

Failed for Now: Pussy Riot and the Rule of Law in Russia

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Abstract

The images of Pussy Riot band members Nadezhda Tolokonnikova, Yekaterina Samutsevich and Maria Alyokhina in the dock at Moscow's Khamovniki District Court have made headlines around the world. Their trial dominated the political debate to an unprecedented extent in the summer of 2012 and gave rise to strong public protest. From a legal point of view, however, the trial only showcases the well-known deficiencies of the Russian criminal justice system: namely that it gives short shrift to the Russian Constitution, the European Convention on Human Rights (ECHR), and the decisions of the European Court of Human Rights (ECtHR) in the interpretation of relevant legal norms. Any discussion on the formal elements of crime remained superficial at the stages of both arraignment and sentencing. Although no political intervention can be shown to have taken place in this case, there is a discernible lack of determination on the part of the political elites to implement the ECtHR's decisions systematically and to make visible efforts to boost the independence of the judiciary.

The Accusation

The stunt perpetrated by the punk group Pussy Riot and the subsequent legal proceedings were the focus of considerable international attention. The charges included violations of human rights and political influence on the proceedings. Indeed, what happened was a violation of the human rights norms of international law. This is not an exceptional instance, however. These violations are due to systemic flaws that have been criticized by the ECtHR on several occasions, but have been left unresolved for years.

The actual events are largely undisputed. On 21 February 2012, five women entered the Cathedral of Christ the Savior in Moscow and stepped up to the *soleas* before the iconostasis in the sanctuary, which is reserved for the clergy. Dressed in colorful clothes and wearing balaclava helmets, they began to dance and imitated the sign of the cross. After a few seconds, Yekaterina Samutsevich was dragged out of the sanctuary area by the custodians who had come running; however, they failed to overpower the remaining members. The action was over after about one minute. It was filmed and later combined with other footage; then lyrics were added, and the film was published on the internet. The lyrics criticized the Russian Orthodox Church for its close relations with the state, especially the KGB, and its homophobia. The text makes reference to believers with the lines "All supplicants crawl to kowtow", while the repeated phrase "holy shit" may be understood as referring to the Church, the faithful, or the world in general.

First of all such behavior could be in conflict with Article 5.26 (2) of the Russian Code of Administrative Offences (KoAP), which imposes an administrative fine of 500 to 1,000 rubles for the offence of "Insulting the religious feelings of citizens or desecration of artifacts, symbols, and emblems of doctrinal significance".

Furthermore, the members of the band had to anticipate prosecution under Art. 282 of the Criminal Code of the Russian Federation. It sanctions "Actions aimed at the incitement of hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group" with punishments including prison terms of up to two years. On this basis, in 2005, participants of the art exhibition "Caution! Religion!" were sentenced for the public display of material critical of religion, irrespective of the intent of the participants.

In the trial against Pussy Riot, however, the court went even further by referencing the notorious Soviet-era crime of "hooliganism". In the Soviet Union, the article was used as a catch-all clause for any type of opposition to the regime. The Criminal Code of the Russian SFSR of 1960 listed three levels of hooliganism: Art. 206 stipulated up to a one-year jail term for "gross violations of public order demonstrating contempt for society"; up to two years for gross hooliganism marked by "extraordinary cynicism, particular impertinence, or obstruction of an officer in the line of duty"; and up to seven years' incarceration for "hooliganism using weapons".

The post-Soviet Criminal Code of 1996 expressly raised the requirements for convictions of hooliganism due to the problematic history of that article. The only remaining punishable offence was hooliganism using weapons. In the revised Criminal Code, Art. 213, the charge is described as "a gross violation of the public order manifested in patent contempt of society and attended by the use of weapons or articles used as weapons", for which a sentence of up to five years' imprisonment may be imposed. Paragraph 2 stipulates prison sentences of up to seven years for the same crime when perpetrated as part of an organized group. Such severe

punishment appeared to be justified since only the particularly serious crime of hooliganism attended by use of weapons remained in the Criminal Code.

However, this restriction was not sustained. The elements of the crime were expanded once more as part of the legislative program to combat extremism in 2007: Since then, the hallmark of hooliganism is no longer only the use of weapons, but it may also be distinguished by the motivation of political, ideological, racist, nationalist, or religious hatred. The punishment remained the same.

Following this change, it remained unclear how the elements of this crime differed from those of “extremism” as cited in Art. 282 of the Criminal Code. Indeed, the Russian Criminal Code is today marked by many internal inconsistencies and discrepancies that may be attributed to changes introduced based on ill-conceived, impulsive political actions. However, any systematic interpretation shows that charges brought under Art. 213 of the Criminal Code are significantly more serious, considering the stipulated penalties, than those of insulting the religious feelings of individuals and desecration of objects under the Code of Administrative Offences or the abasement of a group of people on religious grounds under Art. 282.

However, neither jurisprudence nor the legal literature deals with this problem adequately. There are generally no clear-cut definitions of the two formal elements of the crime, i.e., hooliganism and religious hatred. Thus, neither the prosecution nor the court can refer to definitions or clear legal precedent that would define those charges more narrowly or give citizens a clear idea of which punishments are stipulated for certain kinds of behavior. It is precisely in the case of such vague terminology, however, that the courts are required under the rule of law, which includes determinacy of norms, to be especially diligent in the interpretation of legal norms. While the plenary session of the Supreme Court issued an explanatory ruling in 2007 defining hooliganism as “undisguised contempt for society” that is reflected in “the violation of established norms and rules of behavior and is borne by the desire to defy others”, that phrasing also appears quite nebulous, considering the severe penalties involved. In legal commentaries, moreover, in addition to the reproduction of the text, the only other criterion listed is a “mocking, cynical attitude”, a phrase that harkens back to the terminology of the Soviet-era law. At least the Supreme Court requires that lower courts take into account the method, time, and location of the misconduct as well as its intensity, duration, and other circumstances.

The Charges

According to the charges brought in the case of Pussy

Riot, hooliganism and religious hatred are unquestionably evident from the violation of “general rules of conduct in a cathedral”. The prosecuting authorities assume that hooliganism can be shown to have occurred because “rules of the church were not adhered to”. This behavior, they claim, is evidence of contempt for society and insults the religious feelings of those present in the cathedral, as well as all citizens who are believers, and is motivated by religious hatred and hostility.

Intent is also presumed with regard to religious hatred and is not proven separately. Multiple charges deal with “blasphemous behavior” and “desecration of religious symbols”. It is also charged that the deed represents a “vilification of the spiritual foundations of the state”. The legal substance of these assertions is unclear, given that the neutrality of the state towards various religions is enshrined in constitutional law. In another statement, the arguments of the prosecution are based quite sweepingly on moral considerations, with express disregard for any legal discourse: The defendants’ actions, it is claimed, lack “any ethical or moral foundation”. The defendant Tolokonnikova, it is stated, “acted in a vulgar, defiant, and cynical manner”.

Generally speaking, it is unclear whether all of these accusations and explanations are regarded as being constitutive of the criminal charges.

Detention On Remand

The ECtHR in Strasbourg has on several occasions criticized the conditions prevailing in Russian pretrial custody based on Art. 3 of the ECHR, which bans inhuman or degrading treatment or punishment. As recently as January 2012, complaints about Russian remand prisons emanating from the trial of “Ananyev and others” even formed the basis of a so-called “pilot judgment procedure”. Such a procedure is only rarely imposed by the ECtHR in the event of structural flaws in a member state’s legal system. In this case, the member state was ordered to fulfill special requirements. The ECtHR justified the pilot procedure with the fact that Russia has already been censured more than 80 times in connection with this issue and that 250 further, *prima facie* successful complaints were pending as of January 2012. The essence of the accusation relates not just to the prevailing conditions in prison, but also to the high number of accused who, in some cases, are incarcerated on remand for months on end without a decision on the merits of their case. Russia has thus already been required to ensure that due to the presumption of innocence and the protection of liberty, detention on remand should only be imposed in selected exceptional cases. This is also the fundamental assumption under Russian criminal procedural law, which stipulates that

detention on remand may only be imposed under the justified assumption that the accused will abscond from justice, perpetrate further crimes, intimidate witnesses, or destroy evidence. However, an assessment of proportionality must be undertaken that takes into account the Russian Constitution and the ECHR, but also the severity of the crime and the personality, age, health, family, status, profession, and other circumstances of the accused, including previous convictions. A number of violations show, however, that detention on remand is imposed almost routinely when a conviction and prison sentence are to be expected. In the case of Pussy Riot, the Russian representatives would have to demonstrate to the ECtHR that there were reasons for assuming such a threat and that these reasons were weighed against the personal circumstances of the defendants.

The Trial

The impression that the principle of presumption of innocence was treated in a cavalier fashion is reinforced when one scrutinizes the main phase of the trial. The ECtHR has on numerous occasions issued reprimands for the custom of putting defendants behind bars during the proceedings, even if they are not prone to violence. In the case brought by Mikhail Khodorkovsky against the Russian state, the ECtHR found that the iron cage simply served to give the defendant a particularly dangerous appearance in the public eye and to instill in him a sense of inferiority. In any case, during the second trial of Khodorkovsky in the Russian courts, as well as in the trial against Pussy Riot, the bars were removed from the courtroom in the main trial phase and replaced by glass panes with small apertures for communication. This, too, however, appears unnecessary when considering the huge contingent of security forces; also, the absence of a writing surface further obstructed the defendants in presenting an effective defense. If the Russian authorities had taken seriously the ECtHR's criticism, as well as the principle of equal status of all parties as required by Russian criminal procedural law, the "cages" would have to be dismantled in all Russian courtrooms and all defendants be seated at desks except in exceptional cases involving violence-prone defendants. The fact that the judge has broad discretion in ruling on defendants' motions to take evidence, in the absence of any clear criteria, additionally places the defendant at a factual disadvantage relative to the prosecution.

The Sentencing

In the case of Pussy Riot, too, the court failed to expound carefully the elements of the crime and to show that the actions of the defendants met the corresponding legal requirements. Instead, the trial court (of first instance)

left the finding of justice to the witnesses for the prosecution and the expert witnesses. It is thus particularly remarkable that the judge's opinion began by discussing the argument brought by the defense that the activists had been motivated only by political criticism and not religious hatred. The defendants' statements were cited extensively. However, the court did not subsequently discuss them. Instead, here too, religious hatred is deduced purely on the basis of the course of events: After reproducing page upon page of statements for the prosecution, the court stated in lapidary fashion that: "All actions by the defendants and their unknown accomplices provide clear evidence of hatred of religion and hostility, reflected in behavior that violated general customs of conduct in an Orthodox church. The defendants' actions deeply hurt and insulted the feelings and religious values of the injured parties". Effectively, therefore, the requirements for criminal liability are surprisingly low, despite the severe punishment: Although the court did not state as much explicitly, its conclusion means that any action that is perceived by believers as violating the general rules of the church constitutes "hooliganism" based on religious hatred.

While the judge's deliberations identify the actions in the church as the main accusation, it remains unclear which parts of the song were performed in the church and to which extent they are part of the prosecution's accusation. The prosecution and the judge's sentencing refer in general terms to "swearwords", but this too is the assessment of witnesses and those giving expert testimony, not that of the court.

Neither did the court explore whether the defendants' actions were protected by free-speech laws. This is all the more surprising since the sentence did make express reference to the argument of the defense that the defendants had only acted on their political convictions. Freedom of speech is protected under Art. 29 of the Russian Constitution, however with the exceptions defined in section 2, which include agitation for religious hatred and the propagation of social, racial, national, religious, or linguistic superiority. Based on Art. 55 (3) of the Constitution, furthermore, the basic rights can be curtailed in the interests of protecting the constitutional foundations of the state, public morality, the rights and legal interests of others, and to ensure national defense and the security of the state. It is evident that these criteria must be established by the courts. If the facts of the case depended only on the subjective perception of religious believers or on the opinion of selected expert witnesses, there would be no guarantee of protection. While there is no clear case law in Russia concerning the protection of freedom of speech under the Russian Constitution, it is remarkable that the defense did not

cite the relevant decisions of the ECtHR on freedom of speech. For under the ECHR, freedom of speech can only be restricted if necessary in a democratic state for national security, for maintaining territorial integrity or public safety, to maintain order or prevent crimes, to protect health and morality, to protect the reputation or rights of others, to prevent the dissemination of classified information, or to maintain the authority and impartiality of the courts. It is acknowledged, however, that the member states have broad scope for judgment evaluation regarding these criteria. However, the legal basis must be sufficiently clear-cut to avoid the danger of arbitrary or excessive interventions. This appears to be problematic in the present case.

Conclusion

What is ultimately striking here is the sweeping approach to the interpretation of relevant legal questions and the way the latter are interspersed with moral and religious arguments. However, this rather superficial legal consideration carried out by the court is by no means exceptional in Russian criminal justice. The powerful tradition of legal positivism apparently still constitutes an obstacle to general efforts to promote coherence and consistency in the interpretation and legal systematization regarding the system of norms and adjudication. Furthermore, Russian jurisprudence only selectively scrutinizes the interpretation of norms in accordance with the rule of law. This favors a disparate, selective application of the law.

At the same time, the law does not shield the judges sufficiently from external influence on their decisions. Although open-ended contracts for judges have recently become the rule, the regulations on the appointments of judges and on disciplinary measures remain opaque

and unpredictable. There is no doubt that this gives rise to a high level of loyalty among the judges and prevents them from dealing independently and critically with legal norms and with the decisions handed down by courts of first instance. In Russia, too, the working conditions for the judiciary have been criticized for years.

From a legal perspective, therefore, what is remarkable about the Pussy Riot trial is only the massive public interest, which was ensured not only through comprehensive coverage, but also by the fact that the proceedings were broadcast live on the internet, a very rare occurrence. In the end, following the sentencing, even the judges at the court of appeal met the press and answered questions in an unprecedented move. However, the pretension of openness and impartiality coincided with a massive effort by leading Russian politicians to discredit the defendants. For instance, President Vladimir Putin mocked the women as uncultured and talentless due to the name of the band and their previous actions. Foreign Minister Sergey Lavrov regarded the debate on the trial as a Western propaganda campaign. If the Russian political elites had wanted to defuse the charges of political interference more effectively, they would have had to refrain from commenting on the case. In particular, however, comprehensive efforts should long have been undertaken to implement the respective requirements under international law consistently, to improve the application of the norms by the judiciary in a manner consistent with the rule of law, and to enhance the independence of the judiciary by structural means. While Pussy Riot still has the option of lodging an appeal with the ECtHR in Strasbourg, there are no prospects that the structural shortcomings in the rule of law in Russia will improve fundamentally any time soon.

Translated from German by Christopher Findlay

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