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## Right to “Religious Feelings”: Legal Aspects of Protection of Believers

**Review.** *The subject of this research is the competitive analysis of the approaches of the European Court of Human Rights, the Parliamentary Assembly of the Council of Europe (PACE), and Venice Commission towards the notion of “religious feelings” and the necessary level of its protection by the government. A special attention is given to the essence of the concept of religious feelings and whether or not it is possible to give a legal definition to this notion, which is the reason for an assessment of the comparability between Article 148 of the Criminal Code of the Russian Federation on insulting the religious feelings of believers, with the European standards in the area of requirements for legal certainty. The main conclusion is that it is impossible to set a normative definition for “religious feelings”. The author justifies the need for a clear delineation of incitement of hate and intolerance by difference of religion, and insulting the feelings of believers, including blasphemy and sacrilege, as well as the reasonableness of decriminalization of “insult of religious feelings of believers”.*

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When the Federal Law #136-FZ from June 29, 2013 introduced a new revision to the Article 148 of the Criminal Code of the Russian Federation on “insult of religious right of believers”, there was no doubt in the real reason for this revision: members of the punk rock protest group “Pussy Riot” were charged with hooliganism, but the social resonance was so strong, that the government felt a need to introduce a separate criminal responsibility for similar acts. At the time, the above mentioned

article seemed as a “dormant law”, unlikely to ever be used in reality. But the effect was the complete opposite, and now the “insult of religious feelings of believers” hangs as the Sword of Damocles over every work of art and every public discussion on religious topics.

It should be noted that religious crimes are some of the most ancient. It was blasphemy and impiety (lack of reverence towards gods of the polis) that Socrates was charged with [1, p. 93–98]. The more religious was the society, the harsher was the punishment for

noncompliance with the canons and rules of the dominant religion. We can highlight three main types of religious crimes: blasphemy, desecration, and sacrilege. If we refer to the dictionaries, we will see a fairly defined and rooted concept of what are the religious crimes. Thus blasphemy — an act of insulting or showing contempt for God or gods, or lack of reverence towards a deity, religion, or the Church; desecration — the act of depriving something of its sacred character, or the disrespectful, contemptuous, or destructive treatment of that which is held to be sacred or holy by a group or individual; sacrilege — the violation or injurious treatment of a sacred object or person <sup>[2-5]</sup>.

Despite the differences in legislation of various countries, all laws directly or indirectly operated and operate based on the concepts of “blasphemy”, “desecration”, and “sacrilege”. As the time progressed, these three notions were fusing together, and in the recent decades many countries prefer to replace the formulations of these criminal elements into one, a more neutral term of “insult of religious feelings of believers”. We should note that this term is both, ambiguous and abstract, which causes multiple problems in law enforcement.

Moreover, there is no generally accepted longstanding mechanism for protection of religious feelings. For example, Great Britain has decriminalized “blasphemy” in 2008, keeping only religious hatred as a punishable offense <sup>[6]</sup>. In Ireland, blasphemy is prohibited by the Constitution, but in 2009 the Defamation Act was passed, according to which the fine for blasphemy could be avoided if the defendant can prove that “a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates” <sup>[7]</sup>. Denmark has article 140 of the Criminal Code on mocking or scorning the religious doctrines or acts of worship, but

it has not been used since 1938, which was confirmed in 2006 by the court’s decision in the Jyllands-Posten caricatures case. Italian legislation has stopped regarding blasphemy as a crime in 1999 and made it an administrative violation <sup>[8]</sup>. In Greece it is the other way around; according to the Penal Code it is a punishable offense to “publicly and maliciously and by any means blasphemy God” <sup>[9]</sup>.

### **“Insult to religious feelings” within the documents of the European Council authorities and legal positions of the European Court of Human Rights**

The Venice Commission conducted a comparative analysis of the legislation of the European countries and prepared a report titled “Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred”, in which they come to a conclusion that incitement of hatred or antagonism based on religious identity should carry a criminal consequences. However, “blasphemy” should not be considered a legal violation, and the “insult to religious feelings” should not be a punishable criminal offense <sup>[10, § 89-90]</sup>.

Based on the opinion of the Venice Commission, the Parliamentary Assembly of the Council of Europe has produced a Recommendation 1805 in 2007 “Blasphemy, religious insults and hate speech against persons on grounds of their religion”, where it defines that:

12. The Assembly reaffirms that hate speech against persons, whether on religious grounds or otherwise, should be penalized by law in accordance with General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination produced by the European Commission against Racism and Intoler-

ance (ECRI). For speech to qualify as hate speech in this sense, it is necessary that it be directed against a person or a specific group of persons. National law should penalize statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion.

15. The Assembly considers that, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention, national law should only penalize expressions about religious matters which intentionally and severely disturb public order and call for public violence <sup>[11]</sup>.

In discussing this Recommendation in the Parliamentary Assembly, the importance of legal certainty was especially emphasized. The society that respects human rights and is ruled by law should have criminal responsibility only in the cases where the content of a crime is clearly defined. In other words, a person must have the opportunity to know that they are committing a crime <sup>[12]</sup>.

There is a significant difference between the insult to religious feelings, which by Parliamentary Assembly's opinion should not be a punishable offense under criminal justice, and hatred or incitement thereof against a group of people (social group). Public instigation of hatred, intolerance, and violence, should be criminalized, including when such instigation is aimed at believers of one or another religion.

The European Court for Human Rights is also no stranger to religious feelings, having a vast precedent for the Article 9 of the European Convention (freedom of thought, conscience, and religion). While the Parliamentary Assembly mostly examines problems related to religious insults and incitement of hatred, the European Court deals with protection of religious feelings in the context of limitations to the freedom of speech.

The Court believes that those who openly express their religious beliefs cannot reasonably expect that they will not be criticized. They must display tolerance and be content with the fact that others reject their religious beliefs or even spread doctrines that counterpose their faith. But the methods of criticism or denial of religious doctrines and beliefs can carry legal consequences if the state is unable to ensure peaceful exercising of the right provided by Article 9 for all who share these doctrines and beliefs. As in the case of morals, it is impossible to carve out a uniform perception on significance of religion for the society that would be accepted by all of Europe. This is the reason why the Court states that it is impossible to come to a unified opinion on what is the acceptable interference into the exercising of the right to freedom of speech in a place where that speech is aimed against religious feelings of other people <sup>[13, § 47-50]</sup>. In their decisions, the European Court allows the countries to implement measures limiting the right to freedom of expression in cases of unfounded insulting attacks on the objects of religious reverence <sup>[14, § 27]</sup>. Aggressive harassment of religious beliefs can be prosecuted, and the government can protect religious topic from such interpretation that «is calculated to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented» <sup>[15, § 48]</sup>.

At the same time, the Court relentlessly reminds the countries that the freedom of expression, protected by Article 10 of the European Convention, is one of the fundamental foundations of a democratic society and one of the main requirements for its development and self-improvement of every individual <sup>[16, § 41]</sup>. The freedom of expression encompasses not only the ideas

that are favored by the society or viewed as harmless or neutral, but also those that may be insulting, shocking or causing worry in the government or portion of the population. Such are the requirements for pluralism, tolerance, and broadness of views, without which there can be no democratic society <sup>[17, § 49, 18, § 37]</sup>. Other than freedom of speech, the freedom of expression also includes freedom of art; works of art promote exchange of ideas and self-realization of individuals, which is vitally important for a democratic society, and the government should have a minimal interference in this area <sup>[19, § 33]</sup>. The freedom of speech in mass media also covers possible resorting to some level of exaggeration or even provocation <sup>[20, § 38]</sup>.

From analyzing the precedents of the European Court we can conclude that the Court maintains a cautious position with regards to insult to religious feelings. The court is not as aggressive as the Parliamentary Assembly or the Venice Commission, and allows involvement into the freedom of expression not only for the purposes of protection specific individuals or groups of individuals from calls to hatred or discrimination based on their religion, but also for the purposes of protecting religious beliefs of individuals from aggressive and insulting attacks.

### **The multiformity of “religious feelings”**

The things that can seriously insult people of certain religious views significantly changes depending on the place and time, especially in the era characterized by the ever-growing number of religions and faiths. This is namely the reason why in our opinion the “insult to religious feelings” is not an absolute category, rather one that is constantly undergoing changes.

We can look at the example of the Index Librorum Prohibitorum (List of Prohibited

Books), published by the Roman Catholic Church even until 1966. The list of prohibited books contained compositions that were forbidden and punishable by excommunication from Church. The purpose for such list was to protect the believers from books containing danger to morality. There are several names widely known to jurists that have made the list: Charles de Secondat, baron de Montesquieu for his “Persian Letters”, John Locke for “An Essay Concerning Human Understanding”, Jean-Jacques Rousseau for “The Social Contract, or Principles of Political Right”, and all of the works of Thomas Hobbes <sup>[21]</sup>.

Legal scholars are unable to give a precise definition to religious feelings, and to no surprise: in our opinion, it is impossible to do so. Let’s attempt to prove this thesis tracing the practical embodiment of an abstract term of “religious feelings”. The administration of a soccer club “Real Madrid” for example, after signing a contract with the National Bank of Abu Dhabi has decided to change their official crest to appease the religious feelings of Muslims by removing the cross atop the crown. The representatives of the Muslim community in Switzerland demanded that the adverts of the Swiss International Air Lines be changed due to the use of a cross from the country’s flag and the slogan “Kreuz ist Trumpf”, or Cross is the Trump. A Turkish lawyer Baris Kaska has sued the administration of the Milan club “Inter”. For the 100th anniversary the club added a red cross on white background to their crest symbolizing the crest of the city of Milan. In his words, the cross as the symbol of the Knights Templar and reminds of the gruesome days of the Crusades. “While I was watching the game I felt profound grief in my soul” — said Kaska <sup>[22]</sup>.

When in 2002 the British Parliament was addressing the question on whether or not changes should be made to the legislation on blasphemy, a number of “written

testimonies” were received in the House of Lords from nongovernmental and religious organizations. An interesting one among them is the letter from the Buddhist community of Great Britain, in which they do not deny having religious feelings, but explain that it is impossible to insult them. The central position of the Buddhist practice is to avoid having ties to the material world. The rituals and icons are also a part of the material world to which people are attached, and the threat to them (or insult thereof) leads a person to suffering or psychological trauma<sup>[23]</sup>. Thus for Buddhists, sacrilege or blasphemy as a crime of others is impossible, as being insulted by them would only serve as evidence of ties to the world, making it a fault of a Buddhist himself.

In the Russian Federation the “religious feelings” are protected in a unique way, and often by the believers themselves. In 2013 a Member of the Legislative Assembly of Saint Petersburg Vitaly Milonov along with a group of activists attempted to interrupt the celebration of Halloween in the St. Petersburg’s Park of Internationalists. He felt that it was unacceptable to allow holding “sabbat” next to an Orthodox church. The “Orthodox activists” have also attempted to disrupt the plays of “An Ideal Husband”, and “The Brothers Karamazov” in the Chekhov Moscow Art Theatre (in November of 2013), the premiere of a documentary by Askold Kurov “Children 404” dedicated to the dissemination of the Russian LGBT youth (in April of 2014). The protests were sparked by premiering the movie “Leviathan” in the Russian theatres, and the opera “Tannhäuser” in Novosibirsk<sup>[24]</sup>. In the same Novosibirsk the “Globe” theatre has removed the “Song of an Orthodox Hedgehog” from the play “Songs of the Motherland” (per demand of the Minister of Culture of the Novosibirsk Region). The “Story of an Orthodox Hedgehog”, which is a part of the spectacle, is based on the work of Maya Kucherskaya

“The Modern Patericon” and tells about the demise of a squirrel in a river as a result of an act of baptism organized but that same hedgehog<sup>[25]</sup>.

In the spring of 2015, an iPhone 6 was introduced for the Orthodox believers — in gold and an engraved bas-relief of the “Trinity” by Andrei Rublev. The company that produced this special edition elicited support from the Guild of Experts on Religion and Law. The experts did not find any signs of insult to the religious feelings of believers in the iPhone idea. In their opinion, an owner of such iPhone can pray before the backside of this golden gadget<sup>[26]</sup>.

It seems that the feelings of believers are so multifaceted in their manifestation that to come to a unity in their definition is rather difficult.

However, the legislation (including Russian) is attempting to operate using the term of “religious feelings”. Over the last few years, a question that has gained importance is one on the application of the criminal responsibility for insult to the feelings of believers provided by Article 148 of the Criminal Code of the Russian Federation. But is it reasonable to criminalize it?

### ***Article 148 of the Criminal Code of the Russian Federation: legal certainty***

Analysis of the norm of the criminal law implemented in cases of insult to the religious feelings, namely the Article 148 of the CCRF, leads the researches to believe that in this form the crime resembles hooliganism<sup>[27]</sup>. The disposition of the norm consists in “public actions expressing clear disrespect for society and committed with intent to offend the religious feelings of the faithful”. The Article 213 of the CCRF in turn defines hooliganism as “a gross violation of the public order which expresses patent contempt for society, committed: a) with the use of arms or objects used as arms; b)



with motives of political, ideological, racial, national, or religious hatred, or with motives of hatred towards any social group". The similarity between the two contents is evident, and it is reasonable to conclude that within the legislation there is a "split" in the norm on hooliganism.

But if the article on hooliganism has a direct reference to a disruption of public order, the "public actions" contained in the Article 148 are not specified by the legislator. What can be considered as public actions? For example, the punk moleben (by Pussy Riot) in the Cathedral of Christ the Savior could be considered as an act fitting the Article 148 of the CCRF if it existed at that time. How about an image, or a film, or a play — are they covered by the notion of "public acts"?

Under clear disrespect towards society, the Russian law enforcement holds the intentional breaking of the generally accepted norms and rules of conduct, expressed by the desire of the guilty individual to oppose the society and demonstrate a contemptuous attitude towards others (see for example, the Resolution of the Plenum of the Supreme Court of the Russian Federation from November 15, 2007 N 45 "About court practice on criminal cases of hooliganism and other crimes committed out of hooligan motives").

The legal technique of the norm represents a logical discrepancy of two elements of objective side, namely: "actions expressing a clear disrespect for society" aimed against the entire society, all of the citizens of the country, while "insult to the religious feelings of believers" is aimed against a rather defined, specific social group. We will not delve into the theory of social groups, but we should note that the attributes that define a social group of course differ from those of society.

The stated in the Article 148 motive for insulting the feelings of believers even further complicates the acceptance of the norm

as one that corresponds with the principle of legal certainty. It remains unclear: what should be considered as religious feeling of the believers and how to distinguish the religious feelings of a believer from their other feelings.

The Legal Service of the Moscow Patriarchy of the Russian Orthodox Church defines the religious feelings as feelings of reverence of an individual for what is held sacred according to their religious beliefs, which of course includes their religious beliefs, dogmas, personas and acts of the saints, as well as holly icons and texts, and other objects of religious significance, and places of pilgrimage <sup>[28]</sup>.

In our opinion, the desire to give an exhaustive definition to the abstract category played a trick on the Legal Service of the Moscow Patriarchy, since the "feeling of reverence of an individual towards their own religious beliefs" can hardly be considered a worthy explanation of the notion, let alone a legal definition.

The website for the Russian Public Initiative already has an initiative to amend the Article 148 with insult to atheistic feelings <sup>[29]</sup>. The legal construct cannot withstand any criticism, but the very fact that such initiative emerged speaks to the failure of the current formulation of the said article in the Criminal Code of the Russian Federation.

Currently, the feelings of believers are protected under the Article 5.26 of the Code of the Russian Federation on Administrative Offenses, which causes confusion to say the least, since it speaks about "public desecration of religious or liturgical literature, objects of religious veneration, signs or emblems ideological symbols and attributes or damage or destruction thereof". But this is a subject for a separate research.

In conclusion, I would like to provide an example of a healthy attitude towards the criticism of the religious dogmas, and

the freedom of speech. In New Zealand the feelings of believers are “insulted” by... the church itself. In Auckland, the Anglican Church St. Matthew-in-the-City regularly displays a banner in front of their building. One of them featured an image of a wedding cake with figures of two kissing women, and a sign that said: “We don’t care who’s on top”. For the Christmas season they displayed a banner depicting the baby Jesus in His crib surrounded by a halo of rainbow colors (the rainbow is a known symbol of the LGBT movement), and a text reading: “It’s Christmas. Time for Jesus to come out”. We should note that most people accept such jokes from their ministers fairly adequately, understanding that this merely a way of an unconventional illumination of the existing problems in the society and the Church.

To conclude, the incitement of religious antagonism or hatred towards a particu-

lar religious group of people should be a punishable act, because it poses a threat to the social order, public safety, and life and welfare of the people. What seems proper is the position of the legislator providing a separate article in the Criminal Code of the Russian Federation for such actions (Article 282 of the CCRF).

On the contrary, the “insult to religious feelings of believers”, including blasphemy and sacrilege, in our sincere belief represents the atavism of the legal systems and should not be punishable under the public legal responsibility, since it contradicts the principles of humanism and proportionality between the act’s threat to the public safety, and the punishment for it. Naturally, the insulting statements or actions aimed against religious beliefs cause public condemnation, but hardly ever the fact of public condemnation should carry a criminal sanction.

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