

Thursday, 28 February 2013

Russian punk band Pussy Riot goes to Strasbourg: a song in Major or Minor?
(with a summary in Russian)

by Svetlana Huntley
Russian lawyer LL.M, Washington (USA)



Российская панк-группа Пусси Райот идет в Страсбург: песня в тональности мажор или минор?

В начале февраля 2013 года три участницы российской панк-группы Пусси Райот («ПР») направили жалобу в Европейский Суд по Правам Человека («ЕСПЧ»). Заявители утверждают, что Россия нарушила их права, закрепленные в статьях 3 (запрещение пыток), 5 (право на свободу и личную неприкосновенность), 6 (право на справедливое судебное разбирательство) и 10 (свобода выражения мнения) Европейской Конвенции о защите Прав Человека и Основных Свобод («Конвенция»). Их адвокаты заявляют, что выступление группы в Храме Христа Спасителя не было мотивировано религиозной ненавистью или враждой, а, пожалуй, является политическим заявлением.

В то время как на Западе участниц ПР превратили в любимец средств массовой информации, последующее следствие по делу и судебное разбирательство разделили общественное мнение в России и вызвали различные реакции со стороны правозащитных организаций, юристов, политиков, представителей власти, религиозных деятелей и деятелей искусств. Несомненно, участницы ПР зашли слишком далеко, но то же самое можно сказать и о следственных органах и национальных судах.

Цель настоящего поста состоит не в том, чтобы выступить в защиту участниц ПР или подвергнуть их критике, а в том, чтобы, оставив эмоции в стороне, дать объективную правовую оценку уголовному преследованию в отношении девушек и их шансам на успех в ЕСПЧ. Судя по всему, в этот раз успех их «выступления» будет напрямую зависеть от усердной работы адвокатов.

A SONG IN MAJOR OR MINOR?

In the beginning of February 2013 three members of the Russian punk group Pussy Riot ("PR") submitted their complaint to the European Court of Human Rights ("ECHR"). The applicants claim that Russia violated their rights enshrined in Articles 3 (prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial) and 10 (freedom of expression) of the European Convention on Human Rights and Fundamental Freedoms ("Convention"). Their lawyers claim that PR's performance in the Cathedral of Christ the Savior was not motivated by religious hatred and hostility but rather was a political statement.

While PR's actions turned them into media darlings in the West, the subsequent pretrial investigation and court proceedings divided public opinion in Russia and aroused various reactions from human rights NGOs, lawyers, politicians, government officials, artists, and religious figures. There are no doubts that PR crossed the line, but so did the investigative authorities and domestic courts.

The goal of this post is not to advocate for the PR members or to criticize them, rather to set emotions aside and to give an unbiased legal assessment of their criminal prosecution^[1] and chances for success in the ECHR. At this time it appears that the success of their "performance" before the ECHR will directly depend on the hard work of their lawyers.

FACTS OF THE CASE

On 21 February 2012, members of PR arrived at the Cathedral of Christ the Savior in Moscow and staged a performance on the soleas of the Cathedral. Among them were Tolokonnikova Nadezhda, Samutsevich Ekaterina and Alekhina Mariya, who were later arrested and convicted. All of them were dressed in brightly colored dresses and balaclavas. Security personnel and other employees of the Cathedral attempted to stop PR's actions. While they prevented Samutsevich from accessing the soleas and playing her guitar and turned off PR's sound equipment, the other women continued their performance without music and a song track.

It appears that PR's music video entitled Punk Prayer "Virgin Mary, put Putin away," which many of us saw on YouTube, does not correspond to their actual actions in the Cathedral. Thus, according to eyewitnesses' testimony, there was no music, the women did not perform the song and did not chant any political slogans.^[2] Instead, the members of the band jumped, lifted their legs and arms, fell on their knees making the sign of the cross, and chanted some words. There is no clarity as to which words the women chanted.^[3] After about a one minute performance on the soleas, the security officials of the Cathedral managed to force the women out of the Cathedral unveiling their faces.

PRETRIAL INVESTIGATION AND COURT PROCEEDINGS

In March 2012, Tolokonnikova Nadezhda, Samutsevich Ekaterina and Alekhina Mariya were arrested and accused of 'hooliganism' as prohibited by Article 213(2) of the Criminal Code of the Russian Federation. In particular, they were charged with "gross violation of public order manifested in patent disrespect for society, motivated by religious hatred or enmity and by hatred against a particular social group, and committed by co-conspirators."

On 17 August 2012, a court of first instance convicted the three women of the charged offense and sentenced them to two years of imprisonment. On 10 October 2012, the appellate court upheld the convictions of all three women and the sentences of Tolokonnikova Nadezhda and Alekhina Mariya. However, it changed the sentence for Samutsevich Ekaterina to two years probation, since she was prevented from entering the soleas and did not participate in the performance in the Cathedral with the other PR members.

One of the constituent elements of the offense with which the women were charged is that it was motivated by religious hatred and hatred towards a particular social group. Failure to prove such motive would lead to an acquittal of the accused. PR's attorneys claim that the prosecution failed to prove this motive, which resulted in unlawful imprisonment of their clients.

WHAT WAS THE EVIDENCE OF RELIGIOUS HATRED?

According to legal doctrine, a motive of the crime describes the reasons that supposedly induced a person to commit an offence. Such reasons are based on the person's background, needs and interests. According to the indictment, the investigative authorities relied on the following evidence to prove the motive of religious hatred and hatred towards a particular social group:

Opinions of several eyewitnesses (victims) who believed that PR's actions were aimed at enmity towards orthodox Christians and orthodox religion;

Opinions of hearsay witnesses who later saw Punk Prayer video on the Internet and believed that PR members may have committed these acts due to enmity towards Christian values, orthodox Christians, and orthodox religion;

A storage media with a folder titled "Holy shit" containing audio tracks. In the investigator's opinion, the very name of the folder proves hostility of the accused to the orthodox religion. A person who has a positive attitude towards orthodox religion may not use the expression "Holy shit;" and

The third psychological and linguistic expert report concluding that PR's performance, as observed by the experts on YouTube, was motivated by religious hatred and enmity and by hatred towards a social group of orthodox Christians.[4]

The court of first instance agreed with the prosecution regarding the motive and based its conclusion on the "vulgar and provocative character" of PR's performance, the opinions of the victims and prosecution's hearsay witnesses, the conclusions of the third expert report, and the fact that PR did not chant any political slogans during their performance. The court also supported its findings about the religious motive based on the following reasons:

The women advocate for feminism, which ideas are incompatible with those of orthodox religion. Therefore, the idea of superiority of one ideology over another gives rise to mutual enmity and hatred;

Reactions, emotions and replicas of the accused during trial also proved their religious hatred and enmity; and

Since their performance was staged in the Cathedral, their actions were qualified as a crime. In the court's opinion, commission of the same acts outside religious buildings should be qualified as a violation of moral rules or as a minor offence even if such acts were motivated by religious hatred and hatred towards a particular social group.

Obviously, the subjective opinions of several eyewitnesses and hearsay witnesses about the motive of PR's performance in the Cathedral are based on their speculation, and should not have been relied upon by the court.[5] The accused's reactions at trial have little relevance in showing motive for acts committed some 5 months previously. Further, evidence of guilt should be based on the acts and statements of the accused personally and not on feminist ideological tenants defined by the court without any direct nexus to the accused.

It appears that the most serious evidence the investigation and the court relied on to prove the religious motive was the third expert report, since this is the only document that analyzed PR's ideas, interests and activity prior to their performance in the Cathedral.[6] Meanwhile, the third expert report may lack reliability. According to PR's attorneys, the third report was prepared with violations of the criminal procedure. Thus, the three women were informed of the decision to order the third expert report only after the experts prepared their conclusions. This deprived the accused of the possibility to exercise their procedural rights, such as: to challenge the experts, to request additional questions for the experts, to request appointment of their own experts, and to give explanations to the experts.[7] Furthermore, allegedly one of the experts was not independent, since one of the victims' attorneys was his Ph.D. thesis mentor. Russian law does not allow an expert to take part in the criminal proceedings if he has been or is in an official or any other kind of relationship with the parties or their representatives.[8]

Even if the third expert report was obtained without procedural violations, the accuracy of its conclusions is still doubtful, since Russian law lacks key definitions of "religious hatred or enmity" and "a social group" and the experts did not have clear criteria against which to determine the religious motive in PR's actions in the Cathedral.

WAS THERE AN ALTERNATIVE TO A CRIMINAL PROSECUTION?

Failure to prove the motive of religious hatred as a constituent element of the crime of hooliganism would not necessarily render the members of PR innocent. Their actions in the Cathedral could still be classified as a minor hooliganism, punishable under the Code of Administrative Violations of the Russian Federation ("Administrative Code"), with a maximum penalty of 15 days arrest.[9] Further, since most victims claimed that PR's performance offended their religious feelings and desecrated the Cathedral, it could be punishable by a monetary fine under Article 5.26(2) of the Administrative Code, which prohibits these actions.[10]

CHANCES FOR SUCCESS IN THE ECHR

Before hearing PR's appeal, the ECHR must first decide on the admissibility of their application. PR has met at least two of the admissibility requirements: exhaustion of all domestic remedies and the six-month time-limit requirement.[11] Since PR's application is not available to the public yet, it is unclear if it meets the other required admissibility criteria. Nevertheless, I will proceed assuming that the ECHR will hear PR's application.

The applicants allege that Russia violated Articles 3, 5, 6, and 10 of the Convention. Article 3 relates to inhuman and degrading conditions of their detention on remand and will not be analyzed in this post due to the lack of necessary information on this matter from reliable sources. As concerns the other three Articles, I will focus on the most obvious violations the applicants could have possibly claimed in their application.

Article 6 (right to a fair trial)

There are possibly three different breaches to the right to a fair trial in PR's case: the court of first instance failed to deliver a reasoned judgment, based its conclusions on unreliable evidence, and violated the right to call witnesses for the defense.

A judgment of a domestic court must contain reasons that are sufficient to reply to the party's essential arguments (*Ruiz Torija v. Spain*, at 29-30). As long as some reasons are given in the judgment (even if the defense considers them wrong), a trial will meet the requirements of Article 6 of the Convention. The Russian Government will likely argue that this is exactly the situation in this case. Thus, although PR's argument was that their actions were not motivated by religious hatred, it was rejected by the court of first instance based on its findings that the accused are feminists, their performance took place inside the Cathedral, and their behavior during trial showed religious hatred and enmity. However, the ECHR may still find a violation of Article 6, if the reasons given by a domestic court in its judgment are manifestly incoherent (*Tatishvili v. Russia*, at 59-63). While the above findings may seem to many as being incoherent, the conclusions of the ECHR will largely depend on the persuasiveness of the arguments presented by the applicants as the ECHR has dealt with manifest incoherence of reasons in only a few cases.

The applicants may also argue that the domestic court based its conviction on the third expert report and that this report was unreliable as it was obtained contrary to procedural rules. In most cases the ECHR rejects such complaints under Article 6, since the latter does not set forth any rules on the admissibility of evidence, which is primarily a matter for regulation under national law (*Schenk v. Switzerland* at 46; *Van Mechelen and others v. the Netherlands* at 50). However, the ECHR may pay close attention at how unreliable evidence was treated during proceedings and whether the defense rights (e.g. to challenge the evidence) were disregarded (*Asadbeyli and Others v. Azerbaijan* at 134; *Schenk v. Switzerland* at 47). In this respect, the applicants may argue that they had been informed of the third expert report only after it was lodged; therefore, they were not able to comment effectively on the main piece of evidence at the pre-trial stage.[12] Further, the domestic court did not permit them to call their experts to challenge the third expert report. Since the results of this report were crucial for the outcome of the case, the ECHR may find that the proceedings were not fair (*Mantovanelli v. France* at 31-36).

In addition to the expert witnesses, the court of first-instance also refused to call 27 out of 30 witnesses requested by the defense. The right to call witnesses for the defense is guaranteed by Article 6 §3(d) of the Convention. However, this Article does not give the defense an absolute right to question every witness or expert it wishes to call (*Vidal v. Belgium* at 33). For asserting a breach of this guarantee, the applicants will have to prove that failure to hear their witnesses would have had a decisive impact on the courts' conclusions as to their guilt (*Krempovskij v. Lithuania*, dec. on admissibility).

Article 5 (right to liberty and security)

Should the ECHR find PR's trial unfair, it may also hold that their subsequent imprisonment was unlawful.[13] Thus, Article 5 §1 of the Convention guarantees the right to liberty and personal security. Sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty. One of such grounds, stipulated by sub-paragraph (a), is "the lawful detention of a person after conviction by a competent court." The Russian Government may refer to this sub-paragraph to justify PR's imprisonment as being based on the "conviction." Meanwhile, the word "conviction" has to be understood as signifying both "a finding of guilt" after "it has been established in accordance with the law that there has been an offence" and the imposition of a penalty involving deprivation of liberty (*M. v. Germany* at 87; *Grosskopf v. Germany* at 43). If either of these conditions is not satisfied, then there was no "conviction" as it is understood under sub-paragraph (a). PR may argue that the domestic court failed to meet the first of these two conditions, since the facts to which their sentence relate do not constitute an offence permitting imprisonment, and, therefore, their subsequent deprivation of liberty was unlawful.[14]

In addition, the PR members may claim that criminal law provisions relied upon by the prosecution as the legal basis for their conviction and imprisonment do not meet the requirements of legal certainty and foreseeability under Article 5 of the Convention. In other words, these provisions were not sufficiently precise to allow the applicants to foresee the consequences of their actions, which constitutes a breach of the Convention (*Creangă v. Romania* at 120). The applicants were convicted of hooliganism motivated by religious hatred and hatred against a particular social group. However, such key definitions as "religious hatred" and "a social group" are not defined in Russian law, and their concepts are not clarified by higher domestic courts. Therefore, due to fairly imprecise concepts the prosecution did not have clear rules for determining the religious motive and the applicants could not foresee that their actions would entail imprisonment.

Article 10 (freedom of expression)

The applicants will argue that their criminal conviction, resulting in imprisonment, amounted to an interference with the exercise of their right to freedom of expression (*Okçuoğlu v. Turkey*, *Castells v. Spain*). Such interference breaches Article 10 §2 of the Convention, unless the Government proves that: it was prescribed by law, pursued a legitimate aim, and was necessary in a democratic society (*Giniewski v. France* at 38). While the Russian Government may successfully argue that its interference was prescribed by Criminal Code and pursued a legitimate aim, referring to the protection of rights of orthodox Christians,[15] proving the "necessity" criteria may be challenging.

The Government will most probably refer to the landmark case of *Otto-Preminger Institut v. Austria*, where the ECHR examined religious freedom versus freedom of expression and found no violation of Article 10. In that case the applicant showed a movie portraying God, the Virgin Mary and the Devil in a way that the Roman Catholic Church found offensive, resulting in the local authorities seizing the film. The ECHR held that the right of freedom of expression carries with it duties and responsibilities, one of which is "an obligation to avoid as far as possible expressions that are gratuitously offensive to others," and gave the State a fairly broad margin of latitude when assessing which measures are required to protect freedom of religion.

At the same time, PR may argue that the circumstances of their case are different from those in *Otto-Preminger Institut* and are more similar to *Giniewski v. France*, where the ECHR found a violation of Article 10. In this case a journalist wrote an article criticizing a papal encyclical and the Pope's position which local authorities considered as undermining the honor and character of Christians. The applicant was found guilty of publicly defaming Christians on the basis of their religion. The ECHR concluded that though the article related to religious matter and some of its ideas and phrases may "offend, shock or disturb some people," it did not contain attacks on religious beliefs and its analyses could not be extended to Christianity as whole. Therefore, the applicant's conviction was not 'necessary in a democratic society'. Similar to *Giniewski*, PR's *Punk Prayer* contains mostly a criticism of the Patriarch for his alleged connection with the KGB and support for Putin. Additionally, PR's case differs in that the applicants expressed their ideas not only in the text of their song, but also through actions in the Cathedral. Thus, the ECHR will have to analyze their performance as a whole, which may result in a conclusion different from the one in *Giniewski*.

The ECHR may also look at the nature and severity of the penalty imposed on the applicants when assessing the proportionality of the State's interference with their right to freedom of expression (*Okçuoğlu v. Turkey*, *Castells v. Spain*). Considering that there was an alternative to their criminal prosecution and imprisonment, namely an administrative arrest for 15 days, the ECHR may find that their conviction and sentencing were contrary to Article 10.

As a last resort, the Russian Government may claim that PR's performance incited hatred and religious discrimination, and thus, it falls outside the protection of Article 10 (*Kühnen v. the Federal Republic of Germany*, *Ochensberger v. Austria* (1994)). However, even this argument may be successfully rebutted, since according to the Supreme Court of the Russian Federation, criticism of religious groups, ideological or religious beliefs, national or religious practices can not be regarded as an action aimed at inciting hatred or enmity.[16]

It appears that the success of the PR members in the ECHR is not predetermined. The ECHR is not a court of fourth instance, and as a general rule its task is not to reassess the evidence. In addition, both parties have reasonable arguments supporting their positions. However, in the end it is for the ECHR to give a final ruling and to decide which PR's song it prefers to hear: the one in *Major* or in *Minor*.

[1] The information about the facts of the case and the analyses of PR's prosecution are based on the indictment and the judgments of the domestic courts that are available on the Internet.

[2] There were nine eyewitnesses (victims) of PR's action in the Cathedral of Christ the Savior.

[3] For example, only four eyewitnesses heard the expression "Holy shit" (in Russian it sounds like Sran' Gospodnya, literally translated as Lord's shit), and one of them also referred to the phrase "Mother of God, become a feminist." Two eyewitnesses did not specify which words or phrases the women chanted simply describing them as offending God, God's mother, or the Patriarch or as a strong language. Three eyewitnesses could not understand the words at all.

[4] Interestingly, there were two other expert reports that did not reveal the motive of religious hatred and hatred towards orthodox Christians. However, the court found them unreliable, since they were obtained contrary to the rules of criminal procedure.

[5] According to Russian Code of Criminal Procedure such evidence is inadmissible.

[6] The experts analyzed the text of the Punk Prayer "Virgin Mary, put Putin away," the music video of the Punk Prayer and the information on the official website of the band that includes ideas and political interests of the group, texts of all PR's songs, interviews, comments and articles about the band, as well as the eyewitnesses' testimonies.

[7] Article 198 of the Criminal Procedure Code of the Russian Federation.

[8] Article 70, part 2 of the Criminal Procedure Code of the Russian Federation.

[9] Article 20.1 of the Administrative Code prohibits a minor hooliganism, which is "a violation of public order manifested in patent disrespect for society, accompanied by obscene language in public places, offensive pestering of the people or destruction of or damage to property of other people."

[10] Article 5.26(2) of the Administrative Code prohibits insulting religious feelings of people and desecration of objects, symbols and emblems venerated by them.

[11] The ECHR considers that the "final" court decision in cases against Russia is usually the judgment of the appellate court. A supervisory review of the case by a court of a higher instance cannot be considered as an effective domestic remedy (See e.g. Berdzenishvili v. Russia). The appellate court delivered its judgment in PR's case on 10 October 2012, and PR's complaint was submitted to the ECHR in the beginning of February 2013, which constitutes less than 6 months from the date on which the "final" judgment was rendered.

[12] The applicants had been deprived of the opportunity to put additional questions to the experts, to challenge the experts, to appoint their own experts, and to give explanations to the experts.

[13] The applicants may have also complained about unlawfulness of their detention on remand that has been extended several times. However, due to the lack of information regarding this matter from reliable sources, this issue will not be considered in this post.

[14] PR's actions in the Cathedral could be classified as a minor hooliganism, punishable under the Administrative Code, with a maximum penalty of 15 days arrest.

[15] One of the legitimate aims mentioned in Article 10 §2 of the Convention is the protection of "the rights of others."

[16] Clause 7 of the Ruling of the Plenum of the Supreme Court of the Russian Federation of 28 June 2011, No. 11.