

Limitations of freedom of expression under Russian anti-extremist legislation

The Compatibility of Article 280 and Article 282 of the Criminal Code of the
Russian Federation with the right to freedom of expression as provided under the
European Convention of Human Rights

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List of abbreviations

UN – United Nations

HRC – Human Rights Committee

ECHR – European convention on Human Right

ECtHR – European Court of Human Rights

NGO – Non-governmental organization

RF – Russian Federation

ICESCR – International Covenant on Economic, Social and Cultural Rights

ESCR – Economic, Social and Cultural Rights

CESCR – Committee on Economic, Social and Cultural Rights

UDHR – Universal Declaration of Human Rights

ICCPR – International Covenant on Civil and Political Rights

PKK – Partiya Karkerên Kurdistanê (Kurdistan Workers' Party)

CERD – Committee on the Elimination of Racial Discrimination

EU – European Union

ECRI – European Commission against Racism and Intolerance

OSCE – Organization for Security and Co-Operation in Europe

LGBT – Lesbian, gay, bisexual, and transgender people

ISIL (DAESH) – Islamic State of Iraq and the Levant

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1 Chapter 1. Introduction

1.1 Background of the issue

1.1.1 Defining extremism

Combating extremist has been determined as one of the primary concerns of the Russian Criminal policy. A former president of Russia, Dmitri Medvedev has called extremism a great danger to the society, noting that “the crimes of extremism are able to undermine any, even the most stable and prosperous society”.¹

However, there is no universally accepted definition of extremism. It can be described as “a tendency to go to extremes or an instance of going to extremes, esp. in politics.”² or as “belief in and support for ideas that are very far from what most people consider correct or reasonable”³, “the holding of extreme political or religious views; fanaticism”⁴.

The legal definition of extremism (extremist activity) as provided by the Federal law on Combating Extremism presents a list of prohibited conducts, which are considered to be acts of extremism. It is, however hard to determine any specific characteristics, based on which a more comprehensive definition can be derived.

As it is declared in the Preamble to the Federal Law on Combating Extremism, the anti-extremist law is intended to both protect freedoms and rights of the individual and citizen, as well as the constitutional order, the integrity and security of the Russian Federation.⁵

¹ Rossiyskaya Gazeta, February 9, 2009

² The Free Dictionary, "Extremism"

³ Merriam-Webster, "Extremism"

⁴ Oxford Dictionaries. "Extremism"

⁵ Preamble to 2002 Federal Law

Proceeding from this, in accordance with Russian legislation extremism can be understood as actions or expressions, based or propelled by radical ideas, endangering the most fundamental values and principles on which the existing constitutional order of the Russian Federation rests upon.

1.1.2 The structure of anti-extremist legislation

Modern anti-extremist legislation is a unique body of laws, analogues of which exist only in some other post-Soviet republics, which took it from Russia as a model for their own policies. It can be perceived as a sectorial legislation, however the exact sphere, which it regulates or object that it serves to protect, are hard to define based on the definition, provided in the legal documents in Russia, as it is very broad.

The anti-extremist legislation is a complex set of provisions, which include:

- The Federal Law on Combating Extremist Activity (“the 2002 Law” or “the Extremism Law” or, which lays down the responsibility of the media, religious, political and other public organizations for conducting extremist acts, provides the definition of such key terms as “extremism”, “extremist material” and determines legal and organizational framework for combating extremist activities;
- Several provisions of Criminal Code, namely art. 280 (Public appeals to for performance of extremist activity), newly introduced art. 280.1 (Public calls for the implementation of actions aimed at violation of the territorial integrity of the Russian Federation), art. 282 (Incitement of Hatred or Enmity, as Well as Abasement of Human Dignity); art. 354.1 (Rehabilitation of Nazism), art. 148.1 (Public acts expressing manifest disrespect for society and carried out with the goal of insulting the feelings of religious believers) and art. 205.2 (Public calls for Terrorist Activity or public justification of Terrorism”);

- art. 20.3 (Displaying Fascist Attributes and Symbols) and art. 20.29 (Production and Dissemination of Extremist Materials) of the Code of Administrative Offenses.⁶

There is a long and very diverse list of conducts, which can qualify as extremism. It includes different acts, some of which can qualify as serious crimes (such as terrorism) and the others can amount to administrative offenses (such as dissemination of knowingly extremist material or public demonstration of the Nazi or fascist symbols). It includes conducts ranging from terrorist activity and forcible change of the foundations of the constitutional system to public calls inciting the carrying out any of enlisted extremist actions and mass dissemination of knowingly extremist material.⁷ Consequently, various types of speech, including hate speech and defamation, are punishable under the anti-extremist legislation.

The corresponding provisions of the Criminal Code and the Code of Administrative Offence define different forms of liability of individuals for extremism. A private person cannot be punished for extremism, as it is defined under the Federal Law, if the committed act is not penalized under the Code of Administrative Offence or the Criminal Code. For private individuals punishment for criminal acts ranges from fines with a minimum of 100 000 RUB (which approximately amounts to 1540 USD) up to a jail terms up to seven years.

1.2 Problem statement

As one can see the anti-extremist legislation includes a quite vast body of law, which would be overly ambitious to analyse in its entirety within the framework of this study. Therefore the present paper will concentrate on the application and interpretation of the two main criminal provision of anti-extremist legislation covering hate speech and incitement to

⁷ Federal Law No. 114-FZ, 2002

commit crimes against public order, namely art. 280 (Public appeals to for performance of extremist activity) and art. 280 (Public appeals for performance of extremist activity) as they are the most frequently used ones.

The anti-extremist legislation has been reported to be repeatedly misused.⁸ Today a large part of criminal cases associated with different types of extremist expressions occurs on Internet.⁹ It can be noted that the trend for overly extensive application of the law persists in such cases.

There is a widespread opinion that most of the these cases are politically motivated and that these criminal provisions are deliberately used to oppress the prominent political or civil activists, however that is not always the case, as it frequently reaches simple Russian citizens, not affiliated with any oppositional movement or party.

The problem of the wrongfully passed sentences can stem both from the formulation and the wording of the law itself or from inappropriate enforcement of the law.

The main goal of this thesis will be to determine the causes of the wrongful application articles in question, resulting in the violation of the freedom of speech of individuals on Internet. This issue will be addressed from the perspective of law in context.

The main **research questions** therefore will be formulated as follows:

- *Are Article 280 and Article 282 in conformity with the human right standards accepted in the sphere of freedom of speech on **Internet** as interpreted under the ECHR?*
- *What are the main problems associated with the enforcement of these provisions by judiciary, leading to violations on freedom of speech on Internet?*

⁸ SOVA, Misuse of anti-extremism

⁹ MemorialRU, 2015

1.3 Overview of the Chapters

The thesis will be divided in five chapters. The introductory chapter will consist provide the background of the issue at hand; state the purpose and the rationale of the work. describe and substantiate chosen methodological approach.

In the second chapter a legal analysis of Article 280 and Article 282 of the Criminal Code of Russian Federation, will be conducted. It will present the discussion of the main elements of these crimes. The specifics of application of these rules to resources on the Internet will be highlighted.

In chapter three the international obligations of the State-parties under the European convention on Human Right (ECHR) will be discussed and the conclusion on the applicable rules and standards of protection of freedom of speech on Internet will be made. My analysis in this chapter will rely mainly on Article 10 of the ECHR, the relevant cases from European Court of Human Rights (ECtHR) and a range of scholarly articles.

Based on the findings made in the previous chapters the fourth chapter will provide the assessment of legitimacy of the restrictions imposed by the criminal provisions under consideration and will conclude on their compatibility with the permissible limitations, envisioned under the ECHR.

The Concluding Chapter will sum-up the findings and will outline some general recommendations that could improve the application of and bring them in line with the European human rights standards in the sphere of freedom of expression.

1.4 Methodology

The research will be qualitative in nature. In order to address the question in its entirety the interdisciplinary approach will be preferred.

Frequently the problem of restrictions of freedom of speech in Russia is discussed from an entirely political perspective. There is no doubt that the political situation in the country is an important factor influencing both the law-making and judicial process. This work will take into account the political context, however, will mainly focus on the legal side of the issue, while the political assessment of the application of laws will remain outside the scope of this study. For this reason the “law in context” approach will be chosen.

The theoretical inquiry will be conducted through a desk study. It will be based on both primary sources and secondary sources. The primary sources will include the national law provisions and international legal instruments. The case law of the ECtHR will be of the high importance to the analysis provided in the last two chapters. The secondary literature will be used throughout the study, and will include scholarly articles, reports from number of IGOs and NGOs, as well as official data from governmental offices and media articles.

The analysis of the legal provisions contained in the first chapter is largely based on the works of Russian scholars. This approach is the most beneficial for the research as it allows producing in-depth analysis of legal norms in question.

2 Chapter 2. Legal analysis of Article 280 and Article 282

2.1 Overview of the provisions in question

Both articles have been amended numerous times since the entry into force of the Criminal Code of the Russian Federation in 1996, to which these articles are part of. The disposition of Article 280 has been radically changed with the adoption of the 2002 Federal Law on Combating Extremism. Previously Article 280 criminalized “public calls for forceful change of the constitutional regime” with the use of media.¹⁰ Today the given norm prohibits “public appeals to the performance of extremist activity”. As a result Article 280 has acquired a blanket disposition, which has made the content of the provision in question dependent on the definition of the “extremism”, provided by 2002 Federal Law.¹¹

The most radical changes to Art.282 have been introduced by the Federal Law of June 28, 2014, which consisted of equating the use of the Internet with the use of media. This change applies to Article 280 as well. Current version of Art.282 establishes criminal liability for actions aimed at inciting hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group, if these acts have been committed in public or with the use of mass media or Internet.

Last amendments to these Articles concerned statutory penalties. In case of Article 280 the changes were made towards tightening the fines (the upper limit of the fine was removed, setting the minimum fine of 100 000 RUR) and increasing prison terms from three to four years, whilst under Article 282 the lower bar of the fines has been raised up to 300 000 RUR, and the maximum sentence of community service has been raised from two up to

¹⁰ SOVA, October 25, 2010

¹¹ Mozhegova, 93

four years.¹²

2.2 Object of the crimes

Crimes differ from each other by their object. According to the most widely accepted in Russian criminal law theory classification there are common, generic, specific and immediate objects of the crime, which are distinguished by the level of specificity of the object.¹³ The value of the object, which the proscribed conduct threatens, reflects the danger, which the commission of the crime poses to the society, its nature, and helps to determine the gravity of punishment. It also allows to distinguish between related crimes.¹⁴

Both Article 280 and Article 282 are included under Chapter 29 (“Crimes against the constitutional order and security of the state”) of the Special Part of the Criminal Code. The generic object of the Articles enshrined under this chapter, as it follows from its name, is the constitutional order and security of the state. This fact indicates that the conducts specified under these provisions are considered to be the most serious crimes against the fundamental principles of the State.

There is no agreement on what constitutes the main object of the conducts criminalized under Article 280. According to Rarog its immediate object is “*public relations, ensuring the prevention of extremists activity*”.¹⁵ This wording appears unclear, since it depends on the definition of extremism, as well as the disposition of the article itself. The difficulty in identifying the objects of the crime in the first place stems from difficulty in determining the central notion of the disposition of this article, namely the term “extremism”. There are

¹² Federal Law N 5-FZ, Article 1(1)

¹³ Manshagin, 1938

¹⁴ Zhrebchenko, 110

¹⁵ Inogamova-Khegai, 580

many suggestions of what serves as the object of the crime, but one can agree with the Mozhegova, that many of the versions are incomplete and only partly define the object.

For instance, the definition of the object suggested by Naumov, who states that the conduct criminalized by Article 280 infringes on the constitutional prohibition of incitement to racial, national and religious hatred, being a manifestation of extremism.¹⁶ This definition indeed reflects the object of the prohibited conducts under Article 280, but only in part, and to a large extent overlaps with the object of Article 282, which according to Tenyakova can be described as “national, racial and religious, gender, linguistic, social equality and the freedom to practice any religion or to be an atheist, as well as the dignity of the person”.¹⁷ This latter definition of the object provided by Tenyakova could be regarded as the most accurate and precise.

Thus, the internationally acknowledged principle of non-discrimination is enshrined in The Constitution of Russian Federation. In accordance with Part 2 of Chapter 19 of the Russian Constitution, the State guarantees equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, attitude to religion, convictions, membership of public associations or other circumstances.

In addition, Part 2 of Chapter 29 also establishes the prohibition of propaganda or agitation inciting social, racial, national or religious hatred and enmity, and proscribes the promotion of social, racial, national, religious or linguistic supremacy.

On this basis it becomes apparent that Article 282 has been envisioned to implement and protect these particular fundamental principles of the Russian Federation.

¹⁶ Naumov, 335

¹⁷ Tenyakova, 2012

Returning to Article 280, it is worth noting that it remains difficult to indicate with great precision its immediate object, as it appears to be extremely broad, due to the nature of the definition of “extremism”, which will be considered in more details further in the Chapter. However, the following approach to defining an object of the crimes under Article 280 can be regarded as the most comprehensive: the constitutional system and the political system of the Russian Federation, the integrity and security of the state should be recognized and acknowledged as the main objects of the crimes under Article 280, while human rights and freedoms, as well as public order, could be viewed as additional objects.¹⁸

In the present case the correct identification of an object of the crime helps to distinguish between “crimes of extremism” (or “extremist activity”) and “crimes of an extremist nature”. In the former case the generic object, as it has been mentioned above, is the constitutional order and security of the state, and in the latter crimes endangers other interests as, for example, life or health of a person.

Based on the definitions of the object of the crimes enshrined under Article 280 and Article 282 discussed above, one can conclude that the limitations of the freedom of speech, which are imposed by the aforementioned provisions, are established not only to safeguard the national security or public order, but also serve for protection of the principle of non-discrimination, freedom of conscience and belief, and other rights and freedoms of an individual.

¹⁸ Mozhegova, 2015

2.3 Mental Element (Mens Rea)

The subjective or mental element of the offense reflects internal mental processes occurring in the mind of the perpetrator and will of the person committing the crime. This mental element (*mens rea*) is characterized by a particular form of guilt, motive, purpose and emotion.¹⁹

Guilt in the form of intent or negligence is a mandatory feature of any crime.²⁰ In accordance with RF Criminal Code a person can be a subject to criminal responsibility only for those socially dangerous actions (inaction) and socially dangerous consequences of these actions, in respect of which his guilt is proven.²¹

Direct intent is considered to be the only possible form of guilt for the crimes enshrined under the articles in question. Therefore in order to qualify the *mens rea* one has to prove that a person was aware of the social danger of his actions (inaction), foresaw the possibility or inevitability of socially dangerous consequences and wished for their occurrence.²²

However, due to the formal composition of the crime under Article 282, which implies that the crime is considered to be committed without the occurrence of any socially dangerous consequences of the prohibited conduct, it is not required to prove that the hatred or enmity were actually brought about or that their occurrence was foreseeable to the perpetrator, as long as other parts of intent, namely the intellectual element (which implies the compre-

¹⁹ Gladkikh, 32

²⁰ Ibid. 27

²¹ Criminal Code of the Russian Federation, Article 5

²² Gladkikh, 54

hension of the destructive nature of the action) and the volitional element (which implies the will to bring about their occurrence) are present.²³

The same applies to Article 280, which postulates that it is not compulsory to prove that the particular public appeals, which the perpetrator is charged for, were followed by the commission of any extremist acts.²⁴

There is a significant difference when it comes to the role of the motive and purpose in the qualification of given criminal conducts. In the Russian legal theory motive and purpose are designated as facultative elements of the *mens rea*, which means that they do not constitute mandatory elements for qualification of the crime, but only affect the determination of punishment and the presence of mitigating and aggravating circumstances. In other cases, both motive and goal can determine whether the crime was committed or not.

With regard to Article 280, scholars agree that the motive and goal of the offense are irrelevant for the qualification of the crime, but opinions differ in case of Article 282. Some scholars suggest that motive of hatred and hostility towards national, racial, religious or social groups constitute a mandatory element in qualification of the crime.²⁵ In Resolution No. 11 of 28 June 2011 of the Plenum of the Supreme Court "On judicial practice in criminal cases involving crimes of extremist nature" confirms this position, stating that the crime is committed only with direct intent and a special purpose of inciting hatred and enmity in other people.²⁶

²³ Gladkikh. 518

²⁴ Ibid, 519

²⁵ Ibid.

²⁶ Plenum of the Supreme Court, 28 June 2011

Other authors, however, disagree with this decision of the Supreme Court, suggesting that the aims of the crime can vary, and might include generating income from the distribution of extremist literature or attracting voters, etc.²⁷

Indeed similar case have taken place in Saint Petersburg in 1993, when the court found that, since the purpose of the distribution of the book *Mein Kampf* by that defendant was to make profit, rather than incite hatred and enmity, there was no sufficient evidence to the defendant's guilt.²⁸ Present position seems to be the most logical, as in case where the volitional elements is proven, i.e. it is established that the accused have had the will to cause socially dangerous consequences, the purpose of the crime seems irrelevant, taking into account the fact that the defendant may have had several objectives in mind.

2.4 Material Element (Actus Reus)

The objective element consists of the following features: an act (action or inaction), socially dangerous consequences, a causal link between the act and the socially dangerous consequences, as well as the manner, place, time, environment, instruments and means of committing the crime.²⁹ The most important components of the objective element will be discussed in detail below.

2.4.1 Material Element of Article 282

²⁷ Rarog, 338

²⁸ Zherebchenko, 173

²⁹ Zherebchenko, 140

The objective element of the crime under Article 282 as provided by Rarog is characterized by actions aimed at

- a) incitement of hatred or enmity on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group;
- b) abasement of dignity of a person or a group of persons on the basis of the aforementioned grounds.³⁰

The disposition of Art.282 *begins* with the words “actions aimed at ...”, which indicates that the offense can only be committed in the form of action, not in a form of inaction.

According to Rarog prohibited actions can take place both individually or in connection with each other. On his part, Zhrebchenko argues that the formulation “incitement of hatred or enmity on the statutory grounds absorbs the acts of the abasement of human dignity”, suggesting that insulting the honour and dignity of the representatives of a particular nationality, race, religious group presents one of the ways to create hatred and enmity between different groups.³¹ Nevertheless, by the reference to the wording of the Article, through the use of the wording “as well as” (a takzhe), the Article 282 refers to two separate acts. Following that, the content of both parts will be subjected to analysis.

The law does not specify what types of actions are proscribed, but only indicates what their aim is. Under “actions” one should understand the intentional, deliberate act of external practical activity of a person.³² Such acts could take form of both practical actions, such as destruction of places of worship, impeding national or religious ceremonies, etc. or speech.

Cases under this Article, usually deal with the latter form of activity, which is made publicly or with the use of media or via Internet.

³⁰ Lebedev, 577

³¹ Zhrebchenko, 144

³² Lebedev, 578

Unlike Article 280, which prohibits a certain type of speech, namely “public appeals” inciting to commit extremist acts, Article 282 does not indicate any other characteristics of speech than its aim and requirement of the speech to be made publically or via media, including Internet.

2.4.1.1 “The incitement of hatred or enmity”

In Russian legal literature it is widely accepted that the first part of the Article, prohibiting “the incitement of hatred or enmity on grounds of sex, race, nationality, language, origin, attitude towards religion, and likewise affiliation to any social group” should be understood as “an attempt to create conflicts between citizens on the basis of the aforementioned grounds”.³³ This formulation cannot be considered suitable for the interpretation of this article, as it does not specify either the nature of the conflict, or the level of its depth or intensity, which can lead to an expansive application of the norm.

Therefore, it is useful to consider a more comprehensive interpretation proposed by Zhrebchenko. He starts by defining the key notion of the phrase, namely “hatred” (*nemist*) and “enmity” (*vrazhda*).

According to the Ozhegov dictionary “hatred” is understood as “strong sense of enmity and disgust”. “Enmity”, in its turn, is understood as “an attitude and action imbued with hostility and mutual hatred”.³⁴ The dictionary of the Russian language by Evgenyeva defines “hatred” as “a strong sense of enmity, hostility”³⁵, and “enmity” is defined as “attitude and action imbued with hostility, mutual hatred”³⁶.

³³ Ozhegov Dictionary, “*Nemist*”

³⁴ Ozhegov Dictionary, “*Vrazhda*”

³⁵ Evgenyeva, Dictionary of Russian language, 1985-1988

³⁶ Evgenyeva, Dictionary of Russian language, 1985-1988

Based on these definitions, Zhrebchenko concludes that under this provision term “hatred” should be viewed as a feeling, an “inner mental state, spiritual experience”, while “enmity” equates to attitude and actions, constituting “a deliberate, purposeful act of external practical human activity, which include the expressions of a real behaviour and speech. He proceeds, suggesting that the incitement of hatred and enmity implies acts committed in order to first bring about or awaken the internal mental state of disgust or dislike towards a particular group on the grounds, specified by law, which then will lead to commission of deliberate hostile acts towards this group.³⁷ This approach to the interpretation of given terms appears to be more sound, as it is based on the authoritative and well-know sources and is most consistent in the use of materials.

Lebedev in his Commentary to the Criminal Code provides a similar understanding of the objective element, suggesting that the law criminalizes actions aimed at providing an active impact on the people using the documents, words, images and actions undertaken with the aim of encouraging them to commit hostile actions, resulting in the appearance of the desire and determination in them to perform such actions.³⁸

The greatest difficulty, however, remains the evaluation of the degree of public danger of these expressions, as there are no regularized criteria based on which one can assess the degree of likelihood of enmity to be brought about and result in commission of any dangerous acts under the influence of “extremist” speech.

³⁷ Zhrebchenko, 139

³⁸ *Lebedev*, 577

2.4.1.2 Abasement of human dignity

The “abasement of the human dignity” in the context of Article 282 can be considered as diminishment of the worth of a particular individual as a human being in the eyes of other people on the basis of statutory grounds.³⁹ This point is supported by Yermolova, who believes that the protection of such intangible good as dignity is aimed at ensuring the prevention of illegal impairment of human value before other individuals.⁴⁰

One of the relevant questions in regard to the interpretation of this article is whether the concept of "dignity" can refer to a group of persons, or is it only attributable to a single individual.

Before 2011, protection of human dignity of an individual was provided by Art. 150 of the Civil Code, and Art. 129 and Art. 130 of the Criminal Code, which prohibited slander and insult respectively, now these conducts are decriminalized and punishable under the Code of Administrative Offense under part 1 of Article 5.61 and part 1 of Article 5.60.⁴¹

The objective element of the offense of insult constitutes the abasement of honour and dignity of a person, expressed in indecent form. Insulting the victim, the perpetrator gives a negative assessment of the personality of the person of generalized nature and humiliating his or her honour and dignity.⁴² The difference between slander and insult consist in the fact that slander presupposes dissemination of knowingly false information about the victim, whilst insult is a generalized discrediting to a particular individual assessment of his or

³⁹ Zhrebchenko,

⁴⁰ Ermolova, 54-55.

⁴¹ *Federal Law N 420-FZ, 7th December 2011.*

⁴² Prokhorov, 1999

her personality, expressed in indecent form.⁴³ The main objects of these offenses were defined as the honour and dignity of the individual.

In contrast with acts, proscribed under these provisions, speech prohibited by Article 282, based on the nature of its object discussed above, impinges on the inter-group level of public relations, without a defined personalized orientation.⁴⁴ Tenyakova supports this opinion.

At the same time, as it is suggested by the nature of actions, forming the objective element of this crime, it cannot be executed without a presence of a victim. Therefore, law enforcement authorities investigating such crimes need to establish the identity of those persons, who consider a particular expression to be humiliating to their dignity.

Compared with the conducts the aforementioned Articles of the Code of Administrative Offense, in the case of Article 282, it remains unclear, which criteria are taken into account in the process of assessment of particular expressions as being humiliating to human dignity, as there are no indications of what form or characteristics prohibited speech bears.

In addition, it is difficult to determine whether a certain action or expressions is humiliating to all or most of the members of this ethnic group, not just to a particular person.

2.4.1.3 Prohibited grounds for discrimination

At a first glance the list of statutory grounds under Article 282 seems to be exhaustive. It includes such common and internationally acknowledged grounds as sex, race, nationality, language, origin, and attitude to religion. It also includes such grounds as affiliation to a social group, which in practice as it will be shown below, expands the scope of the Article almost indefinitely. This issue will be addressed further in the chapter, when the notion of

⁴³ Malinovsky, 295-296

⁴⁴ Tenyakova, 2012

“social group” will be analysed, but first a brief overview of the main statutory grounds and a discussion of the most problematic points concerning their application will be provided. It is worth noting that, despite the fact that these grounds not only are a qualifying features of these law but also constitute the “extremist motive” which is considered to be an aggravating circumstance to numerous crimes under the Criminal Code, these terms have not been given any legal definition. Therefore, the commentaries and opinions of legal scholars will be used for their interpretation.

a) Sex

In regard to sex as a stationary ground, there is an opinion expressed by Zhrebchenko that the prohibition of incitement of hatred on the ground of sex cannot be considered as justified.⁴⁵ This position is based on the suggestion that commission of any hostile acts directed towards individuals of a particular gender, as a result of the discriminatory speech or expression, aimed at inciting hatred and enmity on grounds of sex, does not constitute a sufficient level of risk to the public, as the occurrence of such effects seems very unlikely, therefore the author concludes that the charges based on a speech aimed at inciting hatred on grounds of sex should be recognized as not having sufficient grounds. This argument seems arguable, as indeed it is really hard to imagine the appearance of deep and sustained conflict between the sexes; however, one cannot deny that incitement of hatred and contempt towards women, and propaganda of misogynistic views may lead to a growing incidence of violence against women.

b) Race, Nationality and Language

In contrast with the list provided by the ECHR under Article 14 (prohibition of discrimination), the norm under consideration does not explicitly include such grounds as colour or membership in a national minority. However, these characteristics are incorporated under the notions of race and nationality.

⁴⁵ Zhrebchenko, 121

Race can be defined as a large group of people, which the humanity is conventionally divided by on the basis of historically acquired physical traits, such as features of hair, nose or eyes shape, body proportions, ect.⁴⁶ These characteristics obviously imply skin-color, which supposedly was given emphasis under the ECHR as one of the most distinct and obvious features.

Nationality in its turn is a group of people, historically formed based on sharing common territory, language, economic relations, traditions and some other features of culture.⁴⁷

According to Zherebchenko Article 282 should qualify inciting hatred and hostility towards members of any national group, regardless of its size, the belonging to common territory or any other objective characteristics of the group. Thus, the author not only suggests that a national minority are afforded the protection under the ground of nationality, but he also presumes that term nationality should be understood based on the criterion of awareness of belonging to a particular group of people.

The ground of language in the context of Art.282 is considered to be closely related with the ground of nationality. There is a widely supported opinion that language constituting one of the structural elements of ethnicity (or in present case nationality) does not require additional protection or separate mention as a prohibited ground.⁴⁸ However, this characteristic does not present any difficulty in regard to the application of the law, as it is self-explanatory.

c) Origin

⁴⁶ Zherebchenko, 122

⁴⁷ Большая советская энциклопедия / Гл. ред. А.М. Прохоров. М. 1974. Т. 30. С. 375.

⁴⁸ Zherebchenko, p. 124;

The ground of origin can be interpreted in a broad manner, as there is no indication in Russian legal literature in what sense this notion is referred to. In accordance with definition by S.I. Ozhegov “origin” presents belonging by birth to any nation, class or caste. Under the ICESCR term origin is used in connection with national and social origin of the person. The Committee on Economic, Social and Cultural Rights has provided a clarification of this ground under General Comment 20, postulating that term “national origin” can be used in regard to “a person’s State, nation, or place of origin”. “Social origin” may reflect the position of a person that he or she has acquired by birth in connection to the property status, belonging to certain cast or social class, or decent-based status determined by such situations as poverty or homelessness.⁴⁹ The provided definition corresponds with the interpretation by the ESCR Committee and reflects the commonly used approach.

d) Attitude to religion

Religion generally can be generally understood as “a form of social consciousness, a set of ideas, resting on a belief in supernatural beings, which are the object of worship”.⁵⁰

Denial of the existence of God, the rejection of religious beliefs, in other words, atheistic worldview is also included under the phrase “attitude to religion”.

The prohibition of incitement to hatred, and humiliation of dignity of a person or group of persons on the base of their attitude to religion is an expression of the principles enshrined in the Constitution. Thus, Article 28 of the Russian Constitution guarantees everyone the freedom of religion; otherwise everyone has the right to profess any religion or none. In

⁴⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at:

<http://www.refworld.org/docid/4a60961f2.html> [accessed 21 April 2016] para. 24-26, 35

⁵⁰ Ozhegov Dictionary, “*Religion*”

addition, aforementioned Art.19 of the Basic Law of our country establishes equality of rights of citizens regardless of their attitude towards religion.

Thus, there is a collision of the rights to freedom of expression and freedom of religion. A similar problem also holds for Article 280, and will be discussed below.

e) Social group

Belonging to a social group is one of the most complex and ambiguous concepts among the aforementioned grounds. Russian law does not provide any definition of what constitutes “social group”, therefore, the interpretation of this terms is in the hands of the judge sitting in a specific case.

In social science there are several approaches to defining a social group. The more narrow definition, expressed by Robert K. Merton implies that members of this group not only share similar characteristics and interact with each other, but also have a sense of unity and identify themselves as members of the group and are seen as such by others.⁵¹ The broader approach to identifying social group, which is frequently cited in Russian legal literature, reads as follows, “social group constitute a collection of people sharing a common social characteristics and performing socially necessary function in the structure of the social division of labor and work”.⁵² Thus, in accordance with the former the definition of social group, it should contain both objective and subjective elements, in the latter case it can be identified only using external characteristics. Such difference in approaches has a significant impact on the interpretation of this category.

Also, there is no common understanding of what should be a level of sustainability a collection of individuals, to constitute a social group.

⁵¹ Salnikov, 156

⁵² Osipov, 151

From the linguistic point of view the term “social group” can be understood as “any group being a part of the society”.⁵³ Preceding this definition any group of the society, which shares any type of common characteristics, such as for example millionaires, single mothers, teenagers, truck-drivers can qualify as a “social group”.⁵⁴ Thereby, adoption of this approach to defining “social group” in the process of qualification of the crime significantly broadens the scope of the Article, and has proven to be applied in a highly controversial manner.

It is suggested, however, that the notion of a social group has been included into the wording of the law with a view to protect rights of the most vulnerable parts of the society, such as pensioners, persons with disabilities, orphan children⁵⁵, but the practice shows to be opposite.

In a large number of cases the notion of “social group” has been referred to persons holding public offices or positions within one of the government branches, such as “bureaucrats”,⁵⁶ “militia”⁵⁷ or even the “government of Tatarstan”.⁵⁸ A large number of scholars suggest that these cases constitute examples of overly extensive interpretation of the aforementioned category.⁵⁹ Others, however, suggest that professional affiliation should be taken into account as one of the criteria for inclusion in a social group”, even in cases where they hold public office⁶⁰.

⁵³ Asmolov, 2000

⁵⁴ Asmolov, 2000

⁵⁵ Agency of Political News, February 25, 2016; SOVA Center for Information and Analysis, July 20, 2011

⁵⁶ SOVA Center for Information and Analysis, August 2, 2011

⁵⁷ Scherbovich, 96

⁵⁸ SOVA Center for Information and Analysis, January 1, 2009

⁵⁹ Olennikov, 85; Verkhovsky, 43

⁶⁰ Shkhagapsoev, 146

In 2011 the Supreme Court has issued a commentary, where it has addressed this issue⁶¹. It has reinforced the idea expressed in the Declaration on freedom of political debate in the media adopted by the Council of Europe, providing “Political figures have decided to appeal to the confidence of the public and accepted to subject themselves to public political debate and are therefore subject to close public scrutiny and potentially robust and strong public criticism”.⁶² Therefore criticism towards political figures should not be viewed as an act of abasement of the human dignity or incitement of hatred against these groups. Making such clarifications the Supreme Court, however, did not provide any comprehensive definition of the term “social group”, therefore there is still no criteria for the identification of a certain part of society as a “social group” in the context of Article 282.

The term “social group” is considered to be making a significant contribution to the wrongful application of the law and viewed by several commentators as contradicting to the principle of legal certainty enshrined in ECHR, which constitute an integral part of its legal system according with para. 4 Article 15 of the Russian Constitution. The Constitutional Court of the RF, however, has rejected the case brought before it by Roman Zamuraev, who claimed that the notion of “social group” makes the prohibition of incitement to hatred and enmity on this ground enshrined in Article 282 unconstitutionally vague and that it may pose undue restrictions on freedom of expression.⁶³ The Constitutional Court held that the provision in question “is aimed at protection of public relations insuring the recognition and respect for the dignity of individual, regardless of any physical or social characteristics”, highlighting that “the criminal liability is established not for any but only for such acts, which are committed with direct intent, aimed at incitement of hatred and enmity, or abasement of human dignity, and therefore contains no ambiguity”.⁶⁴

⁶¹ Supreme Court Resolution, 2011

⁶² *Committee of Ministers (Council of Europe)*, 2004

⁶³ SOVA Center for Information and Analysis, January 26, 2010

⁶⁴ The Constitutional Court of the Russian Federation, April 22, 2010

2.4.2 Material element of Article 280

The “public appeals for extremist activity” constitute the objective element of the crime under Article 280. In legal literature “appeals” are defined as “an influence exerted on mind, will and behaviour of individuals in order to encourage them to commit a certain act or on contrary to refrain from it.”⁶⁵

Form of appeals may be both oral and written, they may be made using a variety of means: sound-amplifying or recording equipment or through distribution of leaflets and brochures.

As it has been mentioned above, use of media or Internet is qualified as aggravating circumstances.

2.4.2.1 The definition of extremism

One of the main problems associated with qualification of the acts criminalized by Article 280, is the interpretation of the term "extremism".

The definition of extremism provided by the Federal law is not of a descriptive nature and in its essence it represents a list of 13 points, quite broadly defining conducts, which constitute extremist activity. Despite the fact that the law has been amended several times (in 2006 it was expanded and shortened in 2007)⁶⁶ since its adoption in 2002, it did not bring more clarity to what are the common characteristics of the proscribed acts, based on which one could derive a clearer and more universal definition of the extremism.

⁶⁵ Mozhegova, 2015

⁶⁶ SOVA Center for Information and Analysis p.1

It has been noted by many legal experts that the listed acts are extremely heterogeneous and range widely in the level of the danger that they present to the society.⁶⁷ The law puts such serious and dangerous crimes as terrorism or forcible change of the foundations of the constitutional system or a violation of the integrity of the Russian Federation on par with such conducts as public and knowingly false accusation of an individual holding state office of the Russian Federation of having committed extremist activity or any assistance for the organization of any actions, constituting extremist activity, including providing printing and technical support, telephony or other types of communications links . The full definition of extremism can be found in the Appendix to present work.

One of the main points for critique of the law, which the Venice Commission of the Council of Europe highlight,⁶⁸ is the lack of requirement for an element of violence, i.e. the nexus between the act or expression and violence or threats of violence does not constitute a mandatory element for qualification of the conduct as extremism. One of a very few international instruments, namely the Shanghai Convention on Combating Terrorism, Separatism and Extremism formulates this qualification in very clear terms, providing that extremism *constitutes* “any deed aimed at a violent seizure of power or violent holding of power, and at violent change of the constitutional order of the state, as well as a violent encroachment on public security, including the organization, for the above purposes, of illegal armed formations or participation in them”.⁶⁹ The definition enshrined in the 2002 Federal Law goes beyond these margins.

The lack of requirement for element of violence seems to be specially vital for balancing freedom of expression in cases concerning acts under point 3, “stirring up of social, racial, ethnic or religious discord” and point 4, “propaganda of the exceptional nature, superiority

⁶⁷ SOVA Center for Information and Analysis, November, 2010; Verkhovsky,

⁶⁸ Venice Commission, 2012

⁶⁹ Shanghai Convention, Article 1, of 15 June 2001

or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion”.

Interestingly enough the requirement for acts under point 3, proscribing “stirring up of social, racial, ethnic or religious discord”, to be associated with violence or calls for violence, has been in place in the earlier version of the law, but subsequently has been removed, which made this provision prone to be stretched” even more in the process of its application.

In addition the wording of this point has been criticized for including such vague and broad constructs as “social discord”.

The use of the term “discord” has been disputed in a number of studies. This notion has not been defined in Russian jurisprudence; therefore its literal meaning is used to interpret the provision. The meaning of “discord”, however, is broader than “hatred” or “enmity”, and in the Russian language it can be viewed synonymous to “quarrel” or “disagreement”.⁷⁰

Proceeding from this logic, some commentators conclude, that any disagreement stemming from, for example, religious or political discussion can be interpreted as “discord”, despite the fact that no incitement to hatred was pronounced.⁷¹ It is worth noting that such precedents have already taken place in the judicial practice.

In its turn “social discord” is even a more broad term. Some commentators suggest that it can be understood practically as “any display of enmity or disagreement in the society”.⁷² There has been a suggestion that propaganda of such ideologies as communism can propel

⁷⁰ Shibaev, 240

⁷¹ Verkhovsky, July 21, 2015

⁷² Ledovskikh, 36

“social discord”, however legal practice does not support this idea.⁷³

⁷³ Ibid.

2.4.3 Made publically or with the use of Media or Internet

The legal requirement of publicity of the prohibited acts or speech is a compulsory element of crimes under both Article 280 and Article 282. There is, however, a significant difference in approach towards the use of media or Internet in the application of these laws. In the case of Article 280 use of media or Internet is considered to be an aggravating circumstance, whereas in case of Article 282 it is an additional qualifying element, which is on a par with the requirement of publicity.

Experts point out the overall inconsistency in the application of these requirements. Thus, in some cases the dissemination of information in the media is regarded as dangerous as other ways of dissemination of it in public, as in the case of Article 282. In other legislators suggest that use of media presents great threat to the society and, as in case of Article 280, qualify it as an aggravating circumstance.

The concept of publicity as defined by Lebedev in his commentary to Article 282 constitutes “an appeal to the indefinite, as a rule, a wide range of individuals”.⁷⁴ This definition, however, does not allow answer a more specific question of what should be the size of the audience for speech to be considered made in public?

There are four main approaches to determining the scope of publicity. The first approach implies that the size of the audience the speech is directed should be more than two persons to qualify as made publically. Under the second approach public speech is viewed as being perceived not only by its initial addressees, but by a larger group of persons. The third approach entails that the audience should consist of a wide range of persons, which implies a

⁷⁴ Lebedev, 578

large, but definable number of people. The fourth approach presupposes the appeal to the general public, which is understood as the audience so large that the perpetrator stays unaware of its size or composition.

It has been repeatedly pointed out in the literature, that the discussion of these problems in a narrow circle of likeminded persons does not constitute the crime.

Many researchers, however, hold an opinion that a formal "arithmetic" approach, based on determining the number of recipients of a particular (prohibited) speech, is not suitable for establishing the element of publicity, and that it is necessary to take into account such circumstances as the nature of relations between the perpetrator and the audience of the calls or speech, as perceived by the perpetrator himself, etc.⁷⁵ Verkhovskiy supports this idea, stating that indeed the scope of dissemination of an extremist speech should be taken into account, as well as other characteristics of the audience

Public expressions can take form of statements at rallies, public meetings and other types of public events. The distribution of flyers, proclamation, or such printed materials as books, leaflets; periodic publications, not registered as mass media; as well as dissemination of the extremist materials on the Internet also satisfies a requirement of publicity.⁷⁶

For example, if information has been published on an open webpage on Internet, this speech will be considered to satisfy the requirement of publicity, regardless of the size of its audience.

Article 2 of the Russian Media Law provides the definitions for basic notions, such as mass media, the periodical printed publication, mass media products, and so on. Due to the amendments to this law of July 14, 2011 it also defines and regulates the functioning of

⁷⁵ Mozhegova, 97

⁷⁶ Zherebchenko, 161

online media. In accordance with this law online media is defined as following: “any webpage in information-telecommunications network Internet registered as a mass media outlet in accordance with present law”. This law also provides that information spread via social networks or any other type of webpages not registered as media would be considered to be disseminated in public, but will not qualify as being spread with the “use of media”.

In practice, however, courts passing judgments under Article 280 have repeatedly qualified speech on social networks or other types of webpages as been carried out with the use of media, which as it has been pointed out numerous times contradicts the norms enshrined under the Media Law.

Recently, however, the regulations were changed for blogs and other webpages with audience exceeding 3000 users a day. According to the Federal law N 97-FZ of May 15, 2014 owners of such blogs are obliged to register their webpages as media, which stipulates that the corresponding restrictions will be applied to these Internet resources. This law itself raises a lot of questions and is considered to be very controversial.

3 Freedom of Expression and its Limitations under the ECHR

Freedom of expression is considered to be one of the most basic human rights. It is acknowledged as being a fundamental freedom of individuals and vital for their exercise of other internationally recognized rights and freedoms. Moreover, this right is undeniably a cornerstone of democracy.

Freedom of expression is enshrined in a number of major human rights documents, such as the UDHR, the ICCPR, and the main regional human rights Conventions, including the ECHR. Both the ICCPR under Article 19 and the ECHR under Article 10 establish that the right to freedom of expression belongs in equal manner to everyone. In contrast with the UDHR, however, both documents declare this right to be subject to certain restrictions, provided by law and necessary in a democratic society in pursuit of legitimate goals.

Many legal scholars and philosophers argue, that these limitations stem from the need to balance the protection of other individual freedoms and the broader interests of the society. There are a variety of approaches to solving this collision adopted across the Globe on national, regional and international levels. Among other judiciary and quasi-judiciary human rights bodies the European Court of Human Rights (ECtHR) has one of the most detailed and elaborate case law, providing authoritative interpretation of the content and limitations of Article 10 of the ECHR. These legal developments to a great extent shape the common European human rights standards in the sphere of freedom of expression.

The Constitution of Russian Federation under Article 17 establishes the priority of International Law, stating “human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution”.

As a party to the ECHR, the Russian Federation bears the responsibility to respect, protect and promote rights, including the right to freedom of expression, via its national legislation

and by other appropriate means. The right to freedom of opinion and expression is established under article 29 of the Russian Constitution. It, however, also places certain limitations, proscribing propaganda or agitation, which can stir social, racial, national or religious hatred or enmity, as well as propaganda of supremacy on any of the aforementioned grounds as well as on the basis of language.

This chapter provides an overview of the standards regarding the right to freedom of speech under the European human rights regime, and laid down especially through the rulings of the ECtHR. The first section will focus on the content of the right to freedom of expression, whereas the second section will discuss the permissible limitations of this freedom as stipulated under Article 10 (2) of the ECHR. This Chapter to a large extent will rely on analysis of the practice of the European Court, as well as on scholarly literature.

3.1 Content of the Right and nature of the State obligations

3.1.1 General Consideration on Article 10

Article 10 accords protection of freedom of expression to everyone without any distinction, which implies that the right extends to both natural and legal persons, including group of individuals or any type of media outlet.⁷⁷

As it is provided under the Article 10 of the ECHR, the right to freedom of expression should be understood as a right “to hold opinions, to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

⁷⁷ Pieter van Dijk, 776

The freedom to hold opinions is an essential aspect of the right to free expression. Despite the fact that under Article 10 (2) the Convention provides for restrictions on freedom of speech, it is generally agreed that these limitations are not applicable to freedom to hold opinion, as long as it is not expressed.⁷⁸⁷⁹ This right, as well as right to freedom of thought or conscious, enshrined under Article 8 of the ECHR is considered to be absolute. Freedom to hold opinion also implies negative right not to be forced to express any personal opinion.⁸⁰ In application to Internet freedom of opinion isn't considered on its own, but as an aspect of freedom of expression in general.

The freedom to impart and freedom to receive information and ideas are complementary to each other. In this connection the Court has established, that Article 10 protects right of the speaker to transmit and the right of its audience to receive information directly, without distortion or interference.⁸¹

Freedom to receive information implies a right of public to be informed as well as “the right to gather information and to seek information by all lawful means and through all passible lawful sources”.⁸² In this context with the growing importance of Internet the “right to access”, being an element to freedom to receive information, is considered to be an emerging right itself.

Article 10 protects various types of “speech”, which besides the written and oral expres-

⁷⁸ Ibid. 778

⁷⁹ As stated by the Committee of Ministers, “any restrictions to this right will be inconsistent with the nature of a democratic society”.⁸ - Freedom of expression, Monica Macovei, A guide to the implementation of Article 10 of the European Convention on Human Rights 2nd edition.pdf p.8

⁸⁰ Macovei, 8

⁸¹ Macovei, 9

⁸² Macovei, 10

sions covers also images, performances and even dress.⁸³ The form of these expressions is also provided protection equally with the content of the speech.⁸⁴ The Court has repeatedly noted that any restriction on means of expression would constitute a breach of Article 10.⁸⁵ In this way “radio broadcasts, paintings, films or electronic information systems as Internet also fall under the scope the Article.

The right to freedom of expression is not an absolute right and can be limited in accordance with requirements provided under Article 10. Despite the fact that the content of an expression can be restricted with the aim of safeguarding general interests of the society, such as public order or national security, the authority and impartiality of the judiciary or rights of others, the Convention protects speech, which can “offend, shock or disturb”.⁸⁶ In the landmark ruling of *Handyside* case the ECtHR further explains, “such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society”.⁸⁷ This stance has been repeatedly reaffirmed by the Court.

3.1.2 Distinction between facts and value judgments

Article 10 protects right to impart and receive both information and ideas. Some scholars suggest that in the practice of the ECtHR there is a distinction between information, which implies facts existence of which can be proven and opinion, which constitutes a value judgment. However, not every expression of opinion or speech presenting facts is protected by the ECHR, as both types of expressions should be able to stand particular tests designed by the Court.

⁸³ *Stevens v. the United Kingdom*, 1986. - Macovei, 15

⁸⁴ *Oberschlick v. Austria*, 1991; *Thoma v. Luxembourg*, 2001; *Dichand and Others v. Austria*, 2002; Macovei, 15, Pieter van Dijk, p. 783

⁸⁵ Pieter van Dijk, p. 780

⁸⁶ *Handyside v. United Kingdom*,

⁸⁷ *Ibid.*

Thus, it is argued that information, especially disseminated by media should stand a test of “truth”, meaning that the information, on which a particular expression is based, can be susceptible of proof.⁸⁸ In most cases there is no such requirement in regard to statements of opinion (value judgments).⁸⁹

There is, however, a significant shift in the court practice with regard to the tests applicable to these types of speech, as in some cases the facts can be tough to distinguish facts from value judgments merging together under a particular expression. Thus, in order to establish whether an expression should be accorded protection in such cases the Court has developed the test of “sufficient factual basis”, which suggests that even the statement of opinion at least to a certain extent must be rely on facts in order to be protected under Article 10, otherwise it might be “excessive”.⁹⁰

The test of truth, however, is applied to “factual basis” of the statement, as well as a test “good faith”.⁹¹ In regard to media, it has been established that the defiance of “good faith” should provide press “a breathing space for error”.⁹² Thus, as it has been pointed out by Monica Macovei in the situation, where a publication has a legitimate purpose, represents a matter of public concern and the reasonable efforts has been made to verify the factual basis the defense of “good faith” is considered to be proven, even when the facts eventually appear to be false.⁹³

⁸⁸ *Dalban v. Romania, 1999* - Macovei, 10

⁸⁹ *Lingens v. Austria, 1986*

⁹⁰ *Dalban v. Romania, 1999*.

⁹¹ Roca, 377

⁹² *Dalban v. Romania, 1999* - Macovei, 10

⁹³ Macovei, 10

Some authors argue, that the distinction between facts and opinions doesn't influence in a significant manner the decision-making process of the ECtHR. Thus, Rafael Bustos Gisbert makes this conclusion based on the *Godlevskiy v. Russia* case, where the Court provides that the main deference, which can be found between value judgments and facts consists "in the degree of the factual proof which has to be established".⁹⁴ Other legal studies of the ECtHR case law⁹⁵, however, encompass that the Court takes such distinction into account, though it might not play a decisive role in its reasoning.⁹⁶ In addition, it is suggested the case law reflects that the value judgments, which could be proven to have sufficient factual bases, enjoy stronger protection by the ECHR.⁹⁷

3.1.3 Modes of expressions (Elements of the right to freedom of expression)

Apart from the explicitly mentioned in the Article 10 aspects of the right to freedom of expression, namely the right to receive and impart information and right to hold opinions, many scholars discern other elements of this freedom. There is no uniform list of such elements (or in other terms "modes of expression"), which are covered by given provision, however, it is possible to name the most frequently distinguished aspects of this right, such as freedom of press, political expression, commercial speech, scientific and artistic expression, freedom of radio and television broadcasting and professional secrecy for journalists. It would be beneficial for the study to focus on some of these modes of expression and discuss the special features associated with the exercise of the right to freedom of expression in connection to these aspects.

a) Freedom of press and political expression

⁹⁴ Roca, 377

⁹⁵ Freedom of expression and the Internet; Wolfgang Benedek and Matthias C. Kettemann .pdf, 89; ...

⁹⁶ Roca, 377

⁹⁷ Roca, 378-379

Freedom of press has been considered one of the crucial conditions to the development of democracy. The Court has repeatedly reaffirmed this position, stating that press plays a vital role of a “public watchdog” in the society and therefore it should be granted special protection.⁹⁸ Moreover, as it has highlighted in the *Lingens* case the freedom of press not only an expression of the right to impart information that particularly important to the society, but also is inherent to the right of the public to receive such information.⁹⁹

There are several factors, which Court places special attention to, when considering cases dealing with the restrictions imposed on freedom of press. Specifically, the level of “general interest” of the matters discussed influences substantially the degree of protection an expression deserves. Thus, the greater is the interest of the general public in the issue the stronger protection such expression receives and the less limitations can be put on the tone and the content of such speech.¹⁰⁰

The ECtHR has also held on a number of occasions that journalistic freedom to a certain degree allows for exaggeration, or even provocation.¹⁰¹ The Court, however, notices that the journalists also bear duties and responsibilities, and therefore must act in accordance with high standards of journalistic ethics, which implies exercising their right to free expression in a good faith and providing “reliable and precise” information.¹⁰²

b) Political expression

⁹⁸ *Lingens v. Austria*, 1986. - Macovei, 11

⁹⁹ *Lingens v. Austria*, 1986. - Macovei, 11

¹⁰⁰ Roca, 379-381

¹⁰¹ *Oberschlick v. Austria*, 1991; *Dalban v. Romania*, 1999; *Dichand and Others v. Austria*, 2002

¹⁰² *Weber*, 21

Free political expression is accorded an extremely high degree of protection under Article 10, due to its contribution to the democratic process. Therefore the Court is reluctant to support the imposition of limitations on freedom of speech taken place in the context of political debate. In accordance with *Erbakan* judgment, reasons for such interference should be “imperious”.¹⁰³ In regard to political expression, as well as in the case of freedom of press, the level of the public interest in the issue discussed is one of the important criteria in the Courts reasoning.

In the context of political debate people’s representatives has been provided comparable degree of protection of their right to freedom of expression, to the level that free press enjoys.¹⁰⁴

When it comes to the extent of criticism permissible, the Court has set wider limits in regard to critical expressions towards government as a whole, in comparison to those towards private citizens or even politicians.¹⁰⁵

The form and the degree of the debate are another factors, which should be taken into account in regard to political speech. It is suggested that, for example, the written comments could be assessed in a stricter way then the verbal expressions, the former form of speech allows for a greater reflection by the author.¹⁰⁶

c) Artistic, Commercial and Scientific Speech

Unlike the aforementioned modes of expression, the artistic and commercial expression can be subjected to stricter limitations. The margin of appreciation is wider in the cases con-

¹⁰³*Erbakan v. Turkey - Weber, 21*

¹⁰⁴ *Roca*, 383

¹⁰⁵ *Popovic*, 260-261; *Sunday Times; Observer and Guardian; Castells v. Spain*

¹⁰⁶ *Roca*, 379-381

cerning religion and general morals.¹⁰⁷

One of the factors, which the Court took into account in *Karataş* case, was the “potential impact” on national security, public order and territorial integrity of the State. The Court came to the conclusion, that poems in question, due to the form of the speech had limited impact, and didn’t constitute a danger to the aforementioned interest of the society.¹⁰⁸

Commercial expression is more frequently viewed from a perspective of fair competition in the market, than in the light of freedom of expression. In these areas the Court has also been granting a wider discretion to national authorities.¹⁰⁹

3.1.4 Speech excluded from protection of the ECHR

Certain types of speech are considered to fall out of the scope of Article 10, due to the danger they pose to the rights and freedom enshrined in the ECHR. In these cases the Court renders its decision on the basis of Article 17, prohibiting acts “aimed at destruction of any of the rights and freedoms” entrenched in the Convention. Such expressions include revisionist speech and incitement to violence and hatred.

a) Revisionist speech

In this context “revisionist expression” refers to notion of historical revisionism, which constitutes an attempt to give an alternative interpretation to universally accepted historical facts.

This type of speech is not prohibited as such, but in situations, where it is connected to certain traumatic events and is expressed in a “highly unacceptable manner”; and which could infringe on dignity and rights of victims of these events.¹¹⁰ One of the vibrant examples of

¹⁰⁷ Popovic, 261

¹⁰⁸ *Karataş v. Turkey*

¹⁰⁹ Roca, 385-386

¹¹⁰ Popovic, 256

such expressions is Holocaust denial, prohibited in several countries in Europe, including Austria, Germany and Hungary. Moreover, such speech is considered to constitute a denial of crimes against humanity, as well as being able to incite hatred towards particular groups (in the case of Holocaust denial it is incitement of hatred against Jewish community).

b) Incitement to violence and hatred (Hate speech)

Incitement to violence, which occurs under the hate speech doesn't constitute protected expression under Article 10.¹¹¹ The ECtHR has expressed this position on numerous occasions. Thus, in *Erbakan* case the Court has held that expression which "spread, incite, promote or justify hatred based on intolerance" can be punished in democratic societies.

As it has been pointed out in a wide range of studies, that hate speech, being able to incite hatred and provoke violence against person or group of persons, endangers the dignity of an individual and impairs the enjoyment of other rights guaranteed by the international human rights documents, such as one of the fundamental in a democratic society freedom from discrimination, as well as other rights, namely freedom of religion and even freedom to liberty and security.

In this way, in the case of *Norwood v. United Kingdom* the Court has recognized that offensive or threatening speech which is likely to cause harassment, stating that "any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress"¹¹² is not accorded any protection under Article 10 by the ECHR.

The Court has adopted sensitive approach to balancing to cases of hate speech. In assessing such cases the Court takes into account such factors as the context and the content of

¹¹¹ Popovic, 256

¹¹² Oetheimer, 431

speech.

3.1.5 Obligations of the State

The rights enshrined under the ECHR may create both negative and positive obligations of the State. It is generally agreed that right to freedom of expression imposes on the State duty to respect, which means that the State must abstain from any actions that could impede the exercise of this right.¹¹³ The recent ECHR case law, however, reflects a shift in this regard. Under the *Özgür Gündem v. Turkey* case the ECtHR¹¹⁴ sets out that under certain circumstances State might also be required to take positive steps, as for example in cases, when it is necessary to insure safety of journalists.

¹¹³ Roca, 374

¹¹⁴ *Özgür Gündem v. Turkey*

3.2 Restrictions under Article 10(2)

The second paragraph of Article 10 establishes that the exercise of freedom of speech also carries duties and responsibilities, due to which the right to freedom of speech can be subject to certain “formalities, duties, restriction and responsibilities”. However, such limitation cannot be placed arbitrarily by the State, and are subject to a tripartite test, which is set forth by the provision in question. Thus, the restriction should be a) prescribed by law; b) necessary in a democratic society; c) pursue one of the legitimate purposes, listed under Article 10(2). The restrictions imposed by the State should stand all three tests. If the Court finds, that the interference of the State in a given case doesn’t fulfil the necessary requirements, such limitation is regarded as unjustified and it constitutes violation of the right to freedom of speech.¹¹⁵

These tests will be considered in a greater detail in the present section of this chapter.

3.2.1 Prescribed by law

The limitations imposed by the national authorities should be imposed in accordance with legal norms enshrined under domestic legislation adopted by national Parliament.¹¹⁶ Such norms can be established in written or unwritten forms, however, they should fulfil certain (following) requirements to the quality of the law. As it has been highlighted in *Sunday Times* case “the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case”. The laws also have to be formulated with “sufficient precision”, so it would be understandable to individuals and enable them to model their conduct in accordance with given legal norm. The degree of precision should allow person to foresee the consequences of his or

¹¹⁵ Macovei, 30

¹¹⁶ Bakircioglu, 47

her actions, to a degree, which is reasonable in given circumstances.¹¹⁷

The test of precision is applicable not only to laws, but also to other legal norms and practices, as well as jurisprudence of national courts, in cases, when it sets forth restrictions on the freedom of expression.¹¹⁸

3.2.2 Necessary in a democratic society

Under the test of ‘necessity in a democratic society’ the State should prove that its interference with freedom of expression is “relevant and sufficient”, which implies the application of the proportionality test and the proof of presence of the “pressing social need”.¹¹⁹

The proportionality principle implies that the restrictions imposed on particular expressions, as well as prescribed sanctions are proportionate to the aim of such measures.¹²⁰ The legitimate aims of such interference should correspond with those listed under Article 10(2).

The State is likewise required to prove, that there is a “pressing social need”, which requires an interference with freedom of speech.¹²¹ Due to the complementary nature of the ECHR mechanisms of human rights protection, the member States are granted a “margin of appreciation” in accordance with which the State party can decide whether such need exists. The ECtHR, however, is entitled to conduct the supervision of justifications presented by the State, and provides a final say in establishing, whether such interference goes in accordance with the principle of “necessity”.¹²²

¹¹⁷ Weber, 31

¹¹⁸ Macovei, 33

¹¹⁹ Weber, 31

¹²⁰ Macovei, p.33

¹²¹ Ibid.

¹²² Loucaides, 150; Weber, 32; Bakircioglu, 38

3.2.3 In pursue of the legitimate purpose

Restrictions on freedom of speech could only be imposed in pursue of legitimate aim, which, in accordance with Article 10(2) could constitute: protection of national security, territorial integrity or public safety; or prevention of disorder or crime, or protection of health or morals, reputation or rights of others; or prevention of the disclosure of information received in confidence; or maintenance of the authority and impartiality of the judiciary. The State can justify its interference with freedom of speech on the basis of one or more aforementioned grounds.

a) National security, territorial integrity and public safety

The issue of territorial integrity has been addressed by the Court in a number of cases concerning the limitations of freedom of speech imposed by Turkey in regard to the separatist movement in Kurdistan. The Court takes into consideration the general public interest in the matter and favours expressions allowing the public to gain deeper understanding of the issue. Thus, in the case of *Süreş and Özdemir*, dealing with the prohibition of the publications containing interviews of the prominent leader of the PKK, who expressed harsh critique of actions taken by the Turkish government in the South-East of the country, the Court has held that “the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict.”

At the same time the Court accepts the justification based on territorial integrity and public safety, where there are reasons to believe that the prohibited speech can incite violence and that such violence is likely to occur.

In regard to information, which is classified as secret, the ECtHR sets the bar of legitimate interference relatively low, establishing that the interference can be regarded as justified, when the information is “evidently sensitive” and its disclosure can cause damage to its

citizens;¹²³ or when such information “has already been widely distributed” and is known to the public.¹²⁴ There are also additional requirements to the manner in which the status classifying information is adopted. For example, such status can only be imposed for limited time and should be a subject to periodic review.¹²⁵ The public interest in classified information should also be taken into account, when the question of status revision is raised.¹²⁶

b) Prevention of disorder or crime

Frequently, the restriction of freedom of expression, which imposed on the ground of prevention of disorder or crime, are associated with the strong criticism of government and calls for action in connection to particular issues. In such cases the Court has been stressing on numerous occasions that the actions and policies of the government can be subjected to closer scrutiny by public.¹²⁷

In *Saszmann*, the Court, however, has found that the incitement to disobedience with laws passed in constitutional manner “could not be tolerated in a democratic society”.¹²⁸

c) Public health and morals

National authorities enjoy wider “margin of appreciation” in cases relating to public health

¹²³ *Bluf!* ;

¹²⁴ *Ibid.*

¹²⁵ *Macovei*, 40

¹²⁶ *Ibid.*

¹²⁷ *Incal*

¹²⁸ *Saszmann*

and morals, due to the diversity of views on issues of moral between member States.¹²⁹ Thus, in *Handyside* case the Court has left the issue of distribution of book with, what in the view of the State could constitute an obscene content, at hands of national government.

However, in *Open Door and Dublin Well Woman* case the Court has held that the granted to the national authority margin of discretion is not unlimited, and the restrictions imposed on the freedom of speech should be proportionate to the goal.¹³⁰

In relation to religious morals, the Court has pointed out that as the freedom of expression also bears with it duties and responsibilities, it also implies “an obligation to avoid as far as possible expressions that are gratuitously offensive to others”.¹³¹

d) Reputation and rights of others

Protection of “reputation and rights of others” is one of the most frequently used justifications for limiting freedom of speech. Despite the fact, that the Convention doesn’t explicitly state the right to reputation, however the Court has interpreted the right to reputation as an aspect of the right to respect for private life, enshrined under Article 8 of the ECHR¹³².

It’s not a rare case that such restrictions are used to withdraw high public officials or civil servants from criticism. However, as it has been pointed out earlier, politicians as well as government as a whole should tolerate critical commentaries directed against them to a higher extent, then ordinary citizens. In these cases such factors as political context and the interest of the society in the discussion are of primary importance.

As provided in the *Karakó v. Hungary* case the bar for permissible restrictions is quite high in the situation of political debate. The Court has held that the protection of the reputation

¹²⁹ Roca, 391

¹³⁰ Macovei, 48

¹³¹ *Otto-Preminger-Institute case*

¹³² Benedek, 87;

is justifiable only when “factual allegations [of a] seriously offensive nature [with an] inevitable direct effect on the applicant’s private life”.¹³³

In *Tammer* case the Court, however, has removed the burden of tolerating criticism off family members of public figures, finding that there was no violation of Article 10, as the use of insulting expressions against a wife of a former Prime Minister regarding her private life “did not serve any public interest”.¹³⁴

In addition the Court practice also shows the test of “good faith” is particularly important as a defence in defamation cases, which concern statements of facts.¹³⁵

e) The authority and impartiality of the judiciary

Though, at times the members of the judiciary can be in the spotlight in media in connection with a particular case, in accordance with the ECtHR case law, they are not required to stand the same amount of criticism as normally the politicians would be obliged to. Defamatory statements lacking factual basis directed against representatives of the court are able to seriously undermine the impartiality of the judiciary, shanking the trust in the authority of domestic courts. Therefore, expressions of an insulting or virulent nature, which are not contributing to the public debate, constitute a legitimate subject of restrictions.

On the other hand, critical examinations and criticism of court cases cannot be entirely prohibited. This follows from the *Sunday Times* case, where obeying the injunction the newspaper had to abstain from publishing an article on the judicial process around the harmful effects of the sedative “thalidomide”, as the in opinion of the national court its publication would obstruct justice. The ECtHR has found for applicant in this case, holding that “Whilst they [courts] are the forum for the settlement of disputes, this does not mean that

¹³³ *Karakó v. Hungary*

¹³⁴ *Tammer v. Estonia*

¹³⁵ *Macovei*,52

there can be no prior discussion of disputes elsewhere”.¹³⁶

¹³⁶ *Sunday Times v. the United Kingdom, 1979.*

4 Chapter 4. Analysis of compatibility of Articles 282 and 280 with European human rights standards

4.1 Speech proscribed under Article 282 and Article 280

4.1.1 Hate speech under European human rights framework

Both Articles 282 and Article 280 (where extremism is expressed as speech “stirring up social discord”) constitute prohibition of hate speech.

Prohibition of hate speech is explicitly provided in two main human rights instruments, the ICCPR and the CERD and imposes corresponding obligations of the State parties to the Conventions. Thus, the ICCPR under Article 20 (2) requires all the parties to introduce a legal prohibition of “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. CERD developed this idea via Article 4 and specifies in greater detail range of acts, which States are obliged to outlaw following the Convention. Thus, as a signatory to CERD Russia is under obligation to take legislative measures and introduces prohibition of “dissemination of ideas based on racial superiority or hatred” as well as “incitement to racial discrimination” and “all acts of violence or incitement to such acts” on the basis of grounds enumerated under the provision. As it has been mentioned above, the Constitution of Russian Federation contains corresponding provisions, and takes measures to prohibit hate speech, in order to fulfill these requirements of international human rights law.

The hate speech provision is, however, absent from the text of the ECHR. Nevertheless, there are numerous instruments on EU level adopted by the Council of Europe, which in

one way or another such.¹³⁷ Most of these documents, however, do not have a binding force and could be seen more as guidelines to dealing with hateful expressions.

The Court neither provides or incorporates any particular definition of hate speech in its case law, though it had made references to some of them [NAME]. The Court has adopted two main approaches to dealing with hate speech. As it has been mentioned above in some cases concerning with offensive speech inciting to violence or hatred the ECtHR renders a decision based in Article 17, excluding such expression from the protection of the Convention. It concerns such types of speech as revisionist speech, promotion of totalitarian ideologies, as well as racial hate speech¹³⁸, which the ECtHR holds incompatible with values and freedoms enshrined under the Convention. However, there are no general principles by which the Court is guided, when it decides to deal with cases by applying Article 17, instead of considering given expressions in the light of limitations permissible under Article 10 (2).

4.1.1.1 Hate speech standards under European human rights framework

In the view of Council of Europe’s Committee of Ministers” hate speech should be understood “as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti- Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and

¹³⁷ Recommendation (97)20 on “hate speech” by the Committee of Ministers on 30 October 1997 ; Declaration of the Committee of Ministers on freedom of political debate in the media, adopted on 12 February 2004; Resolution 1510(2006) on Freedom of expression and respect for religious beliefs, adopted on 28 June 2006;

¹³⁸ Weber, 109-110

hostility against minorities, migrants and people of immigrant origin.”¹³⁹

This definition is quite narrowly formulated and focuses primarily on ethnic(al) hate speech. The ECtHR, however, has referred to it in its decisions.¹⁴⁰

The ECRI in its General Policy Recommendation No. 15 provides a more detailed and broad definition: “the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of “race”, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status”.

Suggested definition is quite broad compared to the approach to hate speech taken by the ECtHR. The ECRI, however, provides a set of suggestion on how to combat hate speech through education, regulations and legislative measures and points out that only hate speech, intending to incite violence, intimidation or hostility, should be opposed “through the use of criminal law”¹⁴¹, in cases where all other means are not effective enough.

Based on these documents, one can see that the wording used in Article 282 to a large extent corresponds with suggested definitions, implying the prohibition of “incitement to hatred and enmity” on the number of internationally recognized grounds. At the same time, it also includes the prohibition of “abasement of human dignity”. However, as it has been concluded earlier, this formulation is more likely to be seen as specification of the hate speech clause, expressed in the first part of the Article in question, than as a separately proscribed conduct. Moreover, in contrast with Committee of Ministers’ definition, the ECRI contains prohibition of denigration and vilification, which allows to conclude, that the

¹³⁹ [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec\(97\)20_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf)

¹⁴⁰ Oetheimer, 428

¹⁴¹ ECRI General Policy Recommendation No. 15 On Combating Hate Speech Adopted ON 8 DECEMBER 2015, point 10

wording of Article 282 falls within the frames, established within the European human rights regime in regard to combating hate speech.

In contrast with Article 282, the definition of extremism provided by the 2002 Federal law, based on which Article 280 is interpreted, in part relating to prohibition of discriminatory speech includes quite distinct from the aforementioned provisions wording, namely such term as “discord. As it has been pointed out above, the notion of discord presents a challenge to the interpretation of the provision by domestic courts, as it hasn’t been defined under Russian law. Such wording, being poorly defined doesn’t meet the standards, accepted under the European human rights framework, as it provides a requirement of precision of the language, which is viewed as especially important with regard to the formulation of criminal provisions.

4.2 Analysis of compatibility of Article 282 and Article 280 with Article 10(2) of the ECHR

4.2.1 Provided by law

a) Adopted in accordance legal norms enshrined under domestic legislation

These articles were adopted as part of the Criminal Code of the Russian Federation in full compliance with legal procedure provided by the RF legislation. The current version of Criminal Code has been passed by the lower Chamber of Parliament (State Duma) on May 24, 1996 and approved by upper Chamber (the Federation Council) on June 5, 1996, and on June 13, 1996 it was signed by the President of Russia. It officially has entered into force on January 1, 1997.

In accordance with Part 3 of Article 15 of the Russian Constitution official publication of laws or other legislative instruments affecting rights, freedoms and duties of man and citizen constitutes a *sine qua non* condition for entry into force of any legal norm adopted on the territory of Russian Federation.

As it has been pointed out before, both laws were amended numerous times. The amendments to the Criminal Code of the Russian Federation can only be made with adoption of corresponding Federal laws by both Chambers (the State Duma and the Federation Council) of the Federal Assembly (Parliament) of the Russian Federation. The adaptation of the law is considered to be final after it has been signed by the President of Russia. This Law comes into force within ten days after the official publication in "the Russian newspaper", "Parliamentary newspaper" or on the official online portal of legal information **pravo.gov.ru**, or after its publication on the date specified in the law.¹⁴²

b) Adequately accessible

¹⁴² Federal Law N 5-FZ, ///

The current version of the Criminal Code can be found on the web page of an official legal portal <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102041891>. The Internet coverage in Russia reaches 71.3% of the population. The availability of the current version of the Articles in question on the Internet and the fact of publication of the aforementioned amendments in official periodical newspapers can be seen as fulfilling the requirement of accessibility, which constitutes one of the aspects of “provided by law” test, formulated under Article 10 (2) of the ECHR.

c) Formulated with “sufficient precision”

As it can be seen from the discussion provided in the first chapter, the question of “sufficient precision” in regard to both provisions is acute.

Use of the terms “social group” in the context of Article 282

As it has been discussed above Article 282 the interpretation of notion of a “social group” by domestic courts raises serious concerns of both scholars and representatives of NGOs. Indeed the interpretation of the notion of “social group” in the context of given law as “government of Tatarstan”¹⁴³ or “militia”¹⁴⁴ in corresponding cases goes contrary to the standards on permissible limitations on freedom of speech set forth in the legal practice of the ECtHR. As it has been highlighted earlier the permissible limitations of criticism directed at “the government as a whole” are wider, in comparison to the level of criticism a single politician or a private person should tolerate.

¹⁴³ SOVA, January 1, 2009

¹⁴⁴ Scherbovich, 96

The category of “social group” is rarely used in national jurisdictions of the EU countries, and is not mentioned in the ECHR, however, the international law allows for open-ended lists of grounds for non-discrimination, and at times even encourages it.

In its practice the ECtHR didn’t had a chance to deal with cases of discrimination on the basis of social group. The Court however has addressed hate speech cases, where prohibited expressions were directed against two groups, which are not explicitly stated in the ECHR, namely migrant workers and persons with homosexual orientation.¹⁴⁵ In these cases it is evident that the **targeted** groups are marginalized and their representatives are in vulnerable position in the society, and therefore are in need of special protection.

However, as it has been mentioned, Russian courts do not apply the same logic of protection of the socially vulnerable or marginalised categories of the population, when interpreting the term “social groups”.

The likelihood of the harmful consequences to occur, following the harmful expressions should also be taken into account. However, domestic courts are rarely guided by this criterion when rendering decisions.

In spite of the clarification on interpretation of the notion of “social group” provided by the Supreme Court the practice of the lower courts in regard to application of this term continues to be controversial. Thus, only since June last year Russian district courts had rendered two highly questionable verdicts on the basis of incitement of hatred to such social groups as the representatives of authorities and “volunteers from Russia, fighting on the side of the militias in the east of Ukraine”¹⁴⁶; and World War II veterans.¹⁴⁷ The disregard of the lower courts to the Supreme Court clarification suggests that there is a need to improve the wording of the law, as for now it doesn’t allow to reasonably foresee the consequences of particular actions and therefore doesn’t fulfill the requirement of the “sufficient precision”.

¹⁴⁵

¹⁴⁶ SOVA Center for Information and Analysis, April 26, 2016,

¹⁴⁷ SOVA Center for Information and Analysis, July 6, 2015

Bearing in mind this tendency for wrongful application of the law, it can be concluded that the lack of definition of “social group” and absence of any guidelines to its interpretation contribute significantly to overly extensive application of Article 282.

The notion of social discord and lack of requirement of violence in Article 280

As it has been pointed out in Chapter 2, the application of Article 280 is very complex, as its interpretation is directly linked with the definition of “extremism” provided under the 2002 Federal law.

The problematic point associated with interpretation of the definition of “extremism” provided by 2002 Federal law has been discussed in details by the Venice Commission. It has concluded that the wording of the law in its parts lacks sufficient precision, which can lead to its arbitrary application by domestic courts.¹⁴⁸ One has to agree with this opinion of the Commission, as the law indeed contains vague language, which allows for its wrongful interpretation.

The same conclusion also holds true for application of Article 280. The analysis above suggests that in parts relevant to interpretation of given criminal provision the definition of “extremisms” doesn’t provide sufficient level of foreseeability, due to the use of such poorly defined in Russian law concept of “social discord”. In addition, as it has been pointed out above the lack of requirement of violence in conjunction with imprecise language disproportionately widens the scope of application of the law. These factors allow concluding, that the law lacks sufficient precision.

¹⁴⁸ OPINION ON THE FEDERAL LAW ON COMBATING EXTREMIST ACTIVITY

4.2.2 Pursue Legitimate aim

Proceeding from generic objects of articles identified in Chapter 2, both Article 282 and Article 280 protect constitutional order and security of the state. However, in order to assess given provisions in a more comprehensive manner, analysis will be carried out based on the immediate objects of the crimes. As has been noted, the more general category of interests implies the protection of interests formulated as immediate objects of the crime. Thus, the fundamental constitutional order presupposes democratic and federal machinery of a state, republican form of government, rights and freedoms of citizens, and sovereignty of the state and integrity and inviolability of its territory.

One can conclude that Article 282 and Article 280 protect distinct, though overlapping, public interests. Article 280 is designed to protect national security, territorial integrity and public safety; prevent of disorder or crime, and safeguard the rights of others. Article 282 is aimed at the protection of only last category of interests.

Rights of others

Article 10(2) of the ECHR envisages a possibility to limit expressions, if it is necessary to protect the rights of others.

As discussed, Article 282 and Article 280 in part are designed to protect the rights and freedoms of others. Protected rights are not identified with sufficient precision in the literature. However, one can nevertheless conclude, based on the type of speech proscribed, that the limitations imposed are designed to strike a balance between freedom of speech and the right to non-discrimination, the right to reputation and the right to security of a person. Arguably, the provisions in question also protect right to religion.

Right to non-discrimination

The right to non-discrimination is the basis of the hate speech prohibition. This principle constitutes one of the vital parts of the international human rights regime. It is enshrined in every major human rights instrument. The recognition of the principle of non-discrimination was first manifested under the UN Charter, Article 13(1). It has been further developed under the International Bill of Human Rights. Article 1 of the Universal Declaration states that “All human beings are born free and equal in dignity and rights”. The right to freedom from discrimination has been formulated as an autonomous right under Article 26 of the ICCPR; stating that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Both ICCPR and ICESCR contain general and specific non-discrimination clauses, obliging state parties to ensure equal enjoyment of all rights entrenched in these covenants.

Article 14 of the ECHR provides for the right to equal enjoyment of rights and freedoms established under the Convention, with no distinction on the basis of “sex, race, colour, language, religion, political or other opinions, national or social origin, association with national minority, property, birth or other status”.

Hate speech, prohibited under given articles, may impair the enjoyment of such rights, as it contributes to promotion of discriminatory attitudes in society.

The right to reputation is protected as a part of the right to private life, enshrined under Article 8 of the ECHR.

Territorial integrity, public order, and national security

As mentioned above, Article 280 prohibits incitement to forcible change of the government and calls for separatism. The ECHR recognizes protection of territorial integrity, public safety, and national security as legitimate aims for the restriction of the right to freedom of expression. The content and the context of the speech plays a primary role in the assessment of the cases on separatist expressions by the ECtHR. As pronounced by the Court in *Süreş (No. 3)* “the content of the article must be seen as capable of inciting further violence”. Such expressions, however, should be distinguished from the harsh criticism of governmental policies and decisions.¹⁴⁹ This point is especially relevant to the situation in Russia, as many commentators protested against the war in Ukraine and the forcible seizure of the Crimean Peninsula, as well as calling for the return of the territory of Crimea to Ukraine. Despite the fact that such a distinction is implied in the language of the provision, Russian courts have failed to take this into account. One of the recent cases on this matter concerns terrorism on the internet. A citizen of Belarus Kirill Silivonchik has been found guilty and sentenced for two years in a prison colony for displaying images and sharing publications on his social network, demanding the return of Crimea and calls for “killing Muscovites”. Based on the available information, such a verdict is questionable, since it is not clear to what extent these appeals may contribute to the rise of violence. However, it is impossible to make any final conclusions in the absence of publicly available wording used by the accused.

On appeals for terrorism

The offence of incitement to commit a terrorist act will clearly be human rights compliant where there is direct incitement, supported by an intention to promote terrorism and a causal link between the incitement and the likely realization of a terrorist act.¹⁵⁰ In cases of terrorist speech, the usual grounds to invoke would be public order and national security, as

¹⁴⁹ *Arslan v. Turkey*, 1999.

¹⁵⁰ Human Rights Considerations in Combating Incitement to Terrorism and Related Offences, 2006.pdf p.9

protected interests. The invocation of national security has to meet a very high threshold for it to be acknowledged as legitimate. In its working paper, the OSCE suggests that limitations of freedom of expression are acceptable only in “*truly exceptional circumstances*”.¹⁵¹

¹⁵¹ Human Rights Considerations in Combating Incitement to Terrorism and Related Offences, 2006.pdf p. 13

4.2.3 Necessary in a democratic society

Article 10 (2) provides, that the interference with the right to freedom of expression can be Article 10 (2) states that the interference with the right to freedom of expression can be held legitimate only if it is proven to be “*necessary in a democratic society*”. The ECtHR has established three tests to show the necessity of the limitations that the state imposes on freedom of speech. As stated in the *Sunday Times* case, the restrictions in question must be a) adopted to address a “*pressing social need*”; b) proportionate to the aim, which justifies such interference; c) and “*relevant and sufficient*”.

The presence of the “*pressing social need*” reflects the importance of the interest at stake.¹⁵² In the *Baskya and Okcuoglu* case, the Court paid specific attention to the likelihood of violence being incited by the prohibited book, addressing the Kurdish question. When assessing the necessity of the prohibition imposed by the state, the Court also turned to the history of the conflict at hand, acknowledging the existence and severity of the conflict in the past. However, it pointed out that the academic nature of the publication should also be taken into account by national authorities.

Modern day Russia faces enormous challenges with regard to eradication of hate crimes and xenophobic and racist attitudes in society. In accordance with data provided by the analytical centre SOVA, 105 people have been attacked because of their nationality, race or religious belief.¹⁵³ It is possible to name a number of groups that are at higher risk of being violently attacked or harassed. These include migrant workers from Central Asia, natives of the North Caucasus region, and people of African or Arab descent.¹⁵⁴ Domestic courts have

¹⁵² How to improve the necessity test of the European Court of Human Rights, Janneke Gerards*, 467

¹⁵³ <http://www.sova-center.ru/database/violence/?tip1=301&xfield=phenotype&yfield=y&victims=Min&show=1> - [CHECK the DATA]

¹⁵⁴ SOVA , Database

been dealing with numerous cases concerning racist, anti-Semitic and hate speech; however, other vulnerable groups, such as LGBT or migrant workers, have been entirely left out.

In addition, when it comes to the application of the law, domestic courts tend to overlook the actual level of danger a particular expression poses and the likelihood it present of causing violence to occur. Thus, the Courts rarely take into consideration the size of the audience that was exposed to harmful speech, or the type of speech. In the case of reposts and shares on social media, the Courts are prone to overlook the intent of the speaker, which goes contrary to the standards adopted by the ECtHR.

The terrorist threat can be seen as a legitimate concern of the Russian authorities. This is because of the long history of the Chechen wars, followed by severe terrorist attacks that caused the loss of hundreds of lives, the rise of the radical Islam in the North Caucasus, and the general threat posed by ISIL (DAESH), which has recently become more acute with Russian participation in the Syrian war. This is not a full, but only an approximate list of threats to national security, which demands countering incitement and justification of terrorism.

However, in the light of the Ukrainian conflict and seizure of the Crimean peninsula, speech condemning this and expressing disagreement with the official political line, albeit formulated in harsh and virulent terms, is more frequently being subjected to criminal cases. Such a tendency is viewed as attack on dissenting opinion. Article 280 has been frequently used in such cases.

Proportionality

Criminalization of hate speech, or criminalisation of incitement to terrorism or forcible change of the constitutional order, is only one way to combat such expressions and their negative consequences. As the most acute form of a legal impact on social processes, criminal law can only be applied under exceptional circumstances, and must serve the pro-

tection of the most important interests of the individual and society. As pointed out above, both articles are aimed at protection of the vital interests of society; namely territorial integrity, public order, and the rights and freedoms of others.

In the case of Article 282, the standards on prohibition of hate speech are applicable. As noted previously, states that are party to the ICCPR and CERD are under a direct obligation to prohibit hate speech by law. There are also numerous international and regional instruments, which call for criminalization of the most severe types of hate speech. However, the application of criminal provisions should be considered legitimate only in those cases where all other measures are deemed to have been ineffective.

Criminal sentences under Article 282 can reach up to 7 years in prison. The law, however, envisages other penalties aside from jail terms; such as fines, community service and conditional sentences. In practice, domestic courts rarely sentence perpetrators to imprisonment. More often, they choose to impose milder penalties. However, it has been observed that the application of measures provided by these laws lacks consistency, as in similar cases some courts can impose a fine, while other courts sentence to imprisonment. The recent strengthening of sanctions for conducts in question cannot be considered necessary or well justified. This is because, firstly, the previous versions of the provisions were already in accordance with international standards; secondly, jail terms are imposed quite rarely and, thirdly, jail terms may not have positive impact on the prevention of such crimes. Moreover, such amendments are likely to produce a negative effect on freedom of speech, when laws are prone to be misinterpreted and wrongfully applied.

Conclusion

This thesis has explored the issue of the compatibility of two main anti-extremist provisions of the Russian Criminal Code, namely Article 282 and Article 280, with the standards established under the ECHR in the sphere of freedom of expression.

The spread of Internet has led to greater freedom of speech than ever, along with contributing greatly to the development of society and the individual. However, it presents big challenges to national security, public safety, and the rights and freedoms of individuals. It is suggested that the anti-extremist legislation is designed to address these challenges. It provides various measures of combating extremist's activities, including speech aimed at promotion of radical ideas, calls for terrorism, hate speech and so on.

These measures include the criminalization of certain harmful expressions. However, these limitations, which anti-extremist legislation imposes, are often regarded to be too broad and their application overly extensive, which can produce chilling effects on freedom of expression and the democratic process. These concerns are particularly relevant in relation to criminal provision, comprising a part of anti-extremist legislation. Article 282 and Article 280 in this regard call for special attention, as being criminal provisions of this body of law. Their correct application is extremely important to the enjoyment of the right to freedom of speech and safeguarding the pluralism of opinions.

The study has identified several problematic points relating to the interpretation of provisions by domestic courts leading to the overly extensive application of the law. Both Articles contain vague and imprecise language, and include terms lacking legal definitions, such as the notion of a "social group" in Article 280, and "discord" in Article 280. The other issue relates to the interpretation of the requirement of publicity, which is usually considered in a formalistic manner, and is not taken into account when deciding on the gravity of the punishment.

The examination of the provisions in question, as well as consistency of their limitations established under Article 10 (2) of the ECHR, has shown that there are grounds to believe that the adopted restrictions go beyond permissible margins provided by the Convention.

Despite the fact that the aims and goals of the articles under consideration are in accordance with the ECHR, the lack of precision of their wording does not allow individuals to foresee the consequences of their actions, which means that given provisions do not satisfy the requirement of being “provided by law”. Therefore, they cannot be viewed as imposing legitimate restrictions. The proportionality of the measures undertaken has also raised concern, due to their inconsistent application and lack of consideration for the level of the threat, which prohibited speech, imposes. In the light of these consideration, recent amendments to the articles expressed in strengthening of sanctions, which were made without due attention to the wording of the law or complexities of their applications, can be seen as unreasonable and going against the principles of proportionality of the punishment.

The following recommendations concern most and foremost the formulation of articles, as a first and most important step in improving their application.

Wording of Article 282 can be significantly improved by specification of the criteria for qualification of the notion of “social group” in a way that it will serve for protection of the rights of vulnerable segments of population, instead of covering the interests of governmental officials and persons in position of power. This problem can be addressed in various ways, including through the intervention of the Supreme Court.

With the competent application of the provision by domestic courts and due consideration of the judges to the nature of the interests protected the application of the law with application of the aforementioned specifications should significantly contribute to the eradication of wrongful interpretation of the Article.

By contrast in the case of Article 280, which qualification depends almost entirely on the

definition of extremism, contained in the 2002 Federal Law, demands a distinct approach. Its application can be tangibly improved only with the radical revision of the 2002 Federal law in part containing corresponding definition, which has to be done bearing in mind its conjunction with the article in question and the composition of the entire anti-extremist legislation. Firstly, in parts it duplicates already existing provisions of the Criminal Code, namely Article 205.2 and Article 282. Secondly, as it has been demonstrated in the study, the definition of extremism contains imprecise language, which allows for the arbitrary application of this provision.

It can also be conducive to consider returning to the previous formulation of this article, providing a more comprehensive list of prohibited conducts and “untying” it from the definition of extremist activity.

As long as such amendments to the Articles in question are not made, they will be prone to be misused, constituting a threat to freedom of expression.

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