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The Concept of Hooliganism in Putin's Russia:
A Convenient Charge to Control Inconvenient People?

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Abstract

Freedom of expression is a human right demanding state actors to exercise a delicate balance. The paper examines the Russian charge of hooliganism as a possible constraint to freedom of expression. The aim has been to find out whether the charge is in accordance with legal standards protecting the right of freedom of expression which Russia is applicable to. If arbitrarily applied, it may also run contrary to the Russian Constitution. Modern day hooliganism cases are set against the background of and compared to relevant international law and the Soviet history and context, as well as against the civil and political development in Russia in recent years. The paper examines how the charge has been applied in recent high profile hooliganism cases. It demonstrates how the hooliganism charge has re-emerged as a tool to silence political dissent after the re-election of president Putin in 2012. Had Russia made a more efficient transition from totalitarianism, the charge would most probably have been more difficult to re-introduce. Extensive media attention is almost a prerequisite for the authorities to use the charge, indicating that humiliation and fear of political opposition, even the slightest, felt by the political establishment, is likely to precede a hooliganism charge.

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Introduction

When hearing the term hooliganism, or hooligan, the first thing probably coming to the minds of people in the west is images of football hooligans. Literature fans might conjure up images from Anthony Burgess' *A Clockwork Orange*¹ in which the main characters were described as Hooligans.

For most Russians, however, the term hooligan and hooliganism holds much more meaning, as it has been one of the most common crimes in Russia since the beginning of the 18th century, when it first appeared and especially during the Soviet era when it was used heavily. It was not just a petty crime, but for most of Russia's history it has been the very serious crime of showing disrespect for the Soviet authorities and society.

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Having said that, most western Europeans would probably first think of football hooligans when they hear the term hooligan, it must be pointed out that this has most likely changed since early 2012 when Russia was preparing itself for the presidential elections, and allegedly pre-arranged elections, of Vladimir Vladimirovich Putin, the current president of the Russian Federation who was first elected president in 2000 and was in power for eight years until he was again re-elected in 2012 after serving as prime minister during the four years between.³ The most famous hooligans in Russia, and by this stage also internationally, is the punk band Pussy Riot that staged a concert in Moscow's main cathedral in March 2012, in order to bring attention to the blurred lines between president Putin and the Orthodox church.⁴

The Pussy Riot is indeed the most famous modern hooliganism case, but during the same time frame two other similar cases in which the offenders were charged with

¹Burgess, 2012, *The Clockwork Condition*

²LaPierre, 2012, p. 3

³ Encyclopaedia Britannica, Vladimir Putin

⁴ Hoyle, 2013, *What Happened to Pussy Riot*

hooliganism also appeared. The criminal charge of hooliganism is described as "... a gross violation of the public order which expresses patent contempt for society, attended by violence against private persons or by the threat of its use, and likewise by the destruction or damage of other people's property...".⁵ The first was the Arctic 30 case⁶, where 30 Greenpeace activists tried to board a Russian oil rig in September 2013, with the intent to bring attention to the alleged oil exploitation in the Barents sea. Several of the activists were first charged with piracy, but this was later dropped and instead they were charged with hooliganism. Another case which this paper will also examine in more detail is the case of Petr Pavlensky⁷, a political performance artist, who in November 2013 nailed his scrotum to the Red Square in Moscow in order to bring attention in "...a metaphor of apathy, political indifference, and fatalism of Russian society...".⁸ He was also charged with hooliganism but due to a lack of evidence, the charges against him were dropped in April 2014.⁹

Current research will examine this quintessential Russian charge of hooliganism in order to find out whether in fact the charge itself, as well as how it has been applied in the recent media attention cases, is in accordance with international legal standards protecting the right to freedom of expression and which Russia is applicable to, and whether the charge can be said to exist in Russia with the possibility of being arbitrarily applied, because of poor transitioning from the Soviet era, and also, to a certain extent, whether this can be interpreted as a return to Soviet legal practice, as often claimed.

Due to my interdisciplinary background, the paper will not offer a purely legal analysis of hooliganism, but will rather look at it from a broader perspective, hoping to gain some general understanding of how and why it was re-introduced with the alleged intent to silence political opposition in 2012 and to what extent the charge is in accordance with international law.

Having lived in Russia myself on several occasions, first in the immediate aftermath of the collapse of the Soviet Union in 1992-1993, and during a second period immediately

⁵ The Russian Criminal Code Article 213

⁶ Coleman, 2013, Greenpeace Arctic 30: A Shift in Focus for Campaigners

⁷ Walker, 2014, Petr Pavlensky: Why I Nailed My Scrotum to Red Square

⁸ Ibid

⁹ Rapsinews.com, B, 2014, Case Dropped Against Self-Mutilating Artist

after the inauguration of president Vladimir Putin in 2000-2004, I take a personal interest in the country and in understanding in what direction it is currently moving. Coming from a family of journalists, the right to freedom of expression also holds a special place in my heart. It is mainly these two aspects combined which have brought me to want to find out more about the specific issue of the re-emergence of stifling political speech in Russia today. My approach to the subject matter is a hermeneutic one, i.e. I will try to seek understanding, rather than to provide an authoritative reading of the matter.¹⁰

As will be found out, the charge of hooliganism with the intent to silence political dissent is by no means the only method introduced in Russia in the recent years having had detrimental effects to the level of protection of free speech. Nor is it perhaps the worst. However, this paper will focus on the aspect of the recent developments regarding the civil and political rights protection in Russia.

What adds to the relevance of the study, in addition to the declining protection of civil and political rights protection in Russia in general, is that while this paper was being written one of the members of Pussy Riot, Nadezhda Tolokonnikova (1989), made an official appeal to the Russian Constitutional Court in June 2014 seeking for the law of hooliganism to be revised. Tolokonnikova stated that "*...We believe that article 213 of the Criminal Code on 'hooliganism,' which was used to charge the members of the punk group [Pussy Riot], runs contrary to several provisions of the Constitution, including the article that guarantees freedom of expression...*"¹¹.

In June 2012 the three women also applied to the European Court of Human Rights claiming violations of article 10, 3, 5 and 6 of the ECHR.¹² Greenpeace has also filed for compensation in March 2014 from Russia through the European Court of Human Rights for the illegal detention of the activist involved in the Arctic 30 case under the charge of hooliganism¹³, which according to their lawyers was a violation of their right to freedom of expression.

¹⁰ Patel & Davidson, 2003

¹¹ The Moscow Times Newsdesk, 2014, Pussy Riot's Tolokonnikova Wants Hooliganism Charge Removed from Law Books

¹² Maria Vladimirovna Alekhina and others against Russia (19 June 2012) No: 38004/12

¹³ Meikle, 2014, Arctic 30 Protesters Seek Damages from Russia

It would appear that the debate surrounding article 213 in the Russian Criminal Code is not a matter that will be forgotten anytime soon.

The most severe limitation to this research has been the time constraint which has prevented some possibly interesting methods and avenues from being explored.

After introducing the relevant international law and the history and development of freedom of expression both internationally and in Russia I will move on to discussing the situation of the civil and political development in Russia in the recent years and what the situation looks like today.

In order to successfully answer the research question, whether article 213 of the Russian criminal code is in accordance with international law, I will then begin by comparing the charge with the international legal standards applicable to Russia.

I will also examine how the charge has been applied in the most recent and “extreme” hooliganism cases of the last few years in order to see whether also the application of the law is in accordance to relevant international standards.

In addition to the legal analysis of the charge and how it has been applied I will also compare the current context in Russia with the past when hooliganism was used for silencing political dissent in order to identify possible similarities and differences hoping that this will give some indication of what direction Russia is moving in with regards to the protection of civil and political rights protection.

I will also examine what impact the poor transitioning of Russia after the collapse of the Soviet Union has had on the alleged attempts to use the charge of hooliganism to silence political dissent.

1.The Framework

The current chapter will begin by introducing the reader to the global and European standards to the right to freedom of expression and its limits, which will be discussed with the charge of hooliganism in mind. Secondly it will continue by giving a brief historical background to the Soviet Union and the years after up until today, with specific focus on human rights and freedom of expression.

1.1. The International Standards on Freedom of Expression

Freedom of Expression is a right with which states continuously seek to find the right balance to. On the one hand, it is the right of the individual to express their views and opinion. On the other hand it is the responsibility of the state to ensure the protection of its people. In other words, it is a constant balancing between giving rights and restricting them, with the purpose of finding a perfect democratic balance which violates no individuals rights. A modern example of the complexity of this task of constant balancing between the rights of the individual and the protection and safety of the collective can be found in the recent events in Ukraine.

The Ukrainian Revolution is an example of how difficult and complex a task it can be to find a balance between the right to freedom of expression and, in this case, the protection of national security. The tension between the two is an example of the dilemma faced by states when they on the one hand need to protect the individuals right to free speech and on the other hand need to ensure public safety or the protection of other rights. At the end of 2013, when the Euromaidan protests began in Kiev, the Ukrainian government adopted anti-protest laws which were deemed to be against freedom of expression.¹⁴ National experts have indeed confirmed that the laws adopted were extreme and were in their opinion violations of freedom of expression. However, the issue does beg the question of where states should draw the line of what is so called accepted demonstrating and what is demonstrating that threatens national security to the extent that it should be limited. Without in any way taking sides to the attempts to limit the escalating demonstrations in Kiev, the occurrence did emphasize the complexity of

¹⁴ NBC News, 2014, New anti-protest law triggers violent clashes in Ukraine: Klitchko warns of civil-war

balancing that state's face with regards to freedom of expression and the protection of, in this case, what they claimed national security, due to the fact that one could argue that without national security all human rights, including the right to freedom of expression, is essentially at risk.¹⁵

What further complicates the right to freedom of expression is that so many other fundamental human rights are connected to it. The rights entirely dependent on the proper functioning of freedom of expression and vice versa, is the right to freedom of thought, conscience and religion and the right to freedom of assembly.¹⁶

1.1.1. International Protection of Freedom of Expression

The right to freedom of expression is today understood as a fundamental human right and is considered to be one of the cornerstones of a functioning democracy.¹⁷ It is also one of the most violated and consequently most debated of all human rights.

All international human rights law, ranging from the United Nations Declaration on Human Rights (hereinafter UDHR) from 1948¹⁸ and the International Covenant on Civil and Political Rights (hereinafter ICCPR) from 1966¹⁹, to the European Convention on Human Rights (hereinafter ECHR) from 1950²⁰ and the case law surrounding these instruments, as well as International organisations, such as the Organisation for Security and Co-operation (hereinafter OSCE) in Europe, make it very clear that without freedom of expression a state cannot be identified as truly democratic. The quality of the government and the level of democracy of a state is considered to be directly linked to the level of freedom of expression within that state²¹.

Accountability and transparency are two of the most important factors that affect the proper protection of human rights within a state. Without the realisation of freedom of

¹⁵ Englund and Lally, 2014, In Ukraine Protestors Seem to be Preparing for Battle

¹⁶ Jacobs & White 2006, p. 300- 344

¹⁷ Ibid p. 317

¹⁸ The United Nations Declaration on Human Rights, 1948

¹⁹ The International Covenant on Civil and Political Rights, 1966

²⁰ The European Convention on Human Rights, 1950

²¹ Boyle 2010, p. 259

expression those tools cannot function properly. Freedom of expression can, as a result, be interpreted as vital for the proper realisation of other human rights.²²

In addition to the above mentioned instruments also courts, domestic as well as international, and legal commentaries and academic writings, all confirm that freedom of expression is indeed a fundamental right.²³

1.1.2. The Specific Issue of Blasphemy Laws

Today one of the most debated aspects to freedom of expression has been surrounding blasphemy laws and highlights the continuous struggle with balancing the right to freedom of expression with the protection of other rights. The issue has been on the agenda for several years at the United Nations and by now there are several non-binding resolutions condemning defamation on religious grounds. Although it is clear that the protection against blasphemy is to a certain extent a protection of the right to freedom of religion and of the right to non-discrimination the Western countries have strongly opposed laws on blasphemy as they are generally considered to be used by authorities as tools to imprison amongst others, political dissidents.²⁴ The main criticism that human rights defenders, free-speech activists and other critical voices have presented is that the protection of ideas, instead of the protection of individuals who have ideas goes against the very principles of human rights as well as it gives too much power to the state.²⁵ The issue was first brought to the agenda at the human rights commission (now council) in 1999 by Pakistan who claimed that there was an anti-Islamist campaign that was seeking to defame Islam. Ever since 1999 the UN has annually passed resolutions on combating defamation of religions.²⁶ No law has yet been passed on religious blasphemy but the debate on whether one should be adopted has been debated ever since it was first mentioned in the Committee in 1999.²⁷ This debate is another indication of the complexities surrounding freedom of expression, on the one hand

²² Ibid p. 258

²³ Tiilikka, 2008, p. 55

²⁴ Graham, 2010, No to an International Blasphemy Law

²⁵ Defamation of Religions by the Beckett Fund for Religious Liberty Issues brief 2008

²⁶ Examples of Resolutions: 2000/84, 2001/4, 2002/9, 2003/4, 2004/6, and 2005/3, U.N. Doc.A/HRC/4/L.12, A/HRC/7/L.15.

²⁷ Littman, 1999, Islamism Grows Stronger at the United Nations

individuals are considered to be in need of protection against hate speech and religious intolerance but on the other hand limiting speech too much stifles the right to free speech and presents states with a tool that can be easily arbitrarily used against speech that is deemed inappropriate to them.²⁸

1.1.3. The UN Standards

When the United Nation's Universal Declaration of Human Rights was signed in 1948, with its article 19 guaranteeing freedom of expression for the individual, the right was from that very development interpreted and accepted as one of the core human rights, thus placed prominently amongst the other important civil and political rights.²⁹

It is also with the development of the UDHR and later the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the debate following, between on the one hand the Eastern block, wanting the emphasis to be on social and cultural rights and the West on the other hand wanting to emphasize civil and political rights, that gives us a direct understanding to the differences in values surrounding the right to freedom of expression between East and West.³⁰

The violations of freedom of expression today mostly occur in countries that are struggling with democracy. When the UDHR was developed in 1948, the USSR was experiencing one of the severest forms of repression and political dissidents were faced with the worst level of repression imaginable.³¹

While the West welcomed the civil and political rights that the development of the UDHR brought with it³², the Eastern block was much less impressed by the inclusion of civil and political rights and as a result it abstained in the voting.³³ For the rest of Europe, the development of the UDHR with its article 19 on the right to freedom of

²⁸ Jacobs & White 2006, p. 319

²⁹ Boyle 2010, p. 258

³⁰ Lower, 2013, Can and Should Human Rights be Universal?

³¹ Patenaude 2012, p. 1

³² Encyclopaedia Britannica, Universal Declaration of Human Rights

³³ Ibid

expression set the tone and future values of the right high on the agenda, where it has stayed until today. In other words, when the UDHR and article 19 was first introduced in Europe, it immediately gained prominence and its value as a right has steadily increased. However, when it was introduced to the Eastern block, it was not accepted or valued nearly as highly.

Other human rights instruments, such as the ICCPR and the ECHR, have further developed article 19 of the UDHR, which is a purely affirmative formulation of the right and gives no further insight as to the scope and shades of the right, in order to give better understanding of how the right should be interpreted and implemented.

In Addition to the UDHR there are other global mechanisms emphasizing the importance of the protection of the right to freedom of expression, assisting in the monitoring of the implementations of the global protection of the UDHR and its Covenants. The main monitoring body of the ICCPR is the Human Rights Committee, introduced earlier, among other things producing the commentaries to the specific rights in the Covenant.

The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression³⁴ also holds the specific mandate to monitor, report and examine the level of implementation and compliance of states to the right to freedom of expression as stated in article 19 of the ICCPR. Mr. Frank William La Rue, the current Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression since August 2008, confirms some of the general thoughts from the commentaries to article 19 of the ICCPR in his report from September 7th 2012³⁵, stressing the importance of being able to openly debate and make statements that might even shock or disturb, as long as they do not incite to hatred, violence or any forms of discrimination.³⁶

Mr La Rue reiterates that, even though there should be restrictions to freedom of expression in extreme cases, it is important to at all times remember that it is first of all

³⁴ HRC resolution 7/36

³⁵ La Rue, 2012

³⁶ Ibid, p. 16

a means, that when used in accordance with international law and principles, contributes to a democratic society by supporting open debates and the exchange of ideas, thus creating an atmosphere where people feel safe and respected.³⁷

One of the most interesting aspects that this report raises is the issue of domestic legislation which is used for the oppression of critical opposition voices.³⁸ The Special Rapporteur expresses serious concern especially with domestic legislation that is vague and overbroad with the purpose of being easily applicable to cases where there is genuine need for expressing legitimate opinions, but they are suppressed by referring to the right to control incitement to hatred³⁹.

1.1.4. Article 19 of the ICCPR

The right to freedom of expression is not an absolute right, but like other rights it has its limitations. It is the constant balancing between the right and the restrictions and limitations of the right that keeps the debate lively as to what the right balance between the right and the restrictions to it are.⁴⁰

Article 19 of the ICCPR, unlike article 19 of the UDHR, allows for limitations and restrictions of the right, although those restrictions must be provided by law. According to general comment 34 from 2011 to article 19 of the ICCPR by the Human Rights Committee of the United Nations the article may be subject to restrictions, but those can only be used in the limitative areas with regards to the protection of national security and the protection of public order or of public health or morals.⁴¹

Despite the fact that freedom of expression is not absolute, and is therefore open to interpretations, it is considered good practice to interpret it narrowly, as a broad interpretation of the right would infringe on the right and thus impair the entire substance of the concept⁴². The General Comment no 34 further confirms that article 19 is a vital right for the proper functioning of a society and that it is the foundation for a well-functioning democracy, and that reservations on the right are not permitted,

³⁷ Ibid p. 4

³⁸ Ibid p.15

³⁹ Ibid

⁴⁰ Boyle 2010, p. 259

⁴¹ General Comment No: 34, p.9

⁴² Jacobs, White and Ovey 2010, p. 428

because it would be incompatible with the object and purpose of the Covenant⁴³, thus reaffirming the fundamental importance of this right.

With regards to the 2nd paragraph of the article it is pointed out that every form of expression, including non-verbal methods, such as posters and banners as well as audio-visual and internet based ways of expression, is acceptable and falls under the scope of the article.⁴⁴ Today, with the ever increasing vibrant and artistic means of expressing political opinions, it is more important than ever to emphasise the protection of controversial art. Many feel that artists and cultural workers should be getting more focus than they currently are by international human rights organisations, the majority of attention being paid to the media and to literature.⁴⁵

With regards to the scope of application and limitations to article 19 in paragraph 3 the general comment 34 states that it is of utmost importance that the right itself is not threatened. The comments emphasise that “...*the relation between right and restriction and between norm and exception must not be reversed...*”⁴⁶ The restrictions must also be provided by law and that law must be both accessible and formulated in a way that is easily comprehensible in order for individuals to understand it and what they can and what they cannot do. The interpretation of the law has to be clear in order for it not to be up to the persons in charged with the execution to enjoy the discretion of interpreting it in a way that serves their personal interest. It is made clear that even information that may be shocking and disturbing, although they can be subject to restrictions, most of the time falls under the scope of the article.⁴⁷ The comment goes on to state that such restrictions may never be used for the purpose of silencing any advocacy related to politics, democracy or human rights. Any attacks, such as arbitrary arrest or threats to life of any person exercising their freedom of expression, are also condemned in the comments and are said to be incompatible with article 19.⁴⁸ The general comment 34 refers to the general comment 27 when disclosing that the restrictive measures offered

⁴³ General Comment No: 34, p.10

⁴⁴ Ibid p.2

⁴⁵ Information of the European House for Culture Meeting in 2012

⁴⁶ General Comment No: 34, p. 5

⁴⁷ Ibid, p.6

⁴⁸ Ibid

in paragraph 3 must at all times take into account the principle of proportionality.⁴⁹ The restrictive measure must, according to comment 27, also be the least intrusive option which serves the aim of the protective measure.⁵⁰ The value of uninhibited expression is especially high when it comes to debates in the political domain that concern public figures and public institutions.⁵¹ Comment 34 further emphasise that no public figure is outside the scope, including heads of states and governments and religious leaders, all of which are also to be accepted as legitimate subjects.⁵²

1.1.5. The European Standards

The most fundamental European human rights protection mechanism is the European Convention on Human Rights. The ECHR was the first legal treaty established by the Council of Europe that itself was established in 1949⁵³. The purpose of the CoE was, and continues to be, the upholding of democracy, human rights and the rule of law in Europe⁵⁴ and in addition the ECHR the Council also established other human rights protection mechanisms such as the Commissioner for Human Rights whose main tasks are to bring awareness and to promote human rights issues within the CoE member states as well as to bring attention to any areas regarding human rights law that needs further attention or implementations assistance.⁵⁵

The ECHR, dating back to 1950, also established the European Court of Human Rights which was at the time, and is still today, considered an innovative solution for giving the individual a more active role in international law, something that only states had previously had⁵⁶. The European human rights protection is considered to be offering the highest individual protection of human rights in the world. The European interpretation is very highly thought of and the right to freedom of expression is held in equally high regard, considered to be one of the most famous and respected interpretations of the right.

⁴⁹ Ibid p.8

⁵⁰ General Comment No: 27 paragraph 3

⁵¹ Jacobs, White and Ovey 2010, p. 428

⁵² General Comment No: 34, p.8

⁵³ Clements 1994, p. 2

⁵⁴ Jacobs & White 2006, p. 2

⁵⁵ Pellonpää 2005, p. 9-12

⁵⁶ The European Court of Human Rights in Brief on ECHR Homepage

There are several other mechanisms and monitoring methods in Europe in addition to the ECHR and the ECtHR that are working for the right to freedom of expression. What is also important to notice is that there continues to be new and relevant reports, statements and guidelines on the topic and this not only emphasizes the constant need to update relevant information, but also confirms that there is still a serious need for it as well. One example is the May 2014 EU Human Rights Guidelines on Freedom of Expression⁵⁷ by the Council of the European Union, which confirm that the right to Freedom of Expression continues to be one of the most important, respected and valued rights in Europe today and that there is a pressing need to confirm and update issues surrounding the right. The Guidelines put special emphasis on the protection of those persons subjected to violence, persecution, harassment and intimidation because they are exercising their right to freedom of expression.⁵⁸

Another important European Human Rights mechanism is the Organisation for Security and Co-operation in Europe (OSCE). It is primarily a security organisation, but one of its tasks is also the promotion of human rights in Europe. It was established in 1973 through the Helsinki Final Act which for the first time linked human rights protection with security concerns.⁵⁹

The Helsinki Act, signed in 1975 also by the USSR, or the Helsinki Declaration⁶⁰ as it is also called, was an attempt to bring the West and the Communist Bloc closer and thus to improve the relations between the two⁶¹. One of the most significant parts of the Declaration was the part confirming civil rights not very different from the ones in the UDHR. The USSR was the main aim of the civil rights and the rights monitoring bodies were created through the rights. The Moscow Helsinki Group eventually separated into different sections out of which the most important were the International Helsinki Federation and Human Rights Watch.⁶² This was interpreted as an important step for the implementation of human rights protection in the USSR, as unlike the

⁵⁷ Human Rights Guidelines, 2014

⁵⁸ Ibid, p. 2

⁵⁹ OSCE Factsheet

⁶⁰ Helsinki Final Act, 1975

⁶¹ Clements 1994, p. 216

⁶² OSCE Factsheet

UDHR, the Helsinki Final Act had also created monitoring bodies which enabled people to submit complaints.

Today, the OSCE follows issues relating to freedom of expression very closely in Europe and has an appointed representative on Freedom of the Media⁶³ follows the state compliances with the OSCE principles and commitments with regards to freedom of expression and freedom of the media. In the OSCE decision No. 193 from 1997 the document remind European states that “...*freedom of expression is a fundamental and internationally recognized human right and a basic component of a democratic society and that free, independent and pluralistic media are essential to a free and open society and accountable systems of government...*”.⁶⁴

The representative of Freedom of the Media is guided by article 10 in the ECHR on freedom of expression to which all OSCE members are members too. Russia, officially known as the Russian Federation, has been a member of the OSCE since 1973.⁶⁵

There are also joint declarations by the OSCE Representative and the UN Special Rapporteur on Freedom of Opinion and Expression in which the rights and obligations of states are further emphasized. In their last joint declaration on crimes against freedom of expression from 2012 they indeed emphasise the fundamental importance⁶⁶ of freedom of expression for maintaining democratic societies, condemning all violence, from killings to arbitrary arrests, directed towards individuals practicing their right to freedom of expression and express their concern for the silencing effect that these crimes have on societies. The declaration also stresses that crimes perpetrated by states against individuals are particularly grave and is an especially serious form of violation of the right to freedom of expression.⁶⁷

1.1.5.1. Article 10 of the ECHR

Freedom of expression is generally considered to be one of the most important human rights in Europe and the case law of the European court of Human Rights confirms this.

⁶³ OSCE, Representative on Freedom of the media

⁶⁴ OSCE Permanent Council Decision No: 193

⁶⁵ OSCE Factsheet

⁶⁶ Joint Declaration on Crimes Against Freedom of Expression

⁶⁷ Ibid

Freedom of expression is considered to be the kind of right which enables other rights to function properly and this is clear from its relationship with the other rights in the Convention. Article 10 of the ECHR is directly linked to articles 8 and 9 on the right to thought, conscience and religion and in fact article 10 is considered to be an evolution of article 9.⁶⁸ There is also a clear connection between article 10 and article 11 that protects the right to freedom of assembly and association.⁶⁹ Like article 19 of the ICCPR article 10 also allows for a certain margin of appreciation regarding restrictions. This is something feared to be more in the interest of the states, as it is such a vague concept and therefore easy to manipulate.⁷⁰ However, it has been deemed vital since it is regarded as the only way to in practice to deal with the cultural differences between signatory states.⁷¹

The concept of the right to freedom of expression as a fundamental right and one of the cornerstones of a functioning democracy, stated in paragraph 1 of the article, is further confirmed and laid down in the 1976 Handyside case, when the court held that the right is essential for the society and for the individual and is vital for the progress of both.⁷²

The court has however stressed that there are limits to article 10 and that even in case of public interest, article 10 does not guarantee unrestricted freedom of expression.⁷³ The court does, however, in case no breach of article 10 can be found, examine carefully whether the measure or punishment taken against the applicant has been proportionate. There are three categories of restrictions specifically mentioned in article 10 paragraph 2: those that are for the protection of public interest, those for the protection of the rights or reputations of others and those that are necessary for maintaining the authority and impartiality of the judiciary.⁷⁴ They are not the only restrictions: article 15 which deals with derogations in times of emergency, article 16 which deals with restrictions on political activity of aliens and article 17 which deals with the prohibition of abuse of rights, are also enforceable restrictions on article 10.

⁶⁸ Clements 1994, p. 172

⁶⁹ ECHR Article 10 and 11

⁷⁰ Woods 2006, p. 377

⁷¹ Ibid p. 377

⁷² DG of Human Rights, p. 47

⁷³ Pellonpää 2005, p. 483

⁷⁴ Jacobs & White 2006, p. 8

However, just because states are offered the possibility of restrictions to the right does not mean that they can do so without justifying those restrictions.⁷⁵ States must adhere to the following principles: the restriction must first of all be necessary in a democratic society, the aim of the restriction must be one of the aims described in paragraph 2 of the article and the restriction must be prescribed by law.⁷⁶

In response to the restrictions mentioned in paragraph 2, the court has offered interpretations in order to set the minimum standards for what restrictions are allowed. In the judgement on De Haes and Gijssels in 1997, a defamation case, the court stated that both journalistic freedom as well as the freedom of private individuals to express opinions regarding public figures or public institutions may extend to a degree of exaggeration and provocation.⁷⁷ The court has repeatedly explained that the freedom of the press and the freedom for people to voice their opinions must include language and ideas that are provocative and at times exaggerated. In the 1999 Karatas case the court also emphasised that article 10 not only protects the substance of the opinions or ideas, but also the means of expressing it.⁷⁸

One very important aspect that the court has also repeatedly emphasised is the importance of members of society to be able to voice their opinions without the fear of being punished⁷⁹. In the 1989 Barfod judgement the court emphasised this and stated that fear of any forms of criminal or other sanctions should never be an obstacle for members of the public to raise and voice issues that are of public concern.⁸⁰

Another important aspect to freedom of expression as observed by the court is the necessity for a democratic society to be informed of the political opinions and ideas of their leaders since these result in political debate which is essential for a functioning democratic society.⁸¹ In the 1992 Castell judgement the court observed that in order for the public to shape and develop their own thoughts and opinions of their political leaders, it is necessary for the press and the civil-society to be able to without fear and

⁷⁵ Ibid p. 318

⁷⁶ Ibid p. 8

⁷⁷ Case of De Haes and Gijssels v. Belgium (24 February 1997) No: 19983/92

⁷⁸ Case of Karatas v. Turkey (8 July 1999) No: 23168/94

⁷⁹ Pellonpää 2005, p. 484

⁸⁰ DG of Human Rights, p. 11

⁸¹ Jacobs & White 2006, p. 334

restrictions bring knowledge about the leaders to the people. This is interpreted as very important, as in this way everyone is able to participate in the political debate which is considered to be one of the cornerstones of a functioning democracy.⁸² Restrictions on political speech are not offered much room by the court, confirmed in the 1999 Arslan, Polat and Gerger case. However, the court also emphasises that there is a clear distinction between a private person being subjected to publicly voiced opinions and official persons being subjected to the same.⁸³ In the 1999 Ceylan judgement the court confirmed that governments are allowed more room to be criticised than private individuals and even politicians⁸⁴ and the court further points out, in connection to the 1998 Incal case, that special attention and great scrutiny should be given such cases where there has been interferences with the freedom of expression of political figures who are members of the opposition party.⁸⁵

1.1.5.2. Article 10 of the ECHR and Article 19 of the ICCPR: Limitations and the Criminal Charge of Hooliganism

If one was to examine the possible limitations and restrictions allowed by the right to freedom of expression, as stated in article 19 of the ICCPR, by using the Russian criminal charge of hooliganism, the complexity of balancing the restrictions to the right with the freedoms that the right gives an individual, is obvious.

The hooliganism charge has in essence been, and continues to be, a charge with the intent to maintain social order.⁸⁶ This means in practice that it sets limits to the amount of freedom of expression allowed by an individual with the purpose of the maintenance of public order.

If we were to set the limitations that the state could have in applying the charge of hooliganism without violating the right to freedom of expression set out in article 19, one of the most important things would be that the restrictions of freedom of speech that the hooliganism charge creates must be clearly stated, insuring that there is as little room as possible for any misunderstandings.

⁸² DG of Human Rights, p. 12

⁸³ Ibid, p. 52

⁸⁴ Case of Ceylan v. Turkey (8 July 1999) No: 23556/94

⁸⁵ Case of Incal v. Turkey (9 June 1998) No: 22678/93

⁸⁶ La Pierre, 2012, p. 9

Vague formulations of the restrictions should be avoided, as this could lead to the arbitrary use of the charge. The issue of proportionality must at all times be respected, the restrictive measure that in this case the hooliganism charge was to create, must be the least intrusive option possible, serving the aim of the restrictive measure.

Article 19 would also reprimand, or at least demand, for the closest of scrutiny of the application of the charge of hooliganism, if it was clear that the actions restricted by the charge would be related to political advocacy. Article 19 does not allow much room for restrictions when it comes to issues surrounding political speech in general and using a charge such as hooliganism in cases where it was clear that the mode of expression that the charge was to restrict was related to human rights advocacy or to the expression of opinions of a political figure, would not be deemed in accordance with the article.

Article 19 does, however, clearly state in paragraph 3 b that limitations are allowed for the protection of public order, national security and of public health and morals. This paragraph not only leaves much discretion to the states to decide what they ultimately deem as threatening, but also in general brings up the importance of the state indeed having some control over the limitations of freedom of expression, as ultimately without any powers to control freedom of expression could create serious instability for the state.⁸⁷

The charge of hooliganism in Russia, for example, has mainly been used against petty criminals, who more or less disturb the social order by inappropriate conduct, such as violence on the streets.⁸⁸ In this case, article 19 could not be interpreted as allowing for the application of hooliganism against the perpetrator to be a violation of article 19, as the action would clearly protect public order and safety, due to the fact that there would be no element of political speech or any other advocacy related element which the article puts special emphasis on protecting. Most states in Europe have an equivalent charge to the Russian charge of hooliganism. If it is used correctly, with the aims of protecting the state without limiting the rights to freedom of expression, it would not be considered to be a violation of article 19 of the ICCPR. It all comes down to the very easily tipped balancing between right and restriction.

⁸⁷ The ICCPR, article 19, paragraph 3

⁸⁸ LaPierre, 2012, p. 17

Much like article 19 of the ICCPR, article 10 of the ECHR allows for certain margins of restrictions and limitations to the right. When examining those limitations through the charge of hooliganism there are many similarities between how article 19 of the ICCPR and how article 10 of the ECHR define those restrictions. Especially regarding the balance that needs to be struck between on the one hand allowing the state to use charges such as hooliganism to control the safety of public order and on the other hand making sure that the liberties of the state to use the charge for those purposes are not violated and end up being used arbitrarily for other purposes, thus violating the individual's right to freedom of expression.

What article 10 of the ECHR together with article 19 of the ICCPR emphasizes, is that although states are allowed to make restrictions to the right, the restrictions should be especially narrow and limited when it comes to restricting political speech.⁸⁹ The case law of the court has also specifically mentioned that restricting speech which stems from the political opposition or that constitutes opinions oppositional to the states regime, need to be especially carefully scrutinized.⁹⁰ Political figures enjoy less protection under the article, as political speech and opinions of politicians are thought to contribute to the level of democracy in a state, as it contributes to the political debate deemed necessary for the functioning of democracy.⁹¹

This would mean, in practice, that the charge of hooliganism could be used to restrict speech under certain circumstances: if it is deemed necessary in a democratic state, if it is prescribed by law, if it is proportionate to the aim being pursued and if it serves one of the aims described in paragraph 2 of article 10. However, according to the case law surrounding article 10, any restrictions to speech related to political opinions needs to be especially carefully examined and article 10 would also restrict the use of the charge of hooliganism to restrict speech even if it was provocative and with elements of exaggeration, as this is according to article 10 allowed in relation to political speech. If the hooliganism charge was applied in a case where it would result in the limiting of political oppositional opinions, this would be especially harmful for the general democracy of the state.

⁸⁹ The ECHR, article 10 and the ICCPR, article 19

⁹⁰ Pellonpää, 2005, p.483

⁹¹ Ibid, p. 484

Another aspect that article 10 limits, or deems as going too far with the restriction of free speech, is if a criminal charge like hooliganism is used with the intent to instil the fear of being punished and thus ends up stifling free speech even before the individual has had the chance to express their view.⁹² In practice, this would mean that if the hooliganism charge was used with the pre-emptive thought to warn other individuals on how they would be punished for expressing their opinions it would be a breach of article 10.

The constant balancing of the right to free speech and of charges aimed at controlling the stability of the society such as hooliganism, is a very particular kind of balancing. What further complicates the balancing is the fact that while states should indeed protect free speech it should also simultaneously protect the rights of others.⁹³ For example, if a state was to apply the hooliganism charge because an act had been seen as an incitement to hatred, as a threat to public morals and as such as a threat to the protection of the reputation or rights of others, this may be allowed, but needs to satisfy the demands under which the limiting of free speech is allowed.

The issue of limiting hate speech and the insult of others, for example on religious grounds by the use of public order charges such as hooliganism, is a very relevant and complex matter as, while article 10 is offered a broad interpretation, it needs to strike a balance between the way hate speech violates the rights of others. Article 10 does not offer protection to those who are seen as inciting hate speech or any views which incite religious or racial hatred or that incite to violence and thus state interference is accepted under those circumstances and would be considered legitimate.⁹⁴

1.1.6 Conclusion

Defining the margins of the right to freedom of expression is a task that states struggle with constantly. On the one hand states need to guarantee the right to free speech to the individual and on the other hand the state needs to protect other individuals from issues such as hate speech and even national security related issues. In short, they need to protect the individual from others as well as the state from others, while maintaining the

⁹² Ibid

⁹³ Boyle, 2010, p. 259

⁹⁴ Tiilikka, 2008, p. 54

rights of all to free speech. None the less the restrictions to free speech should, according to international law, be allowed with broad margins because it is a fundamental human right without which a democracy can not function properly and which allows for the protection of other human rights.

Both article 19 of the ICCPR and article 10 of the ECHR point out that especially restrictions to political speech need to be especially carefully evaluated, as political speech is considered necessary for the debate of a democratic society and because political figures are allowed to be criticised to a much further extent than civilians. Speech of a political nature is also allowed to be exaggerated and provocative and the form of expression, including artistic means, must be allowed. All international law defining the limitations to freedom of speech that states are allowed to make also emphasize the importance of those laws being clearly stated and easily comprehensive to everyone.

It is evident from a historical perspective as well as by observing the European culture today and the legal methods and interpretations, that freedom of expression is a highly valued and cherished idea in Europe. In general, the problems surrounding human rights violations today is not that the legal protection is not in place, it usually is. The problem mostly lies with the proper implementation of the laws, as will be evident in the case of Russia, that continues to struggle with the proper implementation of human rights protection. The constant balancing between right and restriction is, however, by no means an exclusively Russian problem. It is a world wide problem that knows no geographical boundaries.

1.2 The Soviet Past

After having introduced the international standards regarding the right to freedom of expression the paper will continue, in order to successfully answer the research question, by examining what the situation was with regards to human rights and more specifically to the right to freedom of expression, during the Soviet Era. By examining the legal practices that surrounded human rights and especially freedom of expression during the rule of the Union of Soviet Socialist Republics (USSR) we will hopefully be able to see to what extent the application of the charge of hooliganism in Russia today can be claimed to be a return to Soviet legal practice.

The Soviet Union that lasted from 1924 to 1991⁹⁵ was very adamant to portray itself as a politically progressive country. The doctrine of socialism with its opposition to capitalism and its emphasis on social rights was not entirely unsuccessful in offering some protection for the individual.⁹⁶ However, while social rights were encouraged political and civil rights were not. The USSR was known and continues to be remembered for systematic violations of human rights.⁹⁷ Social rights were indeed protected, but civil and political rights were repeatedly violated⁹⁸. Freedom of expression was one of the rights systematically violated, although it was not until the late 1960's that there was any significant dissident movement, a movement that came as a surprise to the Soviet government which quickly created a strategy involving most of the sectors of Soviet public life in order to efficiently suppress them.⁹⁹

1.2.1. The Protection of Individual Rights in the USSR

First of all, it should be mentioned that whether the concept of human right really existed before the development of the UDHR in 1948 is debatable. However, most states had something resembling human rights and while this paper discusses those rights as human rights, it should be identified that there could be more appropriate terms

⁹⁵ Encyclopaedia Britannica, Union of Soviet Socialist Republics

⁹⁶ Bowring, 2013, B, Socialism and Rights: A reply to David Renton's 'Do Socialists Still have an Alternative Concept of Rights?'

⁹⁷ Lucas, 2008, p. 137

⁹⁸ Human Rights Watch Report A

⁹⁹ Feldbrugge 1980, p. 451

to discuss them by depending on which state is in question. Nevertheless, the Soviet theory of rights for the individual emerged in the 1930's and its main doctrine was that the basis of human rights was the economic system and that the most important human right, and in fact the whole base for human rights, was the right and the obligation to work.¹⁰⁰ Even with regards to rights such as the right to freedom of expression the right and obligation to work was used and framed in a way that excluded the right to use any other human rights.¹⁰¹ Social rights were in essence emphasised and civil and political rights were discarded.

There were comprehensive statements regarding human rights for the Soviet citizens in the Soviet Constitution.¹⁰² However, the rights could only be used with the purpose of fulfilling socialist goals.¹⁰³ While the human rights goals of the west were mainly so called negative rights, which in practice meant the rights of the individual against the state, the human rights conception in the Soviet instead emphasized the positive rights, which meant the collective rights that the state was obligated to give them.¹⁰⁴

The freedom from exploitation that the entire Soviet human rights doctrine was based upon, assumed that the socialist system guaranteed complete freedom of the individual because of its economic system that ensured the impossibility of exploitation by one man of another.¹⁰⁵ In a state report by the USSR to the UN Human Rights Committee in 1978 this typically Soviet belief was also made clear. The report states that "*...Soviet citizens do not know the humiliating feeling of uncertainty about the morrow, or the fear of being left without work, without medical care and without a roof over their heads. Society safeguards their rights and interests and upholds their civic and human dignity...*".¹⁰⁶

Articles 125 and 126 of the Constitution of the USSR dealing with freedom of expression and freedom of assembly are phrased in a way that results in the protection of only the rights to the freedoms that are granted if they are used in socially acceptable

¹⁰⁰ Fryer 1979, p. 298

¹⁰¹ Feldbrugge 2002, p. 455

¹⁰² The Constitution of the USSR

¹⁰³ Minan & Morris 1985, p. 6

¹⁰⁴ Patenaude 2012, p. 1

¹⁰⁵ Feldbrugge 1980, p. 453

¹⁰⁶ State report by the USSR to the UN Human Rights Committee in 1978

ways, in other words there was no genuine freedom of expression, there was only the freedom of disseminating the right ideas and the rights opinions.¹⁰⁷

Rights for the individual emerged in Russia under the rule of Joseph Stalin, the ruler of the USSR between 1941 until his death in 1953¹⁰⁸ However, at the time the interests of the state were always above the interest of the individual¹⁰⁹. The Soviet constitution established in 1936 in order to provide some stability after the atrocious human rights violations that had occurred in the previous years, was never able to offer any protection to the individual as the rule of Stalin was still complete and there was no judicial or legal independence.¹¹⁰ During the rule of Stalin the rights of the individual were severely suppressed and basic rights, such as the right to due process, simply did not exist until after his rule.¹¹¹ In 1958 the Russian criminal code was revised and concepts such as that of due process was introduced into Soviet law.¹¹²

The ideology of the Soviet regime was almost entirely supported by the fear of repression that was instilled into people. The whole Soviet system was possible because the state had control over the mind of its citizens.¹¹³ There was a constant monitoring of people's thoughts and opinions present during the Soviet years and this control was operated by the KGB (*Komitet Gosudarstvennoy Bezopasnosti*). The state's control of the mind of its citizens was an essential part of the means to maintain and perpetuate the power of the Soviet regime.¹¹⁴ This explains why political dissidence was also considered such a serious threat during the Soviet years. Dissidents endangered the whole Soviet project based on the regime deciding the thought and opinions of the whole society.

There were real enemies during the Soviet years and there were invented enemies. The real enemies of the regime were those who made actual attempts at undermining or challenging the regime, such as political dissidents, strikers and those who took part in

¹⁰⁷ The Constitution of the USSR

¹⁰⁸ Encyclopaedia Britannica, Joseph Stalin

¹⁰⁹ Bowring 2013, p. 84

¹¹⁰ Copeland, 1991, p. 106

¹¹¹ Neumann 1996, p. 130

¹¹² Minan & Morris 1985, p. 57

¹¹³ Shlapentokh & Arutunyan 2013, p. 64

¹¹⁴ Ibid p. 12

public demonstrations and in general anyone expressing any anti-Soviet statements.¹¹⁵ The invented enemies were people who had in fact not committed any of the accused crimes against the system but who were accused anyway because the regime needed more enemies than there really were in order to set examples and create unity amongst the rest of the society.

1.2.2. Political Dissidence During the Soviet Years

The worst human rights crimes in the Soviet Union were committed during the rule of Joseph Stalin from 1928 until his death in 1953, but it was not until the 1960's, under the rule of Nikita Khrushchev, that what we today know as Soviet political dissent began to emerge.¹¹⁶ It is, however, important to remember that despite the hasignificant improvement from the repressive methods used during Stalin's rule to the post-Stalin era, all those who were openly opposed to the regime were still persecuted. Human rights did not in any way become a priority just because Stalin's terror did not continue. For example, in 1969-70 all members of a non-official human rights organisation were persecuted simply for the reason of defending human rights.¹¹⁷

It was the new generation after the Stalin-era and before the Mikhail Gorbachev era between 1985-1991¹¹⁸ that opposed human rights violations, such as oppression and censorship by the state, that came to be the most active of the political dissidents in the Soviet Union and the ones who are still remembered. After what was known as the Khrushchev Thaw after the death of Stalin, when the Soviet society was slowly opening up to more influence from abroad, political dissidence slowly emerged¹¹⁹. But it was only during the Leonid Brezhnev¹²⁰ era between 1964 and 1982 that the political dissident movement really gained momentum and became more self-organised and with a reputation also abroad.¹²¹

The political dissidents of the time were heavily influenced by both the ideology and the rhetoric of human rights. As the emergence of the dissidents was identified by the state,

¹¹⁵ Ibid p. 112

¹¹⁶ Patenaude 2012, p. 2

¹¹⁷ Shlapentokh & Arutunyan 2013, p. 117

¹¹⁸ Encyclopaedia Britannica, Mikhail Gorbachev

¹¹⁹ Neumann 1996, p. 141

¹²⁰ Encyclopaedia Britannica, Leonid Ilich Brezhnev

¹²¹ Copeland, 1991, p. 107

Leonid Brezhnev re-introduced stricter measures to control them from the past which had been replaced by more lenient measures during the Khrushchev era.¹²²

The Soviet political dissidents consisted of a very small number of citizens whose main characteristics are thought to have been great courage and equally great despair¹²³ and the dissidence movement is considered to have been a product of the post-Stalin period that was tainted by political instability.¹²⁴ The dissidents played a major role, even though they were few in numbers, to the more open policies of the so called glasnost era under Mikhail Gorbachev.¹²⁵ The main aims of the dissidents were greater civil rights for citizens and the demand that the regime should comply with the international law that defined the legal relationship between the state and the citizen.¹²⁶

The Samizdat movement, which was essentially a movement based on secretly written and circulated critique of the Soviet government¹²⁷, was a movement that is classified as the original dissident movement during the Soviet years¹²⁸.

The first reaction to the emergence of political dissidence was indeed characterised by a forceful policy, but by 1970 the approach regarding how to handle dissidence had changed and the new approach was more low-visibility than it had been in the previous years.¹²⁹ The political trials, which had gained much attention both inside and outside the Soviet Union, were replaced by less visible ‘semi-public’ and ‘criminal trial as political trial’ methods and significant amounts of administrative and harassment measures were adopted by the authorities in reaction to the increasingly high numbers of dissident cases.¹³⁰

1.3. The Soviet Union and its Relationship to International Human Rights

Up to 1973 the human rights stance of the Soviet leaders was reinforced in international affairs without much worry, as they saw no realistic chance with ever being confronted

¹²² Ibid, p. 107

¹²³ Sharlet, 1978, p. 776

¹²⁴ Ibid p.764

¹²⁵ Lozansky 1989, p. 2

¹²⁶ Sharlet 1978, p. 765

¹²⁷ Encyclopaedia Britannica, Samizdat

¹²⁸ Neumann 1996, p. 147

¹²⁹ Feldbrugge, 2013, p. 165

¹³⁰ Sharlet 1978, p. 778

by it as long as the strict control of the society inherited from Stalin's rule prevailed.¹³¹ However, in 1973 they were forced to rethink with the emergence of political dissent and human rights activism both inside the country and with support from the outside. Up to this there had been no real need to address issues such as freedom of expression or freedom of assembly inside the Soviet Union.¹³² While under Khrushchev's rule there had been no real systematic change to the human rights ideology from the past, Khrushchev created a more tolerant social and cultural climate. But Brezhnev quickly returned the traditional party doctrine when he gained control.¹³³ One of the reasons why political dissidents gained more courage in the late 1970's was due to a new agreement signed by the USSR, briefly touched upon in the previous chapter. In 1973 the USSR became part to the Helsinki Final act, or the Helsinki Convention¹³⁴, which was aimed at improving the relations between the west and the communist block in the East. What was of most importance for the political dissidents was that by signing this Convention, even though it was not legally binding as such, the USSR saw the development of monitoring bodies by human rights activists who made it easier and at all possible, for the first time, for political dissidents, to bring forth human rights violations and speak and act more openly.¹³⁵ One would have thought that this would have meant that political dissidents were less repressed, but this was not the case. The numbers of dissidents rose. So did the acts of repression.¹³⁶

In 1976 the USSR ratified the ICCPR, but unlike other states it did not do so with the intention that it should actually practically apply within the Soviet Union although no actual reservations were made.¹³⁷ They did not however ratify the protocol which allowed for individual applications.¹³⁸ As mentioned above, the USSR had always ratified international law, but rarely worried about how to implement or follow it. In 1977, the USSR adopted a new Constitution and within it a new chapter devoted to so called basic rights, freedoms and obligations of the citizens of the USSR.¹³⁹ In a state

¹³¹ Ibid p. 452

¹³² Ibid p. 452

¹³³ Copeland, 1991, p. 107

¹³⁴ The Helsinki Final Act

¹³⁵ Patenaude 2012, p. 2

¹³⁶ Ibid

¹³⁷ Bowring, 2009, p. 265

¹³⁸ Ibid

¹³⁹ Bowring 2013, p. 263

report by the USSR under the ICCPR to the UN Human Rights Committee in 1978 the USSR states, that since the ratification by the USSR of the ICCPR, the new constitution from 1977 ensured all the same rights as are present in the UDHR and the two Covenants. The report goes on to say that the new constitution *"...provides a higher and qualitatively unprecedented level of protection of all the rights and freedoms of every Soviet individual of the Soviet people as a whole, including, in particular, the right to life..."*.¹⁴⁰ The truth was, however, that the rights in the new chapter added, all the rights stated were social and economic rights, which was natural for a socialist regime. There were civil and political rights in the Constitution such as article 50 on free speech, but all civil and political rights were allowed only if they were in accordance with the socialist system. In other words they might as well not have existed.¹⁴¹

1.3.1. Gorbachev's Era

There was a major ideological shift with regards to human rights when Mikhail Gorbachev assumed power, as before his accession the official stance to human rights was that, since all the rights derived from the state, there could be no rights that protected individuals from the state.¹⁴² Gorbachev was the first Soviet leader that publicly recognised the importance of following international human rights standards and in general that legal guarantees were vital¹⁴³. Under Gorbachev, the judicial process was strengthened and problems within the Soviet legal system were admitted.¹⁴⁴ Despite admitting to many legal problems regarding the Soviet human rights system there were few actual changes compared to the amount of political promises and Gorbachev was still not ready to accept criticism from abroad.¹⁴⁵ None the less, there were significant advances with regards to human rights and this helped the Soviet Union in improving its international credibility, as well as for the restructuring of the Soviet economy. We can in other words conclude that the historical background to the development of human

¹⁴⁰ State Report by the USSR to the UN Human Rights Committee from 1978

¹⁴¹ Bowring 2013, p. 264

¹⁴² Copeland, 1991, p. 103

¹⁴³ Neumann 1996, p. 158

¹⁴⁴ Snyder 2013, p. 247

¹⁴⁵ Ibid p. 248

rights in Russia has been quite different compared to Western Europe¹⁴⁶ but this does not mean that no protection of human rights has existed or exists in Russia today.

1.3.2. The Impact of Dualism and Monism

It is also of importance to take into consideration that although the USSR in 1977 added article 29, which was considered to be a good faith article, into the renewed constitution, which proclaimed that the USSR observed generally recognised principles of international law and treaties concluded by the USSR, it was not considered to be of any significance, nor did it offer any guarantee that the USSR was to incorporate international law into the Soviet legal system.¹⁴⁷ The Soviet Union was in fact a dualist state, despite sometimes adopting partial monism, such as article 29 in the 1977 constitution.¹⁴⁸ Russia today is still considered to be more dualist in its approach to adopting international law than monist, although it is obviously difficult to decipher any real patterns in Russia's law enforcement practices with regards to the adoption of international law.¹⁴⁹ The monist nature of both the USSR and Russia gives us an indication of the states relationship to international law in general. Both systems are regarded as equally capable systems of incorporating international law, but monist states are considered to be less likely to violate international law, since it can be applied directly, unlike the dualist system, which requires the law to be translated and adopted into the national legislation in order to become applicable. The majority of European countries use the monist system of adopting international legislation.

1.4. Methods of Repression During the Soviet Years

In the Soviet Union dissent was always followed by repression. Some of the most actively used methods of repression during the Brezhnev years, when political dissidence emerged properly, ranged from administrative methods to the more elaborate methods of judicial action.¹⁵⁰ The administrative methods were typically different kinds

¹⁴⁶ Feldbrugge & Simons 2002, p. 89

¹⁴⁷ Långström, 2003, p. 353

¹⁴⁸ The Constitution of the USSR

¹⁴⁹ Abashidze 2013 p. 6

¹⁵⁰ Sharlet 1978, p. 768

of bureaucratic harassment methods, such as dismissals and evictions. At their worst they were what were known as psychiatric terror and forced expatriation.¹⁵¹

Psychiatric terror usually involved the forced medicalization of dissent and meant that dissidents were forced to undergo forced psychiatric care for an indefinite period of time.¹⁵²

The USSR Constitution did indeed claim to offer the Soviet citizen the right to free speech in accordance to article 19 of the ECHR. In a state report to the Human Rights Committee it is stated that individuals are indeed allowed to express their opinions by arranging meetings, sending letters of complaint to officials or by writing articles to newspapers. What of course undermined the right was that the exercise of this right had to be "*...In accordance with the interests of the people and in order to strengthen and develop the socialist system...*".¹⁵³

1.4.1. The Judicial Methods of Repression

Yet, the judicial methods were the ones considered the most efficient weapon of the regime against the political dissidents and because there was no separation of powers, which would have regulated the power of the state¹⁵⁴ this was an easy solution. There were two kinds of trials widely used: the political trial and the criminal trial as a political trial.¹⁵⁵

The political trial was used with the purpose of eliminating political enemies and because of its high visibility, it was used as a warning to other political dissidents. This kind of trial also functioned to confirm the moral boundaries by the regime to the rest of the society. The political trial was usually not an isolated incident, but instead its purpose was to set an example for all other similar cases by bringing it to the public arena.¹⁵⁶

¹⁵¹ Ibid p. 768

¹⁵² Human Rights Watch Report B

¹⁵³ State Report by the USSR to the UN Human Rights Committee from 1978

¹⁵⁴ Feldbrugge & Simons 2002, p. 68

¹⁵⁵ Sharlet 1978, p. 768

¹⁵⁶ Sharlet 1978, p. 768-769

The political trial was one of the few instances when the regime had to publicly admit that there was political dissent in the Soviet Union at all and it was one of the few occasions when the political dissident was given an opportunity to defend his activity.¹⁵⁷ The political trials were entirely prearranged and there were no due process protections offered to the political defendants.¹⁵⁸

During Stalin's rule the political trials offered no procedural rights to the defendants and the punishments were entirely disproportionate.¹⁵⁹ The political trials continued to be used throughout the Soviet era. However, after Stalin's rule the defendants were offered at least some of the procedural rights and the punishments were in some way more proportionate to the acts than before.¹⁶⁰

The other judicial method used to repress political dissidents was the criminal trial as a political trial. This method had the same objective as the political trial with the main difference that the defendant was not offered a political status.¹⁶¹ This method also ensured less publicity and was therefore less of a risk for the regime than the political trial, although without the benefit of setting an example to other dissidents and the society.¹⁶²

The human right to fair, impartial and lawful proceedings has existed since the Magna Carta of 1215¹⁶³ and it developed over time into what we can now read in the UDHR and more specifically in article 14 of the ICCPR. This right was not, however, practiced by the Soviet Union.¹⁶⁴

The criminal trial as a political trial meant that the defendant was charged with a criminal article instead of a political one, despite of the political nature of the act.¹⁶⁵ The method of prosecuting political dissidents with criminal justice was much less costly than the political trials and also resulted in much less negative publicity abroad, why it

¹⁵⁷ Ibid p. 769

¹⁵⁸ Minan & Morris 1985, p. 53

¹⁵⁹ Feldbrugge and Simons, 2002, p. 58

¹⁶⁰ Ibid p. 58

¹⁶¹ Sharlet 1978, p. 770

¹⁶² Ibid p. 771

¹⁶³ Magna Carta, 1215

¹⁶⁴ F.M Rudinsky 2007, p. 370

¹⁶⁵ Sharlet 1978, p. 770

was much more often used. Like the political trials these trials were also, at least to a certain extent, prearranged.¹⁶⁶

It is quite ironic that the court-room, a law enforcement instrument, which main function should be the realization of civil rights, became the scene where the civil rights of individuals were violated.¹⁶⁷

There was also a third trial method during the Soviet years used especially heavily during Stalin's rule the show trial. The Stalin show trials were tools of repression of individuals then referred to as counter-revolutionaries, Trotskyists and other similar terms, as well as methods of educating the rest of the society in what constituted acceptable behaviour, much like the political trial did.¹⁶⁸

The main difference between a show trial and a political trial is that, with political trials as well as for criminal trials as political trials there is, despite of it being small, still a risk that the defendants could be freed, whereas in a show trial the entire case has been prearranged, including the verdict.¹⁶⁹

Although show trials and political trials are different concepts, making a clear distinction between them can be difficult and there have been cases when trials have been considered to be both a show trial and a political trial at once.¹⁷⁰

1.5. The Soviet Charge of Hooliganism

In the following section the Soviet crime of hooliganism will be introduced. First the reader will be acquainted to the charge of hooliganism and how it was used before 1960 and then it will be followed by a discussion on how the charge was used after 1960.

1.5.1. Hooliganism Before 1960

The hooligan in short was a Soviet citizen who was accused of the most serious of Soviet crimes; that of showing disrespect to the Soviet society.¹⁷¹ The application of the

¹⁶⁶ Ibid p. 771

¹⁶⁷ F.M Rudinsky 2007, p. 342

¹⁶⁸ Allo,2010, p. 52

¹⁶⁹ Ibid p. 452

¹⁷⁰ Ibid p. 52

¹⁷¹ La Pierre 2012, p. 4

criminal charge of hooliganism was a powerful tool during the most active years of political dissent and one of its main alleged purposes during that time was to restrict freedom of expression.

But for most of Soviet history hooliganism was a mass crime. It was a flexible criminal charge that kept changing according to what ever the authorities of the time deemed as unacceptable.¹⁷² During the early 18th Century its symbolism as a means to defy power, not directly, but through public modes of behaviour, was instilled into the Russian culture¹⁷³ and the long history of hooliganism is indeed thought to have begun at the turn of the 18th Century.¹⁷⁴ It was from the very beginning a broad charge, lumping together crimes that had before been separate crimes, such as sexual assault, attempted murder, spousal abuse and just plain disorderly conduct into all being portrayed as hooliganism.¹⁷⁵ Between 1953-1964, when Khrushchev was the ruler of the Soviet Union, hooliganism reached an all time high and it has been argued that this was a result of the so called Khrushchev's Thaw. Khrushchev's Thaw in short meant the new ideological changes including foreign influences that the Soviet Union was experiencing after the iron rule of Joseph Stalin.

In order to both open up the Soviet society to more influence from abroad, but at the same time keeping the society stable, there were numerous hooliganism campaigns introduced by the authorities aimed at controlling the moral uncertainties that the new era was bringing and defining the suitable parameters of morally correct behaviour of the post-Stalin Soviet citizen.¹⁷⁶

In short, Khrushchev made use of the hooliganism charge by turning it into a label of unsuitable behaviour in order to re-educate the Soviet citizens of what the suitable behaviour would be from then on. The hooliganism charge was a typical example of a very broad categorisation of people which could be easily arbitrarily used. The vagueness of the charge made it applicable to almost any crime as long as there was an element of societal disrespect in it.

¹⁷² Ibid p. 9

¹⁷³ Neuberger, 1993 p. 2

¹⁷⁴ Ibid, p. 1

¹⁷⁵ Ibid

¹⁷⁶ La Pierre 2012, p. 23

Hooliganism was then, and continues to be now, a very imprecisely worded crime. In fact, it was said to be the most ambiguous of all ambiguous crimes in the Soviet criminal code according to a USSR Supreme Court justice.¹⁷⁷

1.5.2. Hooliganism After 1960

In 1960, when the Soviet criminal code was reformed, the crime of hooliganism was redefined as a crime against society instead of being a crime against a person, as it had been up until then. In the new definition it was the Soviet society that was the victim and the crime which could earlier have been interpreted as a crime against a person, but that accompanied elements of disrespect also for the society now became a crime directly aimed at challenging the authority.¹⁷⁸

During the rule of Khrushchev the hooliganism charges peaked, because the authorities were using it to create stability and control in a society in the middle of tumultuous change. When Brezhnev entered the stage, the hooliganism cases went down and instead it was used against political dissenters. While Khrushchev had applied hooliganism liberally and mainly focused on applying petty hooliganism, in order to create boundaries and civilising the society, Brezhnev did the opposite. He began using the malicious hooliganism charge with heavier penalties and with more political intent than before¹⁷⁹ and this trend continued when Gorbachev became president in 1985. Again, hooliganism was redefined according to what was deemed most problematic for the authorities; There was a rise in political dissent during Brezhnev's rule which continued into the rule of Gorbachev and for the first time freedom of expression became an issue for the authorities and the vaguely worded and easily applicable hooliganism charge was one way of controlling them and was one of the main tools of repression during those first years of political dissent.¹⁸⁰ Despite some major changes with regards to the attitude to the protection of civil and political rights that Gorbachev introduced, it was for example, during his rule that a law on judicial review of

¹⁷⁷ Ibid, p. 28

¹⁷⁸ Ibid p. 30

¹⁷⁹ Ibid p. 200

¹⁸⁰ Ibid. p 204

administrative acts was included in the 1987 constitution.¹⁸¹ It naturally did not mean that there were no violations of civil and political rights occurring.

1.5.3. Relevant Soviet Hooliganism Cases

For the purpose of this research, I will be focusing on a few case examples of how the criminal charge of hooliganism was applied with the intent to silence political opposition during the Brezhnev and Gorbachev eras of the Soviet Union. By comparing the circumstances of the historical cases, I hope to be able to see what similarities and differences there are to those cases compared to the recent hooliganism cases in Russia. The cases from the past that I will use, without going into much detail, will be the 1978 case of Maria Slepak, Vladimir Slepak and Ida Nudel, who were convicted for hooliganism when they with the act of political dissent asked the authorities for the permission to leave the Soviet Union by standing on their balconies holding posters with the request written on them. I will also examine in more detail the Mathias Rust case from 1987 in which the German born Mathias Rust was charged and convicted for hooliganism when he landed in his private plane on the Red Square in Moscow. The use of the criminal charge of hooliganism against political dissidents during the Soviet era is thought to have enabled the authorities to stigmatise and control critical speech without all the negative attention that a political charge would have entailed.¹⁸² I will introduce the modern day use of the criminal charge of hooliganism in a following chapter.

1.6. Conclusion

The repression of political dissidents during the Soviet years was cyclical, depending on who was ruling the country at the time. But there was always repression in some form. Hooliganism began to be used against political dissidents during the Brezhnev years, but hooliganism has existed all through history and has been deemed a kind of typical Soviet charge, since it is essentially about protecting the collective from the individual, a typical ideology of the Soviet years. Hooliganism was used to control changes in the society and to educate the Soviet man about appropriate conduct. It was a broad and vague charge and used for almost any crime, including political dissent as it effectively

¹⁸¹ Bowring 2009, p. 143

¹⁸² Ibid. 204

de-politicised it and by going through judicial means also legitimised the arbitrary repression of the dissidents.

The general approach to both human rights and to political dissent changed drastically in the Soviet Union in the mid 1980's although it never entirely disappeared. The human rights climate none the less went through a major ideological shift from barely acknowledging human rights violations by the state, against the individual towards a more humane approach that admitted to the past problems regarding the rights of the individual.¹⁸³

The repression of political dissidents through the administrative and legal methods peaked in the 1960's and 1970's, but in the 1980's a general understanding of the positive impact that protecting the individual can have on the collective was realised by the Soviet leadership and with increased concern for foreign relations and opinions also the repressive methods were restricted compared to previous times.¹⁸⁴ Gorbachev was the first Soviet leader to reassess the past admit that the past human rights system had imperfections. This further led to a new, less harsh, approach to dissidents as criticism of the system was no longer forbidden to the same extent as it had been.¹⁸⁵

In conclusion, it can be identified that repression was a constant feature of the Soviet period with the only difference being that the regimes used different kinds of repression methods throughout the years. The difference between the different regimes was in essence only the level of repression they used. Stalin used the most intense methods of terror, which through evolution then ended with a relatively rare use of repressive methods during the perestroika years. There was a clear arbitrary use of power by the Soviet state throughout the years when faced with political dissent. The application of the charge of hooliganism was one of the methods aimed at the political opposition when it first appeared in the late 1960's. A closer look at how hooliganism was used in the past in comparison to how it is being used today will be examined further on.

¹⁸³ Copeland, 1991 p. 101

¹⁸⁴ Ibid p. 109

¹⁸⁵ Ibid p. 110

1.7. Transition to Democracy

By examining the transitioning period and to what extent Russia really transitioned from its Soviet past, the current research will hopefully gain some insight into what the impact of those years has on the current alleged decline of the right to freedom of speech and developments surrounding the right today.

In 1991, after the dissolution of the Soviet Union, there were attempts at transitional justice by the new authorities in Russia. However, many question whether Russia ever really transitioned at all.

Boris Yeltsin, who was president of Russia at the time of transitioning, was not able to create any new vision for the country, nor did he manage to develop a working reform agenda for the future.¹⁸⁶ According to Lilia Shevtsova, Yeltsin's Russia *"...demonstrated the ability to repudiate and restore tradition simultaneously..."*.¹⁸⁷ It has been argued that Russia's progress into a democracy was hindered already before the collapse of the Soviet Union, as no attempts at coming to terms with the atrocious human rights violations under Stalin's rule were ever made. Although Khrushchev's rule after Stalin was seemingly much more liberal, he never made any attempts to openly recall and deal with the past atrocities, as this would have jeopardised the new regime, since the silencing of political opposition and dissent was still dealt with in a similar manner as before. Leonid Brezhnev made no attempts either at reconciling with the past and despite Gorbachev's public admission to the past atrocities, no real responsibility was ever taken for the acts under his rule, since he foremost wanted to strengthen, not weaken, the Soviet regime, which he feared would have happened had he admitted to any responsibility on behalf of the regime.¹⁸⁸

When the Soviet Union collapsed in 1991, Russia was in a unique situation compared to the other Eastern European countries that were beginning their post-communist transitions. Russia, unlike the other states, had no democratic past to return to. And unlike its neighbours, where the regime had been controlled by external sources and

¹⁸⁶ Robinson, 2008, p. 78

¹⁸⁷ Robinson, 2008, p. 78

¹⁸⁸ Barahona de Brito et al, 2001, p. 284

were therefore easy to blame as the enemies, Russia's regime had been an internal product and as a result they had no external enemy to blame.¹⁸⁹ Because the Russian regime was internal there would have been a complete destruction of Russia's nationalist historical myth if all the crimes would have been investigated properly and had been openly admitted to.¹⁹⁰ It has been argued that one of the reasons why Russia did not investigate the crimes perpetrated by the Soviet regime properly was precisely because it would have destroyed the new regimes political power and legitimacy, by taking away the sentimental notions that the people had of their history.¹⁹¹

1.7.1. The Criminal Code and the Criminal Procedural Code

It was as early as 1992 that Russia for the first time expressed its interest to become a member state of the Council of Europe and four years later, in 1996, Russia acceded and as a result also declared itself ready to follow those principles and obligations that falls into the jurisdiction¹⁹². By becoming a member of the Council of Europe in 1996 and by ratifying the ECHR in 1998, Russia made a public promise to do its utmost to protect human rights according to the law and European standards¹⁹³. It was considered as quite a bold move by the European Community to accept Russia as a member of the Council of Europe in light of the fact that it was clear to everyone that Russia would be arriving without the levels of human rights protection deemed the standard. However, the optimism was high that Russia would soon reach the levels and that by making it a part of the Council would assist in making the process easier and faster¹⁹⁴.

When Russia was accepted as a member of the CoE it also became bound by the ECHR and the practice of the ECtHR¹⁹⁵. In addition to the ECHR being a response to the atrocities having taken place in Europe during World War II, in the same way that the UDHR was, it was also a response to the growing power of communism in Eastern Europe. The Convention was drafted in order to avoid future human rights violations like the ones that had occurred in the past, but also to protect the European states from

¹⁸⁹ Andrieu 2011, p. 205

¹⁹⁰ Ibid p. 200

¹⁹¹ Ibid p. 200

¹⁹² Kasekamp & Mälksoo 2013, p. 68

¹⁹³ Ibid, p. 67

¹⁹⁴ Ibid, p. 68

¹⁹⁵ Clements 1994, p. 2

communist subversion¹⁹⁶, a fact becoming evident when looking at the wording of the convention which repeatedly refers to the concept of the democratic society and emphasises the importance of democratic values and principles.

Immediately after the disintegration of the Soviet Union there were in fact some significant strides taken in order to improve the human rights climate. Only six months after the end of the Soviet power Russia applied for membership from the CoE and when the Council agreed, it was considered as a recognition of Russia's European identity and as a sign of its democratic development. But there were also a significant amount of conditions attached to the membership.¹⁹⁷ The accession was, however, also considered quite disturbing, as it was quite clear that the level of human rights protection was not in accordance to the standards that countries acceding to the Council of Europe were expected to have. According to a UN report from 1994, after a visit by the Commission on Human Rights in Russia, in order to examine amongst other the prison conditions and to evaluate whether they were in accordance to international human rights standards, the Special Rapporteur, after one of the prison visits, states:

"...The Special Rapporteur would need the poetic skills of a Dante or the artistic skills of Bosch to adequately to describe the infernal conditions he found in these cells...".¹⁹⁸

What was considered to be the main issue with Russia's accession and why it did not happen sooner than 1996 was Russia's military presence in Chechnya. This presence froze Russia's accession talks and a report by PACE from 1995 states that *"...Until the Chechnyan conflict is solved peacefully, Russia's admission procedure cannot be continued..."*.¹⁹⁹ In 1996 Russia withdrew its troops from Chechnya. However, a new war broke out again in 1999.

One of the criteria that the Council demanded before the accession was for Russia to change the Soviet Criminal Code and the Soviet Criminal Procedural legislation in accordance to international law and in order to secure better protection for the individual. Soviet Criminal procedural legislation, which is directly linked to the level

¹⁹⁶ Jacobs & White 2006, p. 2

¹⁹⁷ Kahn, 2008, p. 532

¹⁹⁸ Report of the special rapporteur to the Commission on Human Rights E/CN.4/1995/34/Add.1 p. 19

¹⁹⁹ Report on Russia's request for membership in the light of the situation Chechnya to PACE 1995

of human rights protection offered to an individual, was as a result immediately set up for review in 1991 and by 1994 three drafts on the criminal procedural code had been produced.²⁰⁰ One of the competing versions was drafted by Yeltsin and his administration and was generally considered to be the most progressive of the three. The second one was rather Soviet in its style and produced by the Prosecutor-General's office and the third one, which was ultimately chosen for further revisions, was the most neutral one and drafted by the Ministry of Justice. The new criminal procedural code was sent to the Council of Europe in 1998, because of some domestic disputes surrounding the direction that the code was taking, and after having approved a sufficient amount of the proposals by the Council Russia it was adapted in 2001.²⁰¹ The code had borrowed heavily from both the ECHR and the ECtHR and was considered very progressive at the time. With regards to human rights it was considered to be a victory, however, it was a short lived victory since very soon after the suggested amendments by the Council had been changed it was decided that there was to be a working group which was to travel in Russia and examine if there was a pressing need for all of the amendments suggested by the Council.²⁰² Many of the amendments suggested both by the working group as well as by the Ministry of Internal Affairs and the Prosecutor-General's Office were often very similar to the Soviet code and the standard of the old days quickly returned.²⁰³ It was clear already in 2001 that the problems with the new Russian criminal procedural legislation was not only that it resembled its predecessors code, but also that it was applied by the courts in the same manner as they had done in the past: often arbitrarily and many of the new democratic initiatives that the code introduced were rejected by the courts.²⁰⁴

The first suggestion had been to amend both the criminal procedural legislation and the criminal code as a unified package. However, the idea was quickly disregarded in 1991 when it very quickly became apparent that there were so many differing views so soon on.²⁰⁵ Russia's criminal code from 1996 which came into effect on the 1st of January 1997 can be interpreted as a reflection on all the new needs that the newly democratic

²⁰⁰ Mishina, 2012, A Rough Road to a Democratic Criminal Justice System

²⁰¹ Ibid

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ Burnham, 2000, p. 365

country was lacking²⁰⁶ and although it was amended to a much larger extent than the criminal procedural legislation the changes made were mostly with regard to economic and property related crimes. Part II, section 9, chapter 24 on crimes against public security, in which we find the article on hooliganism, was not amended in any significant way and article 206, now article 213 in the new criminal code, on the crime of hooliganism remained the same after the new version was adopted in 1996.²⁰⁷ In the general part of the code, where the statement on the purpose of the code can be found, it lets us know that the aim of the code is the *"...protection of rights and freedoms of persons and citizens, property, and public order and security, of the environment and the constitutional structure of the Russian Federation from criminal attacks, the preservation of peace and security of mankind and the prevention of crime..."*.²⁰⁸ However, chapter 24 on the Crimes Against Public Security, which has been described as the most Soviet of all of the chapters of the code as it entails the quintessential Soviet fear of individuals challenging the Soviet order, was not amended but lives on in the current criminal code as well.²⁰⁹ With regards to the alleged aim of the code to protect the rights and freedoms of the Russian citizens it raises some questions of compatibility. In essence, the criminal procedural legislation remained much the same as its Soviet predecessor and although the Criminal Code went through more successful amendments, parts such as the chapter on the Crimes against Public Security, in which we can find article 213 on the crime of hooliganism, also remained identical to the Soviet code.

1.7.2. State Sovereignty and the Relationship Between National and International Law

Russia's accession to the Council of Europe in 1996 and its ratification of the European Convention on Human Rights in 1998 are considered to be some of the most important measures taken by Russia regarding human rights protection.²¹⁰ The international community was indeed surprised that a country with a history that so rigorously had

²⁰⁶ Ibid p. 365

²⁰⁷ The Russian Criminal Code

²⁰⁸ The Russian Criminal Code Article 2

²⁰⁹ Burnham, 2000, p. 390

²¹⁰ Kasekamp & Mälksoo 2013, p. 68

emphasised the concepts of state sovereignty and non-intervention decided to allow mechanisms whose main function was intervention and external supervision to not just influence them but even sanction²¹¹. This surprise was not entirely uncalled for, the dilemma between state sovereignty and international law has indeed been, and continues to be, an issue which greatly impacts the current human rights climate as well. Russia had also been given a rather unfavourable mark with regards to its human rights protection in a report which was done with the possible accession in mind.²¹²

Valery Zorkin, Chief Justice of the Russian Constitutional Court, has argued extensively in favour of Russia deciding independently regarding Russia's level of co-operation with international courts and laws.²¹³ Although he is considered to be the front-figure of the sovereignty debate he is not the only one.²¹⁴ There are numerous intellectuals and scholars in Russia who have expressed that they share his view, among them Dmitry Orlov and Vladislav Surkov.²¹⁵

However, in December 2012, Zorkin seemingly softened his line and now proclaimed that Russia would have to find a way to adapt the concept of sovereignty with human rights as no longer was the Westphalian model on sovereignty to be seen as superior in a globalised world.²¹⁶ The Russian constitution, like most constitutions, contains many positive references to the importance of both human rights and democracy. They are, however, vaguely formulated and have also so far almost never effectively been used in court if a concern over sovereignty and human rights has risen.²¹⁷

When looking for clues regarding the relationship between international human rights obligations and national law in the Russian constitution, it will at first glance seem as international law trumps national law. When, however, examining the article 15 of the constitution more carefully, there is a dilemma.²¹⁸ The wording of the article is constructed in a way that makes it difficult to understand exactly where in the hierarchy of the Russian legal order the international principles and norms fit in and what their

²¹¹ Bowring 2009, p.

²¹² Report on Russia's request for membership in the light of the situation Chechnya to PACE 1995

²¹³ Antonov, 2014, p. 2

²¹⁴ Bowring 2009, p. 197

²¹⁵ Ibid p. 197

²¹⁶ Ibid p. 2

²¹⁷ Ibid p. 1

²¹⁸ Article 15 of the Russian Constitution

legal status therefore in reality is. And perhaps most importantly, whether the international legal norms trump national ones in case of a conflict between them.

The relationship between international and national law in Russia has been, and continues to be, complex. There has been significant advancement since the Soviet era: the 1977 Soviet Basic Law gives international law very little, if any room, whereas the Russian constitution from 1993 at least in its literal form portrays a much more cooperative stance on the relationship between the two areas of law.²¹⁹

An example of Russia's rather complex relationship to international law becomes evident when we examine Russia's relationship to the European Court of Human Rights, a relationship which has been described as "...*rebellious*...".²²⁰ For example, The Supreme Court decree of 2003 stated very clearly the importance for judges to apply also international law and jurisprudence in the Russian courts, it clearly stated how ECtHR jurisprudence was to be complementary to national legislation, however in reality they rarely did and in 2013 the Supreme Court Decree no longer stated the importance of it in writing but instead deemed ECtHR jurisprudence to be subsidiary to national law.²²¹

In 2006, Vladislav Surkov, a Russian politician and businessman, introduced the concept of sovereign democracy to the Russian people. In other words a democracy in which western influence in all areas is severely limited and where human rights is limited for the individual because the individual is merely part of a collective, a collective according to this ideology is significantly lower hierarchy wise to the powers of the sovereign state.²²²

During a speech in 2013²²³ Putin, albeit not in so many words, confirmed the general principles of sovereign democracy brought forward by Surkov a few years earlier. The speech entailed strong opinions on the dangers of foreign influence on the national

²¹⁹ Bowring 2009, p. 9

²²⁰ Ibid p. 193

²²¹ Ibid p. 11

²²² Ibid p. 28

²²³ President Putin's Annual Address to the Federal Assembly of the Russian Federation in April 2005

identity and emphasised the absoluteness of Russian sovereignty, independence and integrity.²²⁴

1.7.3. The Years Between 2000 and 2012

When Putin was elected president in 2000 the expectations of him being the first Russian leader to bring Russia to its democratic path were high all over the world.²²⁵ Because of the unstable and rather chaotic years under president Yeltsin Russia and the rest of the world embraced the new and seemingly strong leader. Putin's first years as president coincided with the war in Chechnya and this enabled Putin to begin his era as a strong and powerful leader.²²⁶ However, the most important issue during his first and second term as president was the economic progress that Russia began making which was significant an the impact that the progress had on Putin's popularity.²²⁷

After serving his two terms as president Putin had to give way to someone else and in 2008 Dmitry Medvedev entered the stage and became president of Russia while Putin became prime minister. This four year period was often described as a kind of "tandem" as it was generally accepted that while Medvedev was indeed president it was Putin who held the reigns.²²⁸ There were some differences to Medvedev's presidency despite Putin allegedly making most of the decisions and the most important change that Medvedev brought with him was a new direction towards modernity. During his second state of the nation address in 2009 he declared a kind of modernisation programme for the country including promises of better internet connectivity for everyone as well as better access for small independent political parties.²²⁹ The tandem aspect was never the less confirmed when Medvedev and Putin informed the Russian society that in the 2012 elections Putin would be the one running for presidency once again and this time Medvedev would be appointed prime minister.²³⁰

²²⁴ Bowring, 2009, p. 31

²²⁵ Shevtsova, 2005, p.7

²²⁶ Shevtsova, 2005, p.70

²²⁷ Kahn, 2008, p. 522

²²⁸ The Economist, 2011, The Putin v Medvedev Tandem

²²⁹ Eke, 2009, Medvedev Sets Out Ambitious Vision

²³⁰ Schwartz, 2012, With Some Dissent, Russia's Parliament Confirms Medvedev

1.7.4. The Concept of Collective Memory

A transitional justice concept which was less concrete than such as the amendments to criminal legislation discussed above but which none the less had equally great impact on the future of the democratic path that Russia was beginning to take in the early 1990's was the concept of the shaping of the collective memory of the past. The main function of transitional justice is indeed to seek recognition for past human rights violations and to promote and enable reconciliation and democracy. Transitional justice is a chance for a state to transition into a democracy by first properly dealing with the painful legacies of the past. In order for societies to successfully begin their journey towards becoming functioning democracies the state should adopt a combination of judicial and non-judicial mechanisms, as well as choose a strategy regarding the shaping of the collective memory in order to learn from the past instead of repeating it.²³¹

Mendelson has observed that Russia never made any great attempts at coming to terms with the human rights violations of the past and it is widely claimed that this inability, not to have dealt with the atrocities of the past has played a significant part in shaping Russia's social and political landscape today and that it complicates Russia's relationship and future understanding of the values of democracy and human rights.²³² It has been argued that because Yeltsin at the time of the transitioning did not truthfully confront the past, the Russian people were left with an ambiguous relationship with the past that has led to a collective memory of the Soviet legacy as something not so terrible after all.²³³ Because of Yeltsin's way of not publicly condemning the crimes of the Soviet past, the collective memory of the Soviet Union as Russia's nostalgic past has lived on and has been exploited also by Putin when he has made references to the Soviet past. In his annual state of the nation address in April 2005 Putin told the people of Russia that *"...the demise of the Soviet Union was the greatest geopolitical catastrophe of the century..."* and that *"...for the Russian people, it became a genuine*

²³¹ Forsberg, 2003, p. 69

²³² Mendelson and Gerber, 2005, p. 83

²³³ Toymentsev, 2011, p. 310

tragedy...".²³⁴ By having sustained a collective memory tainted by nostalgia for the Soviet past it has been argued that Russia and president Putin has been able to exploit that memory of the past for his own political benefits of the present.²³⁵

1.7.5. Conclusion

The very specific situation that Russia found itself in after the disintegration of the Soviet union in 1991, most importantly setting out on a path of democratisation without a democratic past to turn to, has led to Russia developing differently than first expected. With regards to human rights development during the years of transition there were remarkable advances but there were also areas that have remained much the same or at least some would argue too much the same if Russia would want to call itself a democracy as described by the west. While there were significant changes to the legislation after 1991 there have also been persistent themes that Russia has been unable to rid itself of since the Soviet years. In addition to legislative similarities between the Soviet and Russia one of the problems of the transitional justice period was the indifference to shaping a collective memory for the people which would condemn the past human rights atrocities and thus ensure that history would not repeat itself and perhaps most importantly that future authorities could not take advantage of any nostalgia for the past by using it for their own political benefits. It should none the less not be forgotten that there have been very concrete steps taken by Russia since the collapse of the Soviet Union in order to provide better human rights protection for the individual as well.

²³⁴ BBC News Desk, 2005, Putin Deplores Collapse of USSR

²³⁵ Andrieu, 2011, p. 200

2. "*Hooligans, Hooligans, Everywhere*"²³⁶- the Analysis

In order to properly examine whether the application of the charge of hooliganism in some of the most extreme and therefore attention grabbing cases in Russia today is in accordance with international legal standards, as well as to what extent it is a result of poor transitional justice and even a return to Soviet legal practice, this study must examine what the latest developments in Russia have been and what the situation looks like at this very moment, with regards to the level of protection of civil and political rights and more specifically with the right to freedom of expression.

Legally, all the protection of the right to freedom of expression is considered to be in place: The Russian Constitution from 1993 clearly states that Russia is a democratic country that adheres to the rule of law and in chapter 2 of the Constitution the rights and the liberties of the Russian citizens, which are generally considered to be in accordance with European standards, are also presented. Russia is also signatory to all major international human rights conventions and according to article 15 of the Constitution the international legal obligations trump national legislation.²³⁷

This research will examine the level of protection of freedom of speech in more detail in order to find out what it is in practice, not only in theory, and how the re-introduction of the criminal charge of hooliganism is contributing to the alleged decline, as well as what the use of hooliganism in Russia today has to tell us about the alleged statements on Russia never having transitioned from its Soviet past or that Russia is returning to its Soviet past.

This chapter will begin by giving an overview of the recent developments with regards to laws and other mechanisms that are negatively affecting the level of protection of the right to freedom of expression in Russia today in order to gain a better understanding of the context to more specific developments such as the alleged use of the hooliganism

²³⁶ Gessen, 2013, *Hooligans Hooligans Everywhere*

²³⁷ Article 15 of the Russian Constitution

charge with the intent to silence political dissent having emerged into Russian legal practice.

This will follow with an examination into whether Russia's national laws' protecting freedom of speech really are as in accordance to the international protection as alleged in addition to examining what the true relationship to international law is in Russia, in other words what the reality is in Russia today with regards to the protection of freedom of speech both on a national level and on an international level. The impact that the Soviet past has on the current reality regarding the protection of free speech will also be looked at in further detail.

The paper will also then move on to look more specifically at the charge of hooliganism, article 213 of the Russian Criminal Code, in order to determine whether the wording of the charge is in accordance with international legal standards. This will be followed by an examination of the application of the charge in the recent extreme hooliganism cases to see how the application resonates with international free speech protection. In both the examination of the legality of the wording of the charge of hooliganism, as well as in the examination of the legality of the application of the charge in the recent cases, it will also be determined what impact transitional justice has had in the current developments as well as what the societal effects are on Russia today. Some ideas regarding future developments and whether the re-introduction of hooliganism with the intent to silence political dissent can be interpreted as a return to Soviet legal practice as is so widely suggested today will also be debated.

2.1. Recent Civil and Political Rights Developments in Russia

It would be difficult not to be aware of Putin's alleged war against freedom of expression in Russia today. As will be discussed below, articles stating that Russia is on its way back to the Soviet Union are significantly many. International voices, ranging from legal scholars to politicians, generally agree that there have been similarities between the Russian regime and its Soviet predecessor since 1993 when president Yeltsin had a political stand-off with the Russian parliament which was eventually resolved through military force and an even more significant increase since Putin was

elected president in 2000.²³⁸ It has also been put to question whether in fact Russia transitioned at all after the collapse of the Soviet Union in 1991.

The UK based international newspaper the Independent ran a story on March 4th 2014 with the headline *"Is Vladimir Putin Rebuilding the Soviet Union?"*²³⁹ and the last year has seen a dramatic increase in similar claims. A few years earlier, on October 5th 2011 the International newspaper the telegraph ran a story with the headline *"Vladimir Putin is Trying to Take Russia Back in Time"*.²⁴⁰ Numerous similar claims are made by the media on a regular basis but they are not only limited to the press. Public figures such as the Chancellor of Germany Angela Merkel²⁴¹ have also made statements and claimed in relation to Russia's Crimea Occupation that president Putin was *"Out of touch with reality"* and *"In another world"*.²⁴² This was interpreted by the press as a reference or insinuation to president Putin being mentally back in the Soviet time. The President of the United States Barack Obama who has been president of the US since 2009²⁴³ also remarked on how in his opinion Putin should stop bringing back elements from the Soviet past in an interview in March this year *"You would have thought that after a couple decades that there'd be an awareness on the part of any Russian leader that the path forward is not to revert back"*.²⁴⁴ Merkel and Obama are not the only political figures who have claimed that Putin is trying bring back elements from the past. The declining climate surrounding civil and political rights in Russia in the last years have spurred much public debate, opinion and concern in all areas of the international society.

After the collapse of the Soviet Union it quickly became obvious that the break between Russia and the Soviet Union would not be as clear, straight-forward or as final as it first could have appeared.²⁴⁵ One of the most discussed and debated similarities between the two have in the recent years been Putin's alleged crackdown on freedom of expression through various means.

²³⁸ Shlapentokh and Arutunyan, 2013, p. 2

²³⁹ Giddens, 2014, Is Vladimir Putin Rebuilding the Soviet Union?

²⁴⁰ Spillius, 2011, Vladimir Putin is Trying to Take Russia Back in Time

²⁴¹ Encyclopaedia Britannica, Angela Merkel

²⁴² Traynor, 2014, Ukraine Crisis: Vladimir Putin has Lost the Plot, says German Chancellor

²⁴³ Encyclopaedia Britannica, Barack Obama

²⁴⁴ Runnigen, 2014, Obama Suggests Putin Should Get Over Loss of Soviet Union

²⁴⁵ Neumann, 1996, p. 209

In 1991 the general consensus in the world was that Russia was going to be something entirely different than its Soviet predecessor and that the country was on a fast-track to becoming a democracy. However, the world experienced what critics would describe as a crude awakening after 1993 and even more so when Putin entered the political stage at the dawn of the twenty-first century.²⁴⁶ According to some experts it became more difficult to argue against the comparison of Russia and the Soviet than it did to find differences.²⁴⁷ The situation with regards to the level of protection of the right to freedom of expression has been thought to have declined over the last few years and this development has been a major foundation for western concern.

2.2. Putin's Era

Because of the rather unstable and tumultuous years of president Yeltsin's rule both the people of Russia and the international community were genuinely relieved when Putin entered the stage in 2000. The hopes were high all over the world that he would finally bring stability for Russia in order to properly begin their path towards democracy. The world was not aware at the time that Russia and president Putin would become the focus of a very heated human rights related debate for many years to come.²⁴⁸

2.2.1. The Situation since the Re-election: The Legal Development

As has been shown above, the silencing of political critics is nothing new in Russia. However, the situation today has been described as being at its worst since 1991 and to have been declining most rapidly since 2012 when president Putin was re-elected.²⁴⁹ The reason for this quoted is the rather sudden introduction of methods that threatens the right to freedom of expression due to a, albeit still quite limited, growing opposition in Russia. When Putin was re-elected in 2012 there were claims that the elections were rigged and ever since the elections there has been more open criticism of Putin than ever before. Since his re-election there has also, in addition to the Hooliganism headlines,

²⁴⁶ Based on a panel discussion held in Finland in June 2014 called the Kultaranta-Keskustelut

²⁴⁷ Shlapentokh and Arutunyan, 2013, p.2

²⁴⁸ Alexander, 2013, Vladimir Putin creating worst human rights climate since Soviet times

²⁴⁹ Index on Censorship webpage

been a number of other mechanisms introduced which at least indirectly influence the right to freedom of expression. They will be described in further detail in order for us to get a more thorough picture of what the general stance of the Russian state is with regards to the protection of freedom of expression in Russia today.

2.2.1.1. The NGO Law

A noteworthy development with regards to the alleged crackdown on freedom of expression by president Putin, in addition to the use of the charge of hooliganism which will be focused on in greater detail further on, has been the introduction of the Foreign Agents Law in July 2012. The law requires all those NGOs that receive funding from abroad and who are interpreted as participating in political activity to register themselves as foreign agents, a term that in Russian implies the term spy and which according to many was introduced in order to restrict the interference from abroad. The same law also makes it legal for Russian authorities to conduct searches and inspections of the organisations in addition to the organisations being obliged to annually report to the Duma on their activities.²⁵⁰ The NGOs that do not register are heavily sanctioned, strangling their activities financially. The UN High Commissioner for Human Rights Navi Pillay made a statement condemning the discussed law when it was introduced and stated that there was a “...worrying shift in the legislative environment...”²⁵¹ and expressed her fear of how the shift would come to effect the human rights climate in Russia. The independence of public institutions in Russia, such as the judiciary, is also very much questioned by experts today. The general consensus today is that the judiciary is not independent from the executive branch.²⁵² The UN Special Rapporteur on the independence on judges and lawyers Gabriela Knaul stated in 2013 that the impartiality of the Russian judicial system needs to be addressed as a matter of urgency.²⁵³

2.2.1.2. The Public Assembly Law

²⁵⁰ Human Rights Watch Report A, p. 16

²⁵¹ Ibid p. 23

²⁵² Freedom House Webpage

²⁵³ Gabriela Knaul Statement, 2013

In May 2012 yet another law with implications to human rights was being debated in the Duma: the law on restricting public assemblies. and only a few weeks later it was adopted and signed by president Putin.²⁵⁴ The new law meant in practice that the already restrictive laws on public assembly in Russia became even more so: the fines for violating rules of assembly was significantly increased and it made it much more difficult, with bureaucratic obstacles, in general to organise public events.²⁵⁵

On March 5th 2013, the Venice Commission made an official statement on the new law which came into force on June 8th 2012. The report states that "*...The Venice Commission is firmly convinced that the June 2012 amendments to both the Assembly act and to the Code of administrative offences raise a number of serious concerns and represent a step backward for the protection of freedom of assembly in the Russian Federation...*".²⁵⁶

2.2.1.3. The Law On Internet Restriction

The journalist Anna Politkovskaya, who was killed in 2006, once stated that at least the internet in Russia is still free:

*"...We are hurtling back into a Soviet abyss, into an information vacuum that spells death from our own ignorance. All we have left is the internet, where information is still freely available. For the rest, if you want to go on working as a journalist, it's total servility to Putin. Otherwise, it can be death, the bullet, poison, or trial—whatever our special services, Putin's guard dogs, see fit..."*²⁵⁷

Although Politkovskaya never was able to witness it herself, president Putin has of late, while this paper is being written, enforced new laws restricting also the internet, the last area of freedom in Russia according to Politkovskaya.

²⁵⁴ Human Rights Watch Report A, p. 46

²⁵⁵ Ibid p. 49

²⁵⁶ Draft Opinion by the Venice Commission on federal law no. 65-FZ of 8 June 2012 of the Russian Federation p. 17

²⁵⁷ Anna Politkovskaya cited by Ann Cooper on CPJ Website

One of the internet censorship laws, which will enter into force on August 1st 2014, requires bloggers in Russia to register with Russia's media oversight office Roskomnadzor and they will be forced to follow the same rules that larger media outlets follow, i.e. rules that are also as of late much stricter and which make it nearly impossible to voice any opposition opinions or other issues deemed inappropriate by the authorities.²⁵⁸

2.2.1.4. The Blasphemy Law

It has been argued that the cause for the adoption of the 'Blasphemy Bill' in June 2013 was a direct result of the Pussy Riot case the year before, in which the accused were charged with hooliganism incited by religious hatred after their performance at the Christ the Saviour Cathedral in Moscow. Despite its alleged negative effects on free speech, the bill was passed and immediate in practice that anyone who offends the feelings of religious believers may face fines or even prison sentences.²⁵⁹ John Dalhuisen, the director of Amnesty International Europe and Central Asia offices declared in relation to the law that "*...This is the reality of Russia today – the suppression of any form of dissent or diverging views in all spheres of life, from the political to the social...*".²⁶⁰ As mentioned above, the anti-blasphemy laws are considered to be some of the most controversial laws with regards to the protection of free speech today.

2.2.1.5. The Law on Combating Extremist Activity

In August 2012 a new law aimed at restricting extremist activity. In practice, the law works so that after the government has identified extremist activity by a person or an organisation, a warning is issued and after that the entity has a certain amount of time to discontinue whatever activity it was that they were warned over. If the organisation in question does not obey, it will be banned or other forms of penalties will be

²⁵⁸ Rapsi News.com, A, 2014, Putin sign Law Equating Popular Bloggers to Media Professionals

²⁵⁹ Yekaterina Kravtsova, 2013, Blasphemy Bill Passes Duma Unanimously

²⁶⁰ Amnesty Webpage, 2013, New Laws an Affront to Basic Human Rights

introduced.²⁶¹ The Venice Commission issued an opinion on the law in March 2012 which stated that "*...The lack of clarity and precision of certain key provisions of the Law - such as the definition of "extremism", "extremist actions", "extremist organisations" or "extremist materials" - and its potential for an overly broad interpretation by the enforcement authorities, raise concerns from the perspective of the human rights standards as enshrined in the ECHR (in particular Articles 6, 9, 10 and 11) and of the principles of legality, necessity and proportionality...*".²⁶²

2.3. International Opinions on the Declining Protection of Freedom of Expression in Russia Today

The latest Universal Periodic Review on Russia from 2013 voiced many concerns with regards to the level of freedom of expression in the country. The 'foreign agent's law' was deemed risky by many special rapporteur's as it could in their opinion likely lead to a strict-control and a close monitoring of the organisations by the state which would make it difficult for them to function properly and performing their work.²⁶³

Another concern raised was the general atmosphere and climate for human rights defenders and journalists. The report especially points out the ever increasing harassment both through violence and judicial mechanisms and for the lack of efficient investigations by the authorities into these cases.²⁶⁴ The ill-treatment and excessive use of force during peaceful demonstrations is also raised in the report and it expresses genuine concern regarding how this influences the work of the civil society.²⁶⁵ The amendments to the public rally law are also brought up in the report, in addition to several other concerns on Russia's old-new relationship with freedom of expression.

²⁶¹ Federal Law on Combating Extremist Activity of the Russian Federation, translation offered by the Council of Europe. Document No: CDL-REF(2012)004

²⁶² Venice Commission Draft Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation from March 7th 2012, document No: CDL(2012)011

²⁶³ UPR, 2013, p. 9

²⁶⁴ Ibid p. 10

²⁶⁵ Ibid p. 10

In the report by the working group of the UPR states such as the Netherlands and Germany expressed their concern over the declining level of protection regarding freedom of expression and freedom of assembly.²⁶⁶ Austria and Belgium were mainly concerned about the legal developments which seemed to be restricting the activities of the civil society and civil liberties.²⁶⁷

The independence of public institutions in Russia, such as the judiciary, has also been questioned, the argument being that the judiciary is not independent from the executive branch.²⁶⁸ The UN Special Rapporteur on the independence on judges and lawyers Gabriela Knaul stated in 2013 that the impartiality of the Russian judicial system needs to be addressed as a matter of urgency.²⁶⁹

The international human rights organisation, Amnesty International, claim in their report from June 3rd 2104 that the recent development in Russia under president Putin show that there is a sustained attack in force against the use of public space for the expression of views and opinions and that the real turning point were the so called Bolotnaya demonstrations that took place on May 6th in relation to the presidential elections.²⁷⁰

According to a statement by the Venice Commission in a report regarding the amendments to the law on public assembly from June 2012 Russia has taken a "*...step backward...*" with regards to freedom of assembly and freedom of expression.²⁷¹

However, it is not just international actors who have so actively been expressing their distress over the declining protection of civil and political rights in Russia. Russian human rights organisations, e.g. the Moscow Helsinki Group, Golos and Memorial, have all repeatedly shared their thoughts and severe distress over the latest

²⁶⁶ UPR, 2013, p. 7

²⁶⁷ Ibid p. 9, 10

²⁶⁸ Freedomhouse Webpage 2013

²⁶⁹ Gabriela Knaul, 2013

²⁷⁰ Amnesty Report, 2014

²⁷¹ Venice Commission Opinion Report on the amendments on the federal law on assembly. Doc no: CDL-AD(2013)003

developments in Putin's Russia.²⁷² It should also be mentioned that both Golos and Memorial have recently received court orders to register as 'foreign agents'.²⁷³

2.4. The Protection of Freedom of Speech in Russia Today

As shown above, Russia has since the collapse of the Soviet-Union become signatory to all of the major Human Rights declarations, such as the UDHR, including the ICCPR and the ICESR, and the ECHR. These International Human Rights Instruments take precedence over national law according to article 15 of the Russian constitution.

In addition to being signatory to all of the major human rights conventions and mechanisms, there is no denying that Russia has made significant progress in ensuring its human rights since the end of the Soviet Union in 1991.²⁷⁴ There have been several reform measures taken over the years in accordance with European human rights standards, which have all significantly improved the human rights protection in Russia, and the process is still ongoing.²⁷⁵

It is also an undeniable fact that since President Putin was re-elected there have been new laws and methods introduced at an increasing pace, laws and methods which would seem to have the aim of controlling the growing opposition from properly gaining foothold in Russia and silencing political dissent.

In fact, it would seem that in theory the protection of the right to free speech is in place. But not even in theory is the protection quite as evolved as the international standards would want them to be. If we simply followed international law which Russia is applicable to, it would not be a problem for us to do so. However, if we take into account the margin of appreciation that all states have with regards to their culture, it does make the issue more complex. Below we will examine what the similarities between the theoretical protection of freedom of expression is between the Russian law and international human rights law.

²⁷² See Review of the Application of New Laws of the Russian Federation on the Freedom of Peaceful Meetings (2012), Article by Barry, 2011, Russian Authorities Pressure Elections Watchdog, Article by Gannushkina, 2007, Article by Gannushkina, 2007, We Tried Our Best...Changes in the Situation for Foreign Citizens in the Russian Federation

²⁷³ Tumanov, 2014, Is Russia's Foreign Agent's Law Illegal?

²⁷⁴ F.M Rudinsky, 2007, p. 69

²⁷⁵ Starzhenetskii, 2012, p. 349-350

2.4.1. Article 29 of the Russian Constitution

If we examine article 29 of the Russian Constitution which protects the rights to freedom of expression and compare it to article 19 of the ICCPR and article 10 of the ECHR, we are immediately struck by some differences. Whereas article 19 of the ICCPR and article 10 of the ECHR immediately strike as very specific in their wording and therefore make it much more clear and much easier for the reader to comprehend what is and what is not allowed under the articles, article 29 of the Russian constitution protecting the same right is much shorter and much more vague in its description, leaving much room for interpretation and therefore also arbitrary abuse. Both article 19 and article 10 that form the international protection for freedom of expression are presented in a way that makes the protection of the individuals rights to freedom of expression its focal point, whereas article 29 gives the impression that it exists in order for the state to be able to claim its rights in limiting freedom of speech for the individual.

2.5. Putin's Hooligans

As the research has so far demonstrated, the criminal charge of hooliganism has existed in Russia since the beginning of the 18th century. The wording of the charge, as well as how it has been applied and against whom, has changed over time depending upon what the authorities have deemed inappropriate behaviour. The charge has, despite some changes, always been used to control changes in society and to discipline individuals with the intent to create boundaries. During the early Soviet years it was mainly used against petty criminals, but even then it was always with the intent to punish those whose behaviour threatened the social order. In the late 1960's and early 1970's the charge was also used against political dissidents when they first emerged, re-curing during the 2012 presidential elections in post-Soviet Russia.

One of the first cases of hooliganism after the charge was narrowed in 2007 with the alleged intent to silence political dissent was a case against the Russian musician Ivan Aleksandrovich Alekseev who was arrested in 2010 and charged with hooliganism.²⁷⁶ He was accused of using foul language when he performed a song with lyrics accusing the police and political officials of corruption and violence.²⁷⁷ The opposition claimed that he was arrested not because of the foul language of the song, but as a warning not to criticise the authorities. The case did however not gain much media attention outside Russia.

At the time of the re-election of president Putin in 2012 the hooliganism charges began to emerge properly. It was as if officials seem to have been realising the potential of the broad charge, easy and quick to apply. During the months coming up to the elections there was an increase in opposition demonstrations. Under Russian circumstances the demonstrations were significant as they have not been common in Russia. They led to the mayor of Moscow, Sergei Sobianin, considered one of president Putin's closest allies, to give out an official warning stating that anyone who went too far in the protests would be charged with hooliganism.²⁷⁸

The Bolotnaya demonstrations against the re-election of president Putin have gained much publicity also internationally and trials in relations to the demonstrations are continuing while this paper is being compiled. Twenty seven people were arrested in relation to a Bolotnaya square demonstration that resulted in clashes between the police and the demonstrators.²⁷⁹ In relation to the development of the case, the foreign service of the EU issued a statement, on a human rights consultation, on May 19th 2013 in which they expressed their concern regarding the legality of the criminal proceedings against the Bolotnaya demonstrators.²⁸⁰ The Bolotnaya case has come to present a turning point for the worse regarding civil and political rights protection in Russia and under Putin.

²⁷⁶ The Independent Newsdesk, August 2010, Russian Rapper Jailed for Anti-Police Song

²⁷⁷ Bratersky, 2010, Irate Cops Jail Rapper for Hooliganism

²⁷⁸ Walker, 2013, Protest in Russia: an activity only for the brave and foolhardy

²⁷⁹ Bolotnaya Square Information Website

²⁸⁰ EU human rights consultation with Russia 19th of May 2013 Doc no: A 258/13

Another case also directly linked to the 2012 elections was an incident at one of the polling stations in Moscow right before the elections, when three women who belonged to the Ukrainian feminist group called FEMEN, performed a topless protest aimed at gaining attention for the alleged staging of the elections in Putin's favour.²⁸¹ They were likewise charged with hooliganism.

The poet Pavel Arsenyev was also arrested on hooliganism charges on June 12th 2013 for reciting a poem in support of the Bolotnaya demonstrators, who were arrested earlier that year. The authorities claimed that he was arrested because of a swear word in the poem that he recited.²⁸²

In the following part the focus will be on the three most extreme hooliganism cases of the recent years in Russia. The most famous is the case of Pussy Riot, but the paper will also look closer at the Arctic 30 case and the case of Petr Pavlensky, despite the fact that the hooliganism charges against him were dropped in April 2014 due to a lack of evidence.

Although the main focus will be on the Pussy Riot case, the Arctic 30 case and the charges against Petr Pavlensky it should however be pointed out that both the hooliganism charges against the musician Ivan Aleksandrovich Alekseev and the charges against FEMEN are controversial, as they were both clearly political acts. Alekseev was, according to the authorities arrested because of his use of foul language, but as the lyrics that he was arrested for were lyrics that openly and clearly criticised the authorities. It begs the question whether it was not in fact the political speech that he was being arrested for. In this case it would be a clear violation of international law protecting free speech as political speech is allowed large margins and limiting political speech is very much questioned.

Both article 19 of the ICCPR as well as article 10 of the ECHR also clearly state that with regards to political speech, acts are also allowed to be both exaggerated and provocative. The artistic means of expressing political opinions is protected and would further point out that the charge of hooliganism applied in this case would seem to be against international law. Similarly the FEMEN women who were charged with

²⁸¹ Chaykovskaya, 2012, Bare-breasted Protest Wreaks Havoc at Poll

²⁸² Chernov, 2013, Artist and Poet Face Trial

hooliganism were doing so with the specific intent to bring attention to a political issue, which international law sees much value in and allows much room for. The actual form of expressing their political views would in accordance with this interpretation fall under the protection of international law.

2.5.1. The Three Hooliganism Cases in Focus

Petr Pavlensky was charged with hooliganism in November 2013 after he nailed himself by his scrotum to the Red Square in Moscow as a protest against "... *the apathy, political indifference and fatalism of modern Russian society...*"²⁸³. Pavlensky is a Russian painter and political activist from St.Petersburg who has become famous in Russia for his political-activist stunts. Pavlensky was charged with ideologically motivated hooliganism after his performance on the Red Square.²⁸⁴ The charges against him were dropped in April 2014 due to lack of evidence as the documentation by the police failed to prove his guilt to the alleged crime of hooliganism.²⁸⁵

The so called Arctic 30 case began when 30 members of the organisation Greenpeace tried to board a Russian Gazprom oil-rig in order to protest against oil-exploration in the Barents sea.²⁸⁶ The members were arrested for having tried to post banners on the Russian oil-rig Prirazlomnaya and their ship was forcibly taken control of and seized one day after the attempt on September 19th 2013.²⁸⁷ All 30 of the members were taken in for questioning and in early October they were all issued a warrant of arrest and were told that they were being investigated for piracy.²⁸⁸ However, the piracy charges against them were dropped and instead they were all charged with aggravated hooliganism on October 23rd.²⁸⁹ On November 12th they were released on bail but were still facing court. All 30 members were facing possibly up to 7 years in jail had they been convicted of aggravated hooliganism until an amnesty declared by president Putin, in order to

²⁸³ Walker, 2014, Petr Pavlensky: why I nailed my scrotum to the Red Square

²⁸⁴ Ragozin, 2013, Artist who Nailed Scrotum to Red Square is Charged with Hooliganism

²⁸⁵ Chernov, 2013, Artist and Poet Face Trial

²⁸⁶ Vidal, 2014, Arctic 30: Russia Releases Greenpeace Ship

²⁸⁷ Warrell, 2013, Greenpeace 'Arctic 30' Arrive Home from Russia

²⁸⁸ Gutterman, 2013, Russia Charges Greenpeace Activists with Piracy

²⁸⁹ Walker, 2013, Arctic 30: Russia Changes Piracy Charges to Hooliganism

mark the anniversary of the adoption of the 1993 Russian constitution was approved, had the Arctic 30 members freed of the charges.²⁹⁰ On March 17th Greenpeace issued a press release in which they informed the public that they had applied to the European Court of Human Rights requesting damages to the 30 individuals from the Arctic 30 case from the Russian Federation. The lawyers of Greenpeace argued that the Russian Federation breached both article 5 of the ECHR on the right to liberty as well as article 10, the right to freedom of expression.²⁹¹

The most famous of all Russian hooliganism cases is the Pussy Riot case which began when a group of young women who belonged to a punk band called Pussy Riot staged a performance in Moscow's Christ the Saviour Cathedral on February 21st 2012 in the attempt to bring attention to the Orthodox church's support for president Putin in the upcoming 2012 elections.²⁹² The women were arrested and charged with hooliganism motivated by religious hatred a few days after the performance and after an extensive time in detention two of the women were convicted on August 17th 2012 to two years in prison.²⁹³ In December 2013 the two women were released from prison due to the unexpected amnesty that president Putin declared because of the 20th anniversary of the adoption of the 1993 Constitution.²⁹⁴ In June 2012 the three women lodged an application to the European Court of Human Rights against Russia and claimed violations of articles 3,5,6 and 10 of the ECHR.²⁹⁵ Two years later, in June 2014, Nadezhda Tolokonnikova made an official appeal to the Russian Constitutional Court asking for a review of article 213 in the Russian criminal code as it in her opinion is a violation to the right to freedom of expression.²⁹⁶

²⁹⁰ Yarovitsyn, 2013, Russia Amnesty Could Free Pussy Riot, Benefit Greenpeace Activists

²⁹¹ Greenpeace Press release, 2014, Arctic 30 Jailed in Russia to take case to European Court

²⁹² Cohen, 2012, An Evil Collusion Between a Tyrant and a Man of God

²⁹³ Maria Vladimirovna Alekhina and others against Russia (19 June 2012) No: 38004/12

²⁹⁴ Mullen, Magnay, Hanna, 2013, Imprisoned Pussy Riot Band Members Released

²⁹⁵ Maria Vladimirovna Alekhina and others against Russia (19 June 2012) No: 38004/12

²⁹⁶ The Moscow Times Newsdesk, 2014, Pussy Riot's Tolokonnikova wants Hooliganism Charge Removed from Law Books

2.6. How the Charge Was Used in the Past Compared with Today

When this study examined the Soviet era use of the charge of hooliganism it became clear that it is a quintessential Russian charge which was most heavily used during the Soviet years. Both during Stalin's rule as well as during the rule of Khrushchev, and to a certain extent also during Brezhnev's era, the authorities set up campaigns against hooligans. During those times the hooliganism cases reached very high numbers. This would imply a coincidence and a correlation between the amount of hooligans charged and how much change was occurring in the society. Thus the charge of hooliganism may be interpreted as to create stability and to define the acceptable boundaries of the Soviet citizen.

When the Soviet Union collapsed in 1991 there was some significant progress with regards to the protection of civil and political rights in Russia. The most significant progress was made due to Russia's accession to the Council of Europe in 1996 because the Council made demands especially with regards to the human rights protection.²⁹⁷ As we have seen the progress was however quite limited in the end. Despite of the demands made by the Council the changes were not as significant as one would have hoped for. Both the criminal procedural legislation as well as the criminal code were indeed revised, but in the end the changes were not very remarkable. Article 213 in the Russian Criminal Code was one of many details which was not changed. Despite the charge being broad and obviously easy to abuse by the authorities, it stayed almost identical to the hooliganism charge in the Soviet Constitution.

Since the demise of the Soviet Union and up until 2007 the charge of hooliganism had become what has been described as a waste-basket charge²⁹⁸ and was used mainly for application against petty crimes. In 2007, when president Putin decided to streamline the application of hooliganism by amending the article to be more precise and limiting the possibility of applying it as broadly as it had been done in the past a new kind of hooligan was being created.²⁹⁹

²⁹⁷ Kahn, 2008, p. 532

²⁹⁸ Gessen, 2013, Hooligans, Hooligans, Everywhere

²⁹⁹ Rossiskaya Gazeta, 2007, Article on Hooliganism Charge Being Streamlined

It's legal construction may have contracted, but by 2012 it was being applied against political dissidents once again. Because so much of the Soviet Criminal Code stayed intact after the collapse of the Soviet Union, the quintessential Soviet crime of hooliganism also survived and now continues to be applied in Russia, most of the time against petty crimes, but also against political dissidents.

If we look at how the hooliganism charge has been used before it is hardly a coincidence that it emerged again, despite its new wording, to silence the political opposition, around Putin's re-election. Russia was at the time surrounding the re-election of Putin experiencing more opposition than it had during any of the years since 2000.³⁰⁰ When hooliganism was used against political dissidents the first time around it was also a time of change in the Soviet Union. After the death of Stalin in 1958 and with Khrushchev becoming the new ruler the Soviet Union slowly began to unfold from Stalin's iron fist into a society which was more open to foreign influence.³⁰¹

While president Putin has been accused of bringing back elements of the Soviet past it can not be denied that he has also brought much change to Russia. Putin has made significant progress for the country, especially with regards to the economy.³⁰² The change has also brought with it more influence than ever before from abroad and with the ever expanding power of the internet and social media, Russia is now open to influence from abroad in an ever increasing amount.

With the death of Stalin, the Soviet Union softened some of its previously hard-core aspects. Khrushchev was clearly wanting to bring a certain amount of openness to the country, while still maintaining the power of the authorities.³⁰³ It was clearly a schizophrenic time for the Soviet Union and in many ways it resembles the situation in Russia today.

President Putin has indeed brought the country to a level of openness never experienced in Russia before, but since his re-election in 2012 he has also made it clear

³⁰⁰ Herszenhorn, 2012, Putin Wins Presidency but Opposition Keeps Pressing

³⁰¹ Neumann, 1996, p. 141

³⁰² Northam, 2014, Economic Change in Russia

³⁰³ Copeland, 1991, p. 107

that he wants to maintain control of the society by the authorities to a higher degree than perhaps anticipated. In practice, as was the case during the Soviet years, this is a very difficult situation to maintain and it is obvious that Putin's regime has taken advantage of the old trusted favourite, the hooliganism charge, as one of the methods to bring stability and control to an otherwise rumbling society.

In the Soviet era the collective was always emphasised as being more important than the individual. The hooliganism charge was an example of this, as it stigmatised people, individuals, who challenged the authorities.³⁰⁴

Because the Russian society is still based on collectivism³⁰⁵, this kind of stigmatising works even more efficiently. In societies where individuality is regarded higher it matters less, but in collective societies becoming an outcast is much worse. Also, Russians feel that they and the state work together for a greater good, and working against the state is seen as a very serious threat to the whole society. By creating a strong state ideology president Putin clearly thinks that he can keep the society together.³⁰⁶ The way Putin acts in relation to hooliganism and the west/international legal entities, invokes a Russian tradition of a strong political centre.

By now the most famous hooliganism case is by far the Pussy Riot case, which has spurred much debate over the last couple of years regarding Russia's protection of freedom of speech and freedom of assembly. The case took place at a tumultuous time in Russia, Putin and his predecessor, Dmitry Medvedev had recently announced that Medvedev would not be running in the next presidential elections, but that instead Putin would be running and Medvedev would be supporting him while also being appointed Prime Minister.³⁰⁷ For the first time a few more than just the very limited opposition that is usually active in Russia began to voice their opinions against this and Putin's popularity was not considered as guaranteed and safe. This emerging opposition and the general openness of the society have certainly contributed to the re-emergence of the hooliganism charge in a very similar manner as during the 1960's and 70's.

³⁰⁴ La Pierre, 2012, p. 4

³⁰⁵ Antonov, 2014, p. 24

³⁰⁶ Antonov, 2014, p. 30

³⁰⁷ BBC Newsdesk, 2011, Russia's Putin set to return as President in 2012

2.7. Transitional Justice and the Effects on Putin's Re-Introduction of Hooliganism - An Examination of the Wording of the Charge and its Accordance to International Legal Standards

As we have learnt, transitional justice was not performed in what could be considered a very successful way after the collapse of the Soviet Union in 1991. There was a general lack of interest by the authorities at the time to properly deal with the past in order to more efficiently begin the journey towards becoming a democratic state.³⁰⁸ However, Russia was in a unique position after the collapse and if there had been more political will the transitioning would have most likely proved difficult as there was no democratic past to refer to.

The poor transitioning cannot itself be blamed for all the difficulties that Russia has had in finding its democratic path, but it is unquestionably one of the reasons. Despite there having been significant progress since the disintegration of the Soviet Union, there are still severe problems, most of them political. The lack of political will to deal with the past has been a major obstacle over the years and it has not changed under president Putin, quite the opposite.³⁰⁹ President Putin has made it clear that under his presidency the past is something to be proud of, even if the details have to be manipulated in order for it to be possible.³¹⁰

If we examine what impact the transitioning has had on the re emergence of the use of the charge of hooliganism to silence political dissent, it is obvious that had there been a clear cut between the Soviet past and the Russian present the use, or perhaps even the very existence, of the hooligan charge would be questionable. When Russia joined the Council of Europe in 1996 there had been demands by the Council regarding changes that had to be made for the protection of human rights in order for Russia to be

³⁰⁸ Barahona de Brito et al, 2011, p. 284

³⁰⁹ Mendelson & Gerber, 2005, p.83

³¹⁰ Podrabinek, 2013, Soviet Forever

considered and accepted.³¹¹ However, because the political will of Europe to include Russia was so strong, Russia was accepted despite many areas of concern still persisting. The Russian Criminal Code was amended, but the amendments mostly dealt with economic crimes and Chapter 24 dealing with public security and in which we find article 213 on hooliganism stayed almost entirely the same as its Soviet predecessor.³¹²

The charge of hooliganism had been abused heavily by the authorities during the Soviet years, but despite this it remained untouched and ready to be used by the next regime. In spite of Russia and the Soviet Union being different countries, Russia is none the less the legal successor of the Soviet Union, a fact even more so evident when taking into account how much of the legislation, despite the many changes that also took place, has stayed intact since the years before 1991.

When it comes to the responsibility of transitional justice practices and the re-emergence of the charge of hooliganism it is not only the practical possibility of Russian citizens being charged with this quintessential Soviet charge which had been a political tool used by the authorities over the years. If it was not for the poor efforts to create a collective memory of the Soviet past which condemns the human rights violations that took place, the society could not be manipulated with the same tools that were used by the previous regimes to the same extent. Because the authorities have ever since the collapse in 1991 emphasised the nostalgic aspect to their past, they have managed to create a collective memory for the Russian society which instead of condemning the Soviet past, looks back at it with a sense of nostalgia.³¹³ This has enabled Putin to use the charge of hooliganism, used so heavily in the past to create boundaries for acceptable behaviour for the Soviet man, to appeal once again to the old notion of a strong collective society in which the norms must be carefully protected from misbehaviour and deviancy by defining those who try to defy the authority as hooligans; once enemies of the Soviet society and now enemies of the Russian society.

³¹¹ Kahn, 2008, p. 532

³¹² Observation based on a comparison between the two codes and their articles

³¹³ Toymontsev, 2011, p. 310

The wording of the charge of hooliganism is also an issue which should be examined in order to conclude whether it is in accordance with international law. Article 213 does strike as being quite vague, deemed a problem by international law, as laws which could be used with the aim of restricting free speech need to be clear and easy to understand and the limits need to be clearly defined in order for individuals to comprehend what kind of behaviour is and is not allowed under that specific article. When examining the article on hooliganism in the Russian criminal code it is obvious that it is difficult to understand the boundaries of it and it comes across as a convenient charge to use as it can cover a whole range of crimes due to its vague definition.

2.8. The Application of Article 213 and its Legality with regards to International Legal Standards

I will now move on to examine the modern hooliganism cases in more detail in order to establish how the way that the Russian authorities have applied the hooliganism charge complies to international legal standards that Russia is applicable to.

As has been demonstrated, the hooliganism charge first emerged in modern day Russia, with the similar intent to silence political opposition as during the Soviet years, around the time of Putin's re-election in 2012.

All the cases discussed in this research were media stunts, performed with the intention of gaining attention for their political cause. None of the acts could be described as very serious as such. They did not pose as a threat to anyone else, nor did they destroy any property. They can all, however, be interpreted as humiliating acts, acts that were made not only in order to gain attention for the political wrongs that they were fighting, but also with the intent to humiliate the authorities, clearly not highly appreciated, especially not by a figure of authority, such as president Putin, who entirely relies on the societies admiration of him as a strong leader and a very masculine and protective father figure. Public humiliation does not fit well in this strategy of rule

2.8.1. Petr Pavlensky

The act or performance which Pavlensky performed that day on the Red Square was a solitary and peaceful action. He simply placed himself naked on the ground and nailed his scrotum to the ground and stayed there, sitting. When he was removed and detained but released without charges pressed against him, this was done without any resistance by him.³¹⁴ In an interview Pavlensky informed that he first received of the charges against him from the Interfax news agency and only then from his lawyer.³¹⁵ This clearly implies that the media attention that the performance got after Pavlensky had been detained and released had impacted the investigations against him and the pressure to charge him with something in order to make clear that his behaviour was inappropriate was deemed as necessary. By charging Pavlensky with hooliganism charges, which at it's worst could mean 7 years in prison, but not even informing him directly, but rather letting the press get the information first and making no efforts in detaining him or even restricting his right to leave the country, points at the main reason of him being charged: to warn other dissidents of what they have to fear if they participate in something similar, rather than actually punishing him. Considering that the charges against Pavlensky were also dropped confirms that the process of charging him was deemed necessary for the authorities to react in order to set an example.

The performance by Pavlensky was a clear example of a political speech act, where Pavlensky through artistic means wanted to demonstrate and express his opinion on, as he has explained, the corruptness of the authorities and the passiveness of the society.³¹⁶ The fact that he was removed from the Red Square and detained was not very surprising or shocking. Most state authorities in Europe would probably have done the same. The hooliganism charges brought against him is, however, problematic, as they must be interpreted as much too severe in comparison to the act and implies that the whole case can have been fabricated. Pavlensky himself has chosen to see the charges

³¹⁴ As seen in video on the Guardian website,2013, Russian artist Nails Scrotum to Red Square Cobbles - video

³¹⁵ Galperina, 2013, An Interview with Petr Pavlensky: Anarchist Artist Nails his Balls to the Red Square, so You Don't Have to

³¹⁶ Chernov, 2013, Artist and Poet Face Trial

as part of his performance, only highlighting the message and legitimising his criticism.³¹⁷

As discussed above, according to international law protecting the right to freedom of expression, there is not much room for limitation by the state when it comes to political speech, speech that adds to the public political debate and therefore seen as essential to the proper functioning of a democratic state. International law also does not allow for restrictions by the state used in order to silence further individuals from speaking freely in the future. According to both article 10 of the ECHR and article 19 of the ICCPR, many different forms of expression are allowed, including artistic forms, such as the performance by Pavlensky referred to above. The law further emphasises that even speech or acts that provoke should be allowed. The law does also set limitations. In this particular case it could be argued that what Pavlensky did was morally offensive as he was naked in a public space. However, as it was part of a performance and a political speech act, which is given very little room for restrictions, it would never the less be very difficult to argue. By charging Pavlensky with hooliganism, even if the charges against him were dropped, his rights to free speech were violated, as this could be interpreted as persuading him from not speaking freely or demonstrating his opinions in the future. By stigmatizing Pavlensky and by pointing him out as an outsider of the Russian society, which values collectivism over individualism, with the hooliganism charge the authorities also violated the right to freedom of expression in general, as it functioned as a silencing method for the society over all. The performance also brings to mind another act on the Red Square, when Mathias Rust was arrested and charged with hooliganism when he landed his plane on the square in 1987.³¹⁸ Both acts have an aura of humiliation about them for the authorities, or at least it is likely that the authorities interpret it that way. They both performed acts on the countries main square, which is loaded with symbolism of Russia as a great power and both acts openly defied that power. The Russian authorities react to critique today in the same way as 30 years ago, by turning the attention away from the political message that the acts are trying to portray and instead putting the focus on the actors and portraying them as hooligans,

³¹⁷ Ibid

³¹⁸ Wilkinson, 2002, What Happened Next?

outsiders in the Russian society, that show disrespect for the authorities, to societal norms, and therefore need to be punished.

2.8.2. Arctic 30

Another case which gained significant attention internationally and in which the defendants were also charged with hooliganism was the so called Arctic 30 case, already referred to above. The quite rash way in which the charges were changed from piracy to hooliganism demonstrates in my opinion the want and need of the Russian authorities to charge the defendants with ‘at least something’ once the piracy charges were dropped. That even the hooliganism charges were eventually dropped makes it difficult not to wonder whether the charges against them were not in fact fabricated from the beginning in order to set an example of what not to do and how not to behave by the authorities. There seems to be a similar pattern to the Pavlensky case in the sense that the hooliganism charge was in neither of the cases something that the accused were immediately charged with but rather something that after some time, and after extensive media coverage and attention, were applied to both cases. That neither of the cases actually lead to a sentence strengthens the argument that the charges were fabricated and hooliganism was used because it is broad and easy to apply and hold certain symbolism to the Russian society which can be easily taken advantage of when the authorities want to deem something unacceptable behaviour.

According to Greenpeace international and the individuals themselves they were stopped from demonstrating by masked men in balaclavas firing warning shots with automatic weapons.³¹⁹ On September 19th all 30 individuals are seized by FSB agents as they boarded the Greenpeace ship, a boarding which has generally been accepted as illegal according to international law as the Arctic Sunrise was in fact not in Russian waters during the boarding of the agents but in international.³²⁰

According to international legal standards, article 10 of the ECHR and article 19 of the ICCPR protecting the right to freedom of expression, peaceful protesting is allowed and should be protected. It is also specifically emphasised that if the speech is seen as valuable for the public debate it is protected to an even greater extent. If the protest

³¹⁹ Greenpeace Feature Story, 2013, Updates from the Arctic Sunrise Activists

³²⁰ BBC Newsdesk, 2013, Russia 'Seizes' Greenpeace Ship After Arctic Rig Protest

would have been interpreted as a threat to security then under international law the authorities would have had the right to remove and charge the individuals. Or had the message that was being portrayed through the demonstration been proven to have caused moral damage or had it been interpreted as hate speech there could have been a possibility by the state to restrict it as these are instances where the law allows for state interference to a certain degree. However, this was an example of a peaceful protest in which the message could be deemed as very important for the public debate and therefore to the level of democracy of the state and court decisions and interpretations all confirm that when it comes to political speech and even if the speech is performed in an alternative way, states are allowed very little possibility for restrictions.

On September 25th president Putin stated in a speech at the plenary session of the third international Arctic forum that the individuals held in custody and charged with piracy "*...were obviously not pirates...*" but went on to state that publicity stunts like the Arctic 30 stunt were to be seen as threats to lives' and peoples health, although he did not expand on exactly whose lives and health could have been harmed by the hanging of banners on the side of a rig structure.³²¹ None the less, on October 23rd Greenpeace was told in an oral hearing that the piracy charges against the accused are dropped and instead they were to be replaced with charges of hooliganism.³²²

Despite the hooliganism charges being less severe than the prior piracy charges they were generally deemed entirely disproportionate to the act. In relation to the changed charges the European Parliament issued a statement on October 24th in which it read that in addition to the charges being disproportionate they could also be "*...seen as a threat to democracy, freedom of expression and freedom of demonstration...*".³²³

The Arctic case became one of the most media attention grabbing cases of those months in the autumn of 2013 and it would be difficult not to take that into account when analysing; why were the 30 peaceful protesters who were first charged with piracy, but once they were deemed as too severe, were charged with the, albeit less severe, much more ambiguous and broad charge of hooliganism. This also underscores that, due to the media attention, it would have been impossible for the Russian authorities to simply

³²¹ Video on RT.com, 2013

³²² Based on a email exchange with a lawyer from Greenpeace

³²³ Press release by the EP on the piracy and hooliganism charges by Raluca Viviana Huluban

drop the piracy charges and letting the accused go free, as this would have implied that the authorities were wrong and that the accused were in fact not guilty of any crime. Such a procedure would have made the Russian authorities look incapable, something that a strong regime would rather not be identified as. Hooliganism was a convenient and quick tool to maintain the reputation of the authorities in the media and to stigmatise the accused by portraying them as the worst kind of threats to Russian society: hooligans.

2.8.3. Pussy Riot

The intent of the performance of Pussy Riot during their performance in Moscow's Christ the Saviour Cathedral was, according to the women, to bring attention to the Orthodox Patriarch's call, which asked all believers to vote for Putin in the upcoming presidential elections. They defied the accusations of purposely offending the Orthodox believers with their performance and claimed that their song was not, "*...motivated by hatred for Russian Orthodoxy...*".³²⁴

The young women were detained in early March 2012, after a complaint had been lodged by the acting director of the Christ the Saviour Cathedral fund three days after the attempted performance by Pussy Riot.³²⁵ After several extensions to their detention, they finally went to trial on July 20th, over four months after their initial arrest. On August 17th, two of the women - the third participant released earlier as she was seen as not having participated in the act to the same extent - were sentenced to two years in prison.³²⁶

The performance that the women had tried to act out in the Cathedral had clear political intentions, according to themselves, evident in the wording of the song and the circumstances under which it was performed. The presidential elections in March 2012 had stirred unconventionally much opposition in the Russian society and many people openly expressed their frustration with what was considered to be a pre-arranged result, when Putin was elected. This was not the first time that Pussy Riot demonstrated

³²⁴ Tolokonnikova, statements to the charges in the Russian court

³²⁵ The Russian case file against Pussy Riot

³²⁶ The Russian case file against Pussy Riot

political disbelief³²⁷ and critique which should also be taken into account when debating whether their performance was politically motivated or not and the wording of the song repeatedly refers to president Putin and his regime in a critical tone, emphasising the political message of the performance.³²⁸ This was, however, strongly opposed by the prosecution who maintained that the political message of the song was simply a pretence for religious hatred that the women trying to convey through their performance.³²⁹

By entering a part of the Cathedral which is considered holy, and to which women are according to Orthodox traditions and beliefs, not allowed, the women were also protesting against the discrimination of women when they decided to perform in this specific part of the church. The women claimed that their words were not meant to offend Orthodox believers in any way. One of the accused, Nadia Tolokonnikova, admitted to making a mistake by taking a political performance into the Cathedral, but insisted in her statement that "*...the ethical and legal aspects of our case must be separated from each other...*".³³⁰

What the women and their lawyers claimed was, that while they could admit to having made a mistake in the choice of venue, the hooliganism charges against them were still entirely disproportionate to the act performed and that by charging them with hooliganism motivated by religious hatred for a political demonstration, they were violating their right to freedom of expression and de-politicising the case. When the women took the case to the European Court of Human Rights they claimed that the detention and conviction had "*...amounted to a gross, unjustifiable and disproportionate interference with their freedom of expression...*".³³¹

It is an undeniable fact that a performance such as the one in the Cathedral by Pussy Riot would most likely create a stir in most countries. It is also very likely that some believers would find the act offensive in almost all countries, especially since the actors were women and they performed in a place where women are traditionally not allowed.

³²⁷ Openculture.com

³²⁸ Lyrics to Virgin Mary - Drive Putin away in 2012, 'Pussy Riot, a punk prayer for freedom'

³²⁹ The Russian case file against Pussy Riot

³³⁰ Nadias opening statement to the charges

³³¹ Maria Vladimirovna Alekhina and others against Russia (19 June 2012) No: 38004/12

What the women and their lawyers claimed and have claimed since, is that the political message of the performance was entirely ignored and the charges against them, as well as their sentences, were significantly disproportionate to the act performed and that international law is very clear on the point, that when it comes to political speech, the states have much less room for limitations.³³²

However, it is a fact that states are allowed a certain margin of appreciation when it comes to interpreting international law. In the Pussy Riot case, the margin of appreciation would be regarding the claimed distress, that the witnesses had been succumbed to by the performance in the cathedral and the damage that it might have caused. The margin of appreciation that states are allowed must, however, be exercised in a way which does not result in abuse of the allowed discretion.³³³ As it is quite evident that the performance by Pussy Riot was a political critique considering the context, the upcoming presidential elections and the past political stunts that the group had participated in before, as well as the lyrics of the song performed, the alleged religious hatred is likely to have been a pretence for the legal arrest and punishment of the women. By arresting, charging and sentencing the women to prison for their act, the authorities used legal means to justify their arbitrary punishment. By de-politicising their performance and instead claiming religious hatred, the authorities were able to avoid the sensitive subject of political critique and they were able to punish the women by appealing to religion, which immediately makes it easier to appeal to cultural and religious norms and the margin of appreciation that states enjoy in relation to them.

The performance by Pussy Riot was, however, a clear act of political speech. Article 19 of the ICCPR and article 10 of the ECHR, and their interpretations by courts and legal texts, confirm that political speech enjoys significant protection and opposition speech even more so.

Blasphemy laws, which hooliganism motivated by religious hatred inevitably resembles and becomes when put in practice, are deemed as very problematic, as it gives religion the same rights as the believer, violating international law as it creates boundaries to the

³³² Ibid

³³³ Bakircioglu, 2007, p.2

topics allowed to be debated and thus restricts the right to freedom of expression.³³⁴ Blasphemy laws are often abused by authorities wanting to limit free speech, as it is an easily applicable charge and tool of repression.³³⁵ Hooliganism motivated by religious hatred is in fact almost identical to a blasphemy law and it is therefore questionable whether even the charge itself, in addition to the wording being vague and open to abuse, is in accordance with the right to freedom of expression.

When it comes to the performance itself, international law allows for alternative methods of demonstration and even methods which shock or offend. Many of the witnesses in the Cathedral claimed that they had been deeply offended and shocked by the performance because of the women's attires, short skirts and colourful balaclavas.³³⁶ However, the claims of the women's attires being too radical seems disproportionate and would seem to fall under the allowance of various means of artistic expression, deemed acceptable under articles 19 and 10.

By charging the women with hooliganism motivated by religious hatred the authorities not only stripped the women's performance of all its political meaning, but also created a political trial as a criminal trial as was common during the Soviet years.³³⁷ A political trial was disguised as a criminal trial and the women were not offered political status. According to one of the accused, Nadezhda Tolokonnikova said in her closing statement that the trial "*...this poor excuse of a judicial process approaches Stalin's Troikas...*".³³⁸

Similarly to the Pavlensky case and the Arctic 30 case, Pussy Riot received its fare share of media attention. It has been the most followed case in from Russia since Mikhail Khodorkovsky's case in early 2000.³³⁹ Like with Pavlensky and the Arctic 30, the media attention is likely to have played its part in the subsequent hooliganism charges. When the women were briefly detained and then set free immediately after their attempted performance of their Punk Prayer, it took less than 15 minutes for a tweet to appear about their performance and less than 24 hours for them to have

³³⁴ Radsch, 2012, The Trouble with Blasphemy Laws

³³⁵ Brooks, 2012, Calls for Blasphemy Ban Resurface at UN

³³⁶ The Russian case file of Pussy Riot

³³⁷ Sharlet, 1978, p. 770

³³⁸ Tolokonnikova, closing statement

³³⁹ The Guardian website, Mikhail Khodorkovsky

uploaded their video of the performance online.³⁴⁰ This immediately got the attention of journalists and cannot have gone unnoticed by the authorities for long. It is plausible that if there had been no media attention at all after the act, the women would never have been arrested and charged. The media attentions aggravated the authorities more than if there had been no media attention at all. But the media was not just used by Pussy Riot for the dissemination of their performance, it was also used by the authorities.³⁴¹ By publicly charging the women with hooliganism the authorities were able to appeal to the symbolism of the outcast hooligan and use it to create a shared enemy out of Pussy Riot. This brings to mind the hooliganism cases which were most common during the Soviet years whenever too much change was occurring in the society and there was a need to emphasise the societal norms. Pussy Riot can be interpreted as the beginning of a modern hooliganism campaign, similar to those used by Soviet rulers, which consequently continued with Arctic 30 and Pavlensky, as they were all brutally stigmatised as outsiders and enemies in much of the state owned media and thus have come to serve the purpose of the authorities as the common enemy of the people and the state.³⁴²

³⁴⁰ Gessen, 2012, p. 120

³⁴¹ Talanova, What does the coverage of the Pussy Riot story in Russian and UK news media show us about the public sphere, and the type of stories that are in the public interest, in each country?

³⁴² Ibid

Conclusions

As has been argued and we have found out, the Russian crime of hooliganism, which has been used to control individuals seen as threats to the social order over the years, was not left in the Soviet past.

The charge, which was used arbitrarily against political dissidents amongst others during the 60's and 70's in the Soviet Union, is now being used against political dissidents once again.

It was in relation to the presidential elections in 2012 that the charge re-emerged as a tool to control political dissidents and since 2012 there have been several other repressive tools introduced in addition to hooliganism which all stifle free speech. The introduction of measures limiting the right to freedom of expression can be interpreted as a response to the emerging opposition in Russia, which although still very limited, has reached a significant enough size to create worry in the Kremlin.

The changed context in Russia since the collapse of the Soviet Union and perhaps especially since Medvedev's presidency, when Russia was given its final push into modernity, can also be interpreted as one of the reasons for the re-introduction of hooliganism and other measures intending to limit free speech.

The similarities this development has with the time of the emergence with hooliganism used against political dissidents during the Soviet era is striking. It would seem that hooliganism, like before, is indeed a convenient tool when the Russian society is experiencing significant change and when the authorities deem it necessary to keep the boundaries of appropriate behaviour in increasing control by the state.

We can also draw the conclusion, that had Russia had a more successful transitioning from its Soviet past, the charge of hooliganism would most likely have been much more difficult to re-introduce in Russia today. Not only because of the fact that the charge itself, which had been used as a kind of catch-all charge through out Russian history, is very broad and vague and not in accordance with international legal standards, but had there been more pressure from the CoE in 1996 when Russia applied for membership to

conform the Russian Criminal Code more extensively, the charge should have been changed so that it would be more difficult to use it arbitrarily today.³⁴³

As demonstrated above, the biggest impact that transitional justice practices, or the lack of them, has had on the re-emergence of the charge of hooliganism, has more to do with the concept of collective memory than with the actual practical issue of legal reform. Because there have been no real attempts to create a collective memory of the Soviet past and the human rights violations that occurred as something to learn from, in order not to commit the same mistakes again, it has been all too easy for president Putin to bring back elements from the past, such as hooliganism, and appeal to the same Soviet values that rulers appealed to in the past when the charge was used to punish crimes against society.

Today, the majority of the Russian people still look back at their past with a sense of nostalgia and this nostalgia is easily tapped into by the authorities when they bring in repressive methods and elements all too familiar from the past.

When we examined how the charge had been applied in the recent media attention grabbing cases there were a few noteworthy observations made. First of all, what the cases, similarly to the most famous hooliganism cases from the Soviet years, all had in common was, that while none of them could be interpreted as dangerous or threatening, they all shared an element of humiliation aimed at the authorities and they all gained significant media attention.

In fact, in both the Pavlensky and the Pussy Riot case, it is possible that had it not been for the extensive media attention also abroad, the charges of hooliganism against them would never have occurred. The public opinion can be interpreted as very important for Putin, as has been the case of Russian rulers of the past as well.

The centralisation of power which Putin enjoys relies heavily on public opinion of him as a strong leader. Publicity stunts, which all the three hooliganism cases discussed in this paper were, aiming at publicly criticising and in a sense humiliating the authorities, is interpreted as a serious threat. As a consequence, all three cases were treated entirely disproportionately and the "crimes" which should have been punished as administrative

³⁴³ Clements, 1994, p. 2

offences at worst, were de-politicised and turned into criminal cases, in which the accused were portrayed as serious threats to the Russian society.

The hooliganism charge is evidently an easy way for the authorities to de-politicise cases, stripping away the political critique of the acts and instead turning them into normal crimes, dealt with through criminal trials. By doing this, the authorities are minimising the damage caused, because when the political connotations are removed and the acts are treated as regular crimes, the accused become criminals instead of opposition activists and thus it is justified to punish them. All the while, the authorities are able to pretend that there is no opposition which could jeopardise their power.

The frivolity and inconsistency with which the charge has been applied in all three cases inevitably also brings to mind a game of some kind, in which the charge of hooliganism is simply a political tool of the authorities, easily applicable and not taken too seriously.

Petr Pavlensky found out about the charges against him through the media and as suddenly as the charges had been brought against them they were dropped. The Arctic 30 were first charged with piracy, but when the charges were deemed too severe, they were changed and during a oral hearing the accused were suddenly informed that they were all charged with hooliganism instead. The charges were then dropped due to an amnesty by president Putin which was changed in order for the Arctic 30 case to fall under the scope. While the Pussy Riot case was the one case with the most serious consequences, the two women were none the less freed earlier due to the amnesty as well.

This inconsistent way is typical of the authorities in Russia. President Putin is very often keeping everyone guessing on his next moves, almost as a deliberate power strategy. Dr. Jarno Linnell states in an article regarding Russia and the recent events in Ukraine and why Russia has not yet made a cyber attack on Ukraine that "*...There is strategic advantage in keeping the rest of the world guessing...*".³⁴⁴ A strategy that Putin seems to apply to most of his endeavours these days, including the use of hooliganism for his own political benefits.

³⁴⁴ Linnell, 2014, Why Hasn't Russia Released a Cyber Attack on Ukraine?

Because of the connotations that hooliganism bears for the Russian people, it is also a very effective tool to use in order to warn other dissidents of what would happen if they would ever decide to take part in anything similar.

When the women of Pussy Riot were charged with hooliganism and propaganda immediately surmised describing them as inappropriate and as outcasts and threats of the society in the state owned media, it bore many similarities to the hooliganism campaigns, popular during the Soviet years, as they were a way of informing the society of what appropriate behaviour was for a Soviet citizen. Thus they were also warnings to the society of what behaviour threatened the regime and the consequences of the behaviour.

The modern hooliganism campaign, which begun around the 2102 elections, culminating with the arrest of Pussy Riot, continued when both Pavlensky and the 30 individuals of the Arctic 30 case were charged with hooliganism and is an example of the similarities that the use of the charge today has with its use in the Soviet past.

The charge of hooliganism is clearly intimately connected with the general state of the right to freedom of expression in Russia. The gradually introduced laws and practices mentioned earlier are all part of a closing circle, the aim of which is to intimidate and silence opposition to the existing rule.

Hooliganism is, as has been demonstrated in this paper, a very convenient charge to use to control inconvenient people. It is easily applicable, due to its broad and rather vague perimeters and as it holds special meaning for the Russian society, which the authorities are able to take advantage of due to the nostalgic collective memory of the past.

As we have found out states are indeed allowed a certain margin of appreciation regarding the possible limitations to the right to free speech according to international law.³⁴⁵ However, despite the limits not being clearly stated it is possible by examining

³⁴⁵ Woods, 2006, p. 377

the commentaries and previous cases to set certain perimeters on how far the state can go in limiting the right.³⁴⁶

Having examined the three cases in this study and how they were dealt with by the authorities it becomes clear that the Russian state crossed the line of acceptable limitations to the right to free speech.

The right to freedom of expression is considered to be a fundamental human right and one which is vital for the practice of other rights as well as for the functioning of a democratic society.³⁴⁷ International law also offers especially broad perimeters to acts of political speech as it is seen as essential for the public debate and thus to democracy.³⁴⁸ The alternative methods that all three cases delivered their messages through are also protected under international law as is the possibly shocking or exaggerated way that they were presented.³⁴⁹

The balancing of, on the one hand the rights to free speech of the individual and on the other hand matters of protecting other rights, are very complex issues for all states but in this specific case it became clear after careful consideration that the Russian state had gone too far in its restrictive measures and they can be considered as violations of both article 10 of the ECHR and article 19 of the ICCPR.

As for practical issues of this paper, had the time and space constraints been less constraining it would in my opinion have been very interesting to elaborate on the analysis of how the hooliganism charge has been applied in Russia today by examining the developments by using theory such as Emile Durkheim's Social Deviancy theory³⁵⁰ as well as sociological labelling theory³⁵¹, as this could have given some more insight to the benefits the authorities get from applying the charge arbitrarily, as well as offering the possibility for some more general predictions of future developments.

An aspect which could be interesting for future studies on the topic could be to examine what impact the changed context in Russia today, compared to the context during the

³⁴⁶ Ibid

³⁴⁷ Jacobs and White, 2006, p. 300-344

³⁴⁸ The ECHR Article 10 and the ICCPR Article 19

³⁴⁹ General Comment No: 34

³⁵⁰ Encyclopaedia Britannica, Emile Durkheim

³⁵¹ Labeling theory of deviance

Soviet years, has had on the re-emergence of restrictive measures such as hooliganism. For example, was the amnesty that freed Pussy Riot and Arctic 30 an example of how Putin, because of the Olympic games, felt the pressure from abroad and decided that it was in Russia's interest to play by the international rules? One can not imagine that this kind of pressure from abroad would have had any effect on the rulers of the Soviet Union.

The hooliganism cases both past and present, in which the authorities applied the charge with the intent to silence political dissent, may seem trivial as such, but judging by the reaction of the authorities they are deemed as more threatening than they would want the society to know. This stifling and stigmatizing of dissent through the use of the hooliganism charge can be interpreted as a clear indication of a new 'freeze' period for Russia. The 'thaw'³⁵² that Russia saw during the early years of Putin's presidency and perhaps especially during the years of Medvedev would seem to be over. Just as the last pages of this paper was written yet another law was introduced by Putin. This time a law that bans all swearing in all available media in Russia³⁵³ and as we have found out only one of several aiming at restricting free speech since 2012.

Creating these kind of restricting methods inevitably makes one understand that even Putin himself knows that his power is not unconditional. As Nadezhda Tolokonnikova writes in one of her columns *"...When the authorities have to crack down so hard for such small violations, it is hard to escape the conclusion that someone in our country is very much afraid..."*³⁵⁴

³⁵² Neumann, 1996, p. 141

³⁵³ BBC Newsdesk, 2014, Russian Law Bans Swearing in Arts and Media

³⁵⁴ Tolokonnikova, 2014, Putin is Afraid of Any real Opposition - Just Like He Was Afraid of Pussy Riot

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