

## **Ponkin I.V. Opinion on the Judgment of the European Court of Human Rights of 17 July 2018 in the case of Mariya Alekhina and Others v. Russia**

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### **Introduction**

This Opinion contains the results of the analysis from the constitutional and international legal point of view of the content, and assessment of the legal and factual validity of the Judgment of the European Court of Human Rights (Third Section) (hereinafter – ECHR, European Court, Court) of 17 July 2018 in the case of *Maria Alekhina and others v. Russia* (Application no. 38004/12)<sup>1</sup>(hereinafter – ECHR Judgment, Judgment), including the assessment of the compliance of the Judgment issued by the European Court in this case with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 04 November 1950 (hereinafter - the Convention), the relevant protocols thereto, and the Rules of the European Court of Human Rights.

The case in question originated in the European Court of Human Rights with the application of three applicants – Ms Mariya Vladimirovna Alekhina, Ms Nadezhda Andreyevna Tolokonnikova and Ms Yekaterina Stanislavovna Samutsevich, in which they alleged that in the course of their criminal prosecution for their participation in the performance of *Punk Prayer – Virgin Mary, Drive Putin Away* carried out by the five members of the band Pussy Riot on the premises of the Christ the Saviour Cathedral of the Russian Orthodox Church in Moscow on 21 February 2012 the Russian state authorities had acted in breach of Articles 3, 5 (§ 3) and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of (hereinafter - the Convention) and that their conviction for that performance and the subsequent declaration of videos of their performances as “extremist” (implying a ban on the dissemination of such audio-visual material) had been in breach of Article 10 of the Convention.

This Opinion is drawn upon the text of the original text of the above-mentioned Judgment (as published on the official website of the European Court of Human Rights) with reference to our own translation of this Judgment into the Russian language.

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<sup>1</sup> Case of «Mariya Alekhina and others v. Russia» (Application № 38004/12) / Judgment of the European Court of Human Rights (Third Section) of 17 July 2018 // <<http://hudoc.echr.coe.int/eng?i=001-184666>>.

## **Main part**

Constitutional and international legal analysis of the content, and assessment of the legal and factual validity, of the Judgment of the European Court of Human Rights of 17 July 2018 in the case of *Maria Alekhina and Others v. Russia*, also in view of judgments issued earlier by the European Court in comparable cases, made it possible to identify multiple significant shortcomings of this Judgment which provide sufficient legal and factual grounds to declare this Judgment legally deficient, i.e. unjust, biased (subjective), lacking in substance, founded on unreliable and otherwise inadequate evidence, incidents of corruption of the actual legal meaning of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, speculations and a distorted picture of the situation with the performance of the band Pussy Riot on the premises of Christ the Saviour Cathedral on 21 February 2012.

Such significant shortcomings of the above-mentioned Judgment of the European Court of Human Rights include the following:

1) bias and ideological motivation of the European Court of Human Rights expressed in its Judgment in its presumption of the disproportionate severity of the criminal punishment inflicted on three of the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral (applicants) for this act, with the severity and the consequences of this act;

2) bias and ideological motivation of the European Court of Human Rights expressed in its Judgment in conceptual justification of anti-Christian extremist performances in contradiction to its legal stance in its judgments on previously considered comparable cases;

3) applying manipulative and other untoward techniques (substituting of thesis, semantic substitutions, substituting fact with opinion, etc.) in the Judgment of the European Court of Human Rights;

4) blatant misrepresentations of facts and false statements in the Judgment of the European Court of Human Rights;

5) a clear violation by the European Court of Human Rights, as expressed in its Judgment, of the limits of its competence and its explicit neglect of the scope of the case considered by the Russian courts.

**1. Bias and ideological motivation of the European Court of Human Rights expressed in its Judgment in its presumption of the disproportionate severity of the criminal punishment inflicted on three of the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral (applicants) for this act, with the severity and the consequences of this act**

In analysing the Judgment of the European Court of Human Rights numerous allegations made by the Court and distorting the real essence (and its subject) of this case considered in the Russian courts have been revealed, while the principal assertion which the European Court puts forward and tries to prove is that the criminal punishment allegedly imposed on the three participants of the performance staged by the band Pussy Riot in Christ the Saviour Cathedral (applicants) for this act was, in its severity, disproportionate to the severity and consequences of the act. In doing so, this conclusion is being presumed as a given, and it is this conclusion that certain assertions and statements disguised as arguments are being hitched to:

– the punishment was too severe: ***"the punishment imposed on the applicants was very severe in relation to the actions in question"*** (§ 215)<sup>2</sup>;

– ***"the applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers"*** (§ 227);

– *"the interference in question was not necessary in a democratic society"* (§ 229) – here by "interference" the European Court of Human Rights means criminal prosecution of the band members of Pussy Riot who took part in the performance in Christ the Saviour Cathedral for committing such acts (staging the performance).

The bias, legal and factual inconsistency of such position of the European Court of Human Rights, of the alleged disproportion between the severity of criminal punishment for the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral and the act they committed as well as its severity and consequences can be convincingly proved by provisions from the same Judgment of the European Court that, in fact, confirm the unlawful nature and high level of social danger of Pussy Riot's performance in Christ the Saviour Cathedral, such as:

– the European Court's acknowledgement that the participants of the performance in Christ the Saviour Cathedral were shouting rude swear words and expressions, including those of overtly obscene nature, in the course of the performance – *"Words such as "holy shit"... were audible on the video recording"* (§ 14) (these words of the "song" were also cited in § 11);

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<sup>2</sup> Passages in quotes highlighted in semi-bold shall henceforward refer to the author of the present Opinion.

– recognition by the European Court that the participants of the performance in Christ the Saviour Cathedral were "kicking their legs in the air" during this performance (§ 14), which, let it be noted, was also an implementation of a technique of mocking the believers<sup>3</sup>;

– recognition by the European Court that during the performance in Christ the Saviour Cathedral the participants of this performance were shouting out a "song" of an extremely offensive nature for the Orthodox believers (the words of this "song" are given in § 11);

– the assumption (consent, recognition) by the European Court that there may be grounds for considering and evaluating the performance of the band Pussy Riot in Christ the Saviour Cathedral as a violation of internal regulations of a religious organization: *"In the present case the applicants' performance took place in Moscow's Christ the Saviour Cathedral. It can be considered as having violated the accepted rules of conduct in a place of religious worship. Therefore, the imposition of certain sanctions might in principle be justified by the demands of protecting the rights of others"* (§ 214);

– the assumption (consent, recognition) by the European Court that *"holding an artistic performance or giving a... speech in a type of property to which the public enjoys free entry may, depending on the nature and function of the place, require respect for certain prescribed rules of conduct"* (§ 213),

– the assumption (consent, recognition) by the European Court that *"as the conduct in question took place in a cathedral it could have been found offensive by a number of people, which might include churchgoers"* (§ 225); yet such recognition by the European Court shall be speculatively denounced henceforth later in § 225 in the following statement: *"however, having regard to its case-law and the above-mentioned international standards for the protection of freedom of expression, it is unable to discern any element in the domestic courts' analysis which would allow a description of the applicants' conduct as incitement to religious hatred"* (as if existence of positions on other issues in earlier cases, partly comparable in certain aspects", yet significantly different from the case in hand, can play a pivotal role here);

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<sup>3</sup> Let it be reminded that, according to the Opinion of the of the Committee of Experts of 23 May 2012, "blatantly Impertinent, vulgar dancing and other actions undertaken by the participants of the performance and accompanied by singing the song with obscene and abusive lyrics can be assessed within the framework of existing cultural codes in the public conscience of Russians with regard to the place of this performance as "salacious", "inappropriately overtly sexual", "a behaviour of the sexually loose", as "provocative", "abusive", "sacrilegious". In doing so, certain "convulsive" body movements of the participants of the performance (throwing their arms around and kicking their legs in the air) can be evaluated in the conventional understanding of Orthodox believers as "fits of diabolical frenzy", "convulsions of the possessed".

– the assumption (consent, recognition) by the European Court that the performance of the band Pussy Riot in Christ the Saviour Cathedral "*might have appeared unacceptable to certain people*" (§ 226);

– the assumption (consent, recognition) by the European Court that "*certain reactions to the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution*" (§ 228 with reference to § 214).

In accordance with the position previously maintained by the European Court of Human Rights, "the extent of insult to religious feelings must be significant, as is clear from the use by the courts of the adjectives... to depict material of a sufficient degree of offensiveness" (§ 60 of the European Court of Human Rights Judgment of 25 November 1996 in the case of *Wingrove v. the United Kingdom*). But in the case of the Pussy Riot band the European Court of Human Rights fails to acknowledge its own legal positions expressed in conjunction with a wide variety of judgments previously issued by this Court.

## **2. Bias and ideological motivation of the European Court of Human Rights expressed in its Judgment in conceptual justification of anti-Christian extremist performances in contradiction to its legal stance in its judgments on previously considered comparable cases**

The first thing to mention here is that the European Court of Human Rights in its Judgment of 17 July 2018 in the case of *Mariya Alekhina and Others v. Russia* effectively swapped the subject matter by deciding to consider issues and statements deliberately set forth by the Court regarding the contents of the applicants' actions pronounced by the Russian court to be criminal (penal) acts. The European Court arbitrarily decided to consider and redirected the attention to other types of criminal interferences upon the objects protected by the Convention, to argue its logically incorrect statement (in fact, a substitution) that the absence of such criminal acts (a call for violence and a number of others) in the actions of the applicants means complete absence of violations of the Convention in their actions. Such a technique used in unfair polemics is called the straw man fallacy. In the Judgment of the European Court of Human Rights at hand the straw man fallacy was employed on numerous occasions. For example, it is claimed in the Judgment: "*The Court notes that the applicants' actions did not disrupt any religious services, nor did they cause any injuries to people inside the cathedral or any damage to church property. In those circumstances the Court finds that the punishment imposed on the applicants was very severe in relation to the actions in question.*" (§ 215). That is to imply that, according to the opinion of the Court, if the

participants of the Pussy Riot performance in Christ the Saviour Cathedral did not injure anybody, nor disrupt any religious services, then it should, allegedly, logically imply that the punishment imposed on the applicants was overly severe as they had not committed anything of what was mentioned by the European Court which would imply that any other negative consequences of their actions (the harm that they had caused) cannot be deemed equal or more significant in terms of the damage they had caused to the objects (rights, freedoms and other values protected by the law) protected by the Convention and the law. This statement of the European Court clearly demonstrates the obvious logical mistake made by it, which consists in deliberately reducing the totality of possible types of harm that can potentially be caused by illegal public actions in a cathedral, taking into account the import of the act.

We reasonably believe that the range of potential illegal acts committing which in a cathedral may cause harm to objects (rights, freedoms and other values) protected by the law and the Convention is not limited to the above-mentioned types of harm (disruption of worship, personal injury, and property damage).

In addition, it should be emphasised that the performance of public worship (such as the morning worship and the evening worship) does not exhaust the entire list of religious rites and ceremonies performed in an Orthodox cathedral. The judges of the European Court of Human Rights could not have been unaware of this obvious and well-known fact. For example, believers come to a cathedral not only to attend a religious ceremony (worship), held by a priest, but also at other times, when no worship is being performed at the cathedral, in order to pray, perform private religious rites and ceremonies (for example, submitting notes for the health - or lighting candles in memory - of their loved ones).

A typical method of proving a statement employed by the European Court of Human Rights in this case is to use as arguments, contrary to the actual circumstances of the case, other cases in which the essential circumstances were significantly different from the case considered by the Russian courts: *"The Court reiterates that it has had regard to several factors in a number of cases concerning statements, verbal or non-verbal, alleged to have stirred up or justified violence, hatred or intolerance where it was called upon to decide whether the interferences with the exercise of the right to freedom of expression of the authors of such statements had been "necessary in a democratic society" in the light of the general principles formulated in its case-law. One of them has been whether the statements were made against a tense political or social background; the presence of such a background has generally led the Court to accept that some form of interference with such statements was justified... Another factor has been whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance... The Court has also paid attention to*

*the manner in which statements were made, and their capacity – direct or indirect – to lead to harmful consequences... In all of the above cases, it was the interplay between the various factors involved rather than any one of them taken in isolation that determined the outcome of the case" (§§ 217–221).*

On the other hand, the European Court committed a clear logical mistake, namely, that these particular cases do not cover the whole totality of possible situations that possess a variety of forms and direct objects of interference in committing the acts involving insults to the religious feelings of believers and humiliation of their human dignity<sup>4</sup>. Therefore, as a result of the European Court of Human Rights' restrictive (narrow) interpretation of the provisions of the Convention establishing a number of grounds for an acceptable lawful restriction of rights and freedoms, the European Court considered only a few factors affecting the recognition of the act as unlawful, violating the objects protected by the Convention (rights, freedoms and other values), and effectively refused to consider in detail a number of essential aspects, parts of the act committed consisting in causing harm to such objects entitled to legal protection as human dignity. Such position of the European Court is not consistent with the Convention, since, according to the Convention, the state is obliged to recognise and protect the dignity of a person from any kind of insult, including in connection with religious faith, objects of religious worship (article 3 of the Convention – where it deals with the prohibition of degrading treatment, articles 9 and 10 of the Convention, preamble to Protocol No. 13).

If in the cases previously considered by the European Court of Human Rights, referred to in §§ 217-221 of the Judgment at issue, the criteria and approaches specified by the European Court were indeed applied by it, then it does not logically follow that all other cases related to the humiliation of human dignity will be completely similar in their essential circumstances and can be considered in a legally correct fashion according to the same pattern, being limited to consideration of only some of the essential circumstances (conditions, factors, etc.).

It is important to note that the degree of significance of each of the above-mentioned factors and circumstances taken into account by the European Court in deciding whether there was a violation of the Convention in the cases referred to in §§

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<sup>4</sup> See: *Ponkin I. V. Direct Objects of Offence at Committing of the Acts Oriented to an Insult of Religious Feelings of Believers and to Humiliation of their Human Dignity // Protection of the Human Dignity of Believers: Expert Evaluations and Materials of Cases of Insulting Religious Feelings and Humiliation of Human Dignity of Christian Believers / Compiled by: I. V. Ponkin / Institute of Government/Religious Relationship and Law. - M.: Buki Vedi, 2017. – 300 p. – P. 5–9. Ponkin I.V. In merito alla tutela dei sentimenti religiosi e della dignità individuale dei credenti // Diritto Penale Contemporaneo. – 26 Febbraio 2016. Ponkin I.V. Direct Objects of Offence at Committing of the Acts Oriented to an Insult of Religious Feelings of Believers and to Humiliation of their Human Dignity // Forensic Research & Criminology International Journal. – 2017. – Vol. 5. – No. 5.*

217-221 of the Judgment, were different. Those were not completely homogeneous and perfectly identical cases. Many of these cases can be reasonably considered significantly different in content and nature of the acts committed in comparison with the case of the performance of the band Pussy Riot in Christ the Saviour Cathedral, as, for example, completely unreferential case mentioned in § 220 "*where the statement had involved military-style marches in villages with large Roma populations, which, given the historical context in Hungary, had carried sinister connotations*".

The reduction of all possible types (forms) of socially dangerous criminal acts the direct consequence of which is the humiliation of the human dignity of believers and insulting their religious feelings, to only a few factors, namely: 1) a call for violence, 2) committing acts of violence, 3) justification of violence (§ 219 of the Judgment at issue), 4) disrupting a particular religious service (being interpreted in a very idiosyncratic way), 4) causing injuries to people inside a religious building, 5) causing damage to church property (§ 215), or identifying a factor of a certain "*tense political or social background*" (§ 218) is a logical error, a legally and factually unjustified method of proving an argument, because it implies an unfounded reduction of the totality of material circumstances and an unfounded refusal to consider other equally important circumstances of the case.

It should be noted that there are a number of cases considered by the European Court of Human Rights in which the reasoning of the Court's decisions differed significantly as far as the circumstances, factors, and evidence recognised as subject to legal protection of objects (values), and the final statements were concerned<sup>5</sup>. But in the Judgment of the European Court of Human Rights at issue, many of the legal positions previously developed by this Court are being ignored, and some are being distorted.

Degrading treatment can be enacted through intellectual forms of such treatment, as previously asserted by the European Court of Human Rights: "**treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority** breaking their physical or moral resistance" (§ 120 of the ECHR Judgment of 27 September 1999 in the case of *Smith and Grady v. the United Kingdom*). In its other judgments, the European Court of Human Rights has previously

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<sup>5</sup> See: The ECHR Judgment of 07 December 1976 in the case of *Handyside v. the United Kingdom*, ECHR Judgment of 25 November 1996 in the case of *Wingrove v. the United Kingdom*, ECHR Judgment of 20 September 1994 in the case of *Otto-Preminger-Institut v. Austria*, ECHR Judgment of 22 October 1981 in the case of *Dudgeon v. the United Kingdom*, ECHR Judgment of 24 May 1988 in the case of *Müller and Others v. Switzerland*, ECHR Judgment of 27 September 1999 in the case of *Smith and Grady v. the United Kingdom*, ECHR Judgment of 25 April 1978 in the case of *Tyrer v. the United Kingdom*.

For details see: *Ponkin I. V. Legal Positions of the European Court of Human Rights in Considering Cases of Insult of Religious Feelings of Believers // Current Issues of Public Law in Russia and Abroad: Proceedings of the All-Russian Scientific and Practical Conference in memory of A.B. Zelentsov / Editor-in-Charge A.M. Volkov. – M.: RUDN, 2011. – 571 pp. – P. 133–148.*



formulated a somewhat broader interpretation: "**it is sufficient if the victim is humiliated in his or her own eyes**" (§ 120 of the ECHR Judgment in the case of *Smith and Grady v. the United Kingdom*; ECHR Judgment of 25 April 1978 in the case of *Tyrer v. the United Kingdom*) which, however, should be considered in conjunction with legal positions in other (above-mentioned) Court decisions, since it is impossible to absolutise internal subjective experiences of a person as a criterion of objectivity of assessment. The quoted position, however, indicates that the European Court of Human Rights has previously considered (as legally significant) the perception of victims of certain actions that infringe on their rights and dignity. But in the case of the performance of the band Pussy Riot all this was completely and defiantly ignored by the European Court of Human Rights.

While the European Court of Human Rights justifiably notes the need, when making a legal assessment of an act, to determine whether it has a real capacity – "*direct or indirect – to lead to harmful consequences*" (§ 220) (this is the approach of identifying and proving the existence of a cause and effect relationship between the acts and its consequences is implemented in the decision of the Russian courts), the European Court states that "*it is unable to discern any element in the domestic courts' analysis which would allow a description of the applicants' conduct as incitement to religious hatred*" (§ 225). In doing so, the European Court unreasonably limits (narrows), legally and factually, the range of the objects of legal protection to be considered and ignores the presence and specifics of certain socially dangerous and unacceptable content and consequences of the performance of the band Pussy Riot in Christ the Saviour Cathedral.

The analysis of the acts committed and their consequences should not be exhausted only by ascertaining whether the unlawful acts committed in the cathedral caused the consequences in the form of incitement to hatred, but should consider all the essential circumstances and consequences of those actions. That is why the reduction on the part of the European Court of Human Rights of the scope of illegal actions, implemented by it in the consideration of the case and expressed in the Judgment is legally and factually unfounded.

And this obvious shortcoming cannot be compensated by mentioning in § 223 of the Judgment several non-regulatory materials (the European Court appeals to the tendentiously selected private opinions of other persons and recommendations from a number of organisations): 1) the joint submission by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance of the Office of the High Commissioner for Human Rights (OHCHR) for the expert workshop on the prohibition of incitement to national,

racial or religious hatred (Expert workshop on Europe, 9-10 February 2011, Vienna)<sup>6</sup>, 2) the Report of the European Commission for Democracy through Law (the Venice Commission) of 17-18 October 2008, CDL-AD(2008)026 on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred<sup>7</sup>, 3) the Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, of 20 September 2006<sup>8</sup>, as well as a reference in § 224 of the Judgment to 4) the UN Human Rights Committee's General Comment No. 34, Article 19: Freedoms of Opinion and Expression, of 12 September 2011<sup>9</sup>.

These materials are only an expression of private opinions of experts and a number of organisations on cases that differ significantly from the case considered by the Russian courts against the applicants. The above-mentioned materials contain some recommendations but do not have a regulatory power. The European Court of Human Rights, in referring to these materials and, moreover, relying on them as sources of evidence, mandatory guidance, or "standards" for arriving at a decision in the case under consideration is acts in a legally and factually unjustified manner.

It should be emphasised that such extracts from private subjective opinions in the Judgment of the European Court of Human Rights at issue are given in great numbers (§§101-103, 105-113, 223-224). Whether they are expressed collectively by a

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<sup>6</sup> As we have found among the sources: *Bielefeldt H., La Rue F., Muigai G.* Joint submission / OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred Expert workshop on Europe (9–10 February 2011, Vienna) // <[https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint\\_SRSsubmission\\_for\\_Vienna.pdf](https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint_SRSsubmission_for_Vienna.pdf)>.

<sup>7</sup> As we have found among the sources: Report CDL-AD(2008)026-e on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred adopted by the Venice Commission at its 76th Plenary Session (Venice, 17–18 October 2008) // <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)026-e)>.

<sup>8</sup> As we have found among the sources: Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance // <<http://repository.un.org/handle/11176/261903>>; <[http://repository.un.org/bitstream/handle/11176/261903/A\\_HRC\\_2\\_3-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/261903/A_HRC_2_3-EN.pdf?sequence=3&isAllowed=y)>; <[http://repository.un.org/bitstream/handle/11176/261903/A\\_HRC\\_2\\_3-RU.pdf?sequence=5&isAllowed=y](http://repository.un.org/bitstream/handle/11176/261903/A_HRC_2_3-RU.pdf?sequence=5&isAllowed=y)>.

<sup>9</sup> As we have found among the sources (in the Judgment of the ECHR at issue, omitting references to it and to other ones mentioned): General Comment № 34, Article 19: Freedoms of Opinion and Expression, of 12 September 2011 // <<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>; <<http://www.refworld.org.ru/category,REFERENCE,HRC,,4ed34b892,0.html>>.

group of individuals or on behalf of an organisation, it does not follow that they acquire the status of rules, standards or binding norms.

Among other things, the Judgment of the European Court of Human Rights at issue refers to ECRI General Policy Recommendation No. 15 on Combating Hate Speech<sup>10</sup>, namely, its following provision: *when determining whether a statement constituted incitement to hatred, the following elements are essential for assessment of whether or not there is a risk of acts of violence, intimidation, hostility or discrimination: (i) “the context in which the hate speech concerned is being used”; (ii) “the capacity of the person using the hate speech to exercise influence over others”; (iii) “the nature and strength of the language used”; (iv) “the context of the specific remarks”; (v) “the medium used”; and (vi) “the nature of the audience”* (§ 222). All these circumstances in relation to the performance of the band Pussy Riot in Christ the Saviour Cathedral had been exhaustively and properly investigated and confirmed by the Russian courts, but this was totally ignored by the European Court of Human Rights.

In point of fact, the Judgment of the European Court of Human Rights, instead of a conscientious objective analysis of the case considered by the Russian courts, a significant part of the Court's consideration of the case, as can be seen from the content of the Judgment, included a distortion of the import of the legal norms relating to the circumstances of the case, as well as a substitution of the facts for "arguments" based on private opinions (or representing such). In doing so, the European Court arbitrarily provides, as evidence or even regulatory grounds ("standards"), subjective opinions of experts in other cases significantly different from the case considered by the Russian courts.

Such materials include the Rabat Plan of Action on the prohibition of the propaganda of national, racial, or religious hatred that is constituted by incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by the OHCHR, in 2011 (“the Rabat Plan”) was adopted by experts in Rabat, Morocco, on 5 October 2012, referred to in § 110, the Camden Principles on Freedom of Expression and Equality on the basis of discussions involving a group of high-level UN and other officials, civil society and academic experts in international human rights law on freedom of expression and equality issues at meetings held in London on 11 December 2008 and 23-24 February 2009 (“the Camden Principles”) referred to in § 113 and a number of others.

Accordingly, the conclusion given in § 223 of the Judgment at issue (in relation to the materials referred to in §§ 223-224 of the Judgment) that *“according to*

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<sup>10</sup> As we have found among the sources: European Commission against Racism and Intolerance General Policy Recommendation № 15 on Combating Hate Speech: key points // <<https://rm.coe.int/16805d59ee>>.

*international standards for the protection of freedom of expression, restrictions on such freedom in the form of criminal sanctions are only acceptable in cases of incitement to hatred*" is legally unreasonable and logically incorrect because, firstly, the above-mentioned materials are not international standards (norms of international law), but represent private opinions, comments on international standards, and secondly, the reduction of all grounds permitted by the Convention for restricting freedom of expression and freedom of information to one single assumption (in order to prevent incitement to hatred) is clearly contrary to the Convention (Articles 9 and 10) and is a clear legal defect of interpretation.

On the contrary, the European Court of Human Rights has previously held the position that **"the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them"** (§ 47 of the ECHR Judgment of 20 September 1994 in the case of *Otto-Preminger-Institut v. Austria*). When considered by the European Court pursuant the application of the applicants, however, all this was completely and defiantly ignored.

The statement from the UN Human Rights Committee's General Comment No. 34, Article 19: Freedoms of Opinion and Expression, of 12 September 2011 (paragraph 48) brought up by the European Court as an argument (§ 224 of the Judgment) (quoted after the ECHR Judgment at issue): **"Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the [ICCPR], except in the specific circumstances envisaged in article 20, paragraph 2, of the [ICCPR]"** apparently contradicts the Convention and a number of legal positions of the European Court of Human Rights, which it had developed previously, in which restrictions on the freedom of creativity were recognized as permissible and not contrary to the Convention in cases when the exercise of this freedom was directly linked to and entailed a violation of the rights of others protected by the Convention, including the right to personal dignity.

A sweeping ban on all forms of *expression of disrespect to any religion or other belief systems*, and the spread of such a ban on all possible cases of expression that contain disrespect may indeed be regarded as contrary to the International Covenant on Civil and Political Rights, yet the assertion that the conclusion about inadmissibility of such a sweeping ban may serve as a logically foundation for full and utterly unrestrained license (permission) for manifestations of freedom of expression, freedom of self-expression, freedom of information, including those that entail a public insult to human dignity and religious feelings of believers, is totally unacceptable, unjustified

and inadmissible from a legal point of view, it has no basis whatsoever in international and constitutional law.

It is important to note certain positions of the European Court of Human Rights directly related to the public relations considered in this case: "Freedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Article 10 [of the Convention] expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may **legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory**" (§ 52 of the Judgment in the case of *Wingrove v. the United Kingdom*). The European Court of Human Rights had also previously held the position that the state has the right to take measures of public law (including criminal law) to respond in order "*to ensure religious peace in that region and to prevent that some people should become the object of attacks on their religious beliefs in an unwarranted and offensive manner*" (§ 56 the Judgment in the case of *Otto-Preminger-Institut v. Austria*). But in the case of the performance of the band Pussy Riot all these legal positions of the Court were completely, and quite defiantly, ignored.

The United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS), Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) adopted a joint declaration on Freedom of Expression and Access to Information on 9 December 2008 a provision of which, referred to in § 112 of the Judgment of the European Court of Human Rights at issue, reads, among other things (as quoted from the ECHR Judgment at issue): "***The concept of 'defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own***". Deploying this statement as an argument is an obvious application of incorrect polemic (manipulative) method of straw man fallacy, as the phrase "insult of religions" was not used in the decisions of the Russian courts upon the performance of the band "Pussy Riot" in Christ the Saviour Cathedral, nor in the expert opinions referred to in the sentence of the Russian court against the applicants. Statements on the admissibility of virtually unlimited freedoms of expression, self-expression and dissemination of information (it is on the formation of this conviction that the specified biased collection of private opinions in the Judgment at issue is aimed at) would be legally and factually unfounded. The logical consequence of those would be the de-facto license for absolutely free, unlimited mockery (even in its most brutal forms) of the religious feelings of believers and recognition, as a priority of a higher order (in terms of protection), the freedoms of

expression, self-expression and dissemination of information in relation to the protection and safeguarding of the human dignity of believers and their religious rights and freedoms. Such statements, aimed at substantiating the denial of the legal and factual possibility and the need for legal safeguards and protection through the mechanisms of the Convention of the said rights of believers, are politically and ideologically motivated and contradict the Convention.

On the other hand, it should be noted that the comprehensive analysis and teleological analysis (i.e. identification and analysis of the purposes of creating the document) of the above-mentioned documents (indicated in the Judgment of the European Court of Human Rights at issue) shows that they do not, in general, contradict (to the full extent) the position that the entire variety of forms, types and immediate objects of interferences in committing the acts that insult the religious feelings of believers and humiliate their human dignity cannot be reduced to mere "*incitement of religious hatred*" or physical violence.

It is worth noting that § 112 of the Judgment of the European Court referred to the provision of the above-mentioned Joint Declaration of 09 December 2008: "*Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests*". It is obvious that the decisions of the Russian courts are substantially consistent with this recommendation. Thus, the Russian courts ensured the protection of individual rights (a number of persons were justifiably recognised as victims) and the protection of public interests (protection of human dignity of believers, protection of sectarian peace, prevention of sectarian conflicts). In this manner, it is incorrect and misleading to refer to the provisions of this material in the Judgment as an example of international recommendations with which the decision of the Russian court does not correspond.

The Judgment of the European Court of Human Rights at issue also completely ignores the fact that acts aimed at degrading the human dignity of believers and insulting their religious feelings, in many cases, simultaneously incite hatred and enmity between believers who reasonably claim that their rights have been violated, as well as those of the supporting part of the society, on the one hand, and supporters of absolutely unlimited freedom of expression and freedom of dissemination of information, persons of aggressive anti-religious beliefs who, by way of coincidence, happen to support them in this specific case, on the other hand. In other words, there is a de-facto provocation of social conflict with signs of a religious and ideological confrontation, which is completely contrary to the objectives of the Convention.

Moreover, where we have an event of similar nature on our hands, the victims (and those who sympathise with them) almost always assess and articulate the ethnic identity and (at least, indirectly by means of such ethnic identity) the religious identity of the person who committed the above-mentioned act. And such a person is at liberty

to talk as much as (s)he likes about his/her alleged atheism and "lack of ethnicity" (as a rhetorical camouflage), yet this person will inevitably be perceived and evaluated as a representative of a certain religious and/or ethnic group, and the extremely negative feelings in response (as a justified reaction to unprovoked insult and humiliation) will in most cases be extrapolated to this religious and/or ethnic group. The ECHR Judgment in the case of *Otto-Preminger-Institut v. Austria* refers to it as "justified indignation".

And for this reason, acts aimed at humiliating the human dignity of believers and at insulting their religious feelings can be reasonably regarded as, among other things, "incitement to religious hatred."

§ 186 of the Judgment of the European Court of Human Rights provides the opinion of a certain organisation called Alliance Defending Freedom: " *when State authorities had to take action against activists who invaded a church and protested during a religious service they would necessarily be restricting those activists' freedom of speech. In the ADF's view, **the Court should look** at the context of events rather **than the particular content of the speech** when determining whether such a restriction had been proportionate*". In other words, in making its case, the Court quotes a private opinion on the total inadmissibility to decide on the restriction of freedom of speech if it is implemented in the form of intrusion and protesting during a worship in a cathedral, relying on the study of the content of the expressed speech. So the European Court puts a private opinion of a certain Christianophobic organisation on the same level as legal arguments in the protection of rights under the Convention. It is totally unreasonable to argue that a public authority should consider only a certain "context" when making a decision, while the content of the speech itself should be ignored. The European Court therefore reiterates here the argument sorely lacking in any convincing capacity in terms of its legal significance being, in essence, meritless, implementing thereby an explicit substitution. The court in this case realises an extremely incorrect, as far as ethics is concerned, manipulative technique of substituting fact with opinion.

The reference made by the European Court of Human Rights to another statement of the Alliance Defending Freedom (§§ 184-185) that "*Christians, like any other group in society, **did not have the right not to be offended. On the contrary, they had to be prepared to be "offended, shocked and disturbed"***" clearly demonstrates the European Court's approval of such (obviously incorrect) attitude towards Christians, which is expressed in imposing the acceptability of offence, hatred and intolerance, and in articulating a derogatory attitude towards Christian believers. Moreover, the European Court's presenting such an opinion as an argument with regard to which the European Court had made no critical assessments or comments constitutes the European Court's de-facto support of said opinion. But such understanding of the value of dignity and human rights adopted by the European Court paradoxically (and even absurdly) combines the recognition of the compatibility of the obligation of the state to protect

human rights (as a value) proclaimed by the Convention with the denial of the human right not to be offended and with the condition of society (positioned as normal), in which all citizens had to be prepared to be offended. In addition, the inclusion by the European Court (as an argument) of this opinion does, in essence, indicate lack of any respect to the social group of Christians among the judges of the European Court who considered this case. The extremely negative semantic orientation of this quote given by the Court in its Judgment is also expressed in its apparent contradiction to the content of the guarantees of legal protection and protection of human dignity under the Convention for the Protection of Human Rights and Fundamental Freedoms.

It is important to note that the Judgment of the ECHR of 07 December 1976 in the case of *Handyside v. the United Kingdom* referred to something else, namely, that criticism, albeit sometimes disturbing, may be acceptable but there cannot be allowed any possibility of intentional sophisticated abuse of religious feelings or mockery of the human dignity of believers.

According to the positions developed hitherto by the European Court, **the key condition for the legality and legal validity of the actions of the state restricting or suppressing freedom of expression (or other forms of self-expression) is the enforcement of such actions in order to:**

- ensure "the protection of the rights of others" in relation to attacks on their religious convictions" and "to protect the deepest feelings and convictions abusive statements" (§ 58 of the ECHR Judgment in the case of *Wingrove v. the United Kingdom*);

- protect the rights of citizens "**not to be insulted in their religious feelings**" (§ 47 of the ECHR Judgment in the case of *Wingrove v. the United Kingdom*);

- ensure "the protection of **the rights of others... for their religious feelings to be respected**" (§ 47 of the ECHR Judgment in the case of *Otto-Preminger-Institut v. Austria*);

- protect (shield) believers from such materials which **may "hurt or offend the feelings of believers"** (§ 62 of the ECHR Judgment in the case of *Wingrove v. the United Kingdom*);

- "to protect against the treatment of a religious subject in such a manner "which, by using contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit, can outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic" (§ 48 of the ECHR Judgment in the case of *Wingrove v. the United Kingdom*);

- prevent or suppress insults to "religious feelings of believers" caused by "provocative portrayals of objects of religious veneration" and "such treatment of objects of religious veneration that is likely to cause "**justified indignation**" (" (§§ 47, 48 of the ECHR Judgment in the case of *Otto-Preminger-Institut v. Austria*);



– protect citizens from being "insulted in their religious feelings by the public expression of views of other persons" (§ 48 of the ECHR Judgment in the case of *Otto-Preminger-Institut v. Austria*);

– protect believers from such materials as may appear to believers to be "**gratuitously offensive to others and profanatory in regard to objects of veneration**" (§ 52 of the ECHR Judgment in the case of *Wingrove v. the United Kingdom*);

– protect believers from such acts which may give them the impression that "**their religious beliefs were exposed to unwarranted and offensive attacks**" (§ 48 of the ECHR Judgment in the case of *Otto-Preminger-Institut v. Austria*);

But in the case of the performance of the band Pussy Riot, the European Court ignored the legal positions it had developed and failed to provide any justification for this change in its interpretation of the legal norms of the Convention and the legitimate grounds under the Convention for restrictions on rights and freedoms of the individual.

The identified logical and factual shortcomings of the reasons provided by the European Court of Human Rights for its conclusions and justifications of its decision demonstrated above, including the use of unfair and misleading arguments (within the meaning of articles 3 and 44D of the Rules of the European Court of Human Rights<sup>11</sup>), convincingly prove the partiality, dishonesty, ideological motivation and bias demonstrated by the European Court in the consideration of the case and the decision in the case at issue.

### **3. Applying manipulative and other untoward techniques (straw man fallacies, semantic substitutions, substituting fact with opinion, etc.) in the Judgment of the European Court of Human Rights.**

In the Judgment at issue the European Court of Human Rights effectively seeks to prove the absence of social danger in the actions committed by the applicants, the absence of harm from their actions to the rights, freedoms and other objects protected by the Convention eligible for protection by the state under the Convention, and thus to justify the performance of the band Pussy Riot carried out by the applicants in Christ the Saviour Cathedral. A lot of techniques were also used to do this.

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<sup>11</sup> Rules of the European Court of Human Rights (as of 01.01.2016) // <[https://www.echr.coe.int/Documents/Rules\\_Court\\_RUS.pdf](https://www.echr.coe.int/Documents/Rules_Court_RUS.pdf)>. The same is true with regard to the Rules of the European Court of Human Rights as of 01 August 2018 ([https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)) which entered into force after the Judgment at issue was adopted.

Thus, in the Judgment of the European Court of Human Rights it is repeatedly stated that after the previous performance carried out by the band Pussy Riot in the Epiphany Cathedral at Yelokhovo, no legal action were taken on the part of the state authorities against the members of the band Pussy Riot, and no negative legal consequences ensued for them in this regard: "*On 18 February 2012 a performance of the song was carried out at the Epiphany Cathedral in Yelokhovo in Moscow. The applicants and two other members of the band, dressed in bright balaclavas and dresses, entered the Cathedral, installed an amplifier, a microphone and a lamp for better lighting, and performed the song accompanied by a dance. The performance was recorded on video. No complaint to the police was made in relation to that performance*" (§ 12); "*although the Court notes that no proceedings were instituted against the applicants following their mock performance of the same song at the Epiphany Cathedral in the district of Yelokhovo in Moscow on 18 February 2012 in similar circumstances (see paragraph 12 above)*" (§ 214).

The statement of the European Court that lack of reaction from law enforcement agencies of the state to the previous performance of the band Pussy Riot (in the Epiphany Cathedral in Yelokhovo) indicates that such performance did not represent a socially dangerous act (both in itself, as well as an outwardly similar performance in Christ the Saviour Cathedral) is an obvious manipulation, since it does not take into account, firstly, the real circumstances of the events and the reasons for the inaction of these state bodies, secondly, it does not take into account the impact of the venue of the performance, Christ the Saviour Cathedral, which is a particularly significant place for Orthodox Christians, on its consequences. The fact that the relevant state bodies have not fulfilled their obligations to ensure the legal protection and protection of human dignity and religious feelings of believers in one case, does not give grounds to believe that such performances in a cathedral do not bear a serious social danger, nor does it prove the admissibility of such performances of similar content in other cathedrals. Besides, the performance in the Epiphany Cathedral in Yelokhovo was reflected in the sentence passed upon the three participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral.

Considering the decision of the Russian court to recognise the video-recording of the performance of the band Pussy Riot in Christ the Saviour Cathedral an extremist material and to ban its dissemination, the European Court refers to arguments based on the absolutisation of the right to freedom of expression and freedom of information: "*declaring the video-recordings of the applicants' performances available on the Internet as "extremist" and banning them amounted to "interference by a public authority" with the first and second applicants' right to freedom of expression*" (§ 251).

In accordance with the legislation of the Russian Federation, the Russian court lawfully decided to conduct forensic studies of the video materials containing a video

recording of the actions of the applicants in Christ the Saviour Cathedral on 21 February 2012, as it considered it necessary to obtain specialised expert assessments from experts, and then, after they were completed, considered the forensic report, evaluated the conclusions of the experts and attached the report to the case materials.

It is important to understand that the applicants were punished under criminal law for their unlawful acts in Christ the Saviour Cathedral, and the court's decision to recognise the video recording of this performance (the audio-visual material, assembled from fragments of video footage of said act and other materials after the performance in Christ the Saviour Cathedral) as extremist material was made by the court after passing the sentence upon the applicants.

A very clearly biased attitude of the European Court of Human Rights to the consideration of the case was expressed in the distorted way in which the content of the applicants' actions in Christ the Saviour Cathedral was presented in the Judgment, in terms of the presence or absence of a political protest component. This is another example of the clear bias of the European Court of Human Rights in this case, unconditional and uncritical acceptance and consent with the statement of the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral regarding the goals of their performance: "*the applicants wished to draw the attention of their fellow citizens and the Russian Orthodox Church to their disapproval of the political situation in Russia and the stance of Patriarch Kirill and some other clerics towards street protests in a number of Russian cities, which had been caused by recent parliamentary elections and the approaching presidential election*" (§ 212). What was said by the applicants is not true (respectively, the presumption by the European Court of their rightness in this part is defective), since, firstly, the applicants did not verbally express any political statements during their performance in Christ the Saviour Cathedral, secondly, the obvious actual goals of this performance (as was proven by the Russian courts) were to attract public attention to their persons (the so-called "self-aggrandizement"), as well as humiliation of the human dignity of believers, insulting their religious feelings.

The position of the Russian courts, as based on convincing evidence, that the actions of the defendants (participants of the performance of the band Pussy Riot) in Christ the Saviour Cathedral, for which they were subsequently prosecuted, had no political protest (as well as political implication or context) in it, is known to the European Court of Human Rights. This conclusion is amply confirmed in the Opinion of the Committee of Experts (comprehensive judicial psychological and linguistic examination of the criminal case No. 177080) of 23 May 2012 where it focuses on the study of the audio-video recording of the applicants' actions in Christ the Saviour Cathedral. But the European Court seeks to impose a different interpretation: «*the District Court rejected the applicants' arguments that their performance had been*

*politically rather than religiously motivated. It stated that the applicants had not made any political statements during their performance on 21 February 2012" (§ 48), resorting to unfounded questioning of the decisions of the Russian courts and insisting without evidence on its misinterpretation of what had happened.*

The European Court of Human Rights had made an attempt to present the actions of the members of the band Pussy Riot in Christ the Saviour Cathedral as an expression of political opinion, ignoring the fact that the main content and negative social consequences of this performance were the applicants' behavior in the cathedral, which insulted the dignity of believers and was accompanied by rude swear words and expressions, including obscene ones, towards the objects of worship of the believers. And this performance was designed to be widely communicated to the public by the band Pussy Riot who had invited the media, including TV journalists with video cameras, in advance by the time of their performance. The European Court's excessive politicisation of the unlawful criminal act committed by the applicants: "*the applicants wished to draw the attention.... to their disapproval of the political situation in Russia*" (§ 212), can be explained, as we reasonably believe, by the fact that according to the practice of interpretation and application of the Convention by the European Court, the limits of freedom of public expression of political opinion are much wider than the limits of freedom of expression of other opinion, i.e. the case law of the European Court of Human Rights follows the position developed by this Court on the inadmissibility of the restriction of freedom of expression of political views, except for the possibility of restrictions on several grounds, including stirring up religious or ethnic hatred or enmity.

The European Court of Human Rights did nothing to refute the well-founded allegations that there had been no political element in the applicants' performance, nor did it present any convincing evidence that it was the political objectives that were the objectives of the performance, and not anything else.

At the same time, the European Court ignored the evidence in the Russian court's decision that the applicants' actions in the cathedral were motivated by religious hatred and enmity, specifically by hatred against a social group (Christian believers), and not politically motivated. In particular, one of the proofs is that no political statements were made by the applicants during their act of hooliganism in the cathedral (this is confirmed by the audio-video recordings of the applicants' actions in Christ the Saviour Cathedral examined by the Russian court).

That is, the statement that the main purpose of the performance was the expression of political beliefs in an artistic form is nothing but an unsubstantiated repetition in the Judgment of the statement of the persons responsible for committing these actions, using a manipulative method of substituting fact with opinion, contrary to the principles of objectivity and adversarial justice. Accordingly, the statement about

the political nature of the performance in § 212 (with reference to §§ 7-8) of the Judgment of the European Court at issue is a repetition of the rhetorical cover made up by the applicants in advance in case of a criminal prosecution of the participants of the performance.

It should also be noted that in its Judgment the European Court of Human Rights takes a very selective approach to assessing the evidence considered by Russian courts and underlying the decisions of Russian courts. Thus, the Opinion of the Committee of Experts (comprehensive judicial psychological and linguistic examination of the criminal case No. 177080) of 23 May 2012 specified in the text of the sentence of the Russian court on this case is being unjustifiably ignored. The European Court only formally pointed out (in the context of a chronological presentation of events) to this opinion in §§ 29, 35, 50, 51 of its Judgment, but does not consider its conclusions, as well as the circumstances identified by the experts to prove their conclusions, and completely ignores them. At the same time, the European Court of Human Rights dwells in detail on the criticism of a certain conclusion of the Institute for Cultural Research on a related topic, the banning of the video recording of said performance of the band Pussy Riot in Christ the Saviour Cathedral (§§ 76, 261-262). Such approach also clearly indicates the pronounced and demonstrative bias of the European Court of Human Rights in the case at hand.

The bias of the European Court is expressed, among other things, in the phrase of the Judgment at issue, which can only be called sympathy and support for the anti-Christian extremist performance: "*The attempt was unsuccessful, as cathedral guards quickly forced the band out*" (§ 13).

The characteristic of completeness (and effectiveness), expressed in the Judgment of the European Court of Human Rights with regard to the actions of the participants of the performance of the band Pussy Riot as a failed "**success**", in relation to the anti-Christian extremist action aimed to humiliate the human dignity of Orthodox believers and to insult their religious feelings indicates that the judges of the European Court of Human Rights do not understand or consciously ignore the inadmissibility of such characteristics in relation to illegal actions. The performance was held, it attracted the attention of a wider public, as was proved by the court (it is not only about the Opinion of the Committee of Experts of 23 May 2012, but also about numerous testimony and other case materials). And this has been grossly ignored by the European Court of Human Rights in its Judgment.

Sheer cynicism characterizes the European Court's deliberately false reference to the actions of the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral the attributes of praying and making the sign of the cross: "*Two cathedral employees grabbed the first applicant and another band member dressed in pink. She ran away from the security guard, while the second applicant **kneeled down***"

*and started making the sign of the cross and praying. The band continued singing, kneeled down and started crossing themselves and praying" (§ 14).*

In fact, the pejorative and insulting, overtly mocking in its content and form, actions of participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral can by no means be described by words "crossing oneself" and "praying". The focus of this performance on a sophisticated, cynical expression of obvious disrespect and grossly disparaging, mocking attitude to the social group of Orthodox believers, on the implementation of an extremely negative psychological impact on the involuntary viewers who were present in person in a religious building (Christ the Saviour Cathedral), and on the viewers who viewed the audio-video recording of the performance in the Internet, was ensured by the use of a number of techniques by the participants of the performance. Among these techniques were making chaotic and meaningless movements with her arms by a participant of the performance (who was in a red dress, blue tights and a cadmium orange balaclava mask), this deliberately and clearly not being an Orthodox ritual action (in its exterior form, these actions included incorrect and unnecessary movements), it was a mockery of making the sign of the cross by Orthodox believers (as an stand-alone religious rite, expressed by a believer in crossing himself with a simultaneous appeal of prayer to God or the saints religiously revered by him). The scoffing mockery of Orthodox liturgical chants by the participants of the performance is reasonably considered to be equally insulting for the believers. The conclusion that the participants of the performance did not cross themselves and did not pray, but consciously, publicly and explicitly mocked it in a humiliating and pejorative way becomes evident from watching the video recordings of said performance.

The fact that the European Court of Human Rights repeated many times in its Judgment that the participants of the performance "prayed" and "crossed themselves" indicates **the obvious bias and dishonesty of the European Court** in this case, as well as the fact that the circumstances of the case, in fact, had not been properly considered and investigated by the European Court.

The assessment of such actions of the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral by the European Court of Human Rights as prayer and ceremony is in itself a blatant mockery of both justice and human dignity of believers.

Among other things, such a distorted understanding by the judges of the European Court of Human Rights of what constitutes (and what does not constitute) a religious rite or ceremony may indicate their critically insufficient professional qualifications (level of competence) to decide on the matters regarding protection of the dignity of believers and religious rights and freedoms.

We reasonably believe that in a similar way the bias of the European Court is expressed, to a certain extent, in the description in its Judgment of jerking (convulsive), deliberately shocking and provocative body movements of the participants of the performance of the band Pussy Riot during their performance in Christ the Saviour Cathedral through the use of the lexemes "dance" (§ 12) and "to dance" (§ 14): "*The applicants and two other members of the band wearing brightly coloured balaclavas and dresses entered the cathedral, set up an amplifier, a microphone and a lamp for better lighting and performed the song **while dancing***" (§ 12); "*At the same time four band members, including the first two applicants, continued singing and **dancing** on the podium, kicking their legs in the air and throwing their arms around*" (§ 14). Although it is obvious that in this situation (the performance of the band Pussy Riot in Christ the Saviour Cathedral) it is impossible to assess the movements of the participants as a "dance" (in the conventional sense of the word, even with its broadest interpretation).

The manipulation of vocabulary is intended to help to create the appearance of the European Court providing some arguments in support of its biased position.

Everything mentioned above points to the initially biased attitude of the judges of the European Court to the case and the applicants and determines its subsequent judgments and conclusions.

Of similar nature is the refusal of the European Court of Human Rights to adequately (at least tentatively neutral) designate, qualify the performance of the band Pussy Riot in Christ the Saviour Cathedral. On the contrary, the European Court expresses complete solidarity with the band Pussy Riot and, following that band, laudably (with effective imitation) refers to the performance of the band Pussy Riot in Christ the Saviour Cathedral by the use of an accidental phrase "**punk prayer**" (albeit in conjunction with the name of the performance assigned to it by the members of the band Pussy Riot, and italicized): "*On 21 February 2012 five members of the band, including the three applicants, attempted to **perform Punk Prayer** – Virgin Mary, Drive Putin Away from the altar of Moscow's Christ the Saviour Cathedral. No service was taking place, although a number of persons were inside the Cathedral*" (§ 13); "*In the meantime, investigators ordered expert opinions to determine whether the video-recording including **the performance of Punk Prayer**...*" (§ 28); "*who, while not witnesses to the actual performance, had watched the video of **Punk Prayer***" (§ 49); "*video of their performance of Punk Prayer*" (§ 70).

It is obvious and well-known that no "punk prayer" as an individual kind (type, form, etc.) of a creative performance, let alone a religious rite or ceremony, exist. That is to say that here, too, the European Court clearly and openly accepts the vocabulary of the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral, as expressing the real picture of what had happened, and thus, to a certain extent, expresses solidarity with their alleged position that it is unacceptable to prohibit

the performances declared (represented) as an expression of a political position, regardless of the venue of their performance and regardless of their consequences for the rights and dignity of any social group on the basis of attitude to religion.

The disregard of the European Court of Human Rights of the general legal principle of objectivity of justice and the requirements arising from it is revealed in virtually every statement and conclusion of the Court in the Judgment at issue.

The actions of the European Court of Human Rights in the present case, as described above, are obviously characterized with bias, preconception, negligence, and therefore come into gross contradiction with the provisions of paragraph 1, article 3, article 44D, etc. of the Rules of the European Court of Human Rights<sup>12</sup>, with the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its relevant protocols.

#### **4. Blatant misrepresentations of facts and false statements in the Judgment of the European Court of Human Rights**

In the Judgment at issue the European Court of Human Rights attempted to significantly reduce the social danger, the negative consequences, including harm to the rights and dignity of citizens, and other features of the performance of the band Pussy Riot in Christ the Saviour Cathedral, characterising its negative impact on society and on social values and public interests protected by the Convention and by national legislation.

The European Court asserts in its Judgment that "*the applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers*" (§ 227). This statement is not true, because the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral did, in fact, incite hatred, by directly insulting believers in that the applicants publicly mocked the religious feelings and human dignity of believers through explicitly humiliating offensive actions, including rude abusive (even obscene) words and expressions, to Virgin Mary and God and to all who had in person seen it in Christ the Saviour Cathedral and who had seen, or would see, it on the video in the Internet, taking into account that these actions were committed in a place for worship particularly revered by

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<sup>12</sup> Rules of the European Court of Human Rights (as of 01 January 2016) // <[https://www.echr.coe.int/Documents/Rules\\_Court\\_RUS.pdf](https://www.echr.coe.int/Documents/Rules_Court_RUS.pdf)>. The same is true in respect of the Rules of the European Court of Human Rights as of 01 August 2018 ([https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)) which entered into force after the Judgment at issue was adopted.



all Orthodox believers (Christ the Saviour Cathedral). And it had been proved and confirmed to the full by the Russian courts.

The following statement in the Judgment at issue is likewise obviously not true: *"The Court observes that in the case at hand the applicants were convicted of hooliganism motivated by religious hatred, on account of the clothes and balaclavas they wore, their bodily movements and strong language"* (§ 225). This statement of the European Court completely distorts the picture of the event. The participants of the performance were convicted of a criminal offence **not on the basis** that they were wearing masks and some other specific elements of clothing, nor in connection with it. The bodily movements of the participants of the performance of the band Pussy Riot in Christ the Saviour Cathedral were not harmless, nor accidental, but represented a pronounced mocking behaviour. And the language was not just "strong", but rude and abusive, including obscene vocabulary.

In the Judgment of the European Court of Human Rights it is repeatedly, and without substantial grounds, stated that in the course of the trial of the band Pussy Riot, allegedly, no exhaustive evidence of wrongdoing of the defendants were presented, and that the Russian courts were allegedly engaged in arbitrary decision-making:

– that the domestic courts had not conducted the analysis of the context of the "performance" of the band Pussy Riot in Christ the Saviour Cathedral (§ 226); – it is a false statement, since, on the contrary, it was shown in the decision of the Russian court how vital was the place of the performance as a significant factor, largely determining the scale of negative social consequences of the performance as insulting the believers and humiliating their dignity, taking into account the traditions and culture of the Russian society;

– that *"the domestic courts failed to adduce "relevant and sufficient" reasons to justify the criminal conviction and prison sentence imposed on the applicants and the sanctions were not proportionate to the legitimate aim pursued"* (§ 228); this is also not true, since the courts had thoroughly substantiated and confirmed the existence of legally and actually significant, valid reasons and grounds for the specific criminal liability applied in the case described;

– that *"the virtual absence of reasoning by the domestic court makes it impossible for the Court to grasp the rationale behind the interference... in the light of the lack of reasons given by the domestic court, the Court is not satisfied..."* (§§ 263–264); and this is also untrue, since the courts have thoroughly substantiated, argued their positions.

The above-mentioned arguments of the European Court of Human Rights are obviously false statements, they distort the actual content of the criminal process and the written decision of the Russian court. However, the European Court did not provide any valid and convincing evidence of its allegations in its Judgment.

Several times the European Court stated in its Judgment that **the defendants were not given any opportunity to defend themselves** and use the necessary legal instruments for their defense:

*"in fact, the applicants were unable to contest the findings of the expert report relied upon by the domestic court as **none of them were able to participate in the proceedings.**" (§ 265);*

*"the Court observes that it was not a particular shortcoming in their case which meant that the applicants were unable to participate in the proceedings, but because of the state of the domestic law, **which does not provide for concerned parties to participate in proceedings under the Suppression of Extremism Act** " (§ 266);*

*"under the domestic law **an applicant was unable effectively to contest criminal charges brought against him**, , as he was either not allowed to adduce evidence of the truth of his statements, or to plead a defence of justification" (§ 266);*

*"the proceedings instituted in order to recognise the first and second applicants' activity or materials belonging to them as "extremist", in which **the domestic law did not allow their participation**, thereby depriving them of any possibility to contest the allegations made by the public authority that brought the proceedings before the courts, cannot be found compatible with Article 10 of the Convention" (§ 267).*

The foregoing statements and assessments of the European Court of Human Rights are untrue and distort the actual state of affairs. In fact, the applicants were granted all the necessary and sufficient opportunities provided by law for defense in criminal proceedings, when their specific act was being considered (the performance of the band Pussy Riot in Christ the Saviour Cathedral). There are video recordings of broadcasts of court sessions, which were and are available to any interested party. The necessary number of lawyers defended the applicants and attended the court sessions and took part in them. It was clearly seen on the video broadcast of the court session, that the defendants actively discussed the text of the forensic examination and other case materials, expressed their objections, and their lawyers also actively discussed them. The European Court did not provide any proven facts, documentary evidence or other evidence of its allegations and conclusions that the defendants had no opportunity to defend themselves.

As for the trial concerning recognition of the video-recording of the specified performance of the band Pussy Riot in Christ the Saviour Cathedral as extremist material, it was based on a prejudice: the proof (within earlier criminal proceedings) of illegality of the actions of the applicants. To single out and to consider the case on declaring the video-recording of the performance as extremist material as a separate stand-alone case is legally and factually unjustified, such manipulations certainly distort the facts of the case.

Clearly false is the statement in the Judgment of the European Court that after the performance carried out by the band Pussy Riot on 18 February 2012 in the Epiphany Cathedral in Yelokhovo "*no complaint to the police was made in relation to that performance*" (§ 12). Such statements had, indeed, been made. But the European Court uses this false statement to reinforce and justify the imposed (untrue) idea that the performance of the band Pussy Riot in Christ the Saviour Cathedral did not bear any significant social danger, but the Russian courts committed numerous violations while hearing this case in Russia.

The following statement of the European Court is clearly not true: "*The Court notes that the domestic courts convicted the applicants of hooliganism motivated by religious hatred and enmity, committed in a group acting with premeditation and in concert, under Article 213 § 2 of the Criminal Code. It is significant that **the courts did not examine the lyrics of the song Punk Prayer – Virgin Mary, Drive Putin Away performed by the applicants, but based the conviction primarily on the applicants' particular conduct***" (§ 216 of the Judgment).

In reality, the domestic courts (several instances in which the case was tried) had exhaustively examined this issue, and the European Court of Human Rights deliberately distorts the events and circumstances of the case (it cannot be excluded that the European Court was misled by the applicants and did not verify the information received from them). The criminal procedure legislation of any European state provides for the possible engagement of an expert opinion, and this was done, and the materials of the expert studies conducted were considered by the court during the hearing, and the court evaluated and attached the relevant report to the case materials.

The following statement of the European Court of Human Rights is also untrue: "*The domestic courts did not examine whether the applicants' actions could be interpreted as a call for violence or as a justification of violence, hatred or intolerance. Nor did they **examine whether the actions in question could have led to harmful consequences***" (§ 226).

In reality, the Russian court exhaustively investigated this issue, in particular, it was thoroughly analyzed in the Opinion of the Committee of Experts (comprehensive judicial psychological and linguistic examination of the criminal case No. 177080) of 23 May 2012, which was examined by the court, attached to the case file and reflected in the text of the sentence.

It should also be noted that the European Court of Human Rights has in some cases virtually replaced the content of the legal document cited or referred to. Thus, the Shanghai Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001, referred to in § 111 of the Judgment of the European Court, is misinterpreted by the Court in its Judgment with the removal of norms from the context and with a clear disregard for the scope and specificity of its regulation. Said Shanghai Convention, in

fact, does not deal with issues related to the perpetration of unlawful acts in the form of "performances" on grounds of religious intolerance, hatred, enmity, does not deal with issues of humiliation of the human dignity of believers in audiovisual or text materials, being devoted to a different segment of the total array of illegal acts.

### **5. A clear violation by the European Court of Human Rights, as expressed in its Judgment, of the limits of its competence and its explicit neglect of the scope of the case considered by the Russian courts**

It should be noted that the European Court of Human Rights went far beyond the subject-matter scope of the case, having carried out not an objective analysis of the decisions of the Russian courts, but having, for all intents and purposes, acted as a lawyer for the Pussy Riot band. This is evidenced, among other things, by the fact that the "Circumstances of the Case" section of the Judgment refer to the information of numerous other acts (performances) of the band Pussy Riot preceding the performance in Christ the Saviour Cathedral that is not related to the actions of the applicants in Christ the Saviour Cathedral (§§ 6-10).

The performance for which the Pussy Riot band members were convicted was a separate event. And setting this performance arbitrarily on par with the band's previous acts in order to form an opinion about any continuity in the chain of these acts (allegedly justifying them) is completely unjustified in legal, as well as factual, terms. From the fact that the band Pussy Riot had, on numerous occasions, previously carried out scandalous events that did not qualify as criminal offences under any article of the Criminal Code of the Russian Federation<sup>13</sup> (with the exception of the performance of the band Pussy Riot at the Epiphany Cathedral in the district of Yelokhovo in Moscow on 18 February 2012, which has certain attributes to qualify it as a crime, despite the fact that law enforcement agencies decided not to get involved), it does not follow that any of their subsequent performances cannot be examined nor qualify as a criminal offence. The performance carried out by the Pussy Riot band at the Epiphany Cathedral in the district of Yelokhovo in Moscow on 18 February 2012 demonstrates, among other things, that the choice of the place of the next performance (Christ the Saviour Cathedral) was made consciously and deliberately.

In other passages of its Judgment the European Court of Human Rights repeatedly goes beyond the subject matter of the case considered by the Russian courts.

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<sup>13</sup> Criminal liability for such acts is also established in other countries of the world. See selected references as of June 2018: *Ponkin I. V.* Review of Foreign Legislation on Criminal-Law Protection of Religious Feelings and Human Dignity of Believers // *Moral Imperatives in Law.* – 2018. – No. 1. – P. 3–16.

For instance, the Judgment of the European Court states that "*the foregoing considerations are sufficient to enable the Court to conclude that declaring that the applicants' video materials available on the Internet were extremist and placing a ban on access to them did not meet a "pressing social need" and was disproportionate to the legitimate aim invoked*" (§268). In this statement the European Court clearly went beyond the scope of its competence.

The pressing social need is indeed to protect society from the influence of extremists, including those who, under the pretext of freedom of expression or freedom of creativity, effectively offend religious citizens and humiliate their human dignity by mocking in public the objects they worship or respect.

The European Court of Human Rights does not have the right, nor is it competent to assess and imperatively specify what, and to what extent, is or is not socially dangerous for the Russian society and the state and to determine what measures (and to what extent) are permissible to be employed by the state authorities of the sovereign Russian state to protect the rights and freedoms of its citizens from extremist acts, and the limits for such restrictions.

In its legal positions, as developed hitherto, the European Court of Human Rights had repeatedly stated that there is no, nor can be, a single set of fully unified legal standards for the protection of religious feelings of believers in all European countries. The Court claimed that the state authorities of individual countries were better informed and more effective than the international court in determining the requirements necessary to protect religious and moral feelings from abuse: "**in the field of religious convictions there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place**, especially in an era characterised by an ever growing array of faiths and denominations" (§ 58 of the Judgment in the case of *Wingrove v. the United Kingdom*); "As in the case of "morals" **it is not possible to discern throughout Europe a uniform conception of the significance of religion in society...**; even within a single country such conceptions may vary. For that reason it is **not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others**. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference" (§ 50 of the Judgment in *Otto-Preminger-Institut v. Austria*). In other words, in its earlier decisions the European Court of Human Rights reasonably recognised the right of the state to determine, at its sole discretion, the proportionality of liability for the sake of prevention and suppression of such acts. In the case of the

performance by the band Pussy Riot, however, the above-mentioned legal positions of the European Court of Human Rights, as developed hitherto, had been completely, and without specifying any grounds and reasons, ignored.

The ban on disseminating audiovisual material that offends religious feelings and humiliates the human dignity of believers cannot be assessed in the circumstances of the case as an "*interference*", and the European Court's denial that such a ban is lawful and "*necessary in a democratic society*" (§ 268) is ideologically and politically motivated.

The state's refusal to apply, as prescribed by the law, the above-mentioned measures to prohibit the dissemination of materials insulting citizens on the basis of their attitude to religion would mean a free license to commit acts that constitute, in essence, an abuse of freedom of opinion, freedom of expression and freedom of dissemination of information and that have an offensive effect on the dignity of believers, religious objects or objects respected by them, and their other core values. This would eventually entail a gross violation of the rights of religious citizens, which cannot be recognised as justified and permissible in a democratic state based on the rule of law.

It is important to note that, in practice, there are no serious obstacles for the citizens of the Russian Federation to express their political persuasions and demands publicly. Moreover, such public events are often held in accordance with the procedure established by the Federal Law No. 54-FZ "On Assemblies, Meetings, Demonstrations, Marches and Picketing" of 19 June 2004, in many cities of Russia, including Moscow, and harsh criticism and political demands to the head of the state and Government leaders can often be heard at them. It should be noted, however, that acts that incite national or religious hatred and enmity and are recognised by the court as extremist under the law are being suppressed in any state.

The adoption by the state court of a decision to suppress extremist acts aimed at humiliating human dignity and insulting religious feelings of believers cannot therefore be regarded as an interference with the rights of citizens, but is a legitimate suppression of those who violate prohibitions, as imposed by criminal law, to abuse such rights and freedoms.

Among the arguments and submissions employed by the Court referred to in the text of the Judgment of the European Court of Human Rights that testify to the well-defined ideological and political motivations of the Court in the consideration of this case, it is reasonable to highlight the following vivid example: "*Finally, ARTICLE 19 submitted that **the repression of civil society activists in Russia had increased significantly in 2012.** They referred to a number of examples in 2012-13 where such activists had been subjected to physical attacks, administrative penalties for online publications, fabricated criminal charges and even kidnapping*" (§ 194). This quote is a

private opinion of an individual organisation with which the European Court expresses solidarity and in which it is claimed, without any convincing proofs, that political repressions in Russia are widespread, their numbers are increasing significantly. Through including this quote which describes Russia as a country where more and more repressions of "civil society activists" are being committed, the European court employs in its Judgment a technique whereby the legal analysis of the Russian court's decision is being replaced by a politically biased review of what appears to be the situation in Russia and the identification (more precisely, artificial construction, making up) of factors that can be used as justification for the acts committed by the applicants.

As set out by the European Court of Human Rights in its Judgment, the opinion about the persecution in Russia is perfectly irrelevant to the case at issue, but it shows how ideologically motivated the interest of the European Court in representing the Russian Federation as a state in which repressions of "civil society activists", fabrication of criminal cases and even "kidnapping of activists" are common practices and the state has failed to take adequate measures to combat these phenomena, thus creates a very negative image of the Russian state. In the Judgment of the European Court at issue this is obviously done in order to justify the position of the applicants who are interested to present themselves as representatives of political beliefs "in an artistic form" in the environment of "a repressive state". In reality, however, the applicants purposefully and consciously selected one of the main Orthodox churches in Russia as a place of committing their extremely offensive, for Orthodox believers, actions, and committed an act of public insult to believers and humiliation of their dignity through public mockery of the objects religiously revered by Orthodox believers, and subsequently posting on the Internet edited videos containing a video recording of the performance carried out by them with the soundtrack of their "song" called *Punk Prayer – Virgin Mary, Drive Putin Away*, containing rude (including obscene) words and expressions addressed to God and Virgin Mary religiously worshipped by believers, as well as insults addressed to the head of the Russian Orthodox Church, Patriarch Kirill religiously respected by Orthodox believers (the text of the "song" is given in the ECHR Judgment).

## **Conclusions**

1. The Judgment of the European Court of Human Rights (Third Section) of 17 July 2018 in the case of *Maria Alekhina and others v. Russia* (Application no. 38004/12) on the performance of the band Pussy Riot on 21 February 2012 at the Christ the Saviour Cathedral has substantial legal shortcomings clearly expressed by lack of substance in numerous allegations and conclusions it contains, employs dubious manipulative techniques, contains a number of contradictions, a lot of speculations,

arbitrarily contrived and false claims, as a result of which it is, on the whole, reasonable to declare this Judgment unfair, biased, lacking in substance, and unreliable, and the decision on the merits of the case contained therein is legally and factually unfounded and biased which is contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 04 November 1950 (as amended), the relevant protocols, and the Rules of the European Court of Human Rights.

2. The European Court of Human Rights, in examining the case at issue and in its Judgment, has clearly exceeded the bounds of its regulatory competence.

17 September 2018

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