

**Opinion on the Judgment of the European Court of Human Rights
of 17 July 2018 in the case of *Mariya Alekhina and Others v. Russia*
(Application no. 38004/12)**

by Igor Ponkin

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***“New challenges to the freedom of religion in Europe in the light of
the recent judgments of the ECHR”***

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Dear Mr Chairman, dear Ladies and Gentlemen,

Today I would like to share with you some thoughts about the recent Judgment of the European Court of Human Rights in the case of *Maria Alekhina and others v. Russia*. Just a few days ago the ECtHR rejected the appeal of the Russian Government and refused to transfer the case to the Grand Chamber, where the Court could have re-considered its position to bring it in harmony with its own case law in this category of cases. The judgment is now final; however, we can still look at it from the perspective of today's topic, mainly finding the ways to “reconcile” two of the rights guaranteed by the Convention.

For those of you who are unaware of the fabula of the case, I will shortly present the main facts. The applicants are Russian nationals, members of the Russian feminist punk band, Pussy Riot, who give impromptu performances of their songs in various public areas dressed in brightly coloured balaclavas and dresses. On 21 February 2012, following a series of performances in Moscow, they attempted to perform one of their songs, “Punk Prayer – Virgin Mary, Drive Putin Away”, from the altar of Moscow's Christ the Saviour Cathedral. No service was taking place, but some believers were inside the Cathedral, including journalists and the media

invited by the band for publicity. The performance lasted slightly over a minute because cathedral guards quickly forced the band out. The band uploaded video footage of their attempted performance to their website and to YouTube. It was seen one and a half million times in the following ten days. The applicants were arrested shortly after the performance for “hooliganism motivated by religious hatred” and remanded in custody, essentially on account of the gravity of the charge against them. The trial court found that their actions had been offensive and insulting for the Orthodox faithful, referring to their brightly coloured clothes and balaclavas, their waving their arms and kicking their legs around and their obscene language in the main cathedral of the Russian Orthodox Church. The court rejected the applicants’ arguments that their performance had been politically and not religiously motivated. All their appeals against this decision were unsuccessful. They were sentenced to two years’ imprisonment, subsequently reduced by one month.

The applicants made numerous complaints before the ECtHR under Article 3 (prohibition of inhuman or degrading treatment) and Article 6 §§ 1 and 3 (c) and (d). They also complained under Article 5 § 3 (right to liberty and security / entitlement to release pending trial). Lastly, **under Article 10 (freedom of expression), they complained about their detention and conviction, alleging that those measures had been excessive in relation to their conduct.** The Court found violation in multiple instances, in particular, violation of the applicants’ rights guaranteed by Art. 10. The Court accepted that a reaction to breaching the rules of conduct in a place of religious worship might have been warranted. However, it found that sentencing them to imprisonment had been exceptionally severe.

As in most of the admissible cases that come to the ECtHR, in this application it was important for the judges to identify the limits to which two

of the guaranteed rights - the freedom of expression and freedom of religion - can “intervene” into the sphere of each other. It should be noted that countries enjoy a relatively wide margin of appreciation in this area. In many countries, while trying to protect believers from too aggressive behavior of those who want to enjoy their freedom of expression, legislation had introduced an administrative offence or even a crime “blasphemy”.

In terms of law, the object of criminal offence of “blasphemy” is not God at all. Even though this is what we often hear from those, who oppose the criminal persecution of blasphemous actions. Indeed, “God cannot be outraged (humiliated)“, but actually the objects of the criminal offence in such situations are people (faithful), their rights, freedoms and legitimate interests, their human dignity and religious feelings. It is also public interest connected with the need of protection of personal dignity of believers, including public interest in the field of public safety and social order in general. Thus, the specified objects, which are exposed to illegal offence, act here as the objects of such offence indirectly, implicitly. And this significantly complicates the task for forensic experts when carrying out examinations in such cases.

It is therefore necessary to address to the question, what exactly (in terms of law) is the object of illegal offence in extremist crimes of this group of cases.

The analysis of the standards incorporated in the the Russian and foreign criminal anti-extremist legislation as well as legal precedents based on such norms, gives reasons to identify the following groups of objects:

- 1) **images of persons** in respect of which believers carry out religious worship or religious honoring or express special religious respect;
- 2) the main **religious symbols**;
- 3) religious **texts**;

- 4) **reputational image of the religion** in general; the specific lexical structures and **words** recognizably belonging to religion and/or the religious organization representing it, including the names of religion and its believers, titles of its religious attendants, etc.;
- 5) objectified images and **icons** honored by believers;
- 6) religiously honored or respected by believers **material objects** of religious purpose;
- 7) **religious order** (autonomous order – as a form and part of the social order within the sphere of autonomous standard competence of the religious organization).

At least two positions from this list were obviously triggered in *Pussy Riot* case.

In this sense, a test has been prepared consisting of six parts, in order to define a threshold that makes it possible to establish adequately what types of expression constitute a criminal offence: the context, the speaker, the speaker's intention, the content and form of the speech act, its scope and magnitude, and the possibility of damage occurring as well as its imminence (*Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* , § 29).

If we apply this test to the present case, we would see that the Pussy Riot actions were obviously unlawful. It was therefore lawful for the State to intervene and to protect the rights of the faithful.

However, the question I want to put here today is more general: do the faithful have to accept the possibility of the unwanted intervention into their churches by someone, who wants to express their views inside the church? Does Article 10 protect the invasion of churches and other religious buildings and property?

My answer to this question is definitely “no”. I am sure that Christians have the right to worship freely without fear of obscene, hostile or even violent protest taking place within the church. Freedom of expression allows for political criticism, but it does not protect, as stated in paragraph 177 of the *Alekhina* judgment: “... expressions that are gratuitously offensive to others and thus an infringement of their rights and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”

As one of the European Court judges said in his dissenting opinion: “... the State has a positive obligation to protect believers’ freedom of assembly, namely by ensuring that they and their places of worship are fully respected by State and non-State actors and when attacks against them occur, to investigate and punish them.” (Judge Pinto de Albuquerque stated in his concurring opinion in *Krupko and Others v. Russia*, no. [26587/07](#), 26 June 2014, § 12)

Article 10 of the Convention does not protect a right to insult or to humiliate individuals. Freedom of expression does not protect deliberate slander or a discourse with the aim of provoking discrimination (see *Jersild v. Denmark*, 23 September 1994, Series A no. 298, and *Gündüz v. Turkey*, no. 35071/97, ECHR 2003 XI).

Thus the applicants’ conduct goes far beyond the scope of Article 10. Even though the Court stated in its judgment that “in the concrete case the criminal conviction and prison sentence imposed were not proportionate to the legitimate aim pursued”, this is not a reason to consider that the applicant’s conduct deserves protection under Article 10 at all.

In this I fully agree with the ECHR judge Ms **ELÓSEGUI (Элосэги)** who stated in her dissenting opinion to *Alekhina* judgment that there was no violation of applicants’ rights guaranteed by Article 10 of the Convention, as Article 10 does not protect conduct consisting of invading churches and

other religious buildings or property for political purposes, nor does it protect conduct comprising intimidation and hostility against Christian Orthodox believers.

Thank you for your attention!