punishment.

The objective of restricting freedom of expression due to a nation's perceived pressing social need should not be used to silence or repress conflicting opinions or the advocacy of political protest. Rather, in a democratic society, an example of a pressing social need is the promotion of the public exchange of ideas and the encouragement of political debate, not the repression of it. In response to recent political protests in Russia and specifically to the Pussy Riot case, Masha Lipman, a political analyst in Moscow, stated that "we are seeing a concerted effort to instill fear, to let everyone know that dissent will no longer be tolerated."⁶⁸

⁶⁸ "Russia's Pussy Riot Trial: a Kangaroo Court Goes on a Witch Hunt, supra note 7.

ii. Restriction was not proportional

As demonstrated above, Pussy Riot's presence in the cathedral, the language used in their "Punk Prayer" asking the Virgin Mary to "drive away Putin", and their use of profanity may have offended, shocked, or disturbed certain members of the population, but these opinions were protected by the European standard of freedom of expression.⁶⁹ Even if the restriction to Pussy Riot's freedom of expression pursued a legitimate end, was prescribed by law and addressed a pressing social need, the restriction would still have to be proportional to the offense. Russia had a narrow margin of appreciation with regard to the defendants' freedom of expression in the cathedral, a public place⁷⁰, especially since the expression was critical of a public figure.⁷¹

The "Punk Prayer" was a political protest put to music and its lyrics—although offensive to some—served a stylistic purpose as part of communication as a form of expression; its subject matter also dealt with issues of public interest. Consequently, the defendants' "Punk Prayer", while offensive to some, was protected political speech.

The defendants' actions and protest were in no way directed against the religious beliefs of others in the church.⁷² Furthermore, the defendants' "Punk Prayer" lasted for only a few minutes, which limited its potential impact; additionally, several of the witnesses called to testify about moral damage they suffered as a result of the defendants' actions had not even witnessed the crime.

The severity of the charges and the sentence of two years imprisonment were disproportionate, especially when taking into consideration that other means were

⁶⁹ They are also protected under the universal law standard. The Human Rights Committee has stated that the power given to State parties to restrict freedom of expression "must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the populations find offensive." *Robert Faurisson v. France*, Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), Communication No. 550/1993, para. 8, Human Rights Committee, Nov. 8, 1996.

⁷⁰ States have a narrow margin of appreciation with regard to expression in a public space. *Case of Fáber v. Hungary*, supra note 29, Concurring Opinion of Judge Pinto de Albuquerque. A church is in essence a public place accessible to everybody. *Case of Vejdeland and Others v. Sweden*, App. No. 1813/07, para. 9, Concurring Opinion of Judge Botjan M. Zupancic, Feb. 9, 2012.

⁷¹ *Case of Tusalp*, supra note 48, at para. 45.

⁷² *Case of Ollinger v. Austria*, App. No. 76900/01, para. 47, Eur. Ct. H.R., June 29, 2006; a factor that indicated that the restriction was disproportionate to the aim pursued was that the assembly was in no way directed against the cemetery-goers' beliefs or the manifestation of them.

available to deal with the defendants' actions, outside of criminal proceedings.⁷³ The defendants admitted that they made an "ethical mistake", not a criminal one, and should be charged accordingly. Instead, in addition to the two year sentence, the defendants were held for months without formal charges being filed against them and were repeatedly denied bail, despite the fact that two of the women have small children. In July, the month their trial began, a court ordered them to remain in pre-trial detention for six additional months. There was also no violence or threat of violence resulting from the defendants' actions. Taken together, these aspects of the defendants' case reveal that the government's restrictions were disproportionate.⁷⁴

iii. Reasons were not relevant and sufficient

The prosecutor general's office in Moscow accused the three members of Pussy Riot with inflicting significant damage on holy Christian values and encroaching on the sacredness of sacraments. The federal prosecutor stated that the actions of the defendants "clearly show religious hatred and enmity" because "using swear words in a church is an abuse of God" and that "there was real mockery and humiliation directed at the people in the church."⁷⁵ However, the prosecution's first two witnesses, who were asserting that they suffered moral damage due to the defendant's actions, were not even present in the church at the time the "Punk Prayer" took place.

The reasons put forth for the arrest, confinement, and charges brought against the defendants were not relevant. This is exemplified by the fact that the prosecution focused primarily on the religious aspects of the case, when the real issue was political protest. Additionally, it is not sufficient to base a criminal prosecution on the subjective assertion that the defendants' actions were "an abuse of God" and damaged holy Christian values. Based on these hardly relevant and insufficient reasons, the defendants, three young

⁷³ They could have been charged under Russia's Administrative Code with, inter alia, disorderly conduct, or with misdemeanor trespassing or disturbing the peace. See footnote 65.

⁷⁴ Additionally, under the universal law standard, there was no link between liability and the intent of the defendants. The defendants were not motivated by religious hatred, but by their dissatisfaction with the endorsement of Vladimir Putin by the leader of the Russian Orthodox Church. The dialogue of their "Punk Prayer" did not promote or display hatred of any religion, but instead highlighted their objections to Putin's presidency and its close ties to the church. The defendants' protest was in no way directed against the on-lookers religious beliefs. The intent of the defendants was not to incite hatred, but to exercise their right to participate in political protest and openly criticize their government.

⁷⁵ Maria Tsvetkova, "Pussy Riot Trial: Russian Prosecutor Seeks Jail time for Protesters, Huffington Post, Aug. 7, 2012, available at www.huffingtonpost.com/2012/08/07/pussy-riot-trial_n_1750811.html?utm_hp_ref=arts&ir=Arts.

women in a punk rock group with no prior criminal record, were repeatedly denied bail, held for over five months in prison, and are now serving a sentence of two years in prison. With these actions, the Russian State has violated the European standard of protection of freedom of expression.

E. Conclusion

On February 21, 2012, members of the Russian punk rock group Pussy Riot performed a "Punk Prayer" in the Cathedral of Christ the Savior in Moscow in protest of Vladimir Putin's political connections to the Russian Orthodox Church. As a result, three members of the group were arrested, charged, and found guilty of hooliganism motivated by religious hatred. On August 17, 2012, they were sentenced to two years in prison.

Russia has violated the European standard of freedom of expression that it is required to comply with under the European Convention on Human Rights. Russia has failed to establish that its interference with the defendants' freedom of expression—the arrest, confinement, criminal trial, conviction and two-year prison sentence—was prescribed by law, pursued a legitimate aim, and was necessary to achieve that aim.

Although the members of Pussy Riot were charged with hooliganism motivated by religious hatred, their actions were not motivated by religious convictions of any kind, but constituted a legitimate political protest criticizing their government. And while the three defendants were willing to admit to an "ethical mistake," the restrictions by the government of arrest, confinement for almost six months, criminal conviction, and the sentence of two years imprisonment were disproportionate to the "crime:" exercising the right to freedom of expression. As a result, Russia has violated its obligation to uphold the European standard of freedom of expression in the Pussy Riot case.