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*Mikhail Antonov, Ekaterina Samokhina*

# **THE REASONING OF RUSSIAN COURTS IN CASES CONNECTED WITH THE PROTECTION OF RELIGIOUS FEELINGS**

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*Mikhail Antonov,<sup>1</sup> Ekaterina Samokhina<sup>2</sup>*

## **THE REASONING OF RUSSIAN COURTS IN CASES CONNECTED WITH THE PROTECTION OF RELIGIOUS FEELINGS**

The authors examine how the Russian judiciary devises legal policies when adjudicating cases in which religious beliefs are concerned. First, the authors describe the theoretical framework within which research on this matter can be conducted. This framework can be constructed on the basis of the theory of legal argumentation. Applying this framework to the investigation of the Russian court practice enables the authors to discover important features which are characteristic of legal reasoning in this category of cases. The Constitutional Court of Russia has chosen to abstain from crafting principles of legal policy regarding religious issues; yet, the jurisprudence of the ECtHR, by and large, is not followed by the Russian judiciary, and the Supreme Court of Russia has no clear-cut policy in this regard. In such a situation, ordinary judges choose individual strategies which are indispensable as fidelity to the letter of law is inadequate for adjudicating such cases. The case of Pussy Riot and the other cases analyzed in our paper serve as examples of this tendency. The court practice in religious cases can be better explained from this perspective than in light of presumed political influence.

JEL Classification: K1

Key words: religion, human rights, religious freedoms, individual liberties, judicial protection, legal principles, legal policies, freedom of consciousness, jurisprudence of the ECtHR, Russian court system, legal argumentation, court proceedings.

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<sup>1</sup> National Research University Higher School of Economics (St. Petersburg); Associate Professor of Law.

<sup>2</sup> National Research University Higher School of Economics (St. Petersburg); Assistant of Director of Legal Argumentation Research Center.

## Introduction

This research sets out the problem of analyzing the available mechanisms for the judicial protection of religious freedoms in Russia from the standpoint of legal argumentation theory. The technique of argumentation applied by judges is the main object of examination for the authors who first examine several administrative cases connected with the banning of ‘non-traditional’ religious denominations and new religious cults for reasons of national security, and with anti-extremism policies, and secondly, the criminal case of Pussy Riot. These examples show that judicial reasoning in religious cases is more policy-based than rule-based. Fidelity to the texts of statutes would be a vain undertaking for the judge considering such a case, which inevitably implies a large degree of interpretation in debates about the social admissibility of religious cults and practices. The Constitutional Court of Russia has preferred to abstain from interfering with matters pertaining to religious freedoms, so there are almost no clear-cut constitutional policies in this field. Case law of the Supreme Court of Russia is weak, which leaves adjudication on the limits of religious freedoms to the lower courts, without formulating any precedential principles. This position of the superior judicial bodies gives opportunity to the courts of general jurisdiction to choose *ad hoc* their strategies. In general, they tend to support state organs against non-traditional believers or new religious movements, considering this function as a part of their duty to maintain social order. Although, we do not follow the usual interpretation of this tactic as politically influenced. The influence the RF Presidential Administration can exert on the judiciary in Russia is undeniable, but this influence cannot explain the emergence of different strategies where the courts largely differ in the arguments they use, and in the judgments they deliver. The power of interpretation possessed by the judges is revealed through an analysis of the arguments employed in these cases; and in turn, these arguments reveal the hidden motives which determined the outcome of a court case, for example the religious beliefs of the judge. From this perspective, the argumentation of the ordinary courts is a fertile ground for analyzing the situation concerning the judicial protection of religious freedoms in Russia.

The criminal case of Pussy Riot is the focus of the paper. Far from considering it a show trial, the authors study the argumentation of the verdict where the court’s reasoning was generally based on the balancing of the social values and the legal principles, rather than on strictly following the legislation. On this basis the court introduced a new defense for religious feelings, considering the insulting of such feelings as the *corpus delicti* of hooliganism. Even if incompatible with the principle of *nulla poena sine lege praevia* and with that of legal certainty,

this verdict offers an interesting example of judicial reasoning which connects the provisions of the statutes with basic questions of social philosophy. The discussion on stronger protection of the feelings of believers resulted in a draft bill on criminal liability for blasphemy, which has been adopted by parliament. The debate about this bill revealed the inappropriateness of established legal terminology and formalist legal reasoning in such subtle matters as the identification and protection of religious beliefs, and their balancing with other societal values and legal policies.

It is also suggested that due to the peculiarities of the historical development of Russia, the secular character of the State is not necessarily connected with the matters of human rights (so that human rights are conceivable even if religious freedoms are not available), so actions like that of Pussy Riot do not provoke serious disagreements in society. Sociological studies show the traditional propensity of Russians toward keeping the basic social institutes such as church or religion intact, and at the same time being vigilant toward new religious cults. From this point of view, the rigidity of Russian judges toward new confessions and cults can be explained not so much by political influence but rather by their conscious or unconscious negative attitude toward any novelties in the religious sphere which may endanger the social order. These attitudes can be illustrated by the arguments given by the courts in their judgments concerning not only new religious movements, but also in cases involving the activity of ultraorthodox groups.

This case-study represents nothing extraordinary from the point of view of common law, but for continental lawyers, especially Russian ones, the main way to know what law is to study the statutes. The differences between civil and common law became less pronounced in the 20<sup>th</sup> century, and this tendency continues. The debates about the law of precedent are already familiar to Russian lawyers working in commercial courts, where this ideology is widely accepted.<sup>3</sup> One can predict that general jurisdiction courts will, sooner or later, follow. Following this path implies not only obedience to higher courts, but also requires the ability to find and formulate arguments, to master the techniques of case-study and many other aspects which underpin the practice of the law of precedent.<sup>4</sup> In this context, our analysis endeavors to formulate a more precise definition of the methods and limits of case-studies in Russian law.

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<sup>3</sup> See: William Pomeranz, Max Gutbrod, "The Push for Precedent in Russia's Judicial System", 1 (37) *Review of Central and East European Law*, 2012, 1-30.

<sup>4</sup> Mikhail Antonov, "O nekotorykh teoreticheskikh voprosakh pretsedentnoi revoliustii v Rossii" [On Some Theoretical Questions of the Precedential Revolution in Russia], 34(4) *Zhurnal konstitutsionnogo pravosudia* (2013), 9-14.

## 1. Methodology

The determinant factors in the selection of the methodology for this research were influenced by the peculiarities of judicial decision making, derived from the specific features of the legal norms, system, and actors in Russia.

### a) Legal norms as general rules of conduct and the need for interpretation

Generality: this specific characteristic of legal norms, does not necessitate going into detail when adjudicating concrete cases; norms only convey information about the framework patterns of behavior which shall be adopted in typical situations, and do not prescribe specific rules of conduct for the variety of factual situations, which can be similar and share common features with the typical situation described in the norm, but which are not fully identical to it. Many comparative lawyers see in this peculiarity of legal thinking the most characteristic feature of the civil law system.<sup>5</sup> Thus legal norms leave room for extensive judicial interpretation which in continental legal systems plays the role analogous to that of judicial lawmaking in the courts of common law, even if the technique of detailing the similarities and differences between the judicial decisions, between their *ratio decidendi*, is not largely applied in the continental (civil) law. As was pointed out by Belgian legal philosopher Chaim Perelman, the continental legal system “puts the judge under the obligation both to give a judgment, under pain of denial of justice [...] and to give a motivated judgment. Because of these obligations, the legal system is treated as a complete system in which every claim of the parties ought to be susceptible to being adjudged as consistent with or contrary to the law. The system may be considered complete in itself or it may become so only by the avowed intervention of the judge: in either case it is important to note that the obligation to give a judgment takes priority over fidelity to any particular rules of proof, deduction or interpretation.”<sup>6</sup>

The “judge-made” law is of particular importance in the spheres pertaining to culture and spirituality. This is the case of religious beliefs and feelings, as these issues usually refer to the deepest social conventions implicitly accepted in a society. Here we refer to the terminology of Andrei Marmor who has recently sought to reconcile the social or institutional setting, constitutive of the obligation to comply with reasons for action, deep conventions and the surface conventions, the reasons for action established in the relevant institution or social

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<sup>5</sup> René David and John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Free Press, London, 1978).

<sup>6</sup> Chaim Perelman, “The Specific Nature of Juridical Proof”, in Chaim Perelman, *The Idea of Justice and the Problem of Argument* (The Humanity Press, New York, 1963), 100.

practice.<sup>7</sup> It is far from easy to express such implicit social compacts in words, given the multiplicity of meanings conveyed by these conventions. On the other hand, it is the function of the judge not only to deliver judgments on the cases brought before him or her, but also to motivate these judgments, and to provide the justification (to legitimize) of the judgments made in the absence of unambiguous legal norms (the “penumbra cases” in the terminology of Hart<sup>8</sup>). In this sense, revealing and referring to deep and surface conventions is a part of the work of the judge, where he or she cannot arrive at a solution to the case before him or her pursuant only to the legal texts. This “law job” (Karl Llewellyn) often remains hidden behind the formal wordings of court decisions in the civil law countries, but with the help of the argumentation theory it can become more or less apparent in the implicit propositions on which the judges base their verdicts.

### **b) The interpretation of the confused notions**

The idea that all legal and moral norms are substantially undetermined has been developed in the work of many philosophers, among which are Georg Henrik von Wright and Chaim Perelman. This approach sets out the problem of reasoning in concrete cases in which notions that seem ordinary and well-known in general need to be interpreted in light of the particularities of an individual case. As von Wright puts it, “notions central to the moral life of man such as good and evil, virtue and vice, justice and injustice, are concepts in search of a meaning. Although familiar from daily life they are at the same time obscure and vacillating. There may exist wide consensus about how to use them – but there is also much disagreement and controversy about their application to individual cases.”<sup>9</sup> Such concepts, described by von Wright, were defined by Perelman as “confused notions.” This definition has at least two different meanings because there are two cases in legal argumentation in which we are confronted with notions that are confused. First, we face confused notions when the interlocutors are governed by prejudice, which is a distortion and a simplification of reality that necessarily entails confusion. Secondly, we face the confused notion after discussing the matter, and this means that there are still controversies left related to the certain irreducible vagueness of the

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<sup>7</sup> Andrei Marmor, ‘The Dilemma of Authority’, *Jurisprudence*, 2011, No. 2 (1), pp. 121-141; idem, ‘Conventions Revisited: A Reply to Critics’, 2 (2) *Jurisprudence*, 2011, 493-506.

<sup>8</sup> Hart argued that with all general rules, there will be a ‘core of certainty’, central cases where the application is clear, and a ‘penumbra of doubt’, where the application of the rule is uncertain. Hart concluded that judges inevitably must use their discretion on the occasions where the legal rules have “open texture”. In exercising this discretion, the judge or the official will look to the purposes or the social consequences of adopting a certain interpretation of the rule, and other extralegal considerations (Herbert L.A. Hart, *The Concept of Law*, 3<sup>rd</sup> ed., Oxford: OUP, 2012, p. 128 ff.).

<sup>9</sup> Georg Henrik von Wright, “Value, Norm, and Action in My Philosophical Writings” in *Actions, Norms, Values: Discussions with Georg Henrik von Wright* ed. by George Meggle (De Gruyter, Berlin, New York, 1998), 14.

terms we use.<sup>10</sup> This ambiguity has two causes. First, the language we use in jurisprudence is a natural one as opposed to an artificial formalized language (e.g. in mathematics, logical studies, etc.). Second, jurisprudence deals with human behavior and its motives, the values and beliefs of society that cannot be expressed in univocal terms because of their irreducible complexity and policontextuality.<sup>11</sup> Finally, it means impossibility of syllogistic image of law-enforcement.

According to Chaim Perelman, “if one of the meanings is regarded as the “true sense” of the word [...] all the others must be either deliberate or unconscious misuses of the term”.<sup>12</sup> Nevertheless, such notions as “freedom,” “religion,” “justice,” have no clear meaning and can be “made precise and applied only by selecting and bringing to the fore certain of their aspects that are incompatible with others or with notions whose use can be conceived only in terms of their vagueness: an evaluation has to be made by referring both to the subject who acts and the result obtained.”<sup>13</sup> Every time we need to establish such a meaning in a concrete case, the agreement must be determined by the context in which the meaning is sought. “Before agreeing on the use of a term, agreement must be reached on the system of thought within which this concept should be used.”<sup>14</sup> As argued below, one can treat the notion “religious belief” as an essentially confused notion – its irreducible complexity does not allow the legislator to fix the corresponding legal rules in an unequivocal manner and always leaves the judge scope for interpretation in cases connected with religious freedoms. Although, the dominant legal doctrine in Russia does not acknowledge that the judge may have a large discretion in any category of cases and erroneously tries to limit the judges with simple application of the laws; unsurprising, this results in a conceptual conflict between the ideology (where the judge is solely to implement the laws) and the reality (where the judge is able to give to the laws any interpretation depending on his or her personal convictions).

### c) **Formal constraints for legal reasoning and the ways to evade them**

According to the ideology prevailing in the civil law countries after the French Revolution, a judge is bound by the statutes (“*Le juge est la bouche de la loi*”, according to Montesquieu), but this ideology misrepresents the real state of the affairs. But “if the 19<sup>th</sup> century

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<sup>10</sup> See: Guy Haarscher, ‘*Rhetoric and its abuses*’, Working Papers du Centre Perelman de philosophie du droit, N 1 (2008), <http://www.philodroit.be>.

<sup>11</sup> Niklas Luhmann, *A Sociological Theory of Law* (Routledge & Kegan Paul, London, 1985); idem., *Law As a Social System* (Oxford University Press, Oxford, 2003).

<sup>12</sup> Chaim Perelman, *Democracy in a World of Tensions* (UNESCO, Paris, 1951), 295.

<sup>13</sup> Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Univ. of Notre Dame Press, Notre Dame, IN, 1969), 132. See also: Eugen Dupréél, ‘Sur le Rapports de la Logique et de la Sociologie ou Théorie des Idées Confuses’, *Revue de Métaphysique et de Morale* (July 1911), 517-522.

<sup>14</sup> Chaim Perelman, *Democracy in a World of Tensions*, 301.

for law was the century of formalism, associated with the statist and legalistic conception of law and of legal rules; the 20<sup>th</sup> century, under the influence of sociological and methodological considerations, leads to realism, legal pluralism, and to the acceptance of the increasing role of general principles of law, to a more topical understanding than the legalistic conception of legal reasoning. This results in the recognition of the role of judge in the development of law and in the preeminence of the effectiveness of the rule of law over its formal validity”.<sup>15</sup> The most of legal scholars had to accept that the judge has no normative constraints when adjudicating the cases before them; in reality, judges can introduce or even distort the official legal rules under the guise of interpretation or filling in the gaps. “Even in the case of a judge who rests content with following the beaten tracks of jurisprudence and has no desire for innovation, his role is not entirely passive. Indeed, since every vision of reality is to some extent subjective—the more so in that it is a question of a reconstruction rather than of a direct vision—the upright judge will, even involuntarily, be led, in his evaluation of the facts, to make the law and his own inner feeling for justice coincide. By taking his stand on certain evidence or by denying its importance, by having regard to certain facts or by so interpreting them as to deprive them of all meaning, the judge is able to produce a different picture of reality and to deduce from it a different application of the rules of justice.”<sup>16</sup> One of the most specific features of legal reasoning pointed out by Perelman is that since positive law is governed by well-defined texts, legal argumentation has to be developed within this definite system. “The lack of self-evidence attributed to certain rules, the so-called necessity for justifying them, is the consequence of immediately converting the possibility of challenging them into a search for their basis. This is because, even if the values protected by the law are not disputed, any difficulty in applying the rules threatens to set in motion a whole chain of argumentation in which the possible foundations of the rule will probably have to be considered.”<sup>17</sup>

Reflections about the function judicial practice can perform in legal argumentation about the religious freedoms in Russia are not purely theoretical. A decade ago hardly anyone would have seriously discussed precedential law in the Russian legal system, nowadays, after the reforms conducted in the 2000s in the system of the commercial courts under the auspices of the President of the Supreme Commercial Court of Russia (hereinafter – the SCCRF) Anton Ivanov, this topic has become one of the most discussed among Russian legal scholars. Dwelling on the possible merger of general and commercial jurisdictions in the process of moving the Supreme

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<sup>15</sup> Chaim Perelman, *Droit et éthique* (éd. de l’Université de Bruxelles, Bruxelles, 1990), 740.

<sup>16</sup> Chaim Perelman, “Concerning Justice”, in Chaim Perelman, *The Idea of Justice and the Problem of Argument* (The Humanity Press, New York, 1963), 25.

<sup>17</sup> Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 101.



Court of Russia (hereinafter – the SCRF) and the SCCRF from Moscow to Saint Petersburg where they are expected to live under the same roof,<sup>18</sup> it is not excluded that the ideology of precedential law could also strongly influence general jurisdiction headed by the SCRF.

In fact, the courts of general jurisdiction even now do not mechanically apply statutes, and there are signs that in the domain pertaining to religion the courts are developing policies which in some aspects seriously extend the limits of the legislative regulation provided for in the statutes. Here only the general jurisdiction will be analyzed, as all the cases connected with religious freedoms are considered there.<sup>19</sup> To illustrate the state of affairs concerning the legal protection of religious rights in the light of this development, we will analyze the legal argumentation used in the judgments in several cases related to religious freedoms.<sup>20</sup> Recourse to this argumentation can allow an understanding of how general words from legal texts can be interpreted in legal practice so that new objectives are set by the judiciary along with the formally proclaimed principles of the Constitution and of the Federal Law *On the Freedom of Conscience and Religious Denominations* of 1997, sometimes supplanting these principles. The protection of certain religious cultures as basic for Russian society and social order is one of the aims the courts explicitly or implicitly pursue in resolving religious cases. It is often stressed by the courts that some religious practices and acts can be destructive for the entire society or, at least, for a large number of its members; that in some situations allowing for certain religious activities can promote political, national, and religious extremism, and so on. These seemingly contradicting policies – to guarantee freedom in the sphere of religiosity and at the same time to control this sphere – create two poles around which turn most of the debates on the legal protection of religious freedoms.

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<sup>18</sup> About the project of transferring of the superior Russian courts to Saint Petersburg see: Evgenii Taribo, “Itogi piatiletnego prebyvaniya Konstitutsionnogo suda v Peterburge: istoricheskii kontekst” [The results of five years that the Constitutional Court dwells in Petersburg: the historical context], 4(34) *Zhurnal konstitutsionnogo pravosudia*, 2013, 1-4. On 8 October, 2013, President Vladimir Putin sent a draft bill (No.352924-6) to the Russian Parliament (the State *Duma* of the RF Federal Assembly) proposing an amendment to the RF Constitution so as to merge these two court systems (the courts of general jurisdiction and the commercial courts) into one. The text of the draft bill is available at <[http://static.consultant.ru/obj/file/doc/fz\\_081013.pdf](http://static.consultant.ru/obj/file/doc/fz_081013.pdf)>.

<sup>19</sup> About philosophy of the state commercial courts in Russia see: Mikhail Antonov, “The Execution of Foreign Court Decisions and the Question of Sovereignty in Russia”, 38 *Review of Central and East European Law* (2013), 5-26.

<sup>20</sup> Our choice of the case law used in this article remains mostly subjective. On the one hand, our perspective has been technically restricted by the cases and sources which were available for the authors (not all decisions of the courts of general jurisdiction are yet publicly available, nor are some cases connected with “national security” and other similar clauses). A great caseload also must be considered: according to the statistic data of the Judicial Department of the SCRF [Sudebnyi department pri Verkhovnom sude RF] for 2011 there were about 1 million of verdicts in criminal cases; more than 12 million of decisions in civil cases; more than 5 million of judgments in administrative cases – only the first instance of the general jurisdiction courts is considered (see: <<http://www.cdep.ru/index.php?id=5>>). On the other hand, unable to analyze all this bulk of case-law, we have chosen several “pivotal” cases which drew widespread public attention. Here we also commit that the choice was subjective, and putatively it could not have been otherwise. Our investigation in this paper does not pretend to describe all the case law on religious matters in Russia. On the basis of the materials available to us, we formulate some theoretical insights about what is going on with the religious freedoms in Russian courts. The only claim to objectivity we may maintain is that our position was not (as we hope) influenced by our religious credo.

The formal provisions of Russian law on religious rites, beliefs, and denominations are scant and inconclusive. Unlike the Bulgarian, Greek and some other European constitutions, the Russian Constitution of 1993 and the afore-mentioned law of 1997 do not treat Orthodoxy as a legally privileged religion; therefore the feelings of the adherents of this denomination are no more or less valuable, from the point of view of the legislation, than the feelings of any other believers. A formal analysis of the Constitution and other legal texts cannot give a full and authentic account of the constraints which are imposed by the courts and other law-enforcement organs on the behavior of the members of society. Here an inquiry into the attitudes underpinning judicial reasoning can also be helpful to understand which remedies are available to believers, and what the limits of the religious freedoms are; freedoms which are more likely to be permitted by the judiciary.

Having no clear-cut guidance in the texts of statutes, judges sometimes enter into matters which are formally left out of the scope of the legislation, or construct new constraints for religious activities in the areas where the statutes explicitly authorize any forms of religiosity. We are not inclined to explain this development only by the historical symbiosis of the political and religious powers in Russia, or by the political strategies of the clergy and state authorities,<sup>21</sup> though we do not rule out that viewing the issue from these angles can also be helpful. As most judges in Russia are adherents of the “traditional” confessions (Christianity, Islam, Judaism, Buddhism), it is not surprising that they voluntarily or involuntarily take their own axiological stand when adjudicating the conflicts where their religious beliefs and principles are necessarily affected. The model of a judge as of an impartial arbiter is an idealization from the heritage of the Age of the Enlightenment, which does not correspond to real judges who are flesh and blood, and whose activity cannot be conceived as “entirely predetermined by the laws and deductible from them through logical procedures, and who are functioning as an apparatus for the distribution of rights and obligations”.<sup>22</sup> From this standpoint, it is important to examine the texts of the judgments which in some manner sketch out the deep social conventions observable in the terms, arguments, ideas the judges find and refer to in their decisions.<sup>23</sup>

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<sup>21</sup> Cf. such an attempt: Elena Miroshnikova, “National Report on the political Aspects of Religion: Russia / Religion and the secular State”, Javier Martinez-Torron, W. Cole Durham, Jr. (Ed.) *National Reports* (The International center for Law and religious Studies of Brigham Young University Provo, Washington, 2010), 573-591. Available at <http://www.iclrs.org/content/blurb/files/Russia.1.pdf>

<sup>22</sup> Hans Kelsen, “Wer soll der Hüter der Verfassung sein?”, 6 *Die Justiz* (1930/31), 576.

<sup>23</sup> See the discussion about the study of document as one of the methods of legal sociology forwarded by one of its founding fathers: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publishers, New Brunswick, 2001). Our approach does not exclude referring to other models of sociological interpretation of religion (e.g., the model advocated in: James T. Richardson, “The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis”, 67 (3) *Sociology of Religion*, (2006) 271-294); rather it can be seen as auxiliary to such models.

d) **The contemporary methodology of legal research as apposed to legal formalism**

The distinction between the factual and the formal rules in the American legal realism, “Laws in books and laws in action” by Roscoe Pound,<sup>24</sup> and Karl Llewellyn’s response<sup>25</sup> can serve as an illustration of this method. The work of the Scandinavian (such as Alf Ross and Karl Olivecrona) and Russian (Leon Petrazycki and Nikolas Timasheff) legal realists also focuses on the emotional stimuli which are established by a coherent practice of adjudication and which serve as guidelines for human behavior. The position of contemporary European realists can also be noted, especially that of the French constitutional lawyer Michel Troper who insists that the legal texts do not contain the legal rules, these latter are first created and introduced by the judges who confer concrete rights and obligations, and whose decisions are therefore the only real source of binding force which compels the people to act in compliance with the standards instituted by the coherent practice of adjudication.<sup>26</sup> A more radical position is taken by the Italian legal theorist Riccardo Guastini who insists that legal texts *per se* are only normative sentences without any obligatory force. These texts simply express a finite number of potential norms that are first obtained through the interpretation process.<sup>27</sup> A special methodological accent can be put on the theory of legal argumentation as formulated by Perelman.<sup>28</sup> This methodology was prefigured by the *Verstehende Sociologie* of Max Weber, and only developed by Perelman and other representatives of the Brussels school of legal philosophy (Francois Ost, Benoit Frydman *et al.*). This school follows Perelman’s idea that “the law takes shape only through conflict and controversy at all levels, and cannot provide stable reassuring image of an order, guaranteed by an impartial authority”.<sup>29</sup>

Perelman stressed that law is not something given in advance and applied to the facts through legal syllogism. Echoing the ideas of the legal realists, this Belgian philosopher frames the construction of a “particular audience” which potentially exists in every courtroom, and to which the prosecutor and the defense, as well as the judge in his or her verdict refer their arguments. If the appeal to such a particular audience does not allow for obtaining a compromise about the basic criteria and values (as there can be two or more ideal audiences referred to by the parties of a process), the participants of the process can try to convince their adversary through

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<sup>24</sup> Roscoe Pound, ‘Law in Books and Law in Action’, 44 *American Law Review*. 1910, 12-36.

<sup>25</sup> Karl N. Llewellyn, ‘Some Realism about Realism—Responding to Dean Pound’, 44 *Harvard Law Review* (Jun., 1931), 1222-1264.

<sup>26</sup> Michel Troper, *Le droit, la théorie du droit, l’Etat* (PUF, Paris, 2001).

<sup>27</sup> Riccardo Guastini, ‘Rules Skepticism Restated’, Leslie Green and Brian Leiter (eds.), *Oxford Studies in Philosophy of Law*, Vol. I (Oxford University Press, Oxford; New York, 2011).

<sup>28</sup> Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (D. Reidel, Boston, MA, 1980).

<sup>29</sup> Chaim Perelman, *Droit et éthique*, 553.

appealing to a “universal audience” which conceptually serves as a model for sound argumentation. The idea of a universal audience does not refer “to an experimentally proven fact, but to a universality and unanimity imagined by the speaker, to the agreement of an audience which should be universal, since, for legitimate reasons, we need not take into consideration those who are not part of it.”<sup>30</sup> The speaker constructs a universal audience to entreat the concrete audience before them – which “can never amount to more than floating incarnations of this universal audience”.<sup>31</sup> In other words, it is a conceptual model which can be reconstructed on the basis of the arguments employed in court debates and fixed in the legal documents of a case, and which allows the determination of what were the basic implicit conventions and value judgments around which the debates in the courtroom turned.

Our hypothesis is that criminal and administrative court practice (in Russia which is the field of our analysis here) is in a major part defined by the current representations in the judicial community of the factual and ideological constraints, including the argumentation techniques, political and societal balances, the goals of judicial activity, and the hierarchical order of different rules and principles. It does not mean that the legal texts do not play any role in the adjudication of cases before the court – we are far from contending, as Charles Evans Hughes does, that “the law is what the judges say it is”. Doubtlessly, these texts do play a role in fixing what the *corpus delicti* is and in setting out a general framework for the legal argumentation to establish the connection between this and the factual state of affairs, but the court’s judgment on the relative weight of the arguments, the persuasive force of the evidence, the severity of the punishment and many other factors in each concrete case cannot rest on the textual wording of the statutes. These external factors largely prefigure the outcome of the proceedings and the final verdict of the court; they can be revealed through reconstructing the conceptual model – Perelman’s ‘audience’ – to which the arguments were addressed. In this sense, Oliver W. Holmes Jr. was right when claiming that “The life of the law has not been logic; it has been experience”. Perelman explains that “[w]hen the jurist defends a logical interpretation of law, when his opponents retort that “the life of law is not logic, but experience,” when advocates accuse each other of not respecting logic, the word “logic” does not designate in any of these cases formal logic, the only one practiced by the majority of professional logicians, but juridical logic, which modern logicians entirely ignore.”<sup>32</sup> The specific informal character of juridical

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<sup>30</sup> Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, 31.

<sup>31</sup> *Ibid.*

<sup>32</sup> Alan G. Gross, Ray D. Dearin, *Chaim Perelman* (State University of New York Press, Albany, 2003), 25.

logic initially stressed by Perelman appears to be inherent in any type of reasoning about values not only inside the courtroom, but also in ethics, politics, and philosophy.

In this light the study of court decisions can also provide important data about the mindsets of the judicial community – such as they have been shaped by the previous judgments and such as they will probably be outlined in future decisions. Reconstructing the “universal audience” can thus become a viable method to look inside the process of policy-making. The verdicts delivered in criminal cases are more symptomatic of the growing role of policy-making in Russian courtrooms. In criminal cases the maxim “*nulla crimen, nulla poena sine lege praevia*” formally prevents the judges from attempts to broadly construct the legislative provisions. In all the other categories of cases the judge can almost always claim that there is a gap in the law to be filled on the base of policies. It has been discussed by many legal theorists, among which are Hans Kelsen and Eugenio Bulygin, that there are no or almost no genuine gaps in the law, as most cases where the judges find such gaps are the situations where the judges simply are not content with the existing legal regulations and strive for better rules than those contained in the statutes (so called axiological gaps). Here the idea of “gaps in the law” invests the judiciary with a powerful instrument for remaking the laws according to the principles and policies the judges create and employ in their work.

The reconstruction of the universal audience yields a better understanding of the normative constraints which are set forth in the Russian legal system for the exercise of religious freedoms, and which in fact are quite different from the formal constraints and permissions fixed in the text of the Constitution and other federal laws. The question about the remedies provided by the European judicial institutions falls outside the scope of our paper: given the notoriously long procedures of the ECtHR and the lack of substantive mechanisms of the coercive implementation of the ECtHR’s judgments in Russia, the issue about such remedies is not central for understanding the real constraints on the religious freedoms in Russia. At the same time, to illustrate some of our suggestions, we will take several cases from Russia examined by the ECtHR.

To carry out this task, we will start with a succinct analysis of the historical background of the religious question in Russia. Also we will consider the relevant provisions of Russian law which regulate religious freedoms. We may assert that these laws do not contain such provisions which stand in a flagrant contradiction to the laws of other countries of Europe.<sup>33</sup> Nevertheless, it has been repeatedly stated by many researchers that the real constraints imposed on the believers

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<sup>33</sup> To our knowledge, there is no literature which insists on there being such contradictions between the Russian and Western laws on religious freedoms (surely, apart from the issue of their implementation).

from “non-traditional” religious denominations are harsher in Russia (and ex-USSR countries) than in other European countries.<sup>34</sup> This difference between the “law in books” and the “law in action” can be explained by, among other reasons, the different cultural environment and historical traditions which gave rise to the particular social philosophy formulated by the Slavophiles.<sup>35</sup> The political constraints, including the rhetoric of sovereignty, and the activity of the Russian Orthodox Church (ROC) in the political and legal discourse<sup>36</sup> can also be listed among the important factors influencing the reasoning of the Russian judiciary. Therefore, a comparative analysis of legal texts cannot explain the dissimilar conclusions the judges draw in matters concerning the protection or restriction of religious freedoms in different countries.<sup>37</sup> As such, tradition, the political situation, or confessional principles cannot serve as rationales for the differences in legal regulation, although they surely can influence the formation of the legal mentality in different social communities. The impact of these and other factors result in the setting out of a particular set of values, referring to which the Russian law-enforcement agencies justify the stricter control of religious life.<sup>38</sup>

Our objective is to sort out the arguments which have become decisive in such cases and which therefore can be viewed as normative constraints limiting or broadening the real scope of religious freedoms in Russia. Among these cases the notorious criminal case of Pussy Riot, where referring to certain normative constraints which obviously went beyond the scope of the literal text of the applicable norms the courts introduced a new model of criminal liability for blasphemy which was not formally *corpus delicti* of any crime listed in the Penal Code of Russia. Arguing in favor of the protection of the social order,<sup>39</sup> the court refused to apply the

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<sup>34</sup> Characteristically, the situation was described in Council of Europe’s *Reports and Debate on Russia’s Law on Religion* (“Committee on Culture,” April 24, 2002), available at: < <http://wwwn.org/articles/10334/?place=russia>>. See also: James T. Richardson, Valerie A. Lykes “Legal considerations concerning new religious movements in the ‘new Europe’”, Peter Cumper, Tom Lewis (ed.). *Religion, Rights and Secular Society. European Perspectives* (Edward Elgar Publishing Ltd, Cheltenham, 2013), 293-322, especially at 302-304.

<sup>35</sup> Cf.: Mikhail Antonov, “Theoretical Issues of Sovereignty in Russia and Russian Law”, 37(1) *Review of Central and East European Law* (2012), 95-113.

<sup>36</sup> Lauri Mälksoo, “The Human Rights Concept of the Russian Orthodox Church and Its Patriarch Kirill I: A Critical Appraisal”, Benedek, Wolfgang; Benoit-Rohmer, Florence; Karl, Wolfram; Nowak Manfred (ed.) *European Yearbook on Human Rights* (Neuer Wissenschaftlicher Verlag, Vienna, 2013), 403-416.

<sup>37</sup> As Dara Hallinan states, “Although the foundations of the systems may be similar and create a similar theoretical legal model, it is the distortions and differences that have developed that define the Russian model’s deviation from the Strasbourg standard. A consideration of similarities is largely confined to a comparison of the letter of the law and the theoretical construction of space and protection for religion. Unfortunately, construction of a space and a legal model describes the framework but does not describe the reality of protection.” (Dara Hallinan, “Orthodox Pluralism: Contours of Freedom of Religion in the Russian Federation and Strasbourg Jurisprudence”, 37 (2-3) *Review of Central and East European Law* (2012), 336).

<sup>38</sup> This situation in the mid-1990s in Russia was well illustrated by one court case: Marat Shterin, James T. Richardson, “The Yakunin versus Dworkin Trial and the Emerging Religious Pluralism in Russia”, 1 *Religion in Eastern Europe* (2002), 1-39, especially at p. 36 where the authors remark that “Reference to tradition was increasingly prominent and it was used to justify different treatment of different religions”.

<sup>39</sup> In the Russian legal parlance, the term ‘public order’ [*publichnyi poriadok*] is used quite rarely and in most of the situations is replaced by the broader term of ‘social order’ [*obshchestvennyi poriadok*] which includes the legal regulation not only in the public spheres, but also in the private or semi-private ones.

provisions of the Administrative Code<sup>40</sup> (part 2 of article 5.26 of this Code which at that time imposed a fine up to 1000 rubles (about 25 Euros) on those who insult the religious feelings or defame the religious sanctuaries<sup>41</sup>) and chose the *corpus delicti* of hooliganism (challenging the basis of the social order) which pursuant to article 213 of Penal Code involves imprisonment up to seven years. The court in this case overruled the formal legal norms and demonstrated that even in criminal cases the judges can go beyond the formal texts of statutes if they wish to reshape the limits of social control. Of particular interest is the way the judge Marina Syrova reasoned to grant protection to church rules and how she integrated these rules into the “social order” to be maintained and protected by the state courts.

To follow the ideas of Michel Troper, “when the State imposes a religious rule, it does so by means of its own law and thus immediately translates the religious rule into a secular one that will be interpreted and applied as such”.<sup>42</sup> So it was with the judgment in the Pussy Riot case, where the judge delivered the decision thoroughly elaborating the linkage between the infraction of religious rules and the sanction of state law – such a linkage can be considered an individual norm in terms of Hans Kelsen’s theory. Even if it could be formally deemed wrong,<sup>43</sup> this verdict can be justified from the perspective of a broader understanding of the role of the court as an institution whose function is to be “the architect of social engineering”.<sup>44</sup>

The conflict between promoting traditional religious denominations and not infringing upon the rights and interests of other confessions can also be seen in other cases brought before the Russian courts, especially the administrative ones (mostly connected with disbanding of religious denominations). Below, several cases will be cited where the courts interpreted the formal provisions of the actual legislation not in the literal sense, but with a view to the policies behind these statutes. The argumentation employed in these cases is symptomatic of the principles underpinning the legal regulation of religious freedoms in Russia. It is also important that no clear principles were formulated by the Constitutional Court of Russia (CCRF). The only

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<sup>40</sup> The abbreviation used in this paper for Code of Administrative Offences of the Russian Federation.

<sup>41</sup> Now the fine is from 30000 to 50000 RUR (from about 700 to 1200 EUR).

<sup>42</sup> Michel Troper, “Sovereignty and Laicite”, 30 *Cardozo Law Review* (2008-2009), 2561.

<sup>43</sup> We are critical of the political background found by many Western observers behind this case: “The politicians said and the courts did”, as the reality is much more complex: judges in Russia as elsewhere are responsive to the political consequences of their decisions, but it is by far not the only constraint on Russian judges.

<sup>44</sup> As Roscoe Pound puts it “or the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants – the claims and demands involved in the existence of civilized society – by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence – in short, a continually more efficacious social engineering” (Roscoe Pound, *An Introduction To The Philosophy Of Law* (Transaction Publishers, New Brunswick, 1999), 20).

case of intervention of the CCRF into the religious matters concerned a question which was rather formal: the ruling of 23.11.1999 No.16-P on the re-registration of religious denominations. This ruling did not contain any substantial argumentation about legal principles and policies in the religious domain applying instead the general principles of law, and left room for the ordinary courts to introduce policies. The abstention of the CCRF from interfering in religious matters, even in cases which were later accepted and resolved by the ECtHR, led to a lack of legal certainty in these matters, which is attested by the Pussy Riot case and others. As asserted above, the law texts are incapable of giving definite guidance either for judges or ordinary citizens,<sup>45</sup> so it is not surprising that the missing principles and policies were *ad hoc* elaborated in different judicial instances. Under these circumstances, it cannot be expected that these principles are completely coherent, so we still have an unpredictability, even if the formal legal texts on the matter in their literal meaning mostly have univocal significance.<sup>46</sup>

## **2. The Secular State in the Russian history and in Russian law**

The freedom of personal choice in religious matters was not recognized before 1917, and expressions of religious beliefs contradicting the official religion were not legally permitted. This trend did not change in Soviet Russia, where Communism became the *Weltanschauung* and played a role similar to that of religion.<sup>47</sup> It is not surprising that the amalgamation of the state and the church/party, of legal, (quasi-)religious, corporative, and moral norms prevailed both in Imperial and Soviet Russia. Here we do not explain the present situation with religious freedoms in Russia entirely by referring to the historical heritage of the country, but a few words about this heritage can be helpful to demonstrate the intricacies which shaped the particular attitude of the Russians toward the legal regulation of the religious matters.<sup>48</sup>

If contemporary Western legal culture was formed mainly in the course of the struggle for freedom of consciousness, and the first ideas of human rights in England, France, and the

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<sup>45</sup> See the Hart-Fuller debates on this issue: Herbert L. A. Hart, "Positivism and the Separation of Law and Morals", 71 (4) *Harvard Law Review* (1958), 593–629; Lon L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart", 71 (4) *Harvard Law Review* (1958), 630–672.

<sup>46</sup> It also does not involve any moral judgment from our part: neither about the inextricable uncertainty in law, nor about the way the Pussy Riot and other cases were adjudicated in the Russian courts.

<sup>47</sup> Nikolai Berdyaev, *The Origins of Russian Communism*, trans. by R. M. French (G. Bles, London, 1937).

<sup>48</sup> See the account about the problems connected with the legal regulation of religion: Alar Kilp, *Church authority in Society, Culture and Politics after Communism* (Tartu University Press, Tartu, 2012).



USA were designed to protect the personal choice of confession against public interference,<sup>49</sup> the issue of religious freedoms did not play any substantial role in discussions about human rights in the prerevolutionary Russia at the beginning of the 20<sup>th</sup> century, or in the era of *perestroika* at the end of that century. It cannot be said that this issue was irrelevant to the public or was not discussed at all – the question about the choice of religion and confession was debated by Vladimir Solovyov and many other Russian philosophers of the Silver Age,<sup>50</sup> but the discussion of this question publically was barred by the official legislation of Imperial Russia, where the Orthodoxy was established as the official state religion and the Emperor was the head of the Church. For example, Vladimir Solovyov could only publish his reflections on the possible union of the Christian Churches abroad, and in French.<sup>51</sup> Discussions on religious matters at that time were considered challenge to the official ideology, so that free public deliberations on these matters were not possible in Imperial Russia.

After the revolution, religion was proclaimed to be “the opium of the people”<sup>52</sup> and was progressively banned from public life. The Decree *On the Separation of the Church from the State and the Schools from the Church*, of 12 January 1918, established the secular character of the state. Religious rites were allowed only as long as they did not “disturb the public order or infringe upon the rights of citizens”. The ensuing Soviet anti-religious campaigns led to significant changes in the social mentality: the religious rites were more and more regarded as obsolete, so that the Intelligentsia in the 1950s and later did not consider religious questions important. Perestroika fundamentally changed the social position of religious denominations, vesting them with extensive powers and rights. Although this change took place so quickly that there was hardly room for debate compared to other political questions.<sup>53</sup> On the contrary, in most Western countries the secularization of the state was a painful and lengthy process connected with the struggle for individual liberties, which led to the seemingly evident

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<sup>49</sup> See: Franz Wieacker, “Foundations of European Legal Culture”, 38(1) *The American Journal of Comparative Law* (Winter, 1990), 1-29; James T. Richardson, “Religion, law, and human rights”, P. Beyer, L. Beaman (Ed.), *Religion, Globalization, and Culture* (Brill, Boston, MA, 2007), 407-428.

<sup>50</sup> This role is examined, e.g., in: Anastasia Tumanova, Roman Kiselev, *Prava cheloveka v pravovoi mysli i zakonotvorchestve Rossiiskoi imperii vtoroi poloviny XIX – nachala XX veka* [Human rights in the political thought and in lawmaking of the Russian Empire of the second half of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century] (Vysshaya shkola ekonomiki, Moscow, 2011).

<sup>51</sup> These texts are available in English: Vladimir Solovyov, *The Russian Church and the Papacy: An Abridgment of Russia and the Universal Church*, (Catholic Answers Incorporated, San Diego, 2001). See on it: Jonathan Sutton, *The religious philosophy of Vladimir Solovyov: towards a reassessment*, (Macmillan, Basingstoke, 1988).

<sup>52</sup> According to the famous dictum of Marx: “Religion is the sigh of the oppressed creature, the heart of a heartless world, just as it is the spirit of a spiritless situation. It is the *opium* of the people.” (Karl Marx, *Contribution to Hegel’s Philosophy of Right*, Karl Marx, Early Writings (McGraw Hill, New York, 1966), 1).

<sup>53</sup> John Anderson, *Religion, State and Politics in the Soviet Union and Successor States* (Cambridge University Press, Cambridge, 1994).

conviction that “true religious pluralism is an inherent feature of the notion of a democratic society”.<sup>54</sup>

The Russian experience was somewhat different. The Soviet state was secular from the very beginning, and nothing fundamentally changed with *perestroika*. Given the negative attitude of most of the Russian population toward the Bolsheviks, their 1917 Revolution, and the consequent changes, their secularization is not considered an unquestionable improvement, rather it is associated with the cruel anti-religious campaigns, and has no direct connection to the social attitudes to individual liberty and human rights. This historical experience does not allow the univocal linking of positive or negative values: secularity is conceptually associated with the ideas underpinning Lenin’s *Decree on Separation...* rather than with the works of Enlightenment philosophers and with the first human rights pamphlets, as in the West. For this reason, in Russia the principle of secularity in public discussions is often critically reassessed with reference to the anti-religious and atheist campaigns conducted by the Bolsheviks under the flag of secularity. This connotation, along with a certain nostalgia for pre-Bolshevik Russia can partly explain why this principle is not perceived in Russian society by clerics and many lay intellectuals as indisputable – unlike such other fundamental principles as democracy, the rule of law, the integrity of the country and other policies set out in the Constitution.<sup>55</sup>

The encroachment on religious freedoms seems to Western observers as an indisputable and impermissible violation of human rights, however this is not so for many Russians. Along with a lack of public discussion on the connection between human rights and religious freedom, it is important to remember that during the Soviet rule the Christianity (not only and not so much the ROC, but also other Christian denominations) conceptually opposed the ideology of that regime. From this standpoint the religion is not seen in contemporary Russia as a ‘natural enemy’ of the human rights and liberties as for example in France where the idea of individual liberties was traditionally opposed by the conservative ideology of the Catholic Church. Moreover, the negative attitude of the ROC toward the non-traditional believers, such as Scientologists, Jehovah’s Witnesses, and other new religious denominations is often legitimized with references to human rights reformulated in the concept of the ROC. This reformulation favors traditional beliefs over non-traditional ones, which are seen by the ROC as destructive of human mentality and identity, sociality and other values which ought to be protected as per

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<sup>54</sup> The Judgment of the ECtHR of 26 September, 1996 in the case of *Manoussakis and Others v. Greece* (application No. 18748/91), para. 44.

<sup>55</sup> Geraldine Fagan, *Believing in Russia – Religious Policy after Communism* (Routledge, Cavendish, 2013).

natural law.<sup>56</sup> For example, the anti-gay campaigns partly initiated by the ROC are justified with reference to the model of a traditional family, gender roles, religious commands, and other “eternal Russian values” which must be protected from “the perversions of LGBT”: in this and in many other aspects there is conflict between the internationally recognized human rights<sup>57</sup> and the “traditional natural law” advocated by the ROC. This polemic is seen in the provisions of Russian legislation favoring “traditional beliefs”, and in the judicial and administrative practice in cases of the interdiction of religious devotees from military service, marriage, medical assistance, etc.

According to Article 14 of the Constitution, “the Russian Federation is a secular state. No religion may be established as a state or obligatory one. Religious associations shall be separated from the State and shall be equal before the law.” Despite the fact that Russia is declared to be a secular state and the state therefore shall support ideological pluralism, the reality is different. The wording of the Constitution seems to be clear in establishing the principle of secularity, though the content of this principle is subject to different interpretations. Article 28 of the Constitution requires that “Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to profess individually or together with other any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them.” The Constitution does not mention either the historical role of the ROC, or the importance of the Orthodoxy for Russia, and hence formally does not allow any discrimination between different religious denominations depending on their origin, age, history, or number of adherents.

The declarative principles of the Constitution are developed in the Federal law of September 26, 1997 No. 125-FZ “*On the Freedom of Conscience and Religious Denominations*”. Article 2 of this law sets out that “nothing in this law can be interpreted in a manner that infringes or encroaches on the human rights guaranteed by the Constitution or by international treaties”. From a certain perspective this statement can be considered restrictive compared with Article 15 of the Constitution which includes in this list not only treaties, but also “universally recognized norms of international law” which are not mentioned in the Law No. 125-FZ. As the case-law of the ECtHR is seen as one of the main sources of these “universally recognized norms” (at least, in the countries of the Council of Europe), the missing reference in the Law No.

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<sup>56</sup> Harold Berman, “Freedom of Religion in Russia: An Amicus Brief for the Defendant”, John Witte and Michael Bourdeaux (eds.), *Proselytism and Orthodoxy in Russia: The New War for Souls* (Orbis Books, New York, 1999), 265-284.

<sup>57</sup> The Judgment of the ECtHR of October 21, 2010, in the case *Alekseyev v. Russia* (applications No. 4916/07, 25924/08 and 14599/09).

125-FZ is fraught with serious legal consequences.<sup>58</sup> Moreover, the preamble of this law states the special role of Orthodoxy in the history of Russia, in the development of its spirituality and culture. The preamble also acknowledges “respect for Christianity, Islam, Buddhism, Judaism and other religions that form an integral part of the historical heritage of the peoples of Russia”. Thereby the law indirectly introduces a slight discrimination which cannot be inferred from the Constitution. Given that the Russian Federation is a multinational state, the religions forming its cultural heritage cannot be reduced to one common denominator. The law implicitly supports so called “traditional” beliefs, and from this preamble it can be inferred that new religious groups which are not considered traditional may not claim the same freedoms and privileges as the Orthodox, and other “traditional” confessions.

As a consequence of the Pussy Riot case there emerged a draft bill no. 142303-3 “*On the Protection of the Religious Feelings of the Citizens of Russia*” aimed to introduce criminal liability for this misdemeanor which until then was formally punishable only in pursuance to part 2 of article 5.26 of Administrative Code (the members of Pussy Riot were punished instead on the grounds of the hooliganism *corpus delicti*). This draft bill was designed not as a separate law, but in the form of amendments to the Penal code. The draft bill, conceptually based on the preamble of the Law No. 125-FZ, was intended to introduce the *corpus delicti* which provides criminal liability for “the public insult, the humiliation of the worship or other rites and ceremonies of the religions that form an integral part of the historical heritage of the peoples of Russia”, as well for “the public insult of the religious beliefs and feelings of the citizens,” for “the desecration of places and objects of religious veneration, places of worship, or of other rites and ceremonies of the religions that form an integral part of the historical heritage of the peoples of Russia”, and also for “damaging or destroying such objects and places.” The punishment proposed by the authors for such crimes varied from fines (from 100 000 to 500 000 rubles) to imprisonment (up to 3 years, in the previous draft up to 5 years). Also the administrative liability became much more severe (the fine raised from 1000 to 50000 rubles). Many arguments were forwarded while this bill was being debated in the Russian parliament. There were conflicting opinions from the official organs, the judiciary, experts and lawyers, which reiterated the

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<sup>58</sup> Here one can mention the polemic between the SCRF and the CCRF on the possibility for ordinary courts not to apply the laws which are unconstitutional. In its Rulings “*On Some Questions arising in the application of the Constitution in the administration of justice*” (No. 8 of 31 October, 1995) and “*On the Judicial Decision*” (No. 23 of 19 December, 2003) the SCRF insisted that when the court finds a discrepancy between a law and the Constitution, it shall directly apply the Constitution. The CCRF in its Ruling No 19-P of 16 June, 1998 challenged this position and opined that only the CCRF is competent to decide whether there are any discrepancies between laws and the Constitution, so that an ordinary court has either to apply the law, or to bring a petition to the CCRF for the examination of the alleged unconstitutionality of the law. Therefore, facing the discrepancy between the Constitution and Law No. 125-FZ the ordinary courts will have to apply the Law and avoid assessing its merits in the light of the case-law of the ECtHR.

disputed principles of the regulation of religious freedoms in Russia. The Orthodox Church took an active position in these debates, promoting “traditional values” which turned out to be incompatible with “Western” individual rights and freedoms protected by the Universal Declaration of Human Rights and by the European Convention on Human Rights. Finally, on 9 April, 2013 the bill was adopted in the State Duma in the first reading with 230 votes pro and 7 votes contra. Several days after this vote, the deputies abandoned the idea of protecting religious feelings. The wording of the draft bill was changed, the new *corpus delicti* “insulting the feelings” was dropped and the new redaction of article 148 of Penal Code provides additional punishment for “the public actions conducted with the purpose of insulting religious feelings”. On 11 June, 2013 the bill passed the final reading and came into force from 1 July, 2013 (Federal law No. 136-FZ of 29 June, 2013).

The conceptual and terminological background of this law is disputable. First, the very idea of punishing people for insulting the feelings of other people is strange from the standpoint of commonly accepted criteria dividing law and morality (respectively, regulating the external behavior and the inner spirituality). Further, if such notions as “public insult”, “desecration” are familiar to Russian decision-makers and have an established significance in the judicial community, the notion of “humiliation” used in a combination with “worship,” “rite,” and “ceremony” is very uncertain in the light of their probable interpretation by the courts. The SCRF in its official opinion mentioned these and other concerns about “the unusual terms for the vocabulary used in the criminal law doctrine” and about possible intersections of this *corpus delicti* with others from Penal code.<sup>59</sup> Similar criticisms were forwarded by the Social Chamber and by the Government. As a result, the draft bill was rewritten and resubmitted with some minor terminological changes, but the idea of the new *corpus delicti* “insulting the feelings” remained intact.

The most controversial provision of this newly adopted law now refers to the liability for actions directed against the worship, rites, ceremonies, objects and places of the religions that form an integral part of the historical heritage of the peoples of Russia. Russian legislation contains no criteria for distinguishing between religions which “form” and “do not form” this “integral part”, as the Federal Law *On Freedom of Conscience and Religious Denominations* does not contain an exhaustive list of these religions. An acknowledgement of respect for the Christianity, Islam, Buddhism, Judaism in the preamble to that Law gave birth to a confusion: it is so often claimed that Russian law defends only the four traditional religions and many of

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<sup>59</sup> A letter of 29 September, 2012 by the Vice-President of the SC RF A.A. Tolkanenko No. 2-BC-5457/12.

citizens came to believe that this is true. Nevertheless, the list of historical religions is open, and there are no legitimate reasons why the state should protect the Christianity, Islam, Buddhism, Judaism, and to discriminate against such religions as Hinduism, Taoism. The formula “the religions that form an integral part of the historical heritage of the peoples of Russia” taken from the *Law On Freedom of Conscience* to distinguish between the protectable and unprotectable religious denominations can be seen as the violation of the constitutional principle of equality of religious denominations before the law, which implies not only the equal obligations to comply with the law and the equal responsibility for the violation of the law, but also the equal right for protection from the unlawful acts.

### **3. Court practice: policies against rules?**

The legal argumentation of general jurisdiction courts can still be characterized as mostly rule-based. The courts usually confine themselves to a formal analysis of legal norms applicable to a case: if the norms approve or disapprove certain typical behavior, and if the human acts examined in a specific case are a part of this logical set, the court would be highly reluctant to go into the details of the situation, to ponder what are particularities of the case and whether the general norm shall be applied to the case from the point of view of reasonability, justice, and the like non-formal criteria.<sup>60</sup> Several cases considered in the ECtHR contrast the rule-based approach of the Russian courts and the court devotes substantial analysis to these cases.<sup>61</sup>

An instructive example of this formalist attitude to religious freedoms can be found in the judgment of the ECtHR of April 5, 2007 in the case of the Church of Scientology Moscow v. Russia (application No. 18147/02). Due to the legislative amendments, the Church was obligated to bring its articles of association into conformity with the new laws and to re-apply for registration with the Justice Department. The Church of Scientology applied 11 times for registration; its applications were either rejected for technical reasons, or not considered. Reassessing the decisions of the domestic courts which upheld the position of the Moscow Justice Department, the ECtHR found that the grounds for refusing re-registration of the applicant were not consistent throughout the time it attempted to secure re-registration (para. 88). The ECtHR, for example, observed that the Moscow Justice Department refused at least four applications on account of the Church's alleged failure to submit a complete set of documents

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<sup>60</sup> See, e.g., the characterization of this “syllogistic and non-problematic style of judicial writing” in Russia made by Alexander Vereshchagin, *Judicial Law-Making in Post-Soviet Russia* (Cavendish, Routledge, 2007), 236.

<sup>61</sup> Dara Hallinan, ‘Orthodox Pluralism: Contours of Freedom of Religion in the Russian Federation and Strasbourg Jurisprudence’, 37 *Review of Central and East European Law*, (2012), 293-346.

without specifying what information or documents had been missing (para. 91). Other grounds for refusal upheld by the courts were the Church's failure to produce originals of the documents which the Justice Department had in its possession. Rejecting other applications, the Department argued that there was no proof of permanent residence of the applicant in Moscow, though requiring such proofs plainly contradicts the position of the Constitutional Court of Russia. Another reason for turning down the application was the statement that the basic tenets of the creed and practices of the religion were not clearly described in the Books of Scientology (para.93). A similar situation with formal unreasoned refusals against which the plaintiffs were not able to find effective defenses in the Russian laws is described in the ECtHR's judgment of 1 October 2009, in the case of Kimlya and others v. Russia (applications No. 76836/01 and 32782/03). The fact that most of these refusals were upheld by domestic courts simply illustrates that the flexible formulations of Russian law allows for their broad interpretation by the state organs, the courts being unwilling to enter into reassessment of both procedural and material issues connected with the activities of the religious denominations.

In the case Nolan and K. v. Russia (application No. 2512/04) the ECtHR in its judgment of February 12 2009 found a violation of the rights of Patrick Nolan who undertook missionary activities as a member of the Unification Church, and who was expelled from Russia for reasons of national security. The Court held that the provisions of the Concept of National Security of the Russian Federation "Ensuring national security of the Russian Federation also includes opposing the negative influence of foreign religious organizations and missionaries..." were interpreted by the domestic courts in the sense that foreign missionaries pose a threat to national security. Reexamining the case of Nolan in the perspective of his religious activities, the ECtHR found that the expulsion of the claimant was designed to repress the exercise of his right to freedom of religion. The ECtHR considered as evidence the information letter of the Federal Security Service of Russia [*Federal'naiia sluzhba bezopasnosti* – FSB) where it was stated that:

Representatives of such foreign sectarian communities as the Jehovah's Witnesses, the Unification Church [...] under the cover of religion establish extensive governing structures which they use for gathering socio-political, economic, military and other information about ongoing events in Russia, indoctrinate the citizens and incite separatist tendencies [...] Missionary organizations purposefully work towards implementing the goals set by certain Western circles with a view to creating the conditions in Russia and perfecting the procedure for practical implementation of the idea of replacing the 'socio-psychological code' of the population, which will automatically lead to the erasing from

the people's memory of the over a thousand-year-long history of the Russian State and the questioning of such concepts as national self-identification, patriotism, Motherland and spiritual heritage.<sup>62</sup>

In this case the domestic court linked the general rule of article 25.10 of the Law of 15 August 1996 No. 114-FZ "*On the Procedure for Entering and Leaving the Russian Federation*": "A foreign national will be refused entry into Russia if this is necessary for the purposes of ensuring the defensive capacity or security of the State, or protecting public order or health" to the propositions from the letter of the FSB about the injuriousness of missionaries, and concluded that the report of the FSB with a negative characteristic of Nolan's activities constituted sufficient grounds for dismissing Nolan's lawsuit without going into details of his activities. The Supreme Court of Russia in its Ruling of 19 June 2003 confirmed the decisions of the lower courts and reasoned that "the decision on the issue of whether or not the activities of a citizen (in respect of whom a conclusion barring entry into Russia has been issued) pose a threat to State security [...] comes within the competence of the Russian authorities [...] this right of the State is one of the basic elements of its sovereignty".<sup>63</sup> This strictly formalist approach to the adjudication of human rights cases proves to be fully congruent with the provisions of the Russian statutes and with the legal doctrine which considers that the function of the judge is to apply the legal texts and not to reexamine them on their merits.

This argumentation when the courts refuse to examine the material facts with reference to the sovereign rights of the state is not rare in cases where human rights are affected. The argument about sovereignty played a major role in the Markin case where the Russian government insisted that "By assessing Russia's legislation, the Court would encroach upon the sovereign powers of the Parliament and the Constitutional Court,"<sup>64</sup> though case was about parental leave for men. The sovereignty argument is also used as the *prima facie* reason in the polemic of the Russian authorities against the Magnitsky Act, whereby the issue of adopting Russian children by Americans was used to protect the national sovereignty. The debates around the case of judge Kudeshkina v. Russia also touch on the issue of sovereignty, and the former Russian Justice of the ECtHR Anatoly Kovler clearly expressed this concern in his Dissenting Opinion in this case: "A judge has specific responsibilities in the field of the administration of justice, a sphere in which States exercise sovereign powers [...] and performs duties designed to

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<sup>62</sup> Paragraph 39 of the judgment of the ECtHR, where the Court cites from the judgment of the Moscow Regional Court in the case of Nolan: the access to this and other Russian judgments in Nolan's cases is closed because of the concerns of national security.

<sup>63</sup> Paragraph 43 of the judgment of the ECtHR.

<sup>64</sup> Application No. 30078/06, Konstantin Markin v. Russia [GC], Judgment of 22 March 2012, para. 85.



safeguard the general interests of the State.”<sup>65</sup> In such argumentation the concern for sovereignty evidently trumps the concern for the protection of the individual human rights. Lauri Malksoo remarks about the relations between the ECtHR and Russia: “It is true that, while Russia pays for damages, it so far does not do enough in terms of the revision of domestic judgments, not to mention more ground-breaking legislative changes. In this broader sense, Russia’s compliance with Strasbourg jurisprudence has been unsatisfactory. Yet again, the situation can only be judged fairly if we take into account the historical legacy. Having to do what an international body says is a new thing for Russia.”<sup>66</sup>

There is a competing trend to legal formalism in the ordinary courts which demonstrates that the courts sometimes are ready to leave the rule-based approach, and to extend or to abridge the limits of regulation as set forth in the legal norms. This trend can be illustrated by numerous court cases of Jehovah's Witnesses where the state organs refused to register this denomination or tried to close it down. According to the decision of 26 March 2004 of the Golovinskiy district court of Moscow in the case of the Northern administrative region prokuratura of Moscow v. the Moscow Religious Community of Jehovah’s Witnesses, the defendant was ordered to disband.<sup>67</sup> The Moscow Prosecutor who brought this case before the court insisted that the activities of the Jehovah’s Witnesses resulted in the fragmentation of families, the abstention from fulfillment of the civil duties, and the refusal of the medical aid. The decision was motivated by a violation of human rights committed by this community. The court found the violations of freedom from arbitrary interference with privacy, home and family, of the right to a free choice of employment; it also established the involvement of children in the activities of this religious community, and inducement to refuse a blood transfusion. These facts were interpreted in the court’s decision as the negative influence of a religious cult and its rites on the mental state and mental health of the adherents; based on these findings the court characterized the practices of Jehovah's Witnesses as “extremist activities” violating the basic human rights. According to article 14 of the Law *On the Freedom of Conscience and Religious Denominations*, these qualifications constitute grounds for the disbanding of a religious community. The judge ruled out references by Jehovah's Witnesses to the history of Christianity and the Holy Scriptures which, in the opinion of the defendant, contained the justification for the practices followed by Jehovah’s Witnesses. In the same

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<sup>65</sup> Application No. 29492/05, Olga Kudeshkina v. Russia, Judgment of 26 February 2009, Dissenting Opinion of Justice Kovler and of Justice Steiner.

<sup>66</sup> Lauri Malksoo, “Russia and European Human Rights Law: Margins of the Margin of Appreciation”, 37(2-3) *Review of Central and East European Law*, (2012), 362.

<sup>67</sup> Decision of Golovinskii raionnyi sud Severnogo AO Moskvyy (26 March, 2004) in case N.2-67\04, po predstavleniiu prokurora Severnogo administrativnogo okruga Moskvyy o likvidatsii i zaprete deiatel’nosti Religioznoi obzhiny Svidetelei Iegovy v Moskvye (the decision was accessed at the site < <http://stolica.narod.ru/pseudo/jw/120.htm>>).

manner examples of analogous practices in the traditional confessions were dismissed, as in the case of Jehovah's Witnesses they, in court's opinion, were not inherited from historical practices of the Russian people. The reports of psychological and linguistic experts stating that the literature disseminated by Jehovah's Witnesses did not contain any information that impels to action aimed at the fragmentation of family were rejected by the court which reasoned that the experts' analysis concerned only the verbal expression of the instructions and recommendations, but not their influence on the family relationships of the adherents. Evaluating the testimony of the witnesses who had not given a negative assessment of the influence on family life, the court dismissed this evidence on the ground that the witnesses were psychologically compelled to agree with the practices of Jehovah's Witnesses for the fear of eternal torment. The court found that activity of this denomination "leads to destruction of families and is connected with violation of the fundamental rights and liberties of citizens, with agitation for refusal to carry out civic duties before the society. For these reasons, the intervention of the Court is justified as it protects the rights and interests of citizens and of the society, and shall be considered as necessary in a democratic society. Given that the Community [Jehovah's Witnesses] infringed on constitutional rights and liberties of citizens, it is justifiable to limit the scope of its activities and to disband it with reference to the constitutionally relevant objectives."

The argumentation used in the decision contained elements of "black rhetoric"<sup>68</sup> – such as "black-white" contrast in assessing the facts and opinions favorable for the plaintiff and ignoring those favorable for the defendant. Nevertheless, in this case there is no evidence of the judge (Vera Dubinskaia) having a personal interest or there being political pressure behind her decision. There is only an exaggerated vigilance toward new religious cults which do not belong to "the historical heritage of the peoples of Russia", though the literal texts of the statutes do not formally afford such discrimination. This decision is symptomatic of the reasoning where the court evaluates differently the essentially similar practices of believers of traditional and non-traditional faiths. For the court, similar practices, slogans, and prayers can have dissimilar influence on traditional believers, firmly standing on the side of the cultural heritage of their people, and on the non-traditional believers who lost their connection with the "spiritual roots" of their people and who in that way became more susceptible to be fraudulently disassociated from social life. In this case the court apparently went beyond the formal defenses provided by

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<sup>68</sup> See: Karsten Bredemeier, *Schwarze Rhetorik*, (Goldmann Wilhelm GmbH, Munchen, 2005).

the Article 14, interpreting these defenses so broadly that justification can be found for closing down any religious denomination.<sup>69</sup>

In this decision on Jehovah's Witnesses the court did not go beyond evaluating the factual side of the case and considered that the approval or disapproval of the doctrinal statements and the beliefs of Jehovah's Witnesses cannot be subject to adjudication in the state courts. However, in the decision of 30 April 2004 of the Omsk Regional court in case the Regional Omsk Department of the Ministry of Justice v. the Ancient Russian Inglistic Church of Orthodox Old Believers, the court's reasoning involved a reassessment of doctrinal statements and beliefs, though this lawsuit was filed on the same legal grounds as in the Jehovah's Witness cases.<sup>70</sup> The precept "do not follow the laws established by people to divest your freedom, but follow the laws of the one God" taken by the defendant from the Holy Scriptures, was interpreted by the court as an invitation to ignore the laws for the sake of the religious rites and dogmas, and to abstain from the fulfillment of the civil duties. As this precept was fixed in the charter of the defendant, the court ruled that the objective of this religious denomination was to encourage the believers to ignore the law, such an objective being strictly forbidden by article 14 of *Federal Law on the Freedom of Conscience and Religious Denominations* and constituting formal grounds for disbanding. Another, more persuasive argument concerned the use of religious symbols imitating the swastika. The court substantiated its decision on closing down the community by the fact that it used the ancient Slavonic symbol "Kolovrat" which can be associated with the fascist swastika, their graphic images, color and background filling being similar. This associative resemblance of the symbols was interpreted by the court as propaganda and a public demonstration of Nazi attributes or symbols confusingly similar. Such propaganda is prohibited by the Federal Law of 25 July 2002, No. 114-FZ *On Counteraction of Extremist Activity* (Articles 1, 9) and by the Federal Law *On the Freedom of Conscience and Religious Denominations* (Article 14); this latter law allows for the disbanding of a religious denomination. The reasoning provided by the defendant that their symbols imitate ancient Slavonic symbols which had appeared thousands years ago, and can be associated also with the crucifix as depicted in the Early Middle Ages was not taken into the consideration by the judge for the reason that "the earlier historical roots of the emergence of the swastika do not have legal value for the

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<sup>69</sup> Considering application of Witnesses against Russia in this case, the ECtHR on 10 June, 2010 ruled in favour of the Jehovah's Witnesses of Moscow (application No. 302/02), having condemned Russia for violation of religious freedoms. Nevertheless, the Golovinskii district court on 15 February, 2011 refused to implement this judgment of the ECtHR in Russia and to reconsider its decision of 26 March, 2004.

<sup>70</sup> Reshenie Omskogo oblastnogo suda (30 April, 2004) po zaiavleniiu Glavnogo upravleniia Ministerstva Iustitsii Rossiiskoi Federatsii po Omskoi oblasti o likvidatsii mestnykh religioznykh organizatsii Drevnerusskoi Ingliistseskoii tserkvi Pravoslavnykh Staroverov-Inglinov. Available at: <<http://www.sova-center.ru/racism-xenophobia/docs/2004/04/d8899/>>.

qualification of symbols as Nazi's because the main criterion for determining the symbols and attributes as prohibited is the similarity with those of Nazi's." This argumentation exemplifies the fact that if there are the symbols, signs and the associative links between them and some political ideologies which are firmly established in the social mentality, then these symbols acquire a particular significance independent both of their perception by the adherent and their historical and conceptual sources. In terms of our analysis, we can observe how the judge constructs the "universal audience" which is expressly referred to in this court decision – it is the perception of the concerned symbol by this imaginary audience and not the historical provenance of this symbol or the perception of this symbol by the believers which proved to be decisive in the argumentation of the court.

Many similar cases can be cited<sup>71</sup> which demonstrate that the legislative provisions can be interpreted broadly, also covering situations which were not initially conceived of by the legislature, as in the two cases described above, with the disbanding of religious denominations. In these cases the formal statutory norms were overruled by policies which allowed to the court to close down "socially dangerous sects". We would rather avoid qualifying such policies as illegitimate or threatening legal certainty, although one can argue that such extensive argumentation is rather unusual for the Russian judiciary where the traditions of legal formalism prevail. Legal formalism promises simplicity, which can be obtained through the coherent application of the precise and univocal rules and concepts and through fidelity of the judiciary to the deductive decision-making procedure.<sup>72</sup> In cases concerning control over the religious sphere the reliance on formalism is not very convenient because it does not facilitate the courts' reasoning in assessing the impact of the disputed symbols, practices, and activities on the social environment, which is the main topic discussed in the processes connected with disbanding religious denominations. Formalism permits the courts to abstain from going deep into doctrinal religious statements and inter-confessional debates, but this tactic is not productive when evaluating different religious communities and their respective social functions.

The deficiency of formalism can be exemplified by the contradictions which can occur between different court decisions. As long as there is no clear doctrine of *stare decisis* in Russia;

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<sup>71</sup> E.g., after the Omsk decision in case of Inglistic Church other regional courts of Russia have prohibited activities of this Church on their territories, using similar or even identical argumentation. As an example can be cited the decision of Krasnodar regional court of 5 October, 2006 in case №3-1/06: Reshenie Krasnodarskogo kraevogo suda po delu №3-1/06 (5 October, 2006) po zaiavleniiu Prokurora Krasnodarskogo kraia o zaprete deiatel'nosti religioznoi gruppy Krasnodarskoi Pravoslavnoi Slavianskoi Obzhiny "Vedicheskoi kul'tury rossiiskikh ariev" Skifskoi Vesi Rassenii. Available at: <<http://www.sovacentr.ru/racism-xenophobia/docs/2007/03/d10327/>>.

<sup>72</sup> For a detailed account of the influence exercised by the statist understanding of law on law enforcement in Russia, see Andrei Kashanin and Sergei Tret'iakov, "Obshcheteoreticheskie problemy issledovaniia problem pravoprimereniia", in Iurii Tikhomirov (ed.), *Pravoprimerenie: teoriia i praktika* (Formula prava, Moscow, 2008), 12-73, especially at 39-57.

it is possible that different courts can adjudicate the same matters differently. An example of this is the attempt of ultra-Orthodox believers to popularize the slogan “Orthodoxy or Death”, first placed on the Russian social network Vkontakte in 2010. The slogan was recognized as extremist and prohibited by the Cheremushkinskiy district court of Moscow in the case of Cheremushkinskaya Inter-District Prokuratura v. Antireligiya Association, on 21 December 2010.<sup>73</sup> The decision was based on expert opinion, which stated that the slogan incites religious hatred and declares excellence of the followers of one religion above all the others. Pursuant to this decision, the slogan was brought into the Federal Registry of extremist materials which is kept by the Ministry of Justice. On 20 April 2011 the Lyublinskiy district court of Moscow, in the case № 2-3550-12 Lyublinskaya Inter-District Prokuratura v. Antireligiya Association, denied that the contested slogan was extremist, and dismissed the petition of the prosecutor. The court based its decision on the opinion of another expert commission which said that this slogan was “a defense of Orthodoxy, protection of the Christian faith, and opposition to the spiritual death of the soul in the absence of Orthodox belief, a willingness to defend consistently their faith until death.” The decision of the Lyublinskiy court was overturned by the Moscow city court on 10 August, 2011 and resent for reconsideration back to Lyublinskiy court. On 18 June, 2012 this court has ceased the proceedings, ruling that the matter adjudicated by the Cheremushkinskiy district court has *res judicata* force for all the consequent court disputes about “Orthodoxy and Death”.<sup>74</sup>

The problem with this slogan reappeared in other regions of Russia. In a remote settlement of the Leningrad region, the priest of Dudachkino village fixed this slogan to the gates of his church, which constituted grounds for the prosecutor of the town of Volkhov to bring a petition to the Volkhovski district court. According to the decision of this court of 12 February, 2012 in the case Volkhov District Prokuratura v. Alexander Sukhov, the defendant was held guilty of extremism and was obligated to remove the slogan “Orthodoxy or Death”. The parties of this case justified their respective positions referring to the findings of the two aforementioned decisions of the Moscow courts. According to part 1 of article 61 of Code of Civil Procedure the circumstances that had been established as commonly known are not subject to any further judicial proof. The findings of the Cheremushkinskiy district court were followed by the Volkhov court which reasoned that the entry in the Extremism Registry kept by the Ministry of

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<sup>73</sup> Reshenie Cheremushinskogo raionnogo suda Moskvy po delu №2-4039 (21 December, 2010) po isku Prokurora Moskvy o priznanii lozungov ekstremistskimi i obiazanii udaleniia so stranits saita materialov. Available at: <[http://судебные\\_решения.рф/bsr/case/27307](http://судебные_решения.рф/bsr/case/27307)>.

<sup>74</sup> Opredelenie Lyublinskogo raionnogo suda Moskvy po delu №2-3550-12 (16 June, 2012) po isku predstavleniu Lyublinskogo mezhraionnogo prokurora Moskvy o priznanii lozungov ekstremistskimi i obiazanii udaleniia so stranits saita materialov. Available at: <[http://судебные\\_решения.рф/bsr/case/2283583](http://судебные_решения.рф/bsr/case/2283583)>.

Justice (“Orthodoxy or Death” is there under N.855) has binding force and cannot be reconsidered by other courts which adjudicate the cases connected with that slogan.<sup>75</sup>

As one can infer from these cases, the clause of extremism can be used by the authorities in controlling religious denominations. A recent case, resolved by the decision of 28 December 2011 of the Leninskiy district court of Tomsk, was Tomsk City Prokuratura v. Local Religious Organization “The Society of Krishna’s Consciousness”.<sup>76</sup> The Tomsk prosecutor tried to qualify as extremist and to ban the “The Bhagavad Gita as It Is” – the translation with commentary of the “Bhagavad Gita” by A.C. Bhaktivedanta Swami Prabhupad, the founder of the International Society for Krishna Consciousness. According to the prosecutor, the book was an extremist religious text that disseminated social discord. The position of the prosecutor was based on private expert opinions delivered by several researchers from Tomsk State University upon the request of the FSB. The prosecutor claimed that the doctrinal statements contained in the book demonstrated religious intolerance toward other confessions, promoted the idea of exclusivity and contained negative, hostile and degrading description of non-Krishna confessional groups. However, another expert commission from Kemerovo State University appointed by the court overturned the previous opinion, and did not find that these doctrinal statements were extremist, compared with similar affirmations in other religious texts. This process was described by the Indian Ambassador to Russia, Ajai Malhotra, as “absurd, bordering on the bizarre.”<sup>77</sup> The Tomsk court rejected the petition, and on 21 March 2012 the Tomsk Court of Appeal rejected the appeal of the Prokuratura. Wide public support and political involvement of the Indian authorities drew public attention to this case, and the court was attentive enough to these extralegal factors to dismiss the application.

#### **4. The sociological argumentation from the Pussy Riot case**

The accusation of hooliganism brought under article 213 of Penal Code of Russia against the members of the rock-group Pussy Riot, who performed in the Cathedral of Christ Savior in Moscow, was based on the allegation that this action constituted a serious infraction of the social

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<sup>75</sup> Opređenje Sudeboi kolegii po grazhdanskim delam Leningradskogo oblastnogo suda po delu №33a-1797/2012 (10 May, 2012) po zaiavleniiu Volkhovskogo raionnogo prokurora k Sukhovu A.S. o priznanii ekstremistskoi nadpisi na vorotakh khrama i obiazanii demontirovat’ vyvesku s vorot khrama. Available at: <<http://судебныерешения.рф/bsr/case/1359587>>.

<sup>76</sup> Reshenie Leninskogo raionnogo suda Tomsk po delu №2-1641/11 (28 December, 2011) po zaiavleniiu prokurora Tomsk v interesakh Rossiiskoi Federatsii i neopredelennogo kruga lits o priznanii materiala eskremistskim. Available at: <<http://судебныерешения.рф/bsr/case/818542>>.

<sup>77</sup> Response to a media query on Bhagavat Gita by Ambassador of India, H.E. Mr Ajai Malhotra/ <http://www.indianembassy.ru/index.php/k2-tags/k2-comments/media-news/press-releases/800-response-to-a-media-query-today-by-ambassador-of-india-h-e-mr-ajai-malhotra>

order and expressed an open disrespect for society, this disrespect being based on religious hatred and enmity against a certain social group – which is *corpus delicti* of article 213. Below we will analyze how the court came to the conclusion that an antireligious action conducted inside church walls could be identified with a serious infraction of the order of society as a whole and with disrespect for this entire society, and not only for the community of Orthodox believers. The argumentation of the court refers to several ideas about social control, which should be provided by the state and its courts, and construes society as the addressee of the blasphemy. This allowed the court to infer that the action was not a political one, but that it endangered the entire society. This question was one of the most material ones for the case, as if it were only insulting for believers and not for the entire society, the action had to be qualified as a misdemeanor under part 2 of article 5.26 of Administrative code with the maximum fine of 1000 rubles. Putatively, this blasphemy was conceived of and conducted with regard to its possible legal qualification as a minor misdemeanor as the materials of the criminal dossier show that the action was not spontaneous, and was carefully planned and prepared. But in its reasoning the court ruled out the application of this administrative fine, finding that the action brought about a serious threat to society, and required a stronger punishment. Here the principles of legal certainty, on the one hand, and the interests of social integrity, on the other, were at stake, the court weighing them and choosing the second.

In our analysis we do not wish to evaluate the verdict, state whether from a legal point of view the charges were brought correctly or not, whether the evidence was persuasive enough for a conviction, or what were the real intentions of the accused and the social impact of their action. Our analysis is confined to the arguments with which the court linked the requirement to observe church rules with the requirement that the entire social order shall not be impinged on. We will refer to the pages of the verdict of 17 August, 2012 in the case No. 1-170/12 of Khamovnicheskiy district court of Moscow pursuant to which Nadezhda Tolokonnikova, Ekaterina Samutsevitch, and Maria Alekhina were found guilty in committing the crime of hooliganism (point 2 of article 213 of Penal Code) and each sentenced to two years of imprisonment.<sup>78</sup>

Beginning its reasoning on page 2, the court finds the complicity of the three accused persons in the fact that they have brought “the clothes which overtly and evidently contradict the general church rules, the requirement of order and of discipline, and the inner tenor of life in the

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<sup>78</sup> Prigovor Khoroshevskogo raionnogo suda Moskvy po delu № 1-170/12 (17 August, 2012) po obvineniiu Tolokonnikovoi N.A., Alekhinoy M.V., Samutsevitch E.S. v sovershenii prestupleniia, predusmotrennogo chast’iu 2 stat’i 213 UK RF. Available at: <[http://судебные\\_решения.рф/bsr/case/3738990](http://судебные_решения.рф/bsr/case/3738990)>.

church... with the intention to garb themselves inappropriately in order to demonstrate their disrespect toward the Christian world and to the church canons”. Planning their action and being willing to make it known “not only to the visitors and the church staff, but also to other citizens who were not present in the church”, the accused blogged about the planned action, inviting others to join them. Here the court links the church rites and rules which were the immediate target of the crime, with the social impact which was intended by the action in question. In this reasoning the court implicitly presumes that the inner orders of the church and their possible violation, if known to the public, can exert an influence on the entire society, and found in the plans of the accused exactly this malice intent.

This intent was carried out, the accused entered the ambo and performed there their profanities, which resulted in “the violation of public tranquility and order, in disturbance of the normal functioning of the Church, as it is established in the internal regulation of the Church, in the demonstration of disrespect toward those who were inside the Church, in the insulting the feelings of those of them who are religious” (page 3). The next sentence is of particular interest, as here the court qualifies the blasphemy as infringement of the principles of the social order to connect it with the *corpus delicti* of hooliganism: “In general, the action in question was carried out in an evidently impious and irreverent form which was devoid of any morals or ethical standards, and which uttered religious hatred and enmity to one of the existing religions – Christianity, impinging on the equality, identity, and the vital importance of this religion for a large number of nations and peoples” (page 3). In this argumentation the court bridges the connection between the first premise (the fact of insulting the feelings of the believers) and the expected conclusion (that the action contravenes the ethical standards and endangers the social order), in the meantime introducing the presumption that Christianity is vital for many nations and peoples. With these precepts at hand, the court infers that the blasphemy uttered in the given circumstances was dangerous for some peoples and nations (not concretized in the verdict, putatively the Russian nation is implicated *inter alia*), and thereof it concludes that the action encroaches on the vital basis of the society which is built up by these peoples and nations.

On the following pages the court described witness testimonies and the protocols where the evidence was fixed, the expert’s report and other proofs, abstaining from any evaluation of these testimonies and evidence (pages 4-28). The evaluation begins from page 29 where the court rejects some evidence collected in the pretrial process arguing that these opinions were based on the previous qualification of this action under article 282 of Penal Code (the excitement of hatred or enmity, the humiliation of human dignity). As this qualification had been abandoned by the prosecution, and the criminal charges were changed for hooliganism under article 213, the



court dismissed the applicability of the expert opinions where the blasphemy action was discussed and examined with reference to the *corpus delicti* of article 282 (page 29).

Rejecting the objections of the defense based on the inadmissibility of referring to any canon laws or regulations, and bringing in a state court an accusation based on these canon laws, the court agreed that church law is established only on the grounds of ecclesiastical texts. However, their ecclesiastical character does not mean that they cannot be protected by the state which is proclaimed to be secular. In the court's opinion, as the freedom of worship is guaranteed by the Constitution, the infraction of the ecclesiastical rules can be classified as an infraction of the social order, which includes the worship and ritual rites indirectly protected by the constitutional norms (pages 31-32). This argumentation is founded on the assumption that there is no need for the state to introduce official legal norms for behavior inside churches, as such conduct can be regulated by the church rules; such internal regulation does not contradict the Constitution and does not bar church rules of conduct from the protection of the State. Such reasoning constitutes an additional linkage between the violation of church rules, the obligation of the state to protect these rules, and finding the Pussy Riot action to be an act of hooliganism.

This linkage allowed the court to proceed to the central issue of these criminal charges – whether there was an infraction of the moral rules or the religious ones, and whether the blasphemy in question did not go beyond insulting the feelings of the believers and in this sense should be qualified as a misdemeanor under part 2 of article 5.26 of the Administrative Code. The court reasoned that it could accept the arguments of the defense if the action was conducted outside of the religious site (page 33), but given that the action occurred inside, it “changes the very object of the crime, as this action involves the complex of the relationships between human beings; the rules of conduct set forward in the normative regulations, in the morality, and in the traditions which secure the social tranquility and protection of the people in various spheres of activities; the normal functioning of the state and social institutions” (page 33). In the following argumentation the court held that “the places and the buildings which stand in the centre of social attention (such as churches, cathedrals, temples.) and where worship and other religious rites occur, are public places” (page 38). Here the reasoning relies on the previous findings according to which the disrespect of church rules can be identified as disregard for the order of the entire society (page 2), because of the vital role of Christianity (page 3) and the legal protection granted by the Constitution to religious communities, their ceremonies and rites (page 32).

This reasoning led the court to the conclusion that “uttering cuss words publicly and in the vicinity of Orthodox icons and sanctuaries, given the place of this action, cannot be

considered other than as an infraction of the social order, [...] insofar as the people inside the Church were scoffed and laughed at, the social tranquillity was broken” (page 35). The court pursued that this action was targeted “not only at the staff and visitors of the Church, but also at other people who were not present in the Church at the moment, and who share the Orthodox traditions and customs” (page 36). The justification of the verdict is thus achieved through constructing a “universal audience” composed of all those who respect religious culture, and it is this “audience” which constituted the community whose traditions and customs were associated by the court with the rules of the social order. In this regard, the Council of the Russian Muftis officially supported the charges (pages 27-28).

Rebuffing the arguments of the defence that Russia is a secular state and shall not favour a religious confession to the detriment of the freedom of expression, the court stressed that this freedom is outweighed in this case by the rights and freedoms of the believers (article 9 of the European Convention on Human Rights was not directly mentioned but the court evidently took into consideration the balances set out in this article). The court reasoned that the accused “opposed the adherents of Orthodox Christian values, and thereby in a demonstrative and pretentious manner expressed their disrespect for church traditions and dogmas which have been protected and revered from centuries past, exhibited themselves in a way which humiliates the inner convictions of the people spiritually linked to God” (page 36). It was especially noted in the verdict that during the blasphemy no mention was made about any politicians, nor any political claims were uttered (page 38), so that for the “audience” the action was religious and not political.

This analysis shows that the judicial decisions made by Russian courts can be studied more productively in light of the applied techniques and arguments<sup>79</sup> rather than from the perspective of alleged political manipulations and of supposed show trials. The language and the argumentation of this verdict show that the judge Syrova was familiar with the basic concepts of the Orthodox Church and the canons of the Church;<sup>80</sup> she elaborated her position on the philosophical issue of the connection between church rules and social order. One can agree or disagree with these ideas and conclusions, but one should not neglect the additional mechanisms of social control which are sometimes introduced by the judiciary to protect the values and

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<sup>79</sup> See: Anita Soboleva, *Hate Speech Litigation in Russia*, R. Uitz (ed.) Arguments that work: Strategies, Contexts and Limits in Constitutional Law, Issue 7 (Eleven International Publishing, Amsterdam, 2013), 99-119.

<sup>80</sup> We do not enter into discussion about so called “copy-paste” technique when the judge in criminal cases inserts parts of accusation act into his or her verdict, and to which extent the argumentation in the Pussy Riot belongs to the judge or to the prosecution officers. Given the position of the judge as of an impartial observer in the process who cannot refer in his or her to any other arguments except those advocated by the parties, referring to the arguments of the prosecution in verdicts where the accused is held guilty does not constitute a violation of procedural rules. As the author of the verdict is the judge, it is quite explicable that we refer to verdict’s argumentation as belonging to the judge.

interests which are not sufficiently defended by the statutes. In the present case the derisory fine provided by the Administrative Code for insulting religious beliefs was considered by the court as disproportional given the social danger of the blasphemy in question, so that the court in this trial circuitously designed a new argument to protect “the social order”.

### **Conclusion**

Systematic studies of legal phenomena demonstrate that law has never existed separately from other systems of regulation of the relationships within the society, such as religion, and morals. An appeal to the history of law shows that in the earliest periods of the development of human society legal norms did not exist as independent and autonomous. Moreover, the authorities that controlled the observance of the norms in earlier times were mostly religious.<sup>81</sup> Later these functions were handed over to executive powers and only then did a secular authority appear. This process was described by Max Weber. However, secularity is not an absolute variable in society; it is subject to gradations so that religion is never completely separated from the state. The extent of this is set forth in the statutes, but their wording cannot be the only source of our knowledge about the limits of state interference with religious matters. Judicial and administrative practice provides for other sources, which can be as important as the legislation, or even more. Although the creation of legal norms is considered to be the exclusive function of legislators, the role of the judges and other law-enforcement officers in this process cannot be denied. At least, concerning the interpretation of legal rules which often amounts to a cardinal reformulation of the existing norms.

The results of our study support this thesis with the example of Russia. From the beginning of the post-Soviet era in Russian history, the gap between the declaratory provisions of the Constitution and statutes, and their implementation is evident. The situation has not changed so far, and the legal practitioners in Russia know the difference between the declarations written in the legislation and the remedies which can be obtained in the courts. Contemporary Russian legislative texts pertaining to matters of religion do not differ greatly from the Western legal regulations on this matter, but the difference in implementation of these texts in the legal practice is clear. Along with the study of the cultural and political backgrounds of this difference, the arguments with the help of which the judges construct the policies can be analyzed. Their policies are not dictated only by political incentives or by the historical

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<sup>81</sup> Chaim Perelman, ‘On Legal Systems’, 7 *Journal of Social and Biological Structures* (1984), 301-302.

experience of the people. They also depend on the personal choice of the judges who introduce the policies through their judgments.

Our analysis reveals some of the characteristics of how judges in Russia handle religious freedoms, which are alternative approaches to regulation. When adjudicating a case, the judge is free to deliver any decision and to support it with any argumentation whatsoever, but within the limits of the constraints existing in their professional community. These limits are in fact set forth not so much by the legislation, but rather by the doctrine, the instructions, and the case-law of the higher courts. Such limits might be well established, as in the system of Russian commercial courts, or might be vague, and sometimes contradictory, as in courts of general jurisdiction, as exemplified by the cases with the ultra-Orthodox slogan. It is the latter courts which mainly deal with religious cases. From this perspective, an examination of the arguments which underpin the policies elaborated by the ordinary lower courts can provide an understanding of how these policies are formed in reality. Such examination, conducted from the standpoint of the theory of legal argumentation, allows for the motives of the courts to go beyond the wording of the legal rules in the cases where the courts are inclined to provide broader defenses and remedies than formally prescribed by the statutes. Legal doctrine and judicial practice in Russia can still be characterized as rule-based, which contrasts with the policy-based approach of the ECtHR, as demonstrated by the example of several Russian cases heard by the Strasbourg court. However in some cases the Russian judges prefer policies, especially if their inner beliefs are affected. To illustrate, we drew examples of the cases where “perilous sects” were subject to disbanding and the “extremist books” were banned. The argumentation in these cases does not formalistically rest on the wording of the legal rules, but goes into details of the religious cults. The findings of the court can be grouped around such principles to justify the broad interpretation of the applicable legal rules. A special case is the verdict delivered in the case of Pussy Riot, where the court introduced a new defense for religious feelings. This defense was missing in Penal Code prior to the verdict. While the hearings in the court were in progress, a draft bill with new *corpus delicti* to legislate against insulting religious feelings was introduced; after the hearings had been over, this draft bill was adopted establishing the criminal liability which de facto had been already created by the court in Pussy Riot case. This draft bill and its development are briefly examined in the paper.

We are aware that the cases examined do not represent all the variety of the nuances which arise in Russian courts in religious cases. The focus of our study was the issue of the heuristic value of case-based analysis of legal argumentation which allows for a broader explicative scheme than that of the presumed political influence behind the court decisions. Such

analysis can be useful for studies conducted in the domain of the human rights, and especially in the sphere of the protection of the religious freedoms where cases, in fact, are considered on the base of supralegal criteria.

Authors:

Dr. Mikhail Antonov

National Research University Higher School of Economics (St. Petersburg, Russia).

Associate Professor of Law.

E-mail: [mantonov@hse.ru](mailto:mantonov@hse.ru), Tel. +7 (812) 7852540

Ekaterina Samokhina

National Research University Higher School of Economics (St. Petersburg, Russia).

Assistant of Director of Legal Argumentation Research Center  
(<http://spb.hse.ru/en/lawarg/>),

Doctorate student at Law Faculty of Saint Petersburg State University.

E-mail: [ya.samohina@gmail.com](mailto:ya.samohina@gmail.com), tel. +7 921 3743700

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