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## Pluralism, Democracy, and the Conflict Within: Challenging the State's Narrative by Artistic Forms of Protest

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PLURALISM, DEMOCRACY, AND THE CONFLICT WITHIN:  
CHALLENGING THE STATE'S NARRATIVE BY ARTISTIC FORMS OF  
PROTEST

by Alexandra V. Orlova\*

*Abstract*

*This article follows the Pussy Riot case from the 2012 trial decision to the 2018 challenge before the European Court of Human Rights (ECtHR). The case revolved around the "punk prayer" performed by three women in Christ the Saviour Cathedral in Moscow. While the case, which centered on violation of freedom of expression, may be framed as a matter of political speech vs. religious speech, it has broader implications. Pussy Riot's performance and subsequent legal cases were about the ability of pluralism and dissent to counter the carefully constructed government narrative of "traditional values" and moral sovereignty. For democracy to develop and endure, pluralism must continually challenge existing power relationships and expose inequality. Thus, accountability is key when it comes to pluralism in the public realm. However, constant accountability is unimaginable without freedom of expression and the voicing of dissenting opinions. Thus, in order to live up to its constitutional commitment to pluralism, it is key for Russia to develop a safe space for public discussion pertaining to government, governmental representatives and broader public policy issues, despite the conflicts that such discussion will generate. Artistic forms of protest alone, such as the one engaged*

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*in by Pussy Riot, are not enough, as they currently fail to appeal and be accessible to larger Russian audiences.*

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INTRODUCTION

The term “democracy” is often used by various Russian officials, making it “a regular constituent of the government’s self-representation.”<sup>1</sup> However, since the early 2000s the Putin regime has insisted that democracy has to be “managed.”<sup>2</sup> Such “management” has caused the suppression of information, dissenting opinions, and political representation in state institutions. Thus, “[c]reative forms of dissent, such as street theatre and performance art, joined the arsenal of protest weapons.”<sup>3</sup> This article examines the Pussy Riot case from the 2012 trial decision to the 2018 challenge before the European Court of Human Rights (ECtHR). The case revolved around the “punk prayer” performed by three women in Christ the Saviour Cathedral in Moscow. While the women asserted that their performance was a political act, Russian courts defined it as criminal hooliganism motivated by religious hatred under s.213 of the Russian Criminal Code. Pussy Riot’s members were convicted, and each sentenced to two years of imprisonment.

While the Pussy Riot case, centering on violation of freedom of expression, may be framed as a matter of political speech vs. religious speech, its implications are much broader. Ultimately, the

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<sup>1</sup> Anastasia Denisova, *Democracy, Protest and Public Sphere in Russia After the 2011-2012 Anti-Government Protests: Digital Media at Stake*, 39 MEDIA, CULTURE & SOC., 977 (2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 979.

Pussy Riot performance and subsequent legal cases were about the ability of pluralism and dissent to counter the carefully constructed government narrative of “traditional values” and moral sovereignty. Accountability is key when it comes to pluralism in the public realm. However, constant accountability is unimaginable without freedom of expression and the voicing of dissenting opinions. Thus, in order to live up to its constitutional commitment to pluralism, it is key for Russia to develop a safe space for public discussion pertaining to government, government representatives, and broader public policy issues, despite the conflicts that this discussion will inevitably generate. Artistic forms of protest alone, such as the one engaged in by Pussy Riot, are not enough, as they currently fail to appeal and be accessible to larger Russian audiences.<sup>4</sup>

Part I of this article examines why freedom of expression in general and political speech in particular are vital for democracy and considers the justifications for regulating hate speech. Part II looks at the idea of pluralism as vital for democracy, while also noting that due to the antagonistic nature of pluralism and the temporary nature of any type of consensus derived from public deliberations and multiple forms of expression, pluralist democracy by its nature is both dynamic and fragile. This part examines why, despite the seeming recognition of the importance of pluralism for democracy, the concepts of democracy and pluralism are increasingly being challenged in many places around the world. It illustrates how the Russian state, in addition to banishing pluralism from the political sphere, also engaged in a concerted effort of connecting human rights with morality, thus making rights unavailable to “sinners.” Part III of the article examines the challenges to pluralism posed by political and religious speech. It examines the 2012 Russian trial decision against the members of Pussy Riot, the ECtHR’s jurisprudence concerning political speech and religious speech and the ECtHR’s 2018 decision in the Pussy Riot case. The article concludes that pluralism and the conflict that it brings are considered threatening by nation states, as they put ideas into the public realm that compete with the official narrative. The Russian state’s current view is that pluralism is something that needs to be managed within a democracy, and that democracy needs to be based on satisfying the interests of the

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<sup>4</sup> See *id.* at 979.

majority and protecting Russian sovereignty from harmful foreign influences. Ultimately, what nations and institutions often fail to acknowledge is that the forces that assail pluralistic democracy are not foreign, but rather “internal to many, if not most, democratic nations . . . they are our own ideas and voices.”<sup>5</sup> Therefore, the conflict is not so much an external one, between a foreign and a domestic view of human rights and dissent, but rather an internal one, “between people who are prepared to live with others who are different, on terms of equal respect, and those who seek the protection of homogeneity.”<sup>6</sup>

#### PROTECTING FREEDOM OF EXPRESSION IN A DEMOCRACY

In authoritarian regimes, a key concern raised by both domestic and international critics often revolves around suppression of or placement of excessive limits on freedom of expression. Freedom of expression is vital in ensuring the proper functioning of democracy, and “[i]n Western democratic theory, it is often considered to be the fundamental freedom upon which all other rights depend.”<sup>7</sup> Processes of contestation and communication are believed to be indispensable to the development, reshaping and advancement of other norms and rights.<sup>8</sup> In a democracy, it is crucial for all people to be able to participate in debating issues of public importance,<sup>9</sup> and a properly functioning democracy is often measured by its tolerance of unpopular or provocative views.<sup>10</sup> The role of constitutional courts is to ensure that “majoritarian lawgiving” aligns with “the foundational values that underlie the democratic order.”<sup>11</sup> Thus, constitutional courts can limit rights in a democratic society when such limitations are justified. In other

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<sup>5</sup> Martha Nussbaum, *The Clash Within: Democracy and the Hindu Right*, 9 J. HUM. DEV. 357, 374 (2008).

<sup>6</sup> *Id.* at 359.

<sup>7</sup> Keith Dubick, *The Theoretical Foundation for Protecting Freedom of Expression*, 13 NAT'L J. CONST. L. 1, 2 (1993).

<sup>8</sup> Frank A. Morrow, *Speech, Expression, and the Constitution*, 85 ETHICS 235, 235 (1975).

<sup>9</sup> Dubick, *supra* note 7, at 13.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> Jacob Weinrib, *What Is the Purpose of Freedom of Expression?* 67 U. TORONTO FAC. L. REV. 165, 173 (2009).

words, constitutional courts ensure that politics based on a majoritarian conception of democracy do not operate in dissonance with the democratic values that are “intrinsic to the constitutional order.”<sup>12</sup> Given this purported fundamental connection between free speech, democracy and other fundamental rights, it is unsurprising that constitutional courts tend to grant the highest degree of protection to so-called political speech and regulate it only when the “strongest showing of harm” is displayed.<sup>13</sup> Engagement in political speech allows people to criticize existing legal arrangements and propose new ones. Without this ability to contribute to political speech, individuals would become mere “passive citizens” with no ability to influence their elected representatives.<sup>14</sup> However, despite the emphasis on political speech doing “the work of democracy,” attempts to come up with a precise definition of what exactly constitutes political speech inevitably leads to disputes over whether the “excluded communication could be interpreted by someone else as ‘political.’”<sup>15</sup> Apart from conceptualizing speech pertaining to political matters as fundamentally different from speech dealing with purely personal or individual matters,<sup>16</sup> the difficulties of definition stem from ideological considerations and thus persist.<sup>17</sup>

In part, this preferencing of political over other forms of speech stems from identifying various key goals that freedom of expression is thought to promote in a democracy—promotion of self-government, preserving social stability, building accountability and increasing public confidence in the political system.<sup>18</sup> If people are able to meaningfully participate in the

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<sup>12</sup> *Id.* at 177.

<sup>13</sup> Ishani Maitra & Mary Kate McGowan, *On Racist Hate Speech and the Scope of a Free Speech Principle*, 23 *CAN. J. L. & JURIS.* 343, 358 (2010) (quoting Cass R. Sunstein, *Democracy and the Problem of Free Speech* 123 (New York: The Free Press, 1993)); *See id.* at 347 (Political speech includes not only certain types of speech but can also include non-verbal communication and actions).

<sup>14</sup> Weinrib, *supra* note 11, at 180.

<sup>15</sup> Katharine Gelber, *Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory*, 9 *CONTEMP. POL. THEORY* 304, 305, 307 (2010).

<sup>16</sup> Morrow, *supra* note 8, at 238.

<sup>17</sup> Gelber, *supra* note 15, at 308.

<sup>18</sup> Dubick, *supra* note 7, at 15.

political process and provide their input through the voicing of opinions, including dissenting ones, self-government is facilitated.<sup>19</sup> Participation in the political process through various acts of speech should also drive people to accept political decisions that they do not necessarily agree with, thus preserving social stability.<sup>20</sup> Moreover, close public scrutiny of elected officials and governmental policies promotes accountability of public officials to their constituencies.<sup>21</sup> Overall, “[p]olitical legitimacy is more likely to be achieved in a society that tolerates divergent views from all of its members, and is responsive to them.”<sup>22</sup> In other words, public discourse and debate legitimize governmental decision-making by shining a light on governmental decision-making processes<sup>23</sup> and thus ensure the viability of the entire political system.<sup>24</sup>

Given the supposed connection between free speech and the very processes of democratic legitimation, regulating hate speech makes sense, despite this speech often falling within the highly protected category of “political speech.” Hate speech is restricted in democratic societies because it:

“impairs the ability of its targets to participate in the very processes of democratic legitimation that justify the protection of freedom of speech in the first place and which are required to enact democracy itself. [Hate speech] . . . produces inequalities in speech opportunities and tacitly supports the ongoing marginalization of some people from political opportunities.”<sup>25</sup>

Nussbaum has pointed out that the state, under certain circumstances, has a duty to act to ensure that individuals are able to achieve their individual capabilities and that a simple absence of

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<sup>19</sup> Morrow, *supra* note 8, at 241.

<sup>20</sup> Dubick, *supra* note 7, at 16.

<sup>21</sup> Gelber, *supra* note 15, at 305.

<sup>22</sup> Dubick, *supra* note 7, at 17.

<sup>23</sup> Gelber, *supra* note 15, at 311.

<sup>24</sup> Morrow, *supra* note 8, at 239.

<sup>25</sup> Gelber, *supra* note 15, at 314.

“negative state action” is simply not enough.<sup>26</sup> Hence, the extremely harmful nature of hate speech justifies its regulation in a democratic society, even when it also constitutes political speech.<sup>27</sup> However, regulating political hate speech is made complicated if the speakers are able “to couch their claims in language that seems acceptable, even though they may cause more harm with their words.”<sup>28</sup> Thus, while more obvious and blatant instances of hate speech are commonly captured within regulatory frameworks, damaging hate rhetoric presented as “political” or “public policy” discourse can escape regulation despite arguably causing more damage.<sup>29</sup> There exists a “general reluctance to legally regulate speech that may be harmful but is not expressed in an extreme way.”<sup>30</sup> Thus, hateful views couched in civil language may be misidentified as political or academic debate and could not only offend the targeted group, but gain legitimacy and thus create a permanent barrier for such a group, perpetuating the group’s often already marginalized status.<sup>31</sup>

#### FREEDOM OF EXPRESSION AND PLURALISM

Aside from the debates over what amounts to hate speech, how it is regulated and whether the preferencing of political speech is justifiable,<sup>32</sup> the idea that in a democratic state political decisions should be reached through “a process of deliberation among free and equal citizens” remains a key rationale for protecting pluralism that may be achieved only through freedom of speech.<sup>33</sup> The pluralistic political system aims to include as many divergent interests as possible without compromising the ability of the state

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<sup>26</sup> Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECONOMICS, NO. 2-3, 2003, at 39.

<sup>27</sup> Gelber, *supra* note 15, at 321.

<sup>28</sup> Sarah Sorial, *Free Speech, Hate Speech, and the Problem of (Manufactured) Authority*, 29 CANADIAN J. L. AND SOC’Y 59, 60 (2014).

<sup>29</sup> *Id.* at 65 (quoting *Saskatchewan (Human Rights Comm’n) v. Whatcott*, [2013] S.C.R. 467, ¶ 116 (Can.)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 69.

<sup>32</sup> See Weinrib, *supra* note 11, at 177.

<sup>33</sup> Chantal Mouffe, *Deliberative Democracy or Agnostic Pluralism 1* (Institute for Advanced Studies, Vienna, Political Science Series Working Paper No. 72, 2000).



to attend to key projects.<sup>34</sup> After all, self-government, social stability and accountability of public officials all depend on the plurality of views being expressed within the public realm. Thus, instead of trying to force upon everyone a certain “illusory consensus on the common good,” social stability and political participation are better assured through accounting for dissent and making compromises between divergent interests.<sup>35</sup> Pluralism then is essential for democracy,<sup>36</sup> as it grounds both authority and legitimacy in public reasoning.<sup>37</sup> However, pluralism, so seemingly necessary in a democracy, also entails antagonism. Thus, a democracy that respects a plurality of values through a proper accounting of dissent “requires developing an approach, which places the question of power and antagonism at its very center.”<sup>38</sup> Pluralism entails not only recognition of power struggles, injustices and conflicts, but also their legitimation, rather than suppression by the imposition of an authoritarian order.<sup>39</sup> In a pluralistic democracy:

the constitutional state can neither display ambivalence about whether the injustices that it committed in the past actually occurred, nor can it idealize present conditions that fail to conform to constitutional norms. Ambivalence or idealization about past or present injustices would be inconsistent with the dignity of persons, who cannot be assured that past injustices will not recur and that present ones will be addressed if the state does not acknowledge its failings and hold itself, both in the

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<sup>34</sup> William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L. J. 1279, 1293 (2005).

<sup>35</sup> Mouffe, *supra* note 33, at 2.

<sup>36</sup> I.V. Nemkevich, “Konstitutsionnoe Zakreplenie Ideologicheskogo Pluralizma na Postsovetskom Prostranstve,” *Vestnik Nizhegorodskogo Universiteta im. N.I. Lobachevskogo* [Constitutional Consolidation of Ideological Pluralism in the Post-Soviet Space] (2012) 1:1 at 272 (Russ.).

<sup>37</sup> Mouffe, *supra* note 33, at 4.

<sup>38</sup> *Id.* at 13.

<sup>39</sup> *Id.* at 16.

present and in the future, to a standard of conduct that harmonizes with its fundamental norms.<sup>40</sup>

Thus pluralism, by its nature, is contentious, as it entails “politics as a process of contention among groups in society, while at the same time more explicit unmasking and questioning [of] the power dynamics behind pluralist group differentiation in the first place.”<sup>41</sup> Hence, in a pluralistic democracy any sort of consensus becomes a “conflictual consensus,” which by its very nature is temporary. The democratic process becomes “precisely about managing tensions and the articulation of ‘precarious solutions.’”<sup>42</sup> If the goal, however, becomes reaching consensus and causes the suppression of dissent and confrontation, such an emphasis on the “common good,” “common values” or collective unanimity can lead to “apathy and disaffection with political engagement.”<sup>43</sup> Without a true commitment to pluralism, certain groups will disengage from political participation if they think such participation will never yield results that they perceive as important, or if they perceive an entire process as unduly burdensome or even threatening to their group identity.<sup>44</sup>

Due to the antagonistic nature of pluralism and the temporary nature of any type of consensus derived from public deliberations and multiple forms of expression, pluralist democracy by its nature is both dynamic and fragile.<sup>45</sup> However, pluralist democracy potentially engages the most stakeholders and diverse groups in governance, thus enriching democratic discourse.<sup>46</sup> Dissenting views, besides creating antagonism and conflict, also challenge the prevailing consensus.<sup>47</sup> Divergent views “can be a powerful tool

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<sup>40</sup> Weinrib, *supra* note 11, at 175.

<sup>41</sup> John A. Guidry & Mark Q. Sawyer, *Contentious Pluralism: The Public Sphere and Democracy*, 1 PERSPECTIVES ON POLITICS 273, 277 (2003).

<sup>42</sup> Mouffe, *supra* note 33, at 9.

<sup>43</sup> *Id.* at 16.

<sup>44</sup> Eskridge, *supra* note 34, at 1293.

<sup>45</sup> *Id.* at 1294.

<sup>46</sup> *Id.* at 1295.

<sup>47</sup> N.V. Konovalenko, *Democratic Framework of the Freedom of Speech: Possibilities and Limitations*, 1 PERSPECTIVES OF SCIENCE AND EDUCATION 28 (2014) (Russ.). See also Alexandra V. Orlova, *The Soft Power of Dissent: The Impact of Dissenting Opinions*

when it comes to debate and democracy, precisely due to their capacity to show the availability of 'multiple truths' and keep the conversation open."<sup>48</sup> In a pluralist democracy, the majority is forced to bargain with minority interests.<sup>49</sup> While marginalized groups attempt to claim space in the public sphere, elite groups frequently try to retain existing power dynamics and relationships.<sup>50</sup> This process of constant bargaining requires continual conflict management.<sup>51</sup> Despite this perpetual need to account for conflict, "contentious pluralism," is in part realized through freedom of expression, and thought to be essential for democracy.<sup>52</sup> In order for democracy to develop and endure, "contentious pluralism must continually subvert the relationships of power that emerge in public spheres."<sup>53</sup>

Many jurisdictions around the world have specifically written the commitment to pluralism directly into their constitutions.<sup>54</sup> Despite this seeming recognition of the importance of pluralism for democracy, the very concepts of democracy and pluralism are increasingly being challenged in many places around the world.<sup>55</sup> In part, this challenge derives from the gap between "democracy's potential and its lived experience."<sup>56</sup> While elections are now commonplace, the key features of democracy, such as equality, freedom of speech, fairness and restraint are lacking in many nations.<sup>57</sup> This weakening commitment to democracy and pluralism stems from many factors, such as the disastrous war in Iraq, the 2008 financial crisis and a broader desire to regain control

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*from the Russian Constitutional Court*, 52 VANDERBILT J. OF TRANSNATIONAL L. 611 (2019), forthcoming.

<sup>48</sup> Orlova, *supra* note 47, at 641.

<sup>49</sup> Eskridge Jr., *supra* note 34, at 1295.

<sup>50</sup> Guidry & Sawyer, *supra* note 41, at 273.

<sup>51</sup> Eskridge Jr., *supra* note 34, at 1295.

<sup>52</sup> Guidry & Sawyer, *supra* note 41, at 277. See also Anthony Downs, *An Economic Theory of Democracy*, 65 J. OF POLITICAL ECONOMY 135 (1957); ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1974).

<sup>53</sup> Guidry & Sawyer, *supra* note 41, at 274.

<sup>54</sup> Nemkevich, *supra* note 36, at 272.

<sup>55</sup> John D. Whyte, Democracy in Decline: Steps in the Wrong Direction, 40 QUEEN'S L. REV. 787, 787 (2015) (book review).

<sup>56</sup> Guidry & Sawyer, *supra* note 41, at 274.

<sup>57</sup> Whyte, *supra* note 55, at 787.

due to the local impacts of globalization.<sup>58</sup> As Anne Applebaum says, “People very much have the sense . . . that their politicians no longer control events. The ‘Leave’ campaign slogan in the Brexit referendum campaign was ‘Take Back Control.’”<sup>59</sup> Russia is certainly not unique in its departure from democratic principles and values in general and pluralism and freedom of speech in particular. For example, on October 9, 2018, the *Rossiiskaya Gazeta* newspaper, the official governmental mouthpiece and the most widely circulated newspaper in Russia, published an article by V. Zorkin, Chairman of the Russian Constitutional Court. In the article, Zorkin stated that the changes generated by globalization are not always beneficial and at times carry enormous risks and costs in various spheres of human life in many nations around the world.<sup>60</sup> Thus, a desire to oppose these processes of globalization and resistance to universalization is felt in many jurisdictions. Zorkin stated that:

[a]t the level of mass consciousness, this is manifested in the desire to formulate their religious, national, or regional (for example, European) identity, to preserve and strengthen the traditional values of the family, culture, life, etc. And at the level of public authorities, this is manifested in the desire to prevent the erosion of national state sovereignty and to solidify national constitutional identity.<sup>61</sup>

Zorkin further asserted that when it comes to public consensus pertaining to the content of human rights, this consensus is established by most of society and is established for the majority. Zorkin stated that he does not mean to say that the concept of constitutional identity is focused only on the protection of the rights

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<sup>58</sup> Matt Gurney: *This May Be How the West Might Be Lost*, NATIONAL POST (Mar. 29, 2019), <https://nationalpost.com/opinion/matt-gurney-this-may-be-how-the-west-might-be-lost>).

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

<sup>60</sup> Valerii Zorkin, *Bukva I duh Konstitutsii*, [The Letter and the Spirit of the Constitution], ROSSIISKAYA GAZETA [Ros. Gaz.], (Oct. 9, 2018, 6:00 PM), <https://rg.ru/2018/10/09/zorkin-nedostatki-v-konstitucii-mozhno-ustranit-tochechnymi-izmeneniami.html> [<https://perma.cc/6MAG-Q9J4>] (Russ.).

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

of the majority. However, he did state that the rights of minorities could be protected only to the extent that the majority agrees. Zorkin emphasized, "it is impossible to impose on society a legislative norm that denies or calls into question the basic values of the common good shared by the majority of the country's population."<sup>62</sup> It is clear that the solidification of Russian national constitutional identity through the emphasis on majoritarian consensus constitutes a clear challenge to the value of pluralism. Pluralism is portrayed not as a stabilizing societal element that creates greater governmental transparency and accountability as well as greater access to the political process, but instead as destabilizing and even threatening to national security.<sup>63</sup> While the commitment to pluralism and free speech have been specifically written into Articles 13 and 29 of the Constitution of the Russian Federation,<sup>64</sup> the Russian state has a long history of suppressing dissent and minority rights.<sup>65</sup> The "aggressive minority" has been blamed for trying to undermine Russia politically, economically and socially.<sup>66</sup> Thus, the current government perceives freedom (including freedom of speech) as something that needs to be carefully managed, because "if freedom is not 'managed' people [meaning the majority] will suffer."<sup>67</sup> It is asserted that too much information that is not properly controlled and managed by the state can cause "system overdose" and eventual loss of confidence in the system.<sup>68</sup> Therefore, the government engaged in a deliberate

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<sup>62</sup> *Id.*

<sup>63</sup> DAPHNE SKILLEN, FREEDOM OF SPEECH IN RUSSIA: POLITICS AND MEDIA FROM GORBACHEV TO PUTIN 321 (Richard Sakwa et al. eds., 2016).

<sup>64</sup> Konstitutsiia Rossiiskoi Federatsii [Konst. RF][Constitution] art. 13, 29 (Russ.)(Article 13 reads as (1) Ideological plurality is recognized in the Russian Federation and (2) No ideology may be established as the state or obligatory ideology. Article 29 reads as (1) Everyone is guaranteed the right to freedom of thought and speech).

<sup>65</sup> V.A. Kochev and A.B. Ektumaev, *Pravo na svobodu slova kak osnovnoe pravo* [The Right to Freedom of Speech as a Fundamental Right], PERM U. HERALD JURID. SCI. 134 (2017) (Russ); Alikhan Beslanovich Ektumaev, *Predely I Granitsy Prava na Svobodu Slova* [Metes and Bounds of the Freedom of Expression], PERM U. (2017) (Russ).

<sup>66</sup> SKILLEN, *supra* note 63, at 320

<sup>67</sup> *Id.* at 322.

<sup>68</sup> A.V. Rossoshanskiy, *Informatsionnyi Suverenitet I Svoboda Slova v Kontekste Politicheskoi Modernizatsii v Sovremennoi Rossii* [Information Sovereignty and

effort to create so-called “information sovereignty”<sup>69</sup> by eliminating pluralism and dissenting viewpoints from the mainstream.<sup>70</sup> Loss of this “information sovereignty” is perceived to be dangerous, and governmental control over most information channels is equated with people’s trust in the ability of the government to sort out what information is socially useful for the Russian society.<sup>71</sup> Thus, controlling information flows is perceived as key to ensuring security and political sovereignty.<sup>72</sup>

Because of the deliberate attacks on alternative viewpoints, especially after the 2011–12 public protests against the violation of voting procedures during the Russian presidential election, dissent has been practically removed from the political sphere.<sup>73</sup> The Putin regime viewed the election protests as an attempt by the West to effect regime change in Russia, using political dissenters to achieve this goal.<sup>74</sup> Hence, in the aftermath of these protests the regime undertook several measures to suppress political dissent. Examples of suppression include the July 2012 federal law that forces nongovernmental organizations that accept any sort of foreign funding to register as “foreign agents” and to provide reports of their activities every six months.<sup>75</sup> In the same month, defamation was reintroduced as an offence in the Russian Criminal Code, making it easier to control the media through the charge of making

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Freedom of Speech within the Context of Political Modernization in Contemporary Russia], 1 *Irkutsk St. U.*, 19, 22 (2012) (Russ.).

<sup>69</sup> SKILLEN, *supra* note 63, at 333.

<sup>70</sup> *Id.* at 326.

<sup>71</sup> Rossoshanskii, *supra* note 68, at 23.

<sup>72</sup> *Id.* at 326.

<sup>73</sup> Pavel Romanov & Elena Iarskaia-Smirnova, “Foreign Agents” in the Field of Social Policy Research: The Demise of Civil Liberties and Academic Freedom in Contemporary Russia, 25:4 *J. OF EUR. SOC. POL’Y* 361, 362 (2015).

<sup>74</sup> See Ellen Barry, *Rally Defying Putin’s Party Draws Tens of Thousands*, *N.Y. TIMES* (Dec. 10, 2011), <https://www.nytimes.com/2011/12/11/world/europe/thousands-protest-in-moscow-russia-in-defiance-of-putin.html>).

<sup>75</sup> О внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента [On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Function of Foreign Agents], *ROSSIJSKAIA GAZETA [ROS. GAZ.]* July 20, 2012.

defamatory public statements.<sup>76</sup> In June 2012, harsher administrative penalties were introduced for violations during public rallies.<sup>77</sup> Moreover, Russian law requires permission from authorities for public gatherings involving more than one person expressing an opinion.<sup>78</sup> The government also passed federal legislation aimed to suppress so-called “gay propaganda” directed at children<sup>79</sup> in an effort to promote “traditional values.” In June 2013, in response to the feminist punk group Pussy Riot’s performance at Christ the Saviour Cathedral, section 148 (Violation of the Right to Freedom of Conscience and Religion) of the Russian Criminal Code was amended to criminalize “public action expressing clear disrespect for society and committed in order to insult the religious feelings of believers”<sup>80</sup> and a punishment of up to three years imprisonment was set if the offence was aggravated by “its commission in places designed for religious services, religious rites and ceremonies.”<sup>81</sup> After the 2014 annexation of Crimea and the resulting conflict with Ukraine, the Russian political establishment perceived themselves to be engaged in an “information war” with both Ukraine and the West.<sup>82</sup> Hence, any

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<sup>76</sup> О внесении изменений в Уголовный кодекс Российской Федерации и отдельные законодательные акты Российской Федерации [On Amendments to the Criminal Code of the Russian Federation], ROSSIISKAIA GAZETA [ROS. GAZ.] July 28, 2012.

<sup>77</sup> Alexandra V. Orlova, *Challenging Everyday Violence of the State: Developing Sustained Opposition Movements through Anti-Corruption Protests*, RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE (181) (Patrick G. Coy eds. 2018).

<sup>78</sup> Federal’nyi Zakon RF O Vnesenii Izmeneniy v Federal’nyy zakon “O Sobraniyakh, Mitingakh, Demonstratsiyakh, Mitingakh i Piketakh” [On Amendments to the Federal Law “On Gatherings, Meetings, Demonstrations, Rallies and Pickets.”], ROSSIISKAIA GAZETA [ROS. GAZ.] June 8, 2012.

<sup>79</sup> Federal’nyi Zakon RF V Tselyakh Zashchity Detey ot Informatsii, Vystupayushchey za Otritsaniye Traditsionnykh Semeynykh Tsennostey [For the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values], ROSSIISKAIA GAZETA [ROS. GAZ.] June 30, 2013.

<sup>80</sup> *Online and On All Fronts: Russia’s Assault on Freedom of Expression*, HUMAN RIGHTS WATCH (July 18, 2017), <https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression>.

<sup>81</sup> Gleb Bogush, *Criminalisation of Free Speech in Russia*, 69 EUROPE-ASIA STUDIES 1242, 1246 (2017).

<sup>82</sup> S.N. Ilchenko, *Politicheskaya Iznanka Shou-Tsivilizatsii: Illuzii Svobody Slova I Informatsonnaya Voina*, [The Political Inside Out of Show of Civilization: Illusions

viewpoints that were critical of the government's Ukraine policy were equated with the "systematic and mass [media] attack by the enemy" and had to be dealt with.<sup>83</sup> Clearly, the government felt an urgent need to control freedom of expression, as it was viewed as "fuel" for other acts designed to destabilize Russia.<sup>84</sup>

In addition to banishing pluralism from the political sphere, the government also engaged in a concerted effort of connecting human rights with morality, making rights unavailable to "sinners"<sup>85</sup> and thus neglecting the moral pluralism of human rights.<sup>86</sup> The government engaged in a deliberate campaign of defining human rights in accordance with Russian "traditional values" as a way to subordinate democracy and pluralism to sovereignty<sup>87</sup> and to portray criticism of the government as unpatriotic, dangerous and designed to weaken Russia.<sup>88</sup> Instead of the content of human rights being determined in a pluralistic manner, human rights became deliberately associated with certain moral discourses.<sup>89</sup> Hence, human rights are increasingly discussed as subject to local norms, rather than as universal.<sup>90</sup> Asserting the "Russianness" of human rights became a way to resist Western values and those who support them by defining them as "un-

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of Freedom of Speech And Information War], KOMUNIKATIVNYE ISSLEDOVANIYA at 19. (Russ.) (2014).

<sup>83</sup> *Id.* at 21.

<sup>84</sup> I. M. Kunov, *O Sisteme Ogranichenii Svobody Slova po Rossiiskomu Ugolovnomu Zakonodatelstvu*, [About the System of Restrictions on Freedom of Speech under the Russian Criminal Legislation], VESTNIK KRASNODARSKOGO UNIVERSITETA MVD ROSSII at 72. (Russ.) (2016).

<sup>85</sup> Alexandra V. Orlova, *Privatizing Homosexuality: Russia's Reassertion of 'Moral Sovereignty' Over Gay Rights*, 11:2 HUM. RTS. & INT'L LEGAL DISCOURSE 122, 129, 138 (2017).

<sup>86</sup> John M. Alexander, *Capabilities, Human Rights and Moral Pluralism*, 8:4 INT'L J. OF HUM. RTS. 451, 461 (2004).

<sup>87</sup> SKILLEN, *supra* note 63, at 25. The Russian government argues for the traditional idea of sovereignty and argues against the transformation of sovereignty that would include some decision-making capabilities residing in transnational entities; See Julian Culp, *Internationalizing Nussbaum's Model of Cosmopolitan Democratic Education*, 13:2 ETHICS & EDUC. 172, 178 (2018).

<sup>88</sup> Bogush, *supra* note 81, at 1255.

<sup>89</sup> Jay Drydyk, *Responsible Pluralism, Capabilities, and Human Rights*, 12:1 J. OF HUM. DEV. & CAPABILITIES 39, 40, 59 (2011).

<sup>90</sup> Larry Alexander, *Is Freedom of Expression a Universal Right?*, 50 SAN DIEGO L. REV. 707, 715 (2013).



Russian.”<sup>91</sup> The emphasis on so-called “traditional values” was explained by a need to maintain a firm connection to Russia’s culture and history.<sup>92</sup> Moreover, proponents of viewpoints that oppose regime’s policies have been presented as extremists and traitors and subjected to criminal and administrative law sanctions, thus rendering many important political and social issues beyond the scope of acceptable debate.<sup>93</sup> Furthermore, in 2015 the Russian Parliament passed legislation enabling the Russian Constitutional Court to declare rulings of international human rights tribunals (such as the European Court of Human Rights) to be “non-executable,” if such rulings were not reconcilable with the Russian Constitution.<sup>94</sup> The Russian Constitutional Court has so far declared that two of the Strasbourg Court’s rulings could not be executed.<sup>95</sup> Thus, the judiciary has contributed to government efforts to shrink the space for public debate and pluralism.<sup>96</sup> Human rights, including freedom of expression, have become “hostage” to the regime’s interests and limitations have been increasingly justified by security and morality concerns.<sup>97</sup>

In his 2019 state of the union address to the Federal Assembly, Putin reiterated Russia’s continued commitment to “traditional values,” due to Russia’s identity being “rooted in centuries-long

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<sup>91</sup> SKILLEN, *supra* note 63, at 24.

<sup>92</sup> Rossoshanskii, *supra* note 68, at 21.

<sup>93</sup> Bogush, *supra* note 81, at 1255.

<sup>94</sup> Alexandra V. Orlova, *Sovereignty, Dissent, and the Shaping of International Consensus Around Human Rights: An Examination of Russian ‘Disengagement’ from the European Court of Human Rights*, 35:3 ARIZ. J. INT’L & COMP. L. 436, 456 (2018).

<sup>95</sup> See Anchugov i Gladkov protiv Rossii 19 aprelya 2016 g. [*Anchugov and Gladkov v. Russia*], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016; see also YUKOS protiv Rossii 19 yanvarya 2017 g. [*Yukos v. Russia*], ROSSIISKAIA GAZETA [ROS. GAZ.] Feb. 3, 2017.

<sup>96</sup> See Human Rights Watch, *supra* note 80.

<sup>97</sup> Vladimir Ryzhkov, “Russia’s New Totalitarianism Depends on Silence,” *The Moscow Times*, April 23, 2015; I. I. Barysheva, “Nekotorye Problemy Opredeleeniya Predelov Ugolovno-Pravovogo Ogranicheniya Svobody Slova Dlya Zashchity Interesov Gosudarstvennoi Bezopasnosti,” [Some Problems of Defining the Limits of Criminal Law Restrictions on Freedom of Speech to Protect Public Security Interests], *Probely v Rossiiskom Zakonodatelstve* (2008) 1 at 226, 227 (Russ.). Vladimir Ryzhkov, *Russia’s New Totalitarianism Depends on Silence*, THE MOSCOW TIMES, Apr. 23, 2015; *Probely v Rossiiskom Zakonodatelstve* (2008) 1 at 226, 227 (Russ.).

traditions and the culture of our people, our values and customs.”<sup>98</sup> Putin also criticized Western (particularly US) “exceptionalism” and “supremacy” and stated that Russia cannot survive as a state without maintaining its sovereignty.<sup>99</sup> However, the current Russian regime arguably is itself pursuing a policy of exceptionalism on numerous fronts. In this new Russian exceptionalism, loyalty is conflated with patriotism, the contours of human rights are determined domestically and dissent and pluralism in political and legal thought is presented as “Western colonialism”<sup>100</sup> that needs to be defended against.<sup>101</sup> This new Russian identity is fiercely protected by the current regime by its maintaining “information sovereignty”<sup>102</sup> that rejects protest, dissent and criticism. The regime portrays itself as a “champion of genuine, traditional European values against their perceived degeneracy in ‘Gayropa.’”<sup>103</sup> In a sense, Western (particularly European) “detraditionalization”<sup>104</sup> and the secular tradition of human rights is constantly juxtaposed against Russian “traditional values,” steeped in moral and religious principles.

The Russian Constitutional Court has contributed to the construction and maintenance of “information sovereignty” by “hollowing out” various rights in upholding the constitutionality of governmental provisions designed to stifle dissent.<sup>105</sup> While

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<sup>98</sup> Vladimir Putin: Presidential Address to Federal Assembly, KREMLIN WEBSITE (Feb. 20, 2019), <http://en.kremlin.ru/events/president/news/59863> (visited June 2019).

<sup>99</sup> *Id.*

<sup>100</sup> See Orlova, *supra* note 85, at 140.

<sup>101</sup> Mark Galeotti & Andrew S. Bowen, *Putin's Empire of the Mind: How Russia's President Morphed from Realist to Ideologue – and What He'll Do Next*, FOREIGN POLICY (April 21, 2014, 9:50 PM), <https://foreignpolicy.com/2014/04/21/putins-empire-of-the-mind/>.

<sup>102</sup> SKILLEN, *supra* note 63, at 333.

<sup>103</sup> Kevork K. Oskanian, *A Very Ambiguous Empire: Russia's Hybrid Exceptionalism*, 70:1 EUROPE-ASIA STUDIES 43 (2018).

<sup>104</sup> Zachary R. Calo, *Pluralism, Secularism and the European Court of Human Rights*, 26 J. L. & RELIGION 269 (2010).

<sup>105</sup> See Judgment of 23rd September, 2014 No. 24-Π/2014 on the case concerning the review of constitutionality of Section 1 of Article 6.21 of the Administrative Offences Code of the Russian Federation in connection with the complaint of N.A.Alexeev, Ya.N.Yevtushenko and D.A.Isakov, The Constitutional court of the Russian Federation, 2014, No. 2, Item Π/2014 (upholding the constitutionality of

constitutional rights can be limited in some cases, such limitations must be necessary in a democratic society.<sup>106</sup> In other words, rights cannot be limited to such an extent that they would lose their substance, becoming a mere formality and thus irrelevant.<sup>107</sup> The very concept of self-governance, guaranteed to Russian citizens by Article 32<sup>108</sup> of the Russian Constitution, is inextricably connected to the freedom of expression and pluralism also constitutionally guaranteed in Articles 13 and 29. Hence, the stifling of freedom of expression and pluralism has a direct impact on the quality of dialogue between the state and civil society, thus directly impacting self-governance and democracy.<sup>109</sup>

However, as protest and dissent are suppressed in the political sphere (with suppression sanctioned by the legal recognition of the constitutionality of limitations), they spread into the artistic community, which has “always played an oppositionist role in Russian and Soviet society.”<sup>110</sup> A certain “carnivalisation” of protest is occurring as it becomes increasingly hard for people to express dissent, forcing inventive forms of protest to emerge.<sup>111</sup> The “punk prayer” performance by the women of Pussy Riot in Christ

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the federal “anti-gay” legislation); *see also* Judgment of 8 April, 2014 No.10-Π/2014 on the case concerning the review of constitutionality of the provisions of Item 6 of Article 2 and Item 7 of Article 32 of the Federal Law “On Non- Commercial Organizations”, Section 6 of Article 29 of the Federal Law “On Public Associations” and Section 1 of Article 19.34 of the Administrative Offences Code of the Russian Federation in connection with complaints of the Commissioner for Human Rights in the Russian Federation, the foundation “Kostroma Centre for the Support of Public Initiatives”, citizens L.G.Kuz'mina, S.M.Smirensky and V.P.Yukechev, 2014, No. 10, Item Π/2014 (upholding the constitutionality of the federal Foreign Agents Law).

<sup>106</sup> M.V. Solomina, *Svoboda Slova Kak Pravovaya I Politicheskaya Kategoriya*, [Freedom of Speech as a Legal and Political Category] *Vestnik Omskogo Universiteta* (2008) 3:16 at 159 (Russ.); Ektumaev, *supra* note 65; Kochev, *supra* note 65.

<sup>107</sup> Ektumaev, *supra* note 65.

<sup>108</sup> Article 32 of the Russian Constitution reads as: “1. Citizens of the Russian Federation shall have the right to participate in managing state affairs both directly and through their representatives.”

<sup>109</sup> *See* M.A. Lipchanskaya and M.E. Rubanova, *Spetsifika Realizatsii Svobody Slova v Kachestve Formy Konstitutsionnogo Konstruktivnogo Protesta* [Specificities of the Realization of Freedom of Speech as a Form of Constitutional Constructive Protest], 6:119 *VESTNIK SARATOVSKOI GOSUDARSTVENNOI URIDICHESKOI AKADEMII* 104 (2017) (Russ.).

<sup>110</sup> SKILLEN, *supra* note 63, at 3.

<sup>111</sup> Denisova, *supra* note 1, at 979.

the Saviour Cathedral was precisely the type of artistic protest that attempts to inject a dose of dissent into the current Russian political discourse and challenge the carefully constructed status quo.

## POLITICAL SPEECH VS. RELIGIOUS SPEECH

### A. *Pussy Riot Trial Decision (2012)*

On February 21, 2012, Nadezhda Tolokonnikova, Maria Alekhina and Yekaterina Samutsevich entered Christ the Saviour Cathedral in Moscow. They dumped their backpacks in a pile and took off their coats to reveal short, brightly coloured dresses. They proceeded to put balaclavas on their faces, walked to the iconostasis and altar, plugged in an amplifier for an electric guitar and began singing and dancing. During the court hearing there was disagreement about the lyrics. The accused women claimed that they said, “Holy Mother, drive out Putin” and “Holy Mother, become a feminist.” The prosecution witnesses claimed that the women cursed and insulted God and the Church.<sup>112</sup> The three women were charged with criminal hooliganism motivated by religious hatred under s.213 of the Russian Criminal Code. On August 17, 2012 they were convicted and each sentenced to two years of imprisonment.<sup>113</sup> During their trial, the women argued that they were not motivated by religious hatred, but were instead trying to mount a political protest in an artistic form.<sup>114</sup> Their main complaints included the suppression of dissent by the Russian state, anti-gay propaganda laws and the inappropriate support of the Church for Putin’s presidency.<sup>115</sup> The trial judge, however, refused to examine the political aspect of the case and instead focused entirely on the blasphemous nature of the women’s conduct.<sup>116</sup> The judge stated:

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<sup>112</sup>See “Prigovor Pussy Riot” for full text of the decision: <https://snob.ru/selected/entry/51999> (accessed April 2018) (Russ.).

<sup>113</sup>*Id.*

<sup>114</sup>Alexandra V. Orlova, *Russian Politics of Masculinity and the Decay of Feminism: The Role of Dissent in Creating New ‘Local Norms’*, 25 WM. & MARY J. OF RACE, GENDER & SOC. JUST. 59, 68 (2018).

<sup>115</sup>See “Prigovor Pussy Riot,” *supra* note 112.

<sup>116</sup>SKILLEN, *supra* note 63, at 28.

The position taken by the defendants that all actions in the Cathedral were not motivated by hatred and enmity towards Christian believers and the Orthodoxy, but were performed for political reasons, is untenable, due to the fact that, as evidenced by the witnesses' testimony, when committing this hooliganism act, the defendants made no political statements and did not mention any names of politicians.<sup>117</sup>

It is clear that the trial court took an exceptionally narrow view of what constitutes "political speech" by limiting it to specific political statements and calling out names of specific politicians.<sup>118</sup> The Court also did not specify what exact conduct of the women amounted to religious hatred,<sup>119</sup> but based its conclusions of the religiously offensive and hateful nature of the women's speech entirely on witness testimony<sup>120</sup> and the impact of the performance on "the religious considerations of the general public."<sup>121</sup> In other words, the court did not give serious consideration to the intent behind Pussy Riot's performance.<sup>122</sup> In 2014, the Constitutional Court of the Russian Federation<sup>123</sup> proclaimed that § 213 of the Russian Criminal Code was not vague and was thus constitutional.<sup>124</sup> Moreover, the Constitutional Court stated that domestic courts, when applying s.213, need to take account of the historical and cultural traditions of the Russian people as well as

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<sup>117</sup> See *Prigovor Pussy Riot*, *supra* note 112.

<sup>118</sup> Volha Kananovich, "'Execute Not Pardon': The Pussy Riot Case, Political Speech, and Blasphemy in Russian Law," 20 COMM. L. & POL'Y 343, 412 (2015).

<sup>119</sup> Tatyana Beschastna, Comment, *Freedom of Expression in Russia as it Relates to Criticism of the Government*, 27 EMORY INT'L. L. REV. 1105, 1132 (2013).

<sup>120</sup> Kananovich, *supra* note 118, at 405.

<sup>121</sup> Beschastna, *supra* note 119, at 1132.

<sup>122</sup> Kananovich, *supra* note 118, at 403.

<sup>123</sup> ob otkaze v prinjatii k rassmotreniju žaloby graždanki Tolokonnikovoj Nadeždy Andreevny na narušenie ee konstitucionnyh prav čast'ju vtoroj stat'i 213 Ugolovnogo kodeksa Rossijskoj Federacii [about the refusal to accept for consideration the complaint of citizen Tolokonnikova Nadezhda Andreevna about the violation of her constitutional rights by the second part of Article 213 of the Criminal Code of the Russian Federation], ROSSIISKAIA GAZETA [ROS. GAZ.] Sept. 25, 2014.

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

current social behavior norms when determining whether hooliganism motivated by religious hatred took place.<sup>125</sup> Therefore, the Constitutional Court reinforced the importance of “traditional values” and majoritarian consensus being closely associated with religion and morality.

Thus, focus on the religious aspects of Pussy Riot’s speech is unsurprising. On the one hand, this focus was meant to dismiss the women as immoral sinners subscribing to Western ideals of feminism<sup>126</sup> and thus not deserving of protection. On the other hand, the choice to focus on the religious nature of their speech was a deliberate attempt to take advantage of the larger margin of appreciation set by the European Court of Human Rights (ECtHR) in religious speech jurisprudence, given the high-profile nature of the Pussy Riot case and the likely challenge in the Strasbourg Court.

### B. ECtHR’s Political Speech Jurisprudence

Article 10(1) of the European Convention on Human Rights (ECHR) guarantees the right to freedom of expression.<sup>127</sup> However, this right is not unlimited; Article 10(2) allows national governments to limit freedom of expression to achieve a number of aims, such as national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals and so on. However, Article 10(2) prescribes a three-part test that must be satisfied by any governmental restriction to be held valid by the court. Restrictions or limits on freedom of expression must (1) be prescribed by law; (2) pursue a legitimate aim from the list of aims in Article 10(2); and (3) be necessary in a democratic society.<sup>128</sup> One of the key elements of the ECtHR’s jurisprudence over the years has been “the emphasis on the freedom of public, and particularly,

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<sup>125</sup> *Id.*

<sup>126</sup> Orlova, *supra* note 114, at 70.

<sup>127</sup> “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Mar. 20, 1952, 213 U.N.T.S. 230

<sup>128</sup> *Sunday Times v. The United Kingdom*, 2 Eur. H.R. Rep. 245, 271 (1979).

political debate.”<sup>129</sup> The ECtHR stated that “[i]n a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.”<sup>130</sup> The very high level of protection around political speech clearly indicates that the ECtHR has placed priority on transparency when it comes to matters of public interest in a democratic society.<sup>131</sup> In other words, the reason political speech gets such strong constitutional protection is because it is viewed as essential to democratic self-governance.<sup>132</sup> The ECtHR indicated in several cases that in a democratic society public authorities should expect to be under constant scrutiny by their citizens.<sup>133</sup> The Court attached particular importance to pluralism, dissent and tolerance. The ECtHR emphasized that:

Although individual interests can on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority should always prevail: a balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.<sup>134</sup>

The ECtHR interpreted what amounts to “political speech” broadly.<sup>135</sup> The Strasbourg Court placed “criticism of elected officials,”<sup>136</sup> public commentary on public authorities and governance issues<sup>137</sup> as well as statements on matters of public

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<sup>129</sup> Dirk Voorhoof & Hannes Cannie, *Freedom of Expression and Information in a Democratic Society*, 72 THE INT’L COMM. GAZETTE 407, 412 (2010).

<sup>130</sup> *Castells v. Spain*, 236 Eur. Ct. H. R. 18-19 (1992).

<sup>131</sup> Voorhoof & Cannie, *supra* note 129, at 413.

<sup>132</sup> Douglas Laycock, *Freedom of Speech that Is both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 795 (1996).

<sup>133</sup> *Steel v. U.K.*, 2005-II Eur.Ct. H.R. 30; *Women on Waves v. Portugal*, App. No. 31276/05, Eur. Ct. H.R. (2009).

<sup>134</sup> Voorhoof & Cannie, *supra* note 129, at 414 (citing *Gorzelik v. Pol.*, 2004-I Eur. Ct. H.R. 219; *Baczowski v. Pol.*, App. No. 1543/06, Eur. Ct. H.R. (2007)).

<sup>135</sup> Kananovich, *supra* note 118, at 357.

<sup>136</sup> *Ligens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986).

<sup>137</sup> *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) at 23 (1992).

concern<sup>138</sup> into the category of “political speech.” Overall, the ECtHR engages in proportionality analysis to examine whether any particular limitation is necessary in a democratic society,<sup>139</sup> in which the Court examines whether the nature and severity of the limitation imposed on freedom of expression is proportional to the purpose that the government is aiming to accomplish. In cases of political speech, applying the proportionality test by the ECtHR has dramatically reduced the member states’ margin of appreciation of what can be considered an appropriate limitation on freedom of expression.<sup>140</sup>

### C. ECtHR Religious Speech Jurisprudence

While the ECtHR has left member states very little room to maneuver in dealing with limitations on political speech, in religious speech cases the Strasbourg Court’s rulings have given member states a wider margin of appreciation. When it comes to forms of expression critical of religion falling under Article 10 of the ECHR, it seems that the ECtHR has treated journalistic or scholarly criticisms more favorably than the creative or artistic types of critiques.<sup>141</sup> This disparity in treatment stems from the “gratuitously offensive” test set by the ECtHR in the *Otto-Preminger Institut v. Austria*.<sup>142</sup> The ECtHR held that the Austrian authorities were justified in seizing and forfeiting a religiously satirical film that presented an unflattering depiction of the Christian God, Jesus Christ, and the Virgin Mary as well as showing them colluding with the Devil.<sup>143</sup> The intervention by the Austrian authorities were “to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner,” given that Austria’s population is mostly Roman Catholic.<sup>144</sup> In the

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<sup>138</sup> Kananovich, *supra* note 118, at 358.

<sup>139</sup> *Steel*, 2005-II Eur. Ct. H.R. at 35.

<sup>140</sup> *Beschastna*, *supra* note 119, at 1113.

<sup>141</sup> Philippe Yves Kuhn, *Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights*, 19 HUMAN RIGHTS L. REV. 119, 120 (2019).

<sup>142</sup> App. No. 13470/87, Judgement, at ¶ 49 (Eur. Ct. H.R. 1994) (setting out “gratuitously offensive” test).

<sup>143</sup> *Id.* at ¶ 56 and 57.

<sup>144</sup> *Id.* at ¶ 56.



subsequent cases of *Wingrove*<sup>145</sup> and *IA*,<sup>146</sup> the ECtHR followed the “gratuitously offensive” test set out in *Otto-Preminger Institut* pointing to the “voyeuristic”<sup>147</sup> or “abusive”<sup>148</sup> nature of the suppressed materials, noting that the materials lacked permissible “provocative opinion.”<sup>149</sup> In the *Wingrove* decision, the ECtHR relied on the lack of the European consensus when it comes to blasphemy law. Hence, the Court concluded that there was no sufficient uniformity in European practice to draw a conclusion that the offence of blasphemy was not necessary in a democratic society.<sup>150</sup> In both cases, the materials in question were artistic in nature—a video and a novel. In the *Murphy v. Ireland*<sup>151</sup> decision, the ECtHR clearly struggled to reconcile the idea of pluralism as an essential element of democracy with keeping religious peace. The case centered on a ban on all religious advertising contained in the Irish Radio and Television Act of 1988.<sup>152</sup> The ECtHR noted “that the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based mean that Article 10 does not, as such, envisage that an individual is to be protected from exposure to a religious view simply because it is not his or her own.”<sup>153</sup> However, the Court noted that “a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.”<sup>154</sup>

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<sup>145</sup> *Wingrove v. U.K.*, App. No. 17419/90, 1996-V Eur. Ct. H.R. at ¶ 52.

<sup>146</sup> *IA v. Turkey*, App. No. 42571/98, 2005-VIII Eur. Ct. H.R. at ¶ 24.

<sup>147</sup> *Wingrove*, *supra* note 145, at ¶ 61.

<sup>148</sup> *IA*, *supra* note 145, at ¶ 20 and 29.

<sup>149</sup> *Id.* at para 29.

<sup>150</sup> *Wingrove*, *supra* note 145, ¶ 58.

<sup>151</sup> *Murphy v. Ireland*, App. No. 44179/98 Eur. Ct. H.R. (2003), available at <http://hudoc.echr.coe.int/eng?i=001-61207>.

<sup>152</sup> *Id.* at ¶ 9.

<sup>153</sup> *Id.* at ¶ 72.

<sup>154</sup> *Id.* at ¶ 67.

On the other hand, the ECtHR found a violation of Article 10 in the *Giniewski*<sup>155</sup> and *Klein*<sup>156</sup> cases, both dealing with publication of provocative newspaper articles. In *Giniewski*, the ECtHR had to deal with the legality of the defamation proceedings brought against the writer of a newspaper article that discussed the role of the Roman Catholic doctrine of fulfilment and its contribution to anti-Semitism and the Holocaust.<sup>157</sup> The ECtHR concluded that Article 10 was violated since the “applicant’s statements contribute to a recurrent debate of ideas between historians, theologians and religious authorities.”<sup>158</sup> The Court concluded that the article contributed to the issue of public interest in a democratic society and thus was not “gratuitous or detached from the reality of contemporary thought.”<sup>159</sup> Similarly, in the *Klein* case the Court held that the criminal conviction of a writer of an article that criticized the Slovakian Archbishop for his role in undermining the separation of Church and State<sup>160</sup> constituted a violation of Article 10 of the ECHR.<sup>161</sup> The Court stated that the “applicant’s strongly worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia. Contrary to the domestic court’s findings, the Court is not persuaded that by these statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith.”<sup>162</sup>

Finally, in a recent decision of the ECtHR in *ES v. Austria*,<sup>163</sup> the Court strongly reaffirmed the “gratuitously offensive” test for religiously offensive speech set out in *Otto-Preminger*. The case dealt with the challenge to a criminal conviction of an applicant under Article 188 of the Austrian Criminal Code for the offence of

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<sup>155</sup> *Giniewski v. France*, App. No. 64016/00 Eur. Ct. H.R. (2006), available at <http://hudoc.echr.coe.int/eng?i=001-72216>.

<sup>156</sup> *Klein v. Russia*, App. No. 24268/08 Eur. Ct. H.R. (2010), available at <http://hudoc.echr.coe.int/eng?i=001-98010>.

<sup>157</sup> *Id.* at ¶ 14.

<sup>158</sup> *Id.* at ¶ 24.

<sup>159</sup> *Id.* at ¶ 50.

<sup>160</sup> *Id.* at ¶ 12.

<sup>161</sup> *Id.* at ¶ 55.

<sup>162</sup> *Id.* at ¶ 51.

<sup>163</sup> *E.S. v. Austria*, Eur. Ct. H.R. (2018).

disparaging religious doctrines.<sup>164</sup> The applicant asserted that her Article 10 ECHR right to freedom of expression was violated.<sup>165</sup> The applicant had given several publicly advertised seminars titled “Basic Information on Islam” at the right-wing Freedom Party Education Institute.<sup>166</sup> In these seminars, she described the Prophet Mohammad as having pedophilic tendencies due to his marriage with Aisha when she was six years old.<sup>167</sup> The ECtHR held that applicant’s criminal conviction served the legitimate government aim of protecting religious peace<sup>168</sup> and reiterated that the exercise of the freedom of expression carried with it certain duties and responsibilities, “including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.”<sup>169</sup> The ECtHR concluded that there existed a wide margin of appreciation in this case due to the sensitivity of the statements made by the applicant.<sup>170</sup> The Court concluded that “the applicant’s statements had been capable of arousing justified indignation” and that “they had not been made in an objective manner aiming at contributing to a debate of public interest.”<sup>171</sup> Thus, the applicant’s criminal conviction did not violate Article 10 of the ECHR.<sup>172</sup> The Court then rejected the applicant’s assertion that her attack on the Prophet Mohammad had to be tolerated because it formed part of “a lively discussion.”<sup>173</sup>

It is clear that the most recent decision of the ECtHR in the *ES v. Austria* case reaffirmed the approach taken in the *Otto-Preminger Institut* decision, reiterating the “gratuitously offensive” test for limitations placed on religious speech. The approach to religious speech taken by the ECtHR has been criticized on a number of fronts. For instance, it was argued that the *Otto-Preminger Institut*

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<sup>164</sup> *Id.* at ¶ 12.

<sup>165</sup> *Id.* at ¶ 3.

<sup>166</sup> *Id.* at ¶ 7.

<sup>167</sup> *Id.* at ¶¶ 13-4.

<sup>168</sup> *Id.* at ¶ 41.

<sup>169</sup> *Id.* at ¶ 43.

<sup>170</sup> *Id.* at ¶ 50.

<sup>171</sup> *Id.* at ¶ 52.

<sup>172</sup> *Id.* at ¶¶ 57-8.

<sup>173</sup> *Id.* at ¶¶ 54-5.

case that set out the “gratuitously offensive” test was too focused on “majoritarian sentiments in Austria,” emphasizing that Austria’s population is primarily composed of Roman Catholics.<sup>174</sup> However, some might argue that if the overwhelming majority of the population are Roman Catholics, then a shocking religious assertion is unlikely to seriously undermine individual religious rights.<sup>175</sup> Similarly, in *I.A. v. Turkey*, the ECtHR also considered the demographic argument and that many active Muslim believers in Turkey would be disturbed by provocative statements on Islam.<sup>176</sup> Arguably, the ECtHR failed to identify any significant harm to believers who were the dominant majority beyond the possibility of offence flowing from the limited advertising and public discussion of the provocative materials.<sup>177</sup> Moreover, it has been argued that the key problem with the “gratuitously offensive” test is that international human rights law does not recognize the right to have individual religious beliefs spared from criticism or even ridicule or insult. In other words, there is no right in international law “to have one’s religious feelings respected.”<sup>178</sup> Thus, decisions by the ECtHR regarding religiously offensive speech have faced criticism for supposedly “introducing into the Convention a new right not to be offended.”<sup>179</sup> The standard for member states to be able to limit rights—“serious offen[ce] [to] the deeply held feelings of [believers]”—is very vague and prone to expansive interpretation.<sup>180</sup> A better approach to justify restricting freedom of expression is to focus on verbal or written attacks on religious groups that “reach the level of inciting hatred and violence.”<sup>181</sup> Even this approach would require the state to demonstrate a pressing social need to restrict such religious speech.<sup>182</sup>

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<sup>174</sup> Kuhn, *supra* note 140, at 142.

<sup>175</sup> Jeroen Temperman, *Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech*, 2011 BYU L. REV. 736 (2011).

<sup>176</sup> *Id.* at 735.

<sup>177</sup> Kuhn, *supra* note 141, at 142.

<sup>178</sup> Temperman, *supra* note, 175 at 733.

<sup>179</sup> Ian Leigh, *Damned if They Do, Damned if They Don’t: The European Court of Human Rights and the Protection of Religion*, 17 RES PUBLICA 55, 60 (2011).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 72.

<sup>182</sup> *Id.*

*D. The ECtHR's Pussy Riot Decision (2018)*

Clearly, when it comes to resolving a conflict between freedom of expression and freedom of religion, which have equal status in the ECHR, the ECtHR favored “protecting religious sensibilities, even in spite of the criticism of legal scholars and even the CoE’s [Council of Europe] own advisory bodies,” particularly when dealing with artistic or creative expression.<sup>183</sup> Hence, in light of the ECtHR’s differences in approach to political and religious speech, the decision by the Russian trial court in the Pussy Riot case—to frame the conduct of the accused as religiously offensive speech—was clearly a strategic decision, especially given the ECtHR “gratuitously offensive” test for offensive religious speech and considerations of impact on the dominant religious majority. While Article 14 of the Russian Constitution states that the “Russian Federation shall be a secular state,” throughout Putin’s rule Russian Orthodoxy has been synthesized with Russian national identity through the emphasis on “traditional values.”<sup>184</sup> Thus, the reframing of the issues from political speech to religious speech during the Pussy Riot trial was unsurprising, given the government’s overall emphasis on “traditional values” and Russian identity distinct from the West, as well as the ECtHR’s inconsistent rulings regarding religious speech and a wider margin of appreciation available to member states. It was clear from the high-profile nature of the trial that the Pussy Riot case was headed for the ECtHR. In turn, the ECtHR’s decision in the case hinged in large part on the Court’s classification of whether Pussy Riot’s speech was religious or political. If the speech were to be classified as religious, then an argument could be mounted that the restrictions and even criminal punishment of Pussy Riot’s conduct was necessary in order to protect public safety by safeguarding “the large community of Russian Orthodox believers from insulting their feelings, and preventing incitement of religious hatred and interpersonal conflicts on religious grounds.”<sup>185</sup>

At the ECtHR the applicants complained that the criminal proceedings against them and their subsequent detention and conviction for their “punk prayer” performance violated Article 10

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<sup>183</sup> Kananovich, *supra* note 118, at 387.

<sup>184</sup> *Id.* at 379.

<sup>185</sup> *Id.* at 414.

of the ECHR.<sup>186</sup> The Russian government asserted that the applicants' conviction for hooliganism was not due to them expressing their opinions, but rather because they had committed an offence punishable by the Russian Criminal Code.<sup>187</sup> If there had been an interference with the applicants Article 10 rights, then such an interference had been "in accordance with the law."<sup>188</sup> The government claimed it had a legitimate aim in interfering with the applicants' rights as it "sought to protect Orthodox Christians' right to freedom of religion."<sup>189</sup> Furthermore, the interference was proportional and necessary in a democratic society "in order to safeguard the rights guaranteed by Article 9 of the Convention."<sup>190</sup> Not surprisingly, the Russian government went on to rely on the *Otto-Preminger Institut* case to argue that the applicants had "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."<sup>191</sup> Therefore, the actions of the applicant in a place of religious worship were targeting Christians who worked in or visited the cathedral and "had undermined tolerance."<sup>192</sup> The government asserted that the applicants were not being punished for their ideas or opinions, but rather for the form in which they chose to impart those opinions.<sup>193</sup> The government stated that "the Court should consider the context and not the content of their speech."<sup>194</sup> In the government's view, "the applicants' conduct could not 'contribute to any form of public debate capable of furthering progress in human affairs' and had merely been a provocative act and public disturbance, which had constituted an unjustified encroachment on

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<sup>186</sup> *Mariya Alekhina and Others v. Russia*, Eur. Ct. H.R. App. No. 38004/12, July 17, 2008 at ¶174.

<sup>187</sup> *Id.* at ¶ 175.

<sup>188</sup> *Id.* at ¶ 176.

<sup>189</sup> *Id.* at ¶ 177.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at ¶ 178.

<sup>193</sup> *Id.* at ¶ 179.

<sup>194</sup> *Id.*

others' freedom of religion."<sup>195</sup> While the Russian government's framing of the applicants' actions as religious speech and its reliance on the *Otto-Preminger Institut's* "gratuitously offensive" test is not surprising, the government's insistence that only the context, rather than the content, of the applicants' speech should be considered is clearly at odds with the *Otto-Preminger Institut* and the more recent *ES v. Austria* line of cases, where content was clearly highly relevant.

The applicants maintained that their Article 10 rights were violated when they were prosecuted for their performance.<sup>196</sup> The applicants argued that Russian domestic courts failed either to acknowledge their explicitly political message or to assess the proportionality of their performance's interference with freedom of religion.<sup>197</sup> The applicants argued that they chose the venue of their performance for political reasons, since the Patriarch of the Russian Orthodox Church had utilized the cathedral for a political speech.<sup>198</sup> The applicants further noted that their song criticized public and religious officials for their exercise of their official functions.<sup>199</sup> The applicants argued that "political speech enjoyed the highest level of protection under the Convention as being of paramount importance in a democratic society."<sup>200</sup> The applicants' submissions were clearly meant to frame this case in terms of interference with political speech, which enjoys the highest level of protection.

The ECtHR commenced its analysis of the case by emphasizing that freedom of expression constitutes "one of the essential foundations of a democratic society."<sup>201</sup> It is applicable not only to favourable, inoffensive or neutral ideas and information, but also to those ideas and information that "shock or disturb; such are the demand of pluralism, tolerance and broadmindedness, without which there is no 'democratic society.'"<sup>202</sup> Article 10

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at ¶ 181.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at ¶ 182.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at ¶ 197.

<sup>202</sup> *Id.*

protects both the substance, and, the form, in which the ideas and information are conveyed.<sup>203</sup> However, freedom of expression is not an unlimited right and is subject to exceptions; but these must be strictly construed.<sup>204</sup> In order for governmental interference to be justified under Article 10, it must be “prescribed by law,” pursue a legitimate aim from the purposes listed in Article 10(2) and be necessary in a democratic society, which requires a proportionality analysis.<sup>205</sup> The ECtHR further noted that in assessing the proportionality of governmental interference with the freedom of expression, the Court will consider “the nature and severity of the penalty imposed.”<sup>206</sup>

The ECtHR described the applicants’ performance as a mix of conduct and verbal expression that amounted to a form “of artistic and political expression covered by Article 10.”<sup>207</sup> It is clear that from the very beginning the ECtHR framed this case as one of political speech, deserving the highest level of protection, thus reducing the Russian state’s margin of appreciation. The ECtHR noted that the criminal proceedings against the applicants as well as their subsequent prison sentence constituted an interference with their right to freedom of expression.<sup>208</sup> The Court chose not to focus its analysis on whether the interference with the applicants’ freedom of expression was “prescribed by law,” instead choosing to decide this case on the basis of the proportionality of the interference.<sup>209</sup> The ECtHR concluded that the interference with the applicants’ freedom of expression was for the purpose of a legitimate aim—“protecting the rights of others.”<sup>210</sup> The ECtHR then based its conclusions regarding the merits of this case by examining whether the Russian government’s interference with the applicants’ freedom of expression was necessary in a democratic society. The Court indicated that when it comes to Article 10(2) of the ECHR, there is “little scope...for restrictions on political speech

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at ¶ 198.

<sup>205</sup> *Id.* at ¶ 199.

<sup>206</sup> *Id.* at ¶ 201.

<sup>207</sup> *Id.* at ¶ 206.

<sup>208</sup> *Id.* at ¶ 207.

<sup>209</sup> *Id.* at ¶ 208.

<sup>210</sup> *Id.* at ¶ 210.



or debates on questions of public interest.”<sup>211</sup> Furthermore, giving an artistic performance or political speech in a public place, depending on the nature and purpose of the place, may require respect for certain rules of conduct.<sup>212</sup> Since the applicants’ performance took place in Moscow’s Christ the Saviour Cathedral, it did violate certain accepted rules of conduct in a place of religious worship; thus, imposition of certain sanctions could be justified.<sup>213</sup> However, the ECtHR also noted that the applicants’ performance did not disrupt religious services or cause injuries to people inside the cathedral or damage to church property. Given these factors, the ECtHR found that the penalty imposed on the applicants was very severe in relation to their conduct.<sup>214</sup> The ECtHR also noted that Russian domestic courts failed to examine the content of the applicants’ performance, but instead based their conviction of the applicants almost entirely on their conduct.<sup>215</sup>

The ECtHR noted that the applicants were convicted of hooliganism, motivated by religious hatred on account of the type of clothing that they wore, their body movements, and their strong language. Although the applicants’ conduct may have offended people, including churchgoers, nothing in their conduct amounted to incitement to religious hatred.<sup>216</sup> The Russian domestic courts failed to examine whether the applicants’ actions “could be interpreted as a call for violence or as a justification of violence, hatred or intolerance.”<sup>217</sup> There was also no examination of whether applicants’ actions could have led to harmful consequences.<sup>218</sup> The ECtHR concluded that the applicants’ actions did not contain elements of violence and did not stir up or justify violence, hatred or intolerance of believers.<sup>219</sup> The ECtHR stated that:

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<sup>211</sup> *Id.* at ¶ 212.

<sup>212</sup> *Id.* at ¶ 213.

<sup>213</sup> *Id.* at ¶ 214.

<sup>214</sup> *Id.* at ¶ 215.

<sup>215</sup> *Id.* at ¶ 216.

<sup>216</sup> *Id.* at ¶ 225.

<sup>217</sup> *Id.* at ¶ 226.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at ¶ 227.

[I]n principle, peaceful and non-violent forms of expression should not be made a subject to the threat of imposition of a custodian sentence, and that interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of the freedom, which is an element to be taken into account when assessing the proportionality of the interference in question.<sup>220</sup>

The ECtHR concluded that while certain governmental actions towards the applicants may have been justified, the Russian domestic courts failed to justify how the criminal conviction and prison sentences imposed on the applicants were proportionate to the government's aim.<sup>221</sup> Hence, the interference with the applicants' freedom of expression was not necessary in a democratic society<sup>222</sup> and constituted a violation of Article 10 of the ECHR.<sup>223</sup> It is clear that while the Russian domestic court framed the Pussy Riot case as revolving around religious speech, the ECtHR, very early on, stated that the case was clearly about political speech and, therefore, the finding of a violation of Article 10 was almost to be expected.

Despite the differences in framing of the Pussy Riot case by the Russian domestic courts and the ECtHR – as either religious or political speech – the case points to a broader issue than the one of politics vs. religion. Ultimately, Pussy Riot's performance and subsequent legal cases were about the ability of "contentious pluralism"<sup>224</sup> and dissent to counter the carefully constructed government narrative of "traditional values" and moral sovereignty.<sup>225</sup> The reason why Pussy Riot's members faced severe criminal sanctions in the first place was not due to their offence of religious feelings, but rather because they were trying to gain a foothold in the Russian public sphere and were thus threatening the Russian state's carefully constructed "information

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at ¶ 228.

<sup>222</sup> *Id.* at ¶ 229.

<sup>223</sup> *Id.* at ¶ 230.

<sup>224</sup> Guidry & Sawyer, *supra* note 41, at 277.

<sup>225</sup> Orlova, *supra* note 85, at 139.

sovereignty.” The women of Pussy Riot engaged in the act of “contentious pluralism” and were punished in order to send a chilling message to other dissenters.

### CONCLUSION

Pluralism and the conflict that it brings are considered to be threatening, as they put ideas into the public realm that compete with the official narrative. These ideas and their manifestations through human rights discourse are defined as threatening “traditional values” and thus political, legal, and moral sovereignty. Therefore, the Russian state’s current view is that pluralism is something that needs to be managed in a democracy, and democracy needs to be based on satisfying the interests of the majority.<sup>226</sup> Thus, minority rights are considered only to the extent that they do not interfere with the majority.<sup>227</sup> The Russian state has deliberately engaged in the construction of the “aggressively obedient majority”<sup>228</sup> – which is hostile to cultural pluralization and angry about the economic, social and cultural impacts of globalization<sup>229</sup> – through various forms of suppression of dissent. The Pussy Riot cases are an example of suppression of creative forms of dissent through redefining it as sinful, foreign and un-Russian.

Russia is certainly not unique in its uneasy relationship with the concept of pluralism, as even international institutions such as the ECtHR struggle to accommodate the idea of pluralism with the clash of rights that is frequently played out in the public realm. For example, the ECtHR wants to advance religious pluralism on one hand, while on the other hand some of its cases have trouble dealing with pluralism’s contentious nature.<sup>230</sup> Ultimately, what

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<sup>226</sup> Alexandra V. Orlova, “Public Interest, Judicial Reasoning and Violence of the Law: Constructing Boundaries of the ‘Morally Acceptable,’” *Contemporary Readings in Law and Social Justice* (2017) 9:2 at 72.

<sup>227</sup> Zorkin, *supra* note, 60.

<sup>228</sup> SKILLEN, *supra* note 63, at 3.

<sup>229</sup> Culp, *supra* note 87, at 173.

<sup>230</sup> Calo, *supra* note 104, at 264–265. See also *Dahlab v. Switzerland*, App. No.42393/98, (2001) where the ECtHR reasoned that prohibiting a primary school

nations and institutions often fail to acknowledge is that the forces that assail pluralistic democracy are not foreign, but rather “internal to many, if not most, democratic nations...they are our own ideas and voices.”<sup>231</sup> In other words, the conflict is not so much an external one, between a foreign and a domestic view of human rights and dissent, but is rather internal, “between people who are prepared to live with others who are different, on terms of equal respect, and those who seek the protection of homogeneity.”<sup>232</sup> The protection of existing power structures and relationships, reinforced by the reliance on “traditional values” steeped in majoritarian consensus, is one of the key reasons why nations find the idea of true pluralism to be so threatening.<sup>233</sup> Contentious pluralism continually aims to subvert power relationships and structures that emerge in the public sphere.<sup>234</sup> Challenging the existing status quo is ultimately a call for transparency and accountability. However, transparency, accountability and examination of conflicts, injustices and inequalities in an open and honest way is precisely what citizens need in order to truly “justify a political structure . . . ‘for the right reasons,’ [rather than] because they are afraid of chaos.”<sup>235</sup> If true commitment to pluralism exists,

[t]he building of democracies, both existing and future, will depend on how a contested pluralism can construct new norms of recognition in which the roles at work and at stake in political dramas privilege a civil discourse that can take aim at the structures of power – for power and inequality, rather than conflict and contention, are the real culprits working against democracy and a truly “public” sphere.<sup>236</sup>

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teacher from wearing a headscarf is justified by the overriding goal of “preserving religious harmony”.

<sup>231</sup> Nussbaum, *supra* note 5, at 374.

<sup>232</sup> *Id.* at 359.

<sup>233</sup> Guidry & Sawyer, *supra* note 41, at 274.

<sup>234</sup> *Id.*

<sup>235</sup> Michael Edwards, *The Political Emotions of Martha Nussbaum*, OPEN DEMOCRACY (Dec. 15, 2014), <https://www.opendemocracy.net/en/transformation/political-emotions-of-martha-nussbaum/>

<sup>236</sup> Guidry & Sawyer, *supra* note 41, at 277.

Hence, accountability is key when it comes to pluralism in the public realm. This constant accountability is unimaginable without freedom of expression and the voicing of dissenting opinions, despite the ruling government's attempts to consolidate its power by silencing dissenters and couching its actions as protecting the "traditional values" of the majority of the population. The role of the judiciary then becomes key when it comes to protecting the fundamental values that underlie a democratic society: "The legislative and executive branches of government [should] not [be] judges in their own self-interested cause. Rather, the judiciary is the guardian of the constitutional order."<sup>237</sup> Unfortunately, Russian courts, including the Russian Constitutional Court, have narrowed the space for pluralism and accountability by supporting the majoritarian conception of human rights espoused by the Russian state and by actively penalizing dissenters, as was evidenced by the Pussy Riot case.

In order to live up to its constitutional commitment to pluralism, it is key for Russia to develop a safe space for public discussion pertaining to government, governmental representatives, and broader public policy issues. Such a culture of discussion is currently missing.<sup>238</sup> Furthermore, creative communication cannot constitute an end in itself. Artistic forms of protest need to appeal and be accessible to larger audiences.<sup>239</sup> Thus, while Pussy Riot was widely supported outside of Russia, in Russia itself even Russian feminists discussed the harmful nature of their actions.<sup>240</sup> Given the current widespread support for Putin's policies by the "aggressively obedient majority" and the disconnect between Western and Russian conceptions of human rights, rapid social change is unlikely when it comes to pluralism and freedom of expression.<sup>241</sup>

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<sup>237</sup> Weinrib, *supra* note 11, at 182.

<sup>238</sup> Beschastna, *supra* note 119, at 1143.

<sup>239</sup> Denisova, *supra* note 1, at 989.

<sup>240</sup> Orlova, *supra* note 225, at 69-70.

<sup>241</sup> SKILLEN, *supra* note 63, at 3.