NOTE

Conscientious Offenders: Russia's Ban on "Extremist" Religious Literature, and the European Court of Human Rights

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Russia's law on extremist literature, originally intended as a tool to combat terrorism, has turned into a tool to suppress religious minorities and unpopular or offensive speech. Several individual challenges under Article 10 of the European Convention on Human Rights (ECHR) stemming from convictions under the ban are currently pending before the European Court of Human Rights (ECtHR).

Unfortunately, the ECtHR has a poor track record of defending freedom of expression. Despite strong rhetoric about the importance of protecting controversial speech, the ECtHR has been highly deferential to state efforts to restrict speech in order to protect the religious feelings of believers.

The Russian extremism law provides the ECtHR a perfect opportunity to course correct and stake out a more aggressive position in the protection of freedom of expression.

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INTRODUCTION

In June 2011, a public prosecutor in the Siberian town of Tomsk filed suit to add a version of the *Bhagavad Gita*, a text sacred to Hindus across the world, to a federal list of banned extremist literature.[1] The translation in question, *Bhagavad Gita As It Is*, contains commentary on the *Bhagavad Gita* and is revered by the International Society for Krishna Consciousness (ISKCON) (also commonly known as Hare Krishna).[2] The move came as a result of a Federal Security Service (FSB) commissioned study conducted by academics at Tomsk State University which found that the book "contains signs of incitement of religious hatred and humiliation of an individual based on gender, race, ethnicity, language, origin, or attitude to religion."[3]

The accusations provoked large scale outrage both in India and in Russia. Indian Ambassador to Russia, Ajai Malhotra, called the ban "absurd, bordering on the bizarre," and explained that the *Bhagavad Gita* was first translated into Russian in 1788 and was "not merely a religious

1. Abhai Maurya, *Russian Kick Up an Unholy Row over Holy Book*, THE TIMES OF INDIA, Dec. 22, 2011, http://articles.timesofindia.indiatimes.com/2011-12-22/india/30546077_1_e-xpert-opinion-tomsk-state-university-iskcon.

2. *Id.*

3. The text had previously been challenged in Moscow, but charges of extremism were dismissed. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPT. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2011, 8–9, *available at* http://www.state.gov/documents/organization/193067.pdf.

text," but also "one of the defining treatises of Indian thought."[4] In an effort to abate the criticism, Russia's foreign minister explained that the lawsuit was not against the *Bhagavad Gita* itself, but its preface.[5] The Commissioner for Human Rights for the Tomsk region also spoke out in favor of the book.[6] Meanwhile, widespread protests led to rallies held outside of the Russian consulate and even to the shutdown of the Indian Parliament.[7]

In hearings before the court, the expert's study was challenged, and when the writers of the study were brought for a second hearing, they denied that their opinion had been given in their official capacity. They also did not, contrary to their written opinion, support the movement to ban the book for "subversive or extremist content."[8] In addition, it is likely that the prosecutor was an activist with an agenda against ISKCON. The judge then ordered a subsequent study by experts at Kemerovo State University which also found that the book contained "propaganda arguing for the intellectual and social inferiority of individuals in relation to promoting the religious values of the *Bhagavad Gita*."[9] As a result, the judge sought input from the Russian Human Rights Committee and postponed the final verdict.[10] After the Human Rights Committee spoke out against the ban, the judge finally dismissed the charges against the *Bhagavad Gita* on December 28, 2011.[11]

After the lower court in Tomsk dismissed the suit, prosecutors appealed the dismissal[12] with a regional prosecutor explaining that certain paragraphs "could be seen as promoting extremism" and that the effort to ban the commentary was not meant to be an attack on Hindus.[13]

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4. *India asks Russia to Resolve Bhagavad Gita Issue*, THE ECONOMIC TIMES (INDIA) (Dec. 22, 2011), http://articles.economictimes.indiatimes.com/2011-12-22/news/30546692_1_b-hagavad-gita-russian-court-indian-ambassador.

5. *Id.*

6. *On the Field of Dharma*, LENTA.RU (Dec. 22, 2011), http://lenta.ru/articles/2011/12/21/bhagavadgita/ (source is in Russian).

7. Nigam Prusty, *India Uproar at Call in Russia to Ban Bhagavad Gita*, REUTERS, Dec. 19, 2011, http://in.reuters.com/article/2011/12/19/uproar-at-call-in-russia-to-ban-gita-idINDEE7BI0D12-0111219.

8. Maurya, *supra* note 1.

9. *On the Field of Dharma, supra* note 6.

10. *As Hindus Rally, Russia Court Defers Gita Verdict*, INDIA TIMES (Dec. 20, 2011), http://www.indiatimes.com/international/as-hindus-rally-russia-court-defers-gita-verdict-7926.html.

11. Preetika Rana, *Russia Dismisses Bhagavada Gita Ban*, INDIA REAL TIME (Dec. 28, 2011), http://blogs.wsj.com/indiarealtime/2011/12/28/russia-dismisses-bhagavad-gita-ban/.

12. *No Ban on Bhagavad Gita: Russian Court*, Z NEWS (INDIA) (March 22, 2012), http://zeenews.india.com/news/nation/no-ban-on-bhagavad-gita-russian-court_765175.html.

13. *Bhagvad Gita Issue: Prosecutor Wants 'Extremist' Russian Comment Banned*, THE ECONOMIC TIMES (INDIA) (Feb. 16, 2012), http://articles.economictimes.indiatimes.com/2012-02-16/news/31066970_1_translation-russian-court-ban.

Nevertheless, the higher court of Tomsk dismissed the appeal and upheld the lower court's ruling in favor of the book.[14]

Fortunately, a combination of immense public pressure and criticism prevented the implementation of the ban in this case. Still, despite the outcry, little has been done to reform the system in Russia that allowed a thousand-year-old work, central to the religious life of millions across the world, to be put on trial. Indeed, as part of a recent surge of laws restricting religious freedom, freedom of speech, and the right of assembly in Russia, the country has actually strengthened its laws against "extremism."[15]

A few appeals of convictions under the ban are presently pending before the European Court of Human Rights (ECtHR).[16] Unfortunately, given its inconsistent stance on freedom of expression, the ECtHR is a poor vehicle for challenging Russia's extremist literature ban. Indeed, in recent decades the ECtHR has upheld bans on a wide range of speech from blasphemous films to literature critical of homosexuality.[17]

The reasoning underpinning these decisions weakens the Court and the international communities' credibility as it seeks to challenge Russia's abusive laws.[18] By treating such cases as a clash between freedom of expression and freedom from offense to one's religion, and by providing states an overly deferential "margin of appreciation,"[19] the ECtHR has given far too much power to state actors to repress unpopular, shocking, or offensive speech. The Court's reasoning has also allowed states far too much deference in restricting particular viewpoints or types of content. In addition, by requiring or allowing democratic societies to impose pluralism and tolerance, the ECtHR ultimately undermines the values of pluralism or tolerance that it seeks to uphold.[20]

In light of increasingly repressive laws in nations throughout Europe, the time has come for the ECtHR to reexamine its Article 10 freedom of

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14. *Id.*

15. For an overview of the Russian Extremist Ban and a look at religious freedom in Russia, *see* BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPT. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2012, *available at* http://www.state.gov/documents/organization/208572.pdf.

16. For a discussion on Russian ECtHR cases, *see infra* Section II.

17. For a discussion of ECtHR Freedom of Expression precedent, *see infra* Section I.

18. For a critique of ECtHR precedent and suggestions for reform, *see infra* Sections VI.A.–D.

19. The margin of appreciation is a doctrine where the European Court of Human Rights defers to the unique cultural and legal environments of member states and provides them with a wide range of latitude in formulating policy. For an overview of the margin of appreciation see OPEN SOCIETY JUSTICE INITIATIVE, MARGIN OF APPRECIATION (April 2012), http://www.opensocietyfoundations.org/sites/defa-ult/files/echr-reform-margin-of-appreciati-on.pdf [hereinafter MARGIN OF APPRECIATION]. See *infra* Section II for further analysis of the application of the margin of appreciation in the context of freedom of expression.

20. It is a contradiction to impose pluralism and tolerance through force. Such a society which forces tolerance cannot truly be said to be pluralistic.

expression precedent and to articulate and enforce a robust defense of free speech. In particular, the time has come to abandon the notion that states can crack down on speech in order to prevent offense to religious feelings and to robustly protect the right to speak out in favor of ideas that are shocking or offensive.

This Comment will first examine and critique existing ECtHR case law on freedom of expression and freedom of religion. Russian involvement with the ECtHR will also be considered with special attention to cases involving freedom of religion. After looking at the origin and structure of the Russian ban on extremist literature, the ECtHR precedent will be applied to the Russian law, illustrating ambiguous and uncertain results. Finally, criticisms of the Court's current position will be examined in depth in order to offer some suggestions for the ECtHR to ensure that it more fully protects freedom of expression.

I. THE ECTHR AND FREEDOM OF EXPRESSION AND RELIGION

Established in 1959, the ECtHR guarantees the rights of parties to the European Convention on Human Rights (Convention).[21] The Convention is an international human rights treaty to which the members of the Council of Europe are signatories. The Convention guarantees a variety of rights including freedom of thought, conscience, and religion (Article 9) and freedom of expression (Article 10). The Court has since its inception delivered over 10,000 judgments which are binding on the states concerned.

Over the years, the ECtHR has decided an extensive number of cases concerning freedom of expression and freedom of religion. This part will examine two types of freedom of expression cases: (1) offense to religious feelings and (2) hate speech. Subsequently, because of the relevance to much of the banned material in Russia, the ECtHR's approach to restrictions on proselytism[22] will also be examined. Throughout the cases, the ECtHR powerfully speaks about the importance of freedom of expression and religious freedom. Nevertheless, in practice the ECtHR's review of state law is far too deferential and inadequate to prevent suppression of human rights.

21. For an overview of the role of the European Court of Human Rights in the defense of the rights guaranteed in the European Convention, *see generally*, MARGIN OF APPRECIATION, *supra* note 19.

22. Jehovah's Witnesses, and Hare Krishna, for instance, are two groups that often distribute literature while proselytizing whose efforts are likely burdened by the extremist literature ban.

A. The ECtHR's Deferential Treatment of State Efforts to Ban Offensive or Controversial Speech

Before delving into specific freedom of expression cases concerning religion, it is helpful to look at basic principles undergirding the ECtHR's freedom of expression analysis.

Overall, when examining ECtHR case law regarding freedom of expression, two major lines of cases have emerged. The first involves members of radical or totalitarian organizations who are covered under Article 17 of the Convention. For instance, in the Russian case of *Kasymakhunov and Saybatalov v. Russia*, the court upheld the ban on an Islamic fundamentalist organization, Hizb ut-Tahrir, under Article 17.[23] Such organizations are deemed outside of the coverage of Articles 9, 10, and 11 because the positions that these groups advocate are contrary to the underlying values of the Convention. As such, restrictions on the speech of such individuals will generally be upheld without the type of balancing involved in Article 10 cases.

The second line of cases, which deals with speech restrictions on individuals that do not belong to groups covered under Article 17, is analyzed under Article 10. The ECtHR first considered which limitations to freedom of expression are permissible in the well-known and heavily-cited case of *Handyside v. the United Kingdom*.[24] In *Handyside*, the ECtHR dealt with the seizure of more than a thousand copies of a book, *The Little Red Schoolbook*, which authorities alleged contained obscene material.[25] The book aimed to be a reference book for school-age children and spoke extensively about sex.[26] Local courts in the United Kingdom found that the book undermined the influence of parents and authority figures and had a tendency to "deprave and corrupt" children.[27] The ECtHR found that the proceedings against Handyside were undertaken as "prescribed by law."[28] The Court also found that the laws have a legitimate purpose under Article 10(2) for the protection of morals in a democratic society.[29] However, the Court was divided over the degree of scrutiny it should

23. Kasymakhunov and Saybatalov v. Russia, Judgment (Eur. Ct. H.R. March 14, 2013), http://hudoc.echr.coe.int/eng?i=001-117127. *See also*, *infra* Section II.

24. Handyside v. the United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

25. *Id.* ¶¶ 9–23.

26. *Id.*

27. *Id.* ¶ 46.

28. *Id.* ¶ 44. To be prescribed by law, a restriction must have "a basis in domestic law." Additionally, the law must "be accessible to the persons concerned and formulated with sufficient precision . . . to forsee . . . the consequences which a given action may entail and to regulate their conduct." Leyla Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 173 ¶ 84(2005).

29. Handyside, ¶ 46.

apply to determine whether a particular restriction of speech was "necessary in a democratic society."[30]

Ultimately, *Handyside* is most strongly remembered for its introduction of the concept of the margin of appreciation.[31] The majority of the Court held that the ECtHR was not qualified to determine "a uniform European conception of morals" or "the exact content of [the] requirements [of freedom of expression]."[32]As such, states would be given deference within a margin of appreciation to determine their own policies. However, the Court also emphasized that the term "necessary," in the phrase "necessary in a democratic society" while less stringent than terms such as "indispensible" or "strictly necessary" found elsewhere in the Convention, was a greater restriction on state action than far more flexible terms such as "reasonable" or "desirable."[33] Thus, Article 10 leaves to state legislatures and the state judiciaries "a margin of appreciation." However, this margin does not give states "unlimited power of appreciation."[34] The ECtHR is ultimately "empowered to give the final ruling" as to whether a law "is reconcilable with freedom of expression."[35]

The majority of the Court then spoke out strongly in favor of freedom of expression as "one of the essential foundations" of a "democratic society."[36] The Court explained that freedom of expression did not only apply to popular or "favorably received" ideas, "but also to those that offend, shock or disturb."[37] Because such "pluralism, tolerance and broadmindedness" is essential to a "democratic society," restrictions on freedom of expression "must be proportionate to the legitimate aim pursued."[38]

Despite its strong rhetoric about protecting offensive speech, the Court then proceeded to uphold the seizure of *The Red Schoolbook*, paying particular attention to the fact that the book was targeted to children.[39] As such, "protection of the morals of the young" was deemed a legitimate purpose under Article 10 Paragraph 2 of the Convention.[40] The Court also concluded that the ban was consistent with the principles of "necessity" and did not violate Article 10.[41]

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30. *Id.* ¶¶ 48–50.

31. For an overview of the margin of appreciation see MARGIN OF APPRECIATION, *supra* note 19.

32. Handyside, ¶ 48.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* ¶ 49.

37. *Id.*

38. *Id.*

39. *Id.* ¶¶ 52–59.

40. *Id.*

41. In finding that the law met the standard of necessity, the Court rejected Handyside's

Judge Mosler wrote separately concurring with most of the Court's judgment, but disagreeing on whether the law could be said to have been a "necessity."[42] Judge Mosler argued that a measure justified as "necessity" under Article 10(2) must be "likely to be effectual under normal conditions."[43] Judge Mosler, while not requiring a state to prove the effectiveness of a law, would have required a greater proof that the law was tailored to address the problem.[44] However, subsequent decisions have not embraced Judge Mosler's argument. Thus, the ECtHR will rarely discuss how effective a particular law needs to be in order to be considered a "necessity."

In *Handyside* and subsequent speech disputes, the ECtHR first looks to whether Article 10 is implicated. Once implicated, a restriction on Article 10 can only be upheld in cases where the state's action is "prescribed by law" and serves one of the purposes outlined in Article 10(2).[45] Furthermore, the restriction must be "necessary in a democratic society" which has been defined to mean that the restriction meets a "pressing social need" and that the restriction is not overly burdensome or restrictive.

The Court in subsequent cases has hewed close to its decision in *Handyside*. Rhetorically, the Court speaks strongly of the value of unpopular or offensive speech. However, in many instances its review is highly permissive of state efforts to ban speech merely because it is offensive to others. This is the pattern in both cases involving offense to religious sentiment and those involving hate speech.

1. Speech Offensive to Religious Sentiment

Protection of religious feelings or sentiment has provided justification for upholding a wide range of restrictions on speech. For instance, In *Otto-Preminger-Institut v. Austria*, the ECtHR upheld restrictions on the showing

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argument that the fact that the books were only restricted in part of the United Kingdom but not Scotland and Northern Ireland showed an inconsistency or bias on the part of authorities. Likewise, the existence of other sexual material such as pornography in the United Kingdom did not minimize the "necessity" of protecting the morals of children. The Court also noted that the authorities took no action against a revised addition which minimized the offending passages. *Id.*

42. *Id.* (Mosler J., concurring).

43. In this case, because only a small portion of the copies of the book were confiscated and restricted, Judge Mosler deemed the actions of the United Kingdom completely "ineffectual." *Id.*

44. *Id.*

45. "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." *Id.* ¶ 48 (citing Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 221 art. 10.2).

of a satirical film, *Council in Heaven*, whose "object was such to offend the religious feelings of an average person with normal religious sensitivity."[46]

While *Otto-Preminger Institut* was based on the reasoning of *Handyside*, it is significant because it is the first time the Court held that content could be restricted merely because it offended religious feelings. The ECtHR affirmed the Austrian court's conclusion that "wholesale derision of religious feeling" outweighed the public interest in the film and acknowledged that states would sometimes find it necessary to repress "certain forms of conduct, including the imparting of information and ideas" that are incompatible with "the respect for the freedom of thought, conscience and religion of others."[47]

Just as in *Handyside*, the ECtHR spoke strongly in favor of freedom of expression, acknowledging that while the state has a responsibility "to ensure the peaceful enjoyment" of the rights of religious freedom, religious believers "cannot reasonably expect to be exempt from all criticism."[48] Nevertheless, the Court emphasized that freedom of expression also includes an obligation "to avoid as far as possible expressions that are gratuitously offensive to others" and therefore "an infringement of their rights."[49] Such offensive speech is considered less valuable because it does "not contribute to any form of public debate capable of furthering progress in human affairs."[50] Moreover, the Court argued that speech that offends "religious feelings of believers," such as "provocative portrayals of objects of religious veneration," could "be regarded as malicious violation of the spirit of tolerance."[51]

The Court also concluded that the religious sentiments of the majority could be taken into account to justify restrictions on speech. The Court acknowledged that given that Catholics made up the "overwhelming majority" of the state where the film was seized, the Austrian authorities could have viewed the seizure as necessary "to ensure religious peace" and prevent people from feeling "the object of attacks on their religious beliefs in an unwarranted and offensive manner."[52] The ECtHR also urged deference to the national authorities, "who are better placed . . . to assess the need for such a measure" than an international tribunal.[53]

The dissent and subsequent analysis has criticized the Court for placing the theoretical offense of religious sentiment of individuals above the very

46. Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A)(1994).
47. *Id.*
48. *Id.* ¶ 47.
49. *Id.* ¶ 49.
50. *Id.* ¶ 56.
51. *Id.*
52. *Id.*
53. *Id.*

real and concrete restrictions on freedom of expression.[54] Likewise, the Court failed to consider the availability of alternative, less restrictive means than seizure of the film. The dissent also heavily criticized the majority for leaving it open to state authorities to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs."[55] The dissent hearkened back to the *Handyside* decision and reiterated that freedom of expression is meant to protect "particularly" those ideas that "shock, offend or disturb the State or any sector of the population."[56] While conceding that in extreme cases a state might have the right to protect religious feelings against "violent or abusive" attacks, the three judges in dissent argued that "[T]he Convention does not, in terms, guarantee a right to protection of religious feelings," and that the right of religious expression "includes a right to express views critical of the religious opinions of others."[57]

Despite the dissent's concerns in *Otto-Preminger*, in subsequent cases the Court has continually found "protection of religious feelings" to be a valid justification for a state to suppress offensive speech. For instance, the ECtHR upheld the banning, under British blasphemy laws, of a video depicting an ecstatic encounter between St. Teresa of Avila and Jesus Christ.[58] The ECtHR held that the restriction of material "calculated . . . to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic" was a "legitimate aim" under Article 10(2).[59]

The Court concluded that offensive religious speech received less Article 10 protection than other speech. The Court emphasized that while little room exists under Article 10(2) for the restriction of "political speech or on debate of questions of public interest," a "wider margin of appreciation" exists with regard to restrictions of speech on topics "liable to offend intimate personal convictions within the sphere of morals, or especially religion."[60] The Court also acknowledged that it provided a greater degree of deference to states to determine what laws are required to protect others from attacks on their religion because of the lack of a "uniform European conception" of what constitutes an attack on religious conviction.[61] Nevertheless, the Court also reiterated that not all speech

54. *Id. (*Palm, Pekkanen, Makarczky J., dissenting); *see also* Matthias Klatt & Morritz Meister, *Case Analysis:* Otto-Preminger-Institut v. Austria*, in* THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012), *available at* http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199662463.001.0001/acprof-9780199662463-chapter-8.

55. Otto-Preminger-Institut, v. Austria (Palm, Pekkanen, Makarczky J., dissenting).

56. *Id.*

57. *Id.*

58. Wingrove v. the United Kingdom, 1996-V Eur. Ct. H.R. 1937 ¶ 57, (1996).

59. *Id.* ¶ 48.

60. *Id.* ¶ 58.

61. The court recognized that blasphemy laws had grown increasingly uncommon in Europe,

could be restricted merely because it was hostile to religion. The Court noted that the British blasphemy law limited itself to significant insults to religious feelings and that this limitations was "a safeguard against arbitrariness."[62]

Likewise, in the case of *I.A. v. Turkey*, the ECtHR, by a close vote of 4 to 3, upheld the blasphemy conviction of the publisher of a work that insulted the Prophet Muhammad and implied that he had sexual intercourse with dead people and live animals.[63] The Court viewed the work as "an abusive attack on the Prophet of Islam."[64] The Court reiterated that while "pluralism, tolerance and broadmindedness" are "hallmarks of a 'democratic society," such material could lead believers to "legitimately feel themselves to be the object of unwarranted and offensive attacks."[65] The Court concluded that Turkey did not overstep its "margin of appreciation" and that such a conviction could be seen as "relevant and sufficient."[66]

The dissent criticized the majority for continuing to pay homage to the idea that freedom of expression protects ideas that "that shock, offend or disturb the State or any sector of the population," but failing to take this idea seriously in deciding the outcomes of cases.[67] They feared that these words could become "an incantatory or ritual phrase" without any real force.[68] The dissent suggested that while the accusations in the book "may cause deep offense to devout Muslims," there was no compulsion to read the novel, and offended individuals could seek redress under Article 9 or 10 of the Convention.[69] The dissent suggested that any criminal conviction for expression, no matter how light the sentence, produces a "chilling effect" which could lead to self-censorship which would be "very dangerous for freedom."[70] Finally, the dissent suggested that, even though this case could be distinguished from *Wingrove* and *Otto-Preminger-Institut*, "perhaps the time has come to 'revisit' this case-law."[71] The dissent feared that these decisions "place too much emphasis on conformism or

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but given the margin of appreciation granted to nations refused to hold that such laws are "unnecessary in a democratic society." *Id.* ¶ 57.

62. *Id.*

63. I.A. v. Turkey, 2005-VIII Eur. Ct. H.R. 235 (2005).

64. *Id.* ¶ 29; *see also* Nicole McLaughlin, *Spectrum of Defamation of Religion Laws and the Possibility of a Universal International Standard*, 32 LOY. L.A. INT'L & COMP. L. REV. 395, 403 (2010).

65. I.A., ¶ 28.

66. *Id.* ¶ 31.

67. *Id.* (Costa, Cabral Barreto & Jungwiert J., dissenting).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

uniformity of thought," and "that they "reflect an overcautious and timid conception of freedom of the press."[72]

Nevertheless, in at least one instance the ECtHR has struck down a law protecting religious feeling in violation of Article 10.[73] For instance, in *Klein v. Slovakia*, the court overturned a conviction of an individual for defamation of belief for publishing an article critical of an archbishop of the Roman Catholic Church after the archbishop criticized the film *The People v. Larry Flynt* on national television.[74] The article contained many sexual references and suggested that Roman Catholics should leave the church because the archbishop was one of its leaders.[75] The ECtHR found that the restriction of expression, while proscribed by law and pursuant of a legitimate aim of the protection of religious feelings, was not "necessary in a democratic society."[76] The Court found that even though some Catholics may have been offended by the criticism and the suggestion that they should leave the Church, the article did not "denigrate the content of their religious faith."[77] Thus, it seems that the Court is a little less willing to accept restrictions on speech when the speech does not directly target the beliefs of others, but merely touches upon religious practice more generally.

Overall, it is clear that despite strong declarations that Article 10 protects offensive speech, the ECtHR will in many or most instances uphold state efforts to protect the feelings of religious individuals. However, in cases such as *Klein* where the speech was not targeted at insulting the faith of others, the Court will strike down speech bans as disproportionate or unnecessary. In either instance, great deference is given to a state's expressed purpose or aim.

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72. *Id.*

73. Likewise, the ECtHR has shown deference to states that have refused to punish a particular expression insulting towards religious or religious believers. For instance, in *Dubowska and Skup v. Poland*, the court declared inadmissible the complaint of a group of Catholics who complained about offensive materials published in a newspaper. Domestic courts had investigated and decided not to file charges because they found that the publication "had not aimed deliberately at insulting religious feelings and therefore no offence had been committed." The ECtHR reiterated that while there may be "positive obligations," to protect rights guaranteed in Article 9 from undue offense, the court would not draw into question the legal proceeding of a member state. The laws in place provided adequate protection even if in this case Poland failed to take action against the offensive material. The court emphasized that the convention "does not guarantee a right to have criminal proceedings instituted against a third person." Thus, the court will in most instances uphold restrictions of expression, but will not require a state to punish individual speakers. Dubowska and Skup v. Poland, Eur. Ct. H.R. (1997).

74. Klein v. Slovakia, App. No. 72208/01, Eur. Ct. H.R. (2007).

75. *Id.* ¶¶ 45–55.

76. *Id.*

77. *Id.* ¶ 52.

2. Hate Speech

Another important line of freedom of expression cases from the ECtHR concerns convictions for hate speech which have become increasingly common in recent years.[78] Even more so than with other speech laws, the ECtHR has been supportive of state efforts to combat hate speech. In these cases, the Court has overturned convictions in cases where the speech was either clearly not intended to offend or valuable because of its contribution to ongoing public debate. However, outside of these narrow exceptions, the ECtHR has upheld a wide range of laws aimed at preventing hate speech.

Lack of intention to offend played a key role in the case of *Jersild v. Denmark*. In it, the ECtHR overturned charges against a television journalist that broadcast the racist statements of a politician.[79] The journalist prefaced the interview with comments explaining that the program was meant to draw attention to the problem of racism that existed in Danish society. In finding an Article 10 violation, the ECtHR found it significant that it was "undisputed" that the "purpose" of the broadcast was "not racist."[80] Additionally, the Court emphasized that the program was broadcast to a "well-informed audience" likely to understand the point of the broadcast.[81]

Contribution to an ongoing debate was the decisive factor in *Giniewski v. France*.[82] There, the ECtHR overturned a conviction of the author of an article which suggested that the Catholic doctrine of the fulfillment of the Old Covenant in the New Testament contributed to anti-Semitism and helped give rise to the Holocaust. The Court found that the conviction was prescribed by law and had the legitimate aim of protecting "the reputation or rights of others."[83] However, the ECtHR rejected the suggestion that these arguments accused Catholics of "being responsible for the Nazi massacres."[84] Instead, the article contributed to a "wide ranging and ongoing debate."[85] Accordingly, the article was not "gratuitously offensive" and did not "incite disrespect or hatred."[86]

However, even alleged hate speech that is part of an ongoing political debate may at times be proscribed. In the 2009 decision of *Fėret v. Belgium*,

78. *See generally* Jacob Mchangama, *The Harm in Hate Speech Laws*, 176 HOOVER INSTITUTE POLICY REVIEW (2012), available at http://www.hoover.org/publications/policy-review/article/135466.

79. Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1994).

80. *Id.* ¶¶ 30–33.

81. *Id.* ¶ 34.

82. Giniewski v. France, 2006-I Eur. Ct H.R. 277 (2006).

83. *Id.* ¶¶ 30, 32.

84. *Id.* ¶¶ 46–47.

85. *Id.* ¶¶ 51–56.

86. *Id.* ¶ 43

the ECtHR, by a very close vote of 4 to 3, found that the conviction of a Belgian member of parliament of hate speech for publishing a hyper-nationalist xenophobic leaflets was consistent with Article 10.[87] The Court found the need to carry out "a strong and sustained fight" against "racisim, xenophobia, anti-Semitism, and intolerance"[88] to be a compelling justification for the restriction of freedom of expression that was "detrimental to the dignity or the safety" of minority groups.[89] The Court seemed especially convinced by the unique fact that this case involved a member of parliament and speech during an election. It emphasized that members of parliament in particular carry a responsibility to avoid "feeding intolerance" and that such leaflets in an election context were especially dangerous because they could further radicalize right wing voters.[90]

The dissent criticized the majority of the Court for suggesting that certain types of speech go against the alleged "spirit" of the Convention and for allowing restrictions of speech based on content.[91] Restrictions on such a basis would sacrifice "fundamental rights guaranteed by the Convention without compelling reason."[92] Absent a direct call to violence against a portion of the population, the dissent argued that Belgium lacked compelling reasons to restrict speech.[93] The dissent argued that "only an unfettered exchange of ideas brings us closer to the truth," and that such restrictions were incompatible in a democratic society.[94] Nevertheless, the majority upheld the convictions in this case.

One of the Court's more recent freedom of expression cases, *Vejdeland and Others v. Sweden*, is also perhaps its most far reaching hate speech decision.[95] In that case, the Court further advanced the reasoning of the *Fėret* decision by upholding the conviction for hate speech of individuals who distributed leaflets at a high school arguing that homosexuality was "a deviant sexual proclivity" that has had "a morally destructive effect on the substance of society" and is responsible for HIV and AIDS.[96] The ECtHR conceded that even though these statements did not incite to violence, they were "serious and prejudicial allegations."[97] Indeed, the Court explained that "insulting" and "holding up to ridicule or slandering specific

87. Féret v. Belgium, App. No. 15615/07, Eur. Ct. H.R. (2009) (the English translation is not yet official).
88. *Id.* ¶ 72.
89. *Id.* ¶ 73.
90. *Id.* ¶¶ 75–76.
91. *Id.* (Sajo J., dissenting, joined by Nona & Zagrebelsky J.).
92. *Id.*
93. *Id.*
94. *Id.*
95. Vejdeland and Others v. Sweden, App. No. 1813/07, Eur. Ct. H.R. (2012).
96. *Id.* ¶ 8.
97. *Id.* ¶ 54.

groups of the population" can be a sufficient basis for restriction of freedom of expression.[98]

Three judges concurred in the Court's decision with "hesitation."[99] Judges Spielmann and Nussburger were concerned that by labeling the speech in question "unnecessarily offensive," despite the legitimate aims of encouraging dialogue, the Court had laid out a "rather vague test" that was "inconsistent with the traditional and well-established case-law of our court going back to *Handyside*."[100] However, the judges found the school setting of the speech compelling. Judge Zupančič wrote a separate concurrence in which he compared European and American free speech cases[101] and argued that the court had gone "too far in the present case . . . in limiting freedom of speech by over-estimating the importance of what is being said."[102] He emphasized that the school setting — with an increased social interest in properly educating children and the fact that they could be considered a captive audience — provided a justification for the Court's decision.[103]

Along with the *Vejdeland* decision, the ECtHR released a fact sheet on hate speech explaining that it is "careful" to distinguish between "genuine and serious incitement to extremism" and the "rights of individuals" to "offend, shock or disturb" others.[104] The Court also acknowledged that "there is no universally accepted definition" of "hate-speech."[105] However, the fact sheet fails to spell out exactly how individuals or states can best distinguish between the two. The Alliance Defense Fund in particular has criticized the Court's decision for creating "a chilling effect on free speech" by failing to clearly distinguish between protected "offensive" speech and unprotected "serious and prejudicial speech."[106]

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98. *Id.* ¶ 55. Some of the unique facts of this opinion might somewhat narrow its impact. The Court found significant the fact that the leaflets were distributed at a school and targeted young people "at an impressionable and sensitive age" as well as the fact that the students could not decline to accept the flyers. In addition, the lack of jail time helped the court to see the penalty as not excessive. *Id.*

99. *Id.* (Spielmann & Nussberger J., concurring).

100. *Id.*

101. Judge Zupančič looked to the recently decided case of *Snyder v. Phelps*, in which the U.S. Supreme Court upheld the First Amendment rights of members of the Westboro Baptist Church to picket funerals with Anti-homosexual placards. 131 S. Ct. 1207 (2011). Judge Zupančič suggests that in the U.S. the *Vejdeland* case would likely come out the other way. He speaks approvingly the special protection that the American system gives to speech touching on matters of public concern, as well as the heightened scrutiny of restrictions based on the content or viewpoint of speech. Vejdeland, (Zupančič J., concurring) ¶¶ 2–4.

101. *Id.* ¶ 12

102. *Id.*

103. *Id.*

104. Press Release, European Court of Human Rights, Criminal Conviction for Distributing Leaflets Offensive to Homosexuality was not Contrary to Freedom of Expression (Sept. 2, 2012).

105. *Id.*

106. ALLIANCE DEFENSE FUND, VEJDELAND AND OTHERS V. SWEDEN: HATE SPEECH AND ARTICLE 10 ECHR (Apr. 12, 2012) http://www.adfmedia.org/files/2012-04-12_vejdela-

Thus, as with laws seeking to protect against offense to believers, hate speech laws have been upheld by the ECtHR even in instances where speech is merely offensive or shocking rather than a "genuine and serious incitement to extremism." The Court also shows deference for the effort of states to crack down on what the ECtHR sees as the great evil of racism, bigotry, and intolerance through the use of hate speech laws and rebuffs states only in extremely narrow circumstances.

B. Attitudes Towards Proselytism and Religious Expression

Because Russia's ban on religious extremist material often involves groups engaged in proselytism and distribution of literature, the ECtHR's treatment of proselytism is also worth noting.[107] In general, the Court has been supportive of the right to proselytize. However, a vocal contingent on the Court has been heavily critical of proselytism and even suggests that missionary work could violate Article 9 of the Convention, which protects "the freedom to manifest one's religion or belief in public."[108]

For instance, in *Kokkinakis v. Greece* the Court overturned the conviction of a Greek Jehovah's Witness for violating a ban on proselytism.[109] The Court explained that while religious freedom "is primarily a matter of individual conscience," Article 9 of also incorporated freedom to "manifest [one's] religion."[110] However, this right was not absolute and could be subject to "restriction on this freedom" in order to "ensure that everyone's beliefs are respected."[111] Even though the proselytism ban was prescribed by law pursuant to a legitimate government aim, it fell short of the requirement of being "necessary in a democratic society."[112] The Court explained that while nations could restrict "improper proselytism," they could not ban "true evangelism" which was deemed as an essential

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107. Of course, most of the challenges to Russia's literature bans are likely to be brought under Article 9 and Article 10 simultaneously. As this comment is focused on Article 10 Freedom of Expression, a thorough analysis of Article 9 Freedom of Religious precedent is not necessary; nevertheless, proselytism cases are relevant because they provide insight as to how the court treats religiously motivated speech and expression.

108. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 221 art. 9.1.

109. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser.A) (1993).

110. *Id.* ¶ 31.

111. *Id.* ¶ 33.

112. *Id.* ¶¶ 45–50.

Christian mission.[113] Because the Court found an Article 9 violation it did not examine the Article 10 free speech claim.[114]

In concurrence, Judge Pettiti explained that one of the major problems with the Greek law was its vagueness and "the lack of any clear definition" provided to define "proselytism that is not respectable."[115] Judge Pettiti argued that laws restricting fundamental rights must provide "legal certainty." Another judge, Judge Martens, would have taken an even stronger stance against proselytism bans. He partially dissented, criticizing the Court's ruling because it left it to states to decide whether "particular religious behavior is 'proper' or 'improper.'"[116] He argued that it would be impossible to delineate the exact point where proselytism efforts cross the line from proper to coercive, and would have forbidden all such proselytism bans. Judge Martens would have also found that the ban violated Article 7 due to the law's vagueness.

However, at least three judges on the ECtHR would have voted that the proselytism ban was consistent with Article 9. Judge Valticos, in a dissenting opinion argued that freedom to practice and manifest religions does not include efforts to "combat and alter the religion of others," and that interests of "religious peace and tolerance"[117] justify restrictions on proselytism.[118] The two other judges were less critical than Judge Valticious, who compared proselytism to spiritual rape, however, they also viewed proselytism as inconsistent with religious tolerance which "implies respect for the religious beliefs of others."[119] Thus, the ECtHR has upheld the rights of groups to preach and proselytize, but a sizable contingent on the Court views such proselytizing with suspicion if not outright derision. Moreover, because the Greek ban was such an extreme case concerning a total ban on proselytizing activity, it is uncertain whether the dissenting

113. *Id.* ¶ 48. In a subsequent case involving proselytism in Greece, the court upheld the conviction of commanders in the Air-Force who had proselytized to inferior officers because of the condition of power that they held. However, convictions for proselytizing to civilians were overturned as a violation of Article 9. Larissis and Others v. Greece, 1998-I Eur. Ct. H.R. 362 (1998).

114. Kokkinakis, ¶¶ 54–55.

115. *Id.* (Pettiti J., concurring).

116. *Id.* (Martens J., concurring).

117. *Id.* (Valticos J., dissenting).

118. Judge Valticos also dissented in a subsequent case involving the proselytizing efforts of a member of the Greek air force arguing, "I maintain that any attempt going beyond a mere exchange of views and deliberately calculated to change an individual's religious opinions constitutes a deliberate and, by definition, improper act of proselytism, contrary to "freedom of thought, conscience and religion" as enshrined in Article 9 of the Convention. Such acts of proselytism may take forms that are straightforward or devious, that may or may not be an abuse of the proselytiser's authority and may be peaceful or—and history has given us many bloodstained examples of this—violent. Attempts at "brainwashing" may be made by flooding or drop by drop, but they are nevertheless, whatever one calls them, attempts to violate individual consciences and must be regarded as incompatible with freedom of opinion, which is a fundamental human right." Larissis, (Valticos J., dissenting).

119. Kokkinakis, (Foighel & Loizou J., dissenting).

viewpoint would gain a larger following in cases involving a more limited ban on the use of certain proselytizing material such as the ban in Russia.

On the whole, the ECtHR case law suggests that despite rhetoric to the contrary, the Court gives a great degree of deference to states aiming to restrict offensive or hateful speech that denigrates or criticizes others for their faith or other characteristics. Likewise, while the right of religious individuals to speak out about their faith is well established, the kinds of limits that states can place on such speech and religious expression when it offends others remain an open question.

II. RUSSIA AND THE ECTHR

Russia first joined the Council of Europe in 1996. Subsequently, Russia ratified the European Convention of Human Rights in 1998 and became subject to rulings of the ECtHR.[120] Russians have filed more petitions to the ECtHR than any other nationality.[121] Russia has been the subject of several ECtHR cases touching upon freedom of expression (Article 10) and freedom of religion (Article 9). As with the ECtHR precedent generally, the results of these cases have been mixed, with strong statements in defense of individual rights in some cases, and, in other instances, great deference shown to Russian efforts to ban extremist groups.[122]

Compliance with the ECHR ruling has allegedly been spotty with courts in Russia refusing to reconsider their original rulings or to provide compensation.[123] However, use of ECtHR cases in domestic courts has overcome initial skepticism[124] and become more accepted.[125] Indeed,

120. William E. Pomeranz, *Russia and the European Court of Human Rights: Implications for U.S. Policy*, KENNAN INSTITUTE (May 3, 2011), http://www.wilsoncenter.org/publication/russia-and-the-european-court-human-rights-implications-for-us-policy.

121. EUROPEAN COURT OF HUMAN RIGHTS, RUSSIA PRESS COUNTRY PROFILE (2013), http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf.

122. For an overview of all Russian cases, see *id.*

123. Rosemary Griffin, *RUSSIA: European Court of Human Rights 'Obviously Ignored,'* FORUM 18 (March 1, 2011), http://www.forum18.org/archive.php?article_id=1548. For an overview of the Russian Court system and how the Courts typically handle freedom of expression cases, *see* Robert B. Ahdieh, H. Forrest Flemming, *Toward A Jurisprudence of Free Expression in Russia: The European Court of Human Rights, Sub-National Courts, and Intersystemic Adjudication*, 18 U.C.L.A. J. INT'L L. & FOREIGN AFF. 31, 43 (2013).

124. *See generally*, Pomeranz, *supra* note 120. However, the 2011 case of *Konstantin Markin v. Russia* has been described as a "serious breach" in the relationship between the Russian Judicial System and the ECtHR. It represented the first time that the ECtHR "overruled a decision by the Russian Constitutional Court." That case involved a single father seeking parental leave from the army which was guaranteed to servicewoman. Russian courts including the Constitutional Court rejected his request and held that the special role of motherhood, as opposed to fatherhood, justified granting more extensive leave to servicewomen. The ECtHR found that Russia's policy violated Article 14 and constituted discrimination on the basis of sex. Russian Constitutional Court Chairman Valerii Zorkin heavily criticized the ECtHR's ruling as disrespectful towards the Russian legislature and Russian Sovereignty. Zorkin also claimed that the Constitutional Court had supremacy over ECtHR decision.

Russia's Constitutional Court has cited to ECtHR decisions in over 50 decisions.[126]

In one of its strongest statements on freedom of religion in Russia, the ECtHR ruled in 2010 that the dissolution and banning of a Jehovah's Witness congregation in Moscow violated Articles 9 and 11 of the the Convention.[127] The Court accepted Russia's claim that the ban had been "prescribed by law" and that the "interference pursued the legitimate aim of the protection of health and the rights of others."[128] Nevertheless, the Court unanimously found that the banning of membership and preventing of registration violated the rights protected by the Convention because the ban was not "necessary in a democratic society."[129] In the Court's words:

> The State's power to protect its institutions and citizens from associations that might jeopardize them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable."[130]

The Court explained that "exceptions to the rights of freedom of religious and association" must be "construed strictly." Likewise, such restrictions must be "proportionate to the legitimate aim pursued.[131]

In other cases concerning treatment of religious organizations, the ECtHR has likewise been very critical of Russian policy. For instance, the Court rebuked Russia's refusal to re-register the Salvation Army because it was a "paramilitary" organization.[132] Likewise, in *Nolan and K. v. Russia*, the Court found that Article 9 had been violated when a member of the Unification Church was deported and denied re-entry into the country

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President Dmitrii Mededev also agreed declaring that "we will never surrender that part of our sovereignty, which would allow any international court or any foreign court to render a decision, changing out national legislation." Nevertheless, a draft legislation which would give the Constitutional Court effective veto power over ECtHR decisions was withdrawn after heavy criticism from NGOs and the Constitutional Court itself. For now, the relationship between Russia and the ECtHR remains tense; nevertheless, Russia remains a member of the European Convention and continues to fulfill the obligations of membership under the Convention. *Id.*

125. *Id.*

126. *Id. See also* Ahdieh, *supra* note 123 (arguing that the Russian Courts and the ECtHR are engaged in a dialogue in which Russian courts incorporate ECtHR decisions as part of their legal decision making process).

127. Jehovah's Witnesses of Moscow and Others v. Russia, App. No. 302/02, Eur. Ct. H. R. (2010).

128. *Id.* ¶¶ 105–107.

129. *Id.* ¶¶ 108–153.

130. *Id.* ¶ 100 (internal quotations omitted).

131. *Id.* ¶¶ 100, 108.

132. Moscow Branch of the Salvation Army v. Russia, 2006-XI Eur. Ct. H.R. 1 (2006).

because of his religious activities.[133] Refusal to register the Church of Scientology was also deemed a violation of Article 9.[134]

In contrast, the ECtHR upheld the convictions of members of a banned Islamic fundamentalist organization, Hizb ut-Tahrir, finding that Article 17[135] applied and therefore membership in the group could be banned.[136] Because Hizb ut-Tahrir was dedicated to the overthrow of democracy and establishment of Sharia law, members were outside of the scope of the Convention.

In the case of *Pavel Ivanov v. Russia*, the ECtHR deemed an appeal under Article 10 to a conviction for incitement to racial hatred inadmissible. In doing so the ECtHR held that the author's strongly anti-Semitic literature was the type of "general and vehement attack on one ethnic group" that contradicted the Convention's underlying values of "tolerance, social peace and non-discrimination."[137]

Indeed, the ECtHR has found Article 10 violations against Russia only in very limited circumstances unrelated to speech bans such as the extremist law.[138] While outright bans or refusals to register religious organizations have been scrutinized and struck down, bans on specific religious items have yet to be examined by the Court.[139] There are currently at least three pending cases at the ECtHR concerning the banning of religious literature in Russia.[140] Therefore, these cases provide

133. Nolan and K. v. Russia, App. No. 2512/04, Eur. Ct. H.R. (2009).

134. Kimlya and Others v. Russia, 2009-IV Eur. Ct. H.R. 319 (2009); *see also* Church of Scientology Moscow v. Russia, App. No. 18147/02, Eur. Ct. H.R. (2007).

135. "Nothing in [the] Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 221 art. 17.

136. If Article 17 applies to a particular organization such as one with "totalitarian aims," then that organization and members of that organization are not able to make claims under Article 9, 10, 11 of the convention because such groups seek to "destroy the rights or freedoms set forth in the convention. Groups advocating for "destruction of democracy," are excluded from protection under the Convention. Kasymakhunov and Saybatalov v. Russia, Judgment, ¶¶ 104–105 (Eur. Ct. H.R. March 14, 2013), http://hudoc.echr.coe.int/eng?i=001-117127.

137. Pavel Ivanov v. Russia, Admissibility Decision, App. No. 35222/04, Eur. Ct. H.R. (2007).

138. *See* RUSSIA PRESS COUNTRY PROFILE, *supra* note 121; *see also* Grinberg v. Russia, App. No. 23472/03, Eur Ct. H.R. (2005); Reznik v. Russia, App. No. 4977/05, Eur Ct. H.R. (2013) (Article 10 violation in defamation suits); Kudeshkina v. Russia, App. No. 29492/05, Eur. Ct. H.R. (2009) (Article 10 violation for the dismissal of a judge after he made critical comments about the court system).

139. A suit regarding the shutdown of an art exhibition ("Caution, Religion!"), which was critical of the role of religion in society was deemed inadmissible by the court due to lack of adequate evidence on the record. Samodurov and Vasilovskaya v. Russia, Admissibility Decision, App. No. 3007/06, Eur. Ct. H.R. (2009).

140. Valiullin and The Association of Mosques of Russia v. Russia, App. No. 03112/08, Eur. Ct. H.R (2011); Krupko and Others v. Russia, App. No. 26587/07, Eur Ct. H.R. (2010); Ibragimov and Cultural Educational Fund "Nuru-Badi" v. Russia, App. No. 1413/08, Eur. Ct. H.R. (2011).

the Court an opportunity to consider a more targeted ban on religious activity.

III. ORIGIN AND APPLICATION OF RUSSIA'S EXTREMIST LAW

The Russian law "On Fighting Extremist Activity" passed in June 2002 in large part as a response to the increasing threat of Islamic fundamentalism.[141] In the religious context, extremism was defined in four ways: (1) incitement of religious hatred; (2) committing a crime motivated by religious hatred; (3) obstruction of the lawful activity of religious associations accompanied by violence or the threat of violence; (4) propaganda of the exclusivity, superiority or inferiority of citizens according to their attitude towards religion or religious affiliation.[142]

Geraldine Fagan of Forum 18 explains that at first, prosecutions under the law were limited. The first arrest came from a member of a Muslim extremist group, and several books that he possessed were analyzed for extremism. Academics commissioned to study the books criticized them for "belittling the national identity of Christians."[143] However, prosecutions and restrictions began in full force following the school siege in North Ossetia in September 2004. Five Muslims were prosecuted not for participation in terrorist activities, but for the possession of extremist literature. The Russian court claimed that the literature was extremist because it "propagandises the idea of the superiority of Islam—and therefore Muslims—over other religions and the people who adhere to them."[144] This questionable interpretation of the statute allowed a law originally targeted at extremist terrorist activities to transform into a law used to censor religious expression.[145]

Censorship of less extreme material followed, mostly targeting Islamic works. Commentary on the Koran by Said Nursi was banned in 2007 because it "aims to incite religious hatred, propagandise the exclusivity, superiority and inferiority of citizens according to their attitude towards religion."[146] The ban was enforced despite criticism from Russia's Ombudsman for Human Rights who warned, "We must avoid a repeat of the prohibitions and persecutions of those with dissenting views and faiths that are characteristic of undemocratic, totalitarian states."[147]

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141. Geraldine Fagan, *RUSSIA: How the Battle with 'Religious Extremism' Began*, FORUM 18 (April 27, 2009), http://www.forum18.org/archive.php?article_id=1287.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

The law was also strengthened to encompass additional categories of "extremism" including "violation of rights, liberties and legitimate interests of an individual and citizen subject to his/her social, racial, ethnic, religious or linguistic identity or attitude to religion,"[148] which further expanded the categories of material that could be restricted under the extremism law.

In 2012, the punk rock band Pussy Riot performed a sacrilegious political protest song inside of the Cathedral of Christ the Savior in Moscow.[149] The band's song attacked President Vladimir Putin and also contained lyrics critical of the Russian Orthodox Church.[150] Afterwards, several members of the band were arrested and convicted of hooliganism. As a result of public outrage, a bill that criminalized "humiliating an individual because of one's attitude towards religion" was proposed.[151] The bill would increase the penalties for extremism to up to four years in prison.[152] This bill sparked heated debate in Russian society over the nature of freedom of expression which has yet to be fully resolved.[153]

According to Alexander Verkhovsky, the director of SOVA, a Russian pro-democracy group, the extremism laws have for the most part been used to prosecute truly dangerous groups.[154] Indeed, the hate crime rate in

148. SOVA Center for Information and Analysis, *The Structure of Russian Anti-Extremist Legislation* (2010), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/20-1/201011/20101129_3_10sova_en.pdf.

149. *Shrines Safeguarded From Pussy Riot,* RT (Feb. 27, 2012), http://rt.com/art-and-culture/pussy-riot-church-cossacks-297/.

150. Miriam Elder, *Pussy Riot Sentences to Two Years in Prison Colony After Anti-Putin Protest*, THE GUARDIAN, Aug. 2012, http://www.theguardian.com/music/2012/aug/17/pussy-riot-sentenced-prison-putin.

151. *Protecting Believers' Feelings: Rights Watchdog Issues Proposals*, RT (Feb. 6, 2013, 12:18 PM), http://rt.com/politics/law-religion-offence-rights-546/. The video of the Pussy Riot performance was also added to the Russian Extremist List and banned. *See Pussy Riot Video Banned for 'Extremism'*, ASSOCIATED PRESS, Jan. 31, 2013, available at http://www.themoscowtimes.com/news/article/pussy-riot-video-banned-for-extremism/474801.html.

152. *Bill Increasing Extremism Penalties Sent to Russia's Duma,* RIA NOVOSTI (MOSCOW), (June 24, 2013, 11:55 AM) http://en.ria.ru/crime/20130624/181840023.html.

153. In the wake of the Pussy Riot case, individuals have been prosecuted for selling t-shirts featuring band members and putting up posters of the band. An artist in the Siberian town of Novosibirsk was fined for selling shirts with an icon like image of a haloed mother and child wearing Pussy Riot-like gear. His fine was upheld by the Novosibirsk District Court, and he has appealed to the ECtHR. *See Siberian Artist Challenges Pussy Riot Icon Fines at ECHR*, RAPSI (Moscow), Nov. 9, 2012, http://rapsinews.com/judicial_news/20121109/265299162.html. Additional charges were subsequently filed under the theory that each item offends the feelings of believers. *See Police Open Sixth Case over Loskutov's 'Offensive' Pussy Riot T-Shirts*, RIGHTS IN RUSSIA, June 4, 2013, http://hro.rightsinrussia.info/hro-org/pussyriot-52. Prosecutors also considered bringing charges against Ebay because the shirts were sold there. *See E-Bay Religious Feelings*, KISS MY BABUSKHA (May 28, 2013, 6:15 PM), http://kissmybabushka.com/?p=4585 (blog post by the individual prosecuted for selling the shirts containing legal documents sent to him regard the sale on e-bay) (site and documents in Russian).

154. F. Joseph Dresen, *Anti-Extremism Policies in Russia and How They Work in Practice*, KENNAN INSTITUTE, http://www.wilsoncenter.org/publication/anti-extremism-policies-russia-and-how-they-work-practice.

Russia has fallen dramatically since the law began being strongly enforced. However, in recent years Verkhovsky has detected a shift with more convictions for hate speech than for hate crimes. Thus, the vague and open ended language of the extremism legislation allows for wide ranging prosecutorial discretion and has led to an increased willingness to prosecute speech.

Structurally, the law allows any province to add material to the Federal Extremist List and the Justice Ministry does not have vetting or veto power over the list.[155] Equally troublingly, material placed on the list is rarely removed because Courts have also put in place procedural hurdles against appeal.[156] For instance, one court said that only the author or publisher of a work could appeal. [157] Also, because placement on the extremist list may take months, by the time individuals become aware of placement of a work on the extremist list the deadline for an appeal may have passed.[158]

Once an item is placed on the extremist list, individuals distributing the material can be prosecuted. In addition, religious gatherings and churches have been raided in the search of extremist literature.[159] Access to the materials is severally curtailed or completely restricted.[160] In addition, scores of individuals have been prosecuted for possession of banned materials.[161]

Some religions in particular have been harshly targeted by the extremist literature law. For example, Jehovah's Witnesses have suffered by having scores of publications placed on the extremist lists.[162] Likewise, several

155. For instance, a 3,000-signature petition to President Putin seeking to reverse a specific ban was unrequited, as the President declared that only the courts could add or remove items from the list. *See* Geraldine Fagan, *RUSSIA: The Battle with 'Religious Extremism'—a Return to Past Methods?*, FORUM 18, Apr. 28 2009, http://www.forum18.org/archive.php?article_id=1288.

156. *The Amount of Extremist Materials has Decreased*, SOVA CENTER FOR INFORMATION AND ANALYSIS (Aug. 12, 2009, 5:29 PM), http://www.sova-center.ru/en/misuse/news-releases/2009/12/d17495/.

157. See Fagan, *supra* note 155.

158. *Id.*

159. Felix Corley & Geraldine Fagan, *Russia: Lutheran Extremists?*, FORUM 18 (March 2010), http://www.forum18.org/archive.php?article_id=1425.

160. For instance, libraries and schools can be the target of lawsuits or sanctions if they provide access to restricted material. The Russian Library Association recommended that books on the extremism list should be put into special collections that are not generally accessible to the public. One could access the books only by filling out a form identifying himself and explaining why access was desired. *See* Paul Goble, Op-Ed., *Extremist Literature List Forces Russian Libraries to Review Soviety-style Spetskhran System*, KYIV POST, June 23, 2010, http://www.kyivpost.com/opinion/op-ed/extremist-literature-list-forces-russian-libraries-70758.html.

161. *See* Sophia Kishovsky, *Russian Terror Law Has Unlikely Targets*, N.Y. TIMES, Nov. 3, 2011, http://www.nytimes.com/2011/11/04/world/europe/russian-terror-law-has-unlikely-targets.html; *see also* Felix Corley, *RUSSIA: One Acquittal, but the Same Day Trial of Two More Begins*, FORUM 18, Jan. 10, 2012, http://www.forum18.org/archive.php?article_id=1653.

162. Geraldine Fagan, *RUSSIA: 34 Jehovah's Witness Publicans and One Congregation Banned*, Forum 18, Dec. 8, 2009, http://www.forum18.org/archive.php?article_id=1385.

translations and commentaries on the Koran also remain banned throughout Russia.[163] While Russian attempts to outright ban Jehovah's Witnesses have been strongly rebuffed by the international community—with a strong rebuke at the ECtHR—these extremely disruptive bans on literature deemed "extremist" have as of yet received far less attention.[164]

Religious organizations have not been the sole targets of such bans. An episode of the TV show South Park was banned from the air in parts of Russia because prosecutors claimed that the show "offends the honour and dignity of Christians and Muslims alike."[165] Similarly, a painting by renowned artist Alexander Savko, *Sermon on the Mount*, which depicts Mickey Mouse preaching the famous sermon in the place of Jesus Christ, was banned.[166] Two curators were initially charged for displaying these images in a Forbidden Art show, but outcry by Human Rights Groups led the Russian Attorney General to drop the charges.[167] Nevertheless, the painting remains banned. Other artwork making political or religious statements has also been banned.[168] Controversial videos that potentially could offend religious believers such as the infamous "Innocence of Muslims" video were also placed on the extremist list and banned.[169] Political speech critical of the Vladimir Putin, such as the Pussy Riot video, has also been placed on the list.[170] Over 2000 items are currently located on the list of extremist materials.[171]

Moreover, the law has allowed for cracking down on newspapers that provide "assistance to extremism."[172] Media organizations may be punished for airing extremist content or failing to mention that an

163. Daniel Kalder, *Russian Court Bans Qur'an Translation*, THE GUARDIAN, Oct. 8, 2013, http://www.theguardian.com/books/booksblog/2013/oct/08/russian-court-bans-quran-translation.

164. Yet, despite international condemnation, Jehovah's Witnesses were recently placed on the list of extremists organizations in the Russian province of Samara as a result of the groups distribution of extremist literature. The Russian Supreme Court sustained the regional courts ruling. See *Russia's Supreme Court Rules Jehovah's Witnesses from Samara Extremist Organization*, TASS (Nov. 13, 2014), http://en.itar-tass.com/russia/759625.

165. Brad A. Greenberg, *Russia Moves to Ban 'South Park' for Religious Extremism*, JEWISH JOURNAL, Sept. 8, 2008, http://www.jewishjournal.com/thegodblog/item/russia_moves_to_ban_south_park_for_religious_extremism_20080908/.

166. *Russia's Pursuit of 'Extremism' Targets Religious Believers, Civi Dissenters, and Artists*, HUMAN RIGHTS FIRST (Mar. 30, 2012), http://www.humanrightsfirst.org/2012/03/30/ru-ssias-pursuit-of-extremism-targets-religious-believers-civic-dissenters-and-artists/.

167. *Id.*

168. *See Misuse of Anti-Extremism in August 2013*, SOVA CENTER FOR INFORMATION AND ANALYSIS (Sept. 13, 2013, 6:38 PM), http://www.sova-center.ru/en/misuse/news-releases/2013/09/d27908/.

169. *Russian Court Bans 'Extremist' Video 'Innocence of the Muslims'*, RT (Oct. 1, 2012, 1:16 PM), http://rt.com/news/russia-court-muslim-film-banned-417/.

170. Fred Weir, *Russia Stretches 'Extremism' Laws*, CHRISTIAN SCIENCE MONITOR, Aug. 9, 2007, http://www.csmonitor.com/2007/0809/p06s01-woeu.html.

171. MINISTRY OF JUSTICE OF THE RUSSIAN FEDERATION, FEDERAL LIST OF EXTREMIST MATERIAL, *available at* http://minjust.ru/ru/extremist-materials?search= (Russ.)

172. SOVA, *supra* note 156.

organization has been banned or liquidated while reporting on that organization.[173] NGOs have also been severely impacted by the extremism laws, as convicted individual is forbidden from participating in the activities of any NGO.[174] Individuals convicted of extremism are also barred from government office, military service, or service on the police force.[175] Thus, the Russian law has had a far reaching detrimental impact on freedom of expression in Russian society.

IV. APPLICATION OF THE ECTHR'S FREEDOM OF EXPRESSION JURISPRUDENCE TO THE RUSSIAN LAWS

Despite the aforementioned restrictions on freedom of expression, Russia has claimed that it is fully compliant with the European Convention in its enforcement of the extremist ban. As part of a 2008/2009 Universal Periodic Review, Russian Non-Governmental Organizations complained about the vagueness and potential abuses of the extremist laws to the United Nation's High Commissioner for Human Rights.[176] As part of its report, the UN recommended that Russia "revise relevant legislation particularly the federal law on countering terrorism and the law on extremism to ensure their compatibility with international obligations of the Russian Federation."[177] Russia responded that its "[f]ederal legislation on terrorism and extremism conforms to the international obligations accepted by [the] Russian Federation and the [sic] doesn't have to be changed."[178]

Russia makes a plausible claim given the spotty and inconsistent enforcement of Article 10 by the ECtHR. While several extreme cases would likely be clear violations of Article 10, many of the restrictions that Russia has put in place would hinge on close factual inquiry and how the Court would ultimately come down is unclear.[179]

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173. *Id.*

174. *Id.* NGOs have also been directly targeted as a result of the extremist literature ban. *See Russia Inspects NGOs for Extremism, Charges Three Vilations*, RAPSI (Oct. 7, 2013, 3:55 PM), http://rapsinews.com/news/20130710/268111574.html.

175. *Analysis on Russia's New 'Extremist Activity Law'*, THE INSTITUTE ON RELIGION AND PUBLIC POLICY, (Aug. 1, 2013), http://www.religionandpolicy.org/reports/the-institute-country-reports-and-legislative-analysis/europe-and-eurasia/russia/analysis-on-russia-s-new-extremist-activity-law-2012/.

176. *Russia Accepted Part of the UN Recommendations on Counteraction to Xenophobia and Extremism*, SOVA CENTER FOR INFORMATION AND ANALYSIS (June 26, 2009, 6:04 PM), http://www.sova-center.ru/en/xenophobia/news-releases/2009/06/d16336/.

177. U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Russian Federation*, U.N. Doc. A/HRC/11/19* (Oct. 5, 2009), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/162/59/PDF/G0916259.pdf?OpenElement.

178. SOVA, *supra* note 156.

179. Additionally, if a group falls under Article 17, it is beyond the protection of Articles 9 and 10, and therefore a ban of its literature will almost certainly be upheld. For instance, bans on literature distributed by the Anti-Semitic group involved in the *Pavel Ivanov* case would almost

This section will apply the aforementioned freedom of expression cases where Russia has restricted or banned extremist literature. As mentioned, the Court will first look to whether a restriction of speech is prescribed by law. Next, the Court will consider whether the ban serves a legitimate state aim. The Court will then take into account whether the ban is "necessary in a democratic society."[180] As part of this inquiry, the Court will consider several factors including the margin of appreciation granted to states, the degree to which the material is shocking or offensive, the intent of the speaker, whether the target audience would understand the material, Russia's stated interest of protecting children, and the extent of sanctions imposed on the speaker. Each of these factors is highly complex and context sensitive, which means that the outcome of all but the most extreme cases is difficult to predict with certainty.

The first requirement is that a particular restriction of speech be prescribed by law. There are instances in Russia where satisfaction of this prong is questionable. For instance, in a recent ECtHR case, members of the banned group Hizb ut-Tahrir claimed that their conviction was a violation of Article 6 of the convention because the judgement of the Supreme Court of Russia banning the organization was not officially published at the time he was convicted.[181] There may be similar procedural irregularities in extremist literature cases as a regional ban of a religious work may not become known to members in another region before they are fined or convicted for distributing banned material. Other procedural problems such as the difficulty of raising an appeal could also lead the court to question whether a particular conviction is proscribed by law.[182] In the typical case, however, of material that has been placed on the list through a valid court procedure, and where adequate notice is given to members of a religious group, it is highly likely that the Russian bans will be considered "prescribed by law."

The second requirement that the ban on religious literature serve a "legitimate aim" would almost certainly be met in the case of Russia's extremist literature ban. In the aforementioned cases, the ECtHR has

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certainly be upheld. *See* Pavel Ivanov v. Russia, Admissibility Decision, App. No. 35222/04, Eur. Ct. H.R. (2007). In *Pavel Ivanov,* the ECtHR deemed an Article 10 appeal of a conviction for incitement to racial hatred was inadmissible. In doing so the ECtHR held that the author's strongly anti-Semitic literature was the type of "general and vehement attack on one ethnic group" that contradicted the conventions underlying values of "tolerance, social peace and non-discrimination." *Id.* The ECtHR's Article 17 precedent is beyond the scope of this comment, but for a critique of the categorical approach take by the ECtHR, see Hannes Cannie & Dirk Voorhoof, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?,* 29 NETH. Q. HUM. RTS. 54 (2011).

180. *See* Handyside v. the United Kingdom, 24 Eur. Ct. H.R. ¶¶ 42, 47–49 (ser. A) (1976).

181. Kasymakhunov and Saybatalov v. Russia, Judgment (Eur. Ct. H.R. March 14, 2013), http://hudoc.echr.coe.int/eng?i=001-117127.

182. *See supra* notes 156–160 and accompanying text.

never questioned the legitimate aim of a restriction of speech for the goal of protecting the dignity of religious individuals.[183] Likewise, the ostensible purpose of the ban was to restrict "hate speech" from terrorist or radical groups. Because the ECtHR has thus far refused to question a state's stated motive, the Russian law almost certainly has a legitimate aim.

The ECtHR would next closely look at whether a particular ban is "necessary in a democratic society." The margin of appreciation granted to Russia would likely play a significant role in the results of cases. For instance, the Court might be willing to grant Russia a greater degree of deference given the unique circumstances of Russia's battle against Islamic fundamentalism in the Chechnya and the Caucuses.[184] As in the *Feret* decision, it is likely that the court would acknowledge that Russia's efforts are part of "a strong and sustained fight" against "racisim, xenophobia, anti-Semitism, and intolerance."[185] The Court would likely be especially sympathetic to efforts to ban literature that advocates the "destruction of democracy" or efforts to undermine the rights of others.[186]

In contrast, the Court has stated that the margin of appreciation is not endless. In its case overturning the dissolving of the Jehovah's Witness community in Moscow, the ECtHR looked quite critically at the necessity of each of the proffered justifications for Russia's ban.[187] As such, the Court is unlikely to simply accept the Russian court determination that certain material is "gratuitously offensive." However, ECtHR seems to be more willing to accept protection of religious sentiment than some of the other justifications offered by Russia in the Jehovah's Witness case,[188] because it views this as an obligation binding upon the state due to Article 9. A lack of pluralism and respect for other faiths did not come up in the Russian Jehovah's Witness case as a justification for restrictions and could be a persuasive argument. Thus, it is not entirely clear how much deference the ECtHR would give to Russia as a result of the margin of appreciation.

The Court would then turn to look at the content of the materials themselves. As the ECtHR has mentioned on several occasions, Article 10 is meant to protect expressions that "offend, shock or disturb."[189] Yet the

183. *See supra* Sections II and III and accompanying cases.

184. *See* Alexei Anishchuk, *Putin Says Foreign Foes Use Radical Islam to Weaken Russia*, REUTERS, Oct. 22, 2013, http://www.reuters.com/article/2013/10/22/us-russia-putin-islam-idUSBRE99L0NJ20131022.

185. Féret v. Belgium, App. No. 15615/07, Eur. Ct. H.R. ¶ 72 (2009).

186. *See* Kasymakhunov, ¶¶ 104–105.

187. Jehovah's Witnesses of Moscow and Others v. Russia, App. no. 302/02 Eur. Ct. H.R. (Jun. 10, 2010).

188. Some of Russia's more specious arguments included: alleged infringement of the right of others to respect for private life, allegations of proselytising, "mind control" and totalitarian discipline, and incitement of citizens to refuse civic duties. *Id.* ¶¶ 108–153.

189. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 221.

Court has also recognized an obligation upon religious organizations to "avoid as far as possible expressions that are gratuitously offensive to others."[190]

As in its cases analyzing "hate speech" laws, the ECtHR would also likely consider the intention of the author of a particularly controversial work.[191] For instance, with the banned work of Alexander Savko featuring Mickey Mouse in the Last Supper, the court might find Savko's own explanation of the painting significant: "The purpose of this painting is not abuse of Christ and not abuse of Christians. This is displaying of current reality: The substitution of human spiritual, moral values with mass-cultural values."[192]

Savko's purpose of advancing a debate about modern materialistic culture would likely be given a great deal of weight in the court's determination. However, discerning intent or purpose is far trickier in the case of ancient works or works with long dead authors. As such, the court might find Russia's reliance on expert witnesses to be significant. Expert studies might be viewed as the most objective way to discern the purpose or intention of a work.[193]

The Court would also consider whether the intended audience would understand the author's stated purpose. In the *Jerslid* case, the Court found it significant that the intended audience was well educated and would understand the message being conveyed.[194] Thus, if a work is displayed or distributed in such a context where the audience is likely to misinterpret or misunderstand its true intention, this might outweigh a non-offensive purpose. For instance, in *Vejdeland* the Court also found the fact that materials distributed to children or to captive audiences were less likely to be protected by Article 10.[195]

These factors might weigh in favor of bans of literature distributed in a proselytizing setting by groups such as Hare Krishna or Jehovah's Witnesses. Material passed out to passers-by on the street might be viewed as having less Article 10 protection than private devotional materials. Given that a not insubstantial portion of the Court has been critical of proselytizing efforts, the Court might be more skeptical of literature distributed in such settings.[196]

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190. Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. ¶ 49 (ser. A)(1994).

191. *See* Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1994).

192. *Russian Court Bans Alexander Savko Painting with Mickey Mouse's Head on Jesus' Body*, HUFFINGTON POST, (June 14, 2012, 3:45 PM), http://www.huffingtonpost.com/2011/0-8/25/russian-court-bans-painti_n_937331.html.

193. On the other hand, evidence of manipulation of expert testimony such as existed in the Gita trial would cut against Russia. *See* Maurya, *supra* note 1.

194. Jersild, ¶¶ 9, 34.

195. Vejdeland and Others v. Sweden, App. No. 1813/07, Eur. Ct. H.R. (2012).

196. The *Kokkinakis* court was protective of proselytizing, but three of the judges in concurrence were outright hostile to missionary work and depending on the court composition attitudes towards

Additionally, Russia has argued that one of the purposes of its ban on certain works is to protect children from offensive material. This fact could be outcome determinative, as it was in *Vejdeland*, if the offensive material banned is especially likely to reach children — for instance, the restriction on airing episodes of South Park on public television. Indeed, Russian authorities justified the ban of the South Park episode in part due to the fact that it would pervert the moral orientation of children.[197]

Finally, the ECtHR would also consider the extent of the sanctions/punishment with mixed results. On one hand, the fact that an item is placed on a federal extremist list with an unclear process of removal would perhaps be viewed as excessive. On the other hand, the materials are still available at libraries for those interested for academic purposes.[198] Additionally, convictions for displaying or distributing extremist materials have often only carried monetary fines rather than jail time.[199] Depending on the facts of a particular case before the ECtHR, this factor could either support or oppose finding an Article 10 violation.

On the whole, the ECtHR would be unlikely to accept Russia's attempt to categorize widely revered and distributed works such as the *Bhagavad Gita*, or translations of the *Koran* as "gratuitously offensive" or "necessary in a democratic society."[200] In contrast, the recording of Pussy Riot's performance in the Cathedral of Christ the Savior is a far closer case. Some lyrics could certainly be considered offensive to believers. For instance:

> *Virgin birth-giver of God, drive away Putin!*
> *Drive away Putin, drive away Putin!*
> *Black frock, golden epaulettes*
> *Parishioners crawl bowing [toward the priest, during the Eucharist]*
> *Freedom's ghost [has gone to] heaven*
> *A gay-pride parade [has been] sent to Siberia in shackles*[201]

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missionary activity may vary greatly. *See* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser.A) (1993).

197. Lee Glendinning, *Russia Attempts to Ban South Park*, THE GUARDIAN, Sept. 25, 2008, http://www.theguardian.com/news/blog/2008/sep/25/television.russia.

198. *See* Corley & Fagan, *supra* note 159.

199. Press Release, Article 19, Russia: European Court Must Ensure that Religious "Hate Speech" Laws Conform with International Standards on Freedom of Expression, (May 18, 2010), http://www.strasbourgconsortium.org/common/document.view.php?docId=4911.

200. As in the *Klein* case, the court is unlikely to find that such material denigrates the content of the religious faith of others. Klein v. Slovakia, App. No. 72208/01, Eur. Ct. H.R. (2007) ¶ 52. On the other hand, it is unclear how vigorously the court will challenge Russia's characterization of works as hostile to the faith of others. *See* Husna Haq, *Russia Blacklists Translation of Quran*, THE CHRISTIAN SCIENCE MONITOR, Oct. 9, 2013, http://www.csmonitor.com/Books/chapter-and-verse/2013/1009/Russia-blacklists-translation-of-the-Quran. (justifying the Koran ban on the basis of "[N]egative evaluations of persons who have nothing to do with the Muslim religion.").

201. Jeffrey Taylor, *What Pussy Riot's 'Punk Prayer Really Said*, THE ATLANTIC, Nov. 8, 2012, *available at* http://www.theatlantic.com/international/archive/2012/11/what-pussy-riots-punk-

Like the movie in *Wingrove*, the performance was clearly "calculated . . . to outrage" those with religious sentiments.[202] As Germany did in *Otto-Preminger*, Russia could justify such a ban as necessary "to ensure religious peace" given that members of the Russian Orthodox church make up the "overwhelming majority" of the population in Russia.[203]

As the above analysis reveals, except in the most extremely egregious cases, such as bans on classic pieces of religious literature, the results of an Article 10 dispute in the ECtHR is highly unclear and depends heavily on how the Court will decide to weigh a wide range of factors. Additionally, due to the wide range of judges with different viewpoints on freedom of expression and freedom of religion,[204] the outcome might depend on which judges happen to hear a particular case.[205]

V. HOW THE ECTHR CAN MORE FULLY PROTECT FREEDOM OF EXPRESSION

The time has come for the ECtHR to seriously reexamine its position on freedom of expression. As has been feared, allowing states to restrict laws that are "offensive" to religious sentiments has opened up room for a wide range of speech restrictions.[206]

The Russian extremist laws offer the ECtHR a perfect opportunity to remedy its past inconsistencies and weaknesses in protecting freedom of expression. Russia's high profile public efforts to ban classic works of religious literature, artistic works touching on fundamental questions of the role of religion in society, and religiously motivated political speech are exactly the kinds of actions that Article 10 is designed to protect.[207] Russia's insistence that its law is consistent with Article 10 allows the ECtHR to clarify Article 10 and the remedy some of the vagueness that has plagued interpretation of Article 10(2).[208] Likewise, the unquestionably legitimate initial purpose of Russia's law, contrasted with its abuse and

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prayer-really-said/264562/.

202. Wingrove v. the United Kingdom, 1996-V Eur. Ct. H.R. 1937 (1996).

203. Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A)(1994). On the other hand, political speech has often been given a greater degree of protection,203. which further complicates the analysis because of the anti-Putin nature of the song. Wingrove, ¶ 58.

204. Observe for instance the radical range of opinions in the Greek proselytism case with one judge calling proselytism "spiritual rape" and others defending it as a fundamental human right. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser.A) (1993).

205. The ECtHR usually hears complex cases by a seven judge chamber, and since there are 47 judges (one for each member state), compositions of panels can vary greatly from case to case. European Court of Human Rights,"4" *in The ECHR in 50 Questions*, http://www.echr.coe.int/Documents/50Questions_ENG.pdf.

206. I.A. v. Turkey, 2005-VIII Eur. Ct. H.R. 235 (2005) (Costa, Cabral Barreto & Jungwiert J., dissenting).

207. *See supra* Section III.

208. *See infra* Section V.A.

misuse in practice, provides the Court with a chance to reexamine the margin of appreciation granted to states.[209] Finally, the Russian extremist laws show that allowing states to restrict freedom of expression in the name of protecting the feelings of believers leads to abuse and suppression of unpopular minorities. [210] Thus, the extremist laws provide the ECtHR the opportunity to reverse course and ensure robust protection of freedom of expression under Article 10.

A. Clarify Exception to Article 10

The above analysis of Russia's speech law clearly gives weight to those that have criticized the Court's freedom of expression decisions as vague.[211] As shown above, the ECtHR's ultimate decision rests on a wide range of diverse factors, which are impossible to weigh with any precision. Unfortunately, this vagueness chills speech because individuals are unable to predict whether their expression is protected by the Convention and therefore will choose not to speak out in fear of punishment.[212] The broad exceptions provided for in Paragraph 2 of Article 10 permitting restrictions on speech for "the protection of health and morals" and "the protection of the reputation and rights of others" fail to provide states effective guidance on which laws will withstand Article 10 scrutiny and which will not.[213]

This vagueness has in turn empowered repressive regimes such as the one in Russia to pass suppressive speech laws while still claiming that its laws "conform[] to the international obligations" under the Convention.[214] For instance, this year, the Russian Constitutional Court found a law that significantly curtails the freedom of assembly to be constitutional. In its decision, the court looked to ECtHR decisions, and found that while a right to assembly was protected under the Convention, that right "is not absolute and may be restricted by a federal law with the aim to protect constitutionally significant values with obligatory observance of the principles of necessity, proportionality and commensurateness."[215] In

209. *See infra* Section V.B.

210. *See infra* Section V.C.

211. For instance, as mentioned above, the Court's recent decision in *Vejdeland* has been heavily criticized by some for failing to provide effective standards for individuals to know whether their expression is merely "shocking" and "offensive and therefore protection by Article 10, or "serious and prejudicial" and therefore subject to restriction and sanction. *See* ALLIANCE DEFENSE FUND, *supra* note 106.

212. *Id.* This is especially true given that the length process of review by the ECtHR (around 5–6 years from initial complaint to final judgment in many instances) and the lack of precedential value of decisions allows states to continue to abuse rights while appeals are pending.

213. *Id.*

214. *See* Weir, *supra* note 170.

215. In the case concerning the review of constitutionality of the Federal Law "On Amendments to the Administrative Offences Code of the Russian Federation" and the Federal Law "On

application, however, the court deferentially found that the laws advanced public safety and legitimate concerns. The vagueness of ECtHR policies therefore permitted the Russian Constitutional Court to use ECtHR decisions and language as a stamp of approval to a questionable law.

Likewise, although not heavily present in the extremist literature bans, Russia has often used the protection of public morals or "traditional values"[216] to justify the restriction of speech.[217] For instance, Russia,[218] Ukraine,[219] and Moldova[220] have all justified widely criticized restrictions on "homosexual propaganda" as an effort to protect public morals. Unfortunately, in the case of restrictions on religious, political, or social minorities, "public morals" and "traditional values" are used as ways to enforce the position of the majority religious tradition at the expense of alternative viewpoints. Ultimately, such vague exceptions to freedom of expression allow for suppression of unfavored and unpopular ideas.

The ECtHR should more clearly articulate exactly what kinds of situations justify restrictions on freedom of expression to prevent this kind of abuse. The relative weight that the court will give to certain factors should be more clearly defined in order to provide more guidance and predictability.

Assemblies, Meetings, Demonstrations, Processions and Picketings" in connection with the request of a group of deputies of the State Duma and the complaint of E.V.Savenko, Russian Constitutional Court (February 14, 2013), *available at* http://www.ksrf.ru/en/Decision/Judgments/Documents/2013%20February%2014%204-P.pdf.

216. Before the Human Rights Council in support of a declaration about the importance of "traditional values," Russia declared that "all international human rights agreements, whether universal or regional, must be based on, and not contradict, the traditional values of humankind. If this is not the case, they cannot be considered valid." *See* Maggie Murphy, *'Traditional Values' vs Human Rights at the UN*, OPEN DEMOCRACY (Feb. 18, 2013), http://www.opendemocracy.net/5050/maggie-murphy/traditional-values-vs-human-rights-at-un.

217. At the very least, public morals were used as a justification for the banning of the South Park episode. *See* Fagan, *supra* note 155 and accompanying text.

218. According to Russia, homosexual propaganda would "harm the health and moral and spiritual development, as well as form misperceptions about the social equivalence of conventional and unconventional sexual relationships, among individuals who, due to their age, are not capable to independently and critically assess such information . . . . " *S*e Council of Europe, European Commission for Democracy Through Law, *Opinion on the Issue of the Prohibition of So-Called "Propoganda of Homosexuality" in Light of Recent Legislation in Some Member States of the Council of Europe*, (June 18 2013), at 3–4, *available at* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e.

219. Ukraine has justified its laws in order to promote the "healthy moral, spiritual and psychological development of children, to promote the idea that a family consists of a union between a man and a woman" and "to overcome the demographic crisis." *Id.* at 4–5.

220. The preamble of the Moldovan legislation exclaims: "Considering particular importance and historic role of the Moldovan Orthodox Church as a state-establishing institute of the Republic of Moldova; considering traditional values of Moldovan society; incompatibility with modern democratic standards of aggressive intrusion of sexual behaviour forms on the majority, which are characteristic for the most insignificant part of population; bearing responsibility for security (including ethical and moral one) of Bălţi city residents." *Id.* at 5–6.

B. Narrow the Margin of Appreciation

The Russian example also raises serious doubts about the "margin of appreciation" that the ECtHR gives to states. As seen in the preceding case law, there are many different ways that the ECtHR shows deference to states. Some of these are procedural and structural. For instance, the ECtHR has explained that it is a court of limited jurisdiction able only to address question regarding compatibility of state laws with the Convention rather than examining internal consistency of laws.[221] Likewise, the Court shows deference by only judging individual cases or controversies rather than engaging in abstract pronouncements. This deference is rooted in the very structure of the European Convention and is required.

In contrast, the "margin of appreciation" in freedom of expression cases has been described as "judge made doctrine,"[222] rooted in deference and also in practical considerations of differences between member states. As the Court has expressed in *Wingrove*, cases involving expression of religion involve large margins of appreciation regarding protection of expression because a consensus does not always exist between member states.[223]

Nevertheless, some judges on the Court have cautioned that the "margin of appreciation" should be "handled with care."[224] The extreme application of the margin of appreciation has also been criticized as a form of "moral relativism" which undermines the purpose of the convention in "setting universal standards for the protection and promotion of human rights."[225] Granting a wide margin of appreciation for the suppression of speech seems especially inappropriate in cases involving despised religious, political, or social groups whose rights are unlikely to be adequately protected in domestic courts.[226] This is especially true with repeat offenders of fundamental rights such as Russia. Providing too deferential a margin of appreciation would be "giving undue deference

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221. Gregor Puppinck, *The Case of* Lautsi v. Italy: *a Synthesis*, 2012 BYU L. REV. 873 (2012).

222. Dean Spielmann*, Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidarity of European Review?*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381 (2011–2012).

223. *See* Wingrove v. the United Kingdom, 1996-V Eur. Ct. H.R. 1937 ¶ 57, (1996). As the Russian response to the *Markin* decision reveals, members states are wary of allowing the ECtHR to decide fundamental questions of morality. See Markin, *supra* note 124.

224. Lautsi v. Italy, App. No. 30814/06, Eur. Ct. H.R. (Nov. 3, 2009)(Malinverni J., Dissenting).

225. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843–44 (1999).

226. Lawrence Helfer suggests several other factors that might make high levels of deference less appropriate including several factors relevant to the Russian Extremist Laws such as cases involving fundamental rights, instances when laws are selectively enforced or enforced in a biased fashion, and when less rights restrictive means are available. Laurence R. Helfer, *Consensus, Coherance and the European Convention of Human Rights*, 26 CORNELL INT'L L.J. 133, 161 (1993).

to local conditions, traditions and practices."[227] The margin of appreciation for state violations of Article 10 also contributes to the vagueness problems already discussed.[228]

A margin of appreciation also becomes increasingly inappropriate in the internet age.[229] As expression flows without regard to borders,[230] allowing states to set restrictions based on local standards unduly hampers the free flow of information.[231] Such restrictions also invariably lead to restrictions on access to the internet and censorship of content.[232] Indeed, in Russia, internet content has widely been restricted. For instance, sites are often removed after being declared "extremist."[233] Facebook, Twitter, and YouTube have been threatened with total bans if they refused to remove certain offensive content.[234] Minority religious groups are especially hampered by these restrictions, as websites critical of their faith remain accessible, while sympathetic content is removed. Likewise, even news sites merely reporting on individuals prosecuted for "inciting religious hatred" have received warnings.[235] Thus, the effect of the ban is to limit not merely "extremist" content, but also discussion and debate over the validity of the Russian extremism laws. A margin of appreciation for such laws has far reaching and deeply detrimental consequences.

At least one judge on the Court has urged the Court "to banish" the concept of a margin of appreciation "from its reasoning," at least in

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227. A. Lester, *Universiality Versus Subsidarity: A Reply*, 1 EUR. CT. HUM. RTS. L. REV. 73, 76 (1998).

228. *See supra* Section V.A.

229. The full ramification's of Russia's extremist ban on internet freedom is beyond the scope of the present comment, but worthy of further research and inquiry.

230. Constance Bitso et al., *Trends in Transition from Classical Censorship to Internet Censorship: Selected Country Overviews*, IFLA (2012), http://www.ifla.org/files/assets/faife/publications/spotlights/1%20Bitso_Fourie_BothmaTrendsInTransiton.pdf.

231. A comparable example can be found in United States obscenity law which as part of the test for obscenity articulated in *Miller v. California* allows for obscenity to be determined "by applying contemporary community standards." 413 U.S. 15, 24 (1973). The *Miller* reliance on contemporary community standards has recently been criticized by the United States Supreme Court for potentially forcing "all speakers on the Web to abide by the 'most puritan' community's standards." Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 577 (2002) The problems expressed by the Supreme Court are likely to be even more exacerbated in the European context given that the exceptions to Article 10 contained in Paragraph 2 are far broader than the very narrow category of obscenity in American law.

232. For instance, Russia considered suing American website, E-bay for selling offensive material relating to the Pussy Riot demonstration. *See Bill Increasing Extremism Penalties Sent to Russia's Duma*, *supra* note 152

233. REPORTERS WITHOUT BORDERS, INTERNET ENEMIES REPORT 2012 (2012) available at https://en.rsf.org/IMG/pdf/rapport-internet2012_ang.pdf.

234. Andrew E. Kramer, *Russians Selectively Blocking Internet*, N. Y. TIMES, March 31, 2013, *available at* http://www.nytimes.com/2013/04/01/technology/russia-begins-selectively-blocking-internet-content.html?_r=0.

235. Andrei Soldatov, *What's Russia Blocking on the Web?*, INDEX (June 13, 2013), www.indexoncensorship.org/2013/06/what-russia-censored-in-april/.

regard to cases "where human rights are concerned"[236] because the boundaries of Article 10 speech should be "as clear and precise as possible."[237] At the very least, the margin of appreciation given to states to outlaw speech offensive to religious should not be larger than that given in cases involving political speech.[238] Religious sentiments, precisely because they concern "intimate personal convictions"[239] with eternal import to believers, require a vibrant exchange and discussion.[240]

C. Stop Treating Protection of Religious Feelings as a Countervailing Right

ECtHR efforts to protect freedom of expression have also been undermined by viewing cases involving restrictive laws as clashes between Article 10 rights of freedom of expression and Article 9 rights of religious freedom.[241] This approach has been problematic because it allows states to justify laws punishing religious minorities and limiting their freedom of expression and freedom of religion as efforts to protect "the rights of citizens not to be insulted in their religious feelings."[242] By placing the protection of individuals "religious feelings" on the same plane as freedom of expression, the Court allows states to rely on imaginary or feigned offenses to justify real violations of rights.[243] As Jacco Bomhoff has suggested, with laws restricting freedom of expression, it would be more appropriate for the Court to focus on the conflict "between fundamental rights . . . and governmental powers," rather than on a clash between the fundamental rights of different individuals."[244] Instead,

236. Z v. Finland, 1997-I Eur. Ct. H.R. 323 (1997) (De Meyer J., partially dissenting)

237. *Id.*

238. Wingrove v. the United Kingdom, 1996-V Eur. Ct. H.R. 1937 ¶ 58, (1996).

239. *Id.*

240. Judge Marten's Kokkinakis dissent describes religious discourse as "a field where tolerance demands that 'free argument and debate' should be decisive." Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser.A) (1993)(Martens J., concurring).

241. Oliver De Schutter and Francoise Tulkens wrote the seminal piece on the resolution of conflicts between rights at the European Court of Human Rights. Schutter and Tulkens identify three categories of conflicts that should be easily resolvable by existing European Court precedent including: 1) conflicts between a protected right and another state interest; 2) a conflict between an absolute right and a right subject to restrictions; and 3) cases where the obligation to respect a right conflicts with the affirmative obligation to protect a right. Cases involving freedom of expression against the right of citizens not to be offended seem to quite clearly fall into the third category. A State certainly has a duty to fully respect the freedom of expression rights of its citizens, while the right to not be offended requires affirmative state action and protection. In such cases, States should prioritize the respect of rights above the obligation to protect other rights. Oliver Schutter & Franoise Tulkens, *The European Court of Human Rights as a Pragmatic Institution, in* CONFLCITS BETWEEN FUNDAMENTAL RIGHTS 169, 180 (Eva Brems, ed., 2008).

242. Jacco Bomhoff, *The Rights and Freedoms of Others: The ECHR and its Peculiar Category of Conflicts between Individual Fundamental Rights*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS (Eva Brems, ed., 2008).

243. *Id.*

244. *Id.*

ECtHR decisions limiting freedom of expression are far too quick to assume that protection of "religious feelings" is a legitimate state aim without inquiry into whether such a restriction is merely pretextual. The Court's current view of speech is indeed "overcautious and timid." [245]

Such a conception also could lead to a "pro-majoritarian bias," where the "rights of citizens" and "others" is equated with the values of the majority group.[246] In the context of religion, this danger is particularly acute, as established religions will be far less likely to use "extremist" rhetoric and more likely to call upon the power of the state to restrict opposing religions as "extremist."[247] Suppression of views considered "extremist" is also likely ineffective as it tends to drive extremist views underground and radicalize religious moderates.[248]

Likewise, while "pluralism, tolerance and broadmindedness" are essential elements of democratic society, allowing democratic societies to impose these values violates those same norms of pluralism, tolerance and broadmindedness.[249] By requiring or allowing democratic societies to impose pluralism and tolerance, the ECtHR undermines the values that it seeks to uphold and allows oppressive states to suppress unpopular speech.

Instead, laws such as Russia's extremist law should violate Article 10 because they are means by which the state decides in favor of certain preferred messages and against others. In effect, such laws "establish a hierarchy of beliefs"[250] which is contrary to the robust marketplace of ideas that is required in a democratic society.[251] By restricting some, but not other, expressions of religious or political beliefs, states further divide and alienate those with different viewpoints. Such restrictions should not be justified on the specious basis of seeking to protect hurt feelings or prevent "gratuitous offense."[252]

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245. I.A. v. Turkey, 2005-VIII Eur. Ct. H.R. 235 (2005) (Costa, Cabral Barreto & Jungwiert J., dissenting).

246. *Id.*

247. Tracy Hresko Pearl, *Rights Rhetoric as an Instrument of Religious Oppression in Sri Lanka*, 29 B.C. INT'L & COMP. L. REV. 123 (2006).

248. Laurence R. Iannaccone & Eli Berman, *Religious Extremism: the Good, the Bad, and the Deadly*, 128 PUBLIC CHOICE 109 (2005).

249. *See* Scott Thompson, *Can Might Make Right? The Use of Force to Impose Democracy and the Arthurian Dilemma in the Modern Era*, 71 LAW & CONTEMP. PROBS. 163 (2008).

250. Agnes Callamard, *Freedom of Speech and Offense: Why Blasphemy Laws are not the Appropriate Response*, ARTICLE 19 (2006), http://www.article19.org/data/files/pdfs/publications/blasphemy-hate-speech-article.pdf.

251. The ECtHR has similarly been criticized as taking sides on issues through its decisions. For instance, the *Vejdeland* concurrence was quick to note that it was extremely unlikely that a similar prosecution would have followed from flyers harshly critical of those that were anti-homosexual. Vejdeland and Others v. Sweden, App. No. 1813/07, Eur. Ct. H.R. (2012) (Zupančič J., concurring).

252. Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. ¶ 49 (ser. A)(1994).

The Court should instead embrace the argument made by the dissent almost twenty years ago in *Otto-Preminger*, and explain that the state can only restrict speech that is a "violent or abusive" attack.[253] The Court should begin by clearly acknowledging that the rights of freedom of expression and freedom of religion both include "a right to express views critical of the religious opinions of others."[254] As the dissent argued in *I.A*, speech that is non-coercive and targeted at discerning adults should not be restricted on the basis that individuals will "feel themselves to be the object of unwarranted or offensive attacks."[255] Such a change would help the Court to fulfill the promise of Article 10 to fully protect not only "favorably received" ideas, but also "those that offend, shock or disturb."[256]

CONCLUSION

Russia's extremism laws have been used as a tool to censor unpopular minorities and to suppress offensive or controversial speech and ban religious material. As a court with authority to hear appeals involving Russian citizens, the ECtHR has the potential to check Russia's policies and take a clear stance in protection of Article 10 freedom of expression rights. Unfortunately, the Court's current free exercise decisions are inconsistent and give far too much weight to state efforts to protect religious individuals from offense. The lack of clarity in ECtHR cases fails to deter states like Russia and gives little comfort to individuals facing prosecution and fines for expressing their faith or challenging the faith of others. The ECtHR should use this opportunity to take a stronger stance in defense of freedom of expression and strike down convictions under the Russian extremism law which target merely offensive speech as inconsistent with the promise of Article 10.

253. *Id.* (Palm & Pekkanen & Makarczky J., dissenting).

254. *Id.* ¶ 6.

255. I.A. v. Turkey, 2005-VIII Eur. Ct. H.R. 235 (2005) (Costa, Cabral Barreto & Jungwiert J., dissenting).

256. Handyside v. the United Kingdom, 24 Eur. Ct. H.R. ¶ 49(ser. A) (1976).,

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