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**Creative Cultural Resistance and Law in Criticism:
Heavy Metal Aspects**

Ph.D. Dissertation

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Table of Content

1. Introduction.....	1
1.1 The Heavy Metal Controversy.....	3
1.2 Freedom of Speech and Heavy Metal.....	6
1.3 Current Relevance in Academia.....	8
1.4.1 Theoretical Background.....	9
1.4.2 Legal Background of the Study.....	11
1.4.3 Scientific Novelty.....	11
2. Development of Heavy Metal: History, Discourse, and Moral Panic.....	12
2.1 Terminology of Heavy Metal.....	12
2.2 Expansion of Heavy Metal to Popular Culture.....	14
2.3 Heavy Metal as Subculture.....	19
2.3.1 Subcultural Formations.....	19
2.3.2 Subcultures and Countercultures.....	23
2.4 Heavy Metal as Discourse.....	25
2.4.1 Power.....	25
2.4.2 Resistance.....	30
2.4.3 Freedom.....	31
2.4.4 Challenge.....	32
2.4.5 Transgression.....	33
2.4.6 Obscurity.....	34
2.5 Fear and Shock Value.....	34
2.6 Controversy and Moral Panic.....	38
2.6.1 Folk Devils of Heavy Metal.....	39
3. Heavy Metal and Freedom of Speech.....	43
3.1 The Worldwide Adaptation.....	43
3.2 Heavy Metal in Western Democratic Systems.....	45
3.3 Heavy Metal and the Constitutional Freedoms.....	49
3.3.1 The Horror Narratives.....	49
3.3.2 Intentions to Shock and Disturb.....	50
3.3.3 Occultism and Blasphemy.....	50
3.3.4 Sexual Explicitness.....	51
3.3.5 Incitement of Violence and Self-harm.....	52
3.3.6 Drugs and Alcohol.....	53
3.4 Legal Challenges.....	54

4. Heavy Metal in the United States and the First Amendment.....	56
4.1 Dangerous Tunes.....	57
4.2 Censorship War.....	58
4.3 Exposure.....	62
4.4 The Aftermath.....	66
4.5 Self-Censorship.....	68
4.6 The Legal Matters.....	73
4.6.1 Obscenity.....	76
4.6.1 a Restrictions for the Underaged Audience.....	82
4.6.1 b Law and Community Standards.....	82
4.6.2 Violence and Offensiveness.....	86
4.6.3 Subliminal Messages and Heavy Metal on Trial.....	90
4.7 Summary.....	95
5. Heavy Metal in Germany: Impacts and Legal Regulations.....	97
5.1 Development of Rock and Heavy Metal in Germany.....	97
5.2 Controversy.....	99
5.3 Freedom of Speech and Freedom of Art.....	103
5.4 Child Protection Laws and Restrictions.....	106
5.4.1 Rammstein.....	110
5.4.2 Free Art and Pornography.....	111
5.5 Incitement of Hatred.....	115
5.6 Regulation of Blasphemy.....	119
5.6.1 Insulting of Confessions.....	121
5.6.1 a Lüdinghausen /Münster Case.....	124
5.6.1 c Karlsruhe Case and Magazine Publication.....	128
5.7 Other Limits.....	130
5.8 Summary.....	132
6. Heavy Metal and Freedom of Speech in Russia.....	135
6.1 Music and Subcultures in the USSR.....	135
6.2 Development of Rock Music.....	138
6.3 Development and Adaptation of Heavy Metal.....	143
6.4 Controversy.....	146
6.5 Freedom of Speech and Creativity in Russia.....	155
6.5.1 Restrictions of Creativity.....	160

6.5.2 Instigating Speech and Extremism.....	161
6.5.2 a Case of the Party “Rodina”.....	165
6.5.2 b Kolovrat and Related Cases.....	166
6.6 Child Protection Law.....	169
6.6.1 Cannibal Corpse Case.....	178
6.6.2 Other Child Protection Cases.....	180
6.7 Expert Examination and Informational Products.....	181
6.8 Regulation of Pornography.....	182
6.9 Blasphemy Law in Russia.....	185
6.9.1 Pussy Riot Case.....	191
6.9.2 Case of Sokolovsky.....	193
6.9.3 Humiliation of Religious Attributes Case.....	196
6.10 Summary.....	198
7. Controversial Points and Practice of the European Court of	
Human Rights.....	201
7.1 Regulation of Obscenity.....	206
7.3 Hate Speech.....	217
7.4 Summary.....	221
Conclusion.....	224
Literature.....	228

1. Introduction

Unknown to themselves and to the rest of the world, jurisprudence and rock music may actually be secret allies... Both exemplify the struggle to ensure freedom and create meaning in a flawed world where imagination is always a risk of being stifled.

Robbie Sykes, “Law Up Loud: Jurisprudence of Rock Music”, 2013.

1.1 Rock and Heavy Metal as an Ultimate Form of Artistic Expression

Music has always been a form of artistic self-expression throughout human history. However, it is not only a creative manifestation of one’s mind but also a form of communication between the creator and the listener. Music projects the visions of its creator, their feelings and thoughts, via tunes, melodies, and rhythms, which carry a specific message to the audience. Obviously, that message can be also textual if a composition requires vocals and lyrics. Meanwhile, the instrumental constituent of music directly targets the listener’s emotions, communicating via evoking and inspiring certain feelings in the audience.

Sometimes the creation of particular music genres served a certain purpose, e.g., to inspire, motivate, encourage or unite its listeners. For example, military marches were written in a way to encourage bravery and patriotism among soldiers. Or blues, created in the United States in 1860s by African Americans,¹ which became a symbol of their cultural heritage, turned into an instrument and a driving force in the civil rights movement.

Rock music, which emerged from “rock’n’roll” in the late 1940s and the early 1950s, also carried its own purpose. It signified a new era in popular music, reflecting the spirit of the American youth of that time.² It spoke straightforwardly to the listener, valued freedom, authenticity, and encouraged young people to liberate themselves from the norms of the old conservative society.

¹ Davis, Francis (1995). *The History of the Blues*. New York: Hyperion.

² W. E. Studwell and D. F. Lonergan, *The Classic Rock and Roll Reader: Rock Music from its Beginnings to the mid-1970s* (Abingdon: Routledge, 1999)

Indeed, the idea of freedom and self-liberation became crucial in forming the rock community, attracting thousands of new fans and followers in the Western world. The idea to create their own reality based on their own values and needs seemed quite appealing to the teenagers, especially for those who were lost in a complicated and dull adult world. While the prevalent norms and values of society at the time had left many young people feeling excluded and alienated, the rock community embraced them, making every outsider feel valued and appreciated being among like-minded peers.

The ongoing musical evolution split rock into several subgenres, establishing a huge stylistic diversity.³ Thus, blues rock, funk rock, pop rock, industrial rock, noise rock, alternative rock, and many other subgenres appeared in the scene starting from the 1950s up until the 1980s and 1990s.

Parallel to these stylistic diversifications, from as early as the 1960s, the new advancing technologies began to influence music production, which drastically changed contemporary popular music. It also inspired musicians to experiment with sound, including the opportunity to make it even “heavier” by using distorted electric guitars.

Thus, hard rock appeared in the scene as a heavier form of rock music. It featured distorted electric guitars, bass, drums, rough and emotional vocals, and sometimes keyboards.⁴ However, over time some subgenres pushed the boundaries in terms of hardness and heaviness even further.

Finally, the early and mid-1960s brought heavy metal to life. It appeared as a heavier subgenre of hard rock in the United Kingdom and the United States. Similar to hard rock, heavy metal featured distorted electric guitars, fast technical drums, and intense vocals, however, its sound became even darker, thicker, and more invasive. The main concepts of heavy metal lyrics still reflected the narratives of protest and rebellion, but this time it went even further by touching the most “taboo” topics of the society, such as themes of death, occult and anti-religion. It intentionally played with the listener’s fears, provoking so-called “shock value” by revealing the most controversial topics to the mainstream, and thus, presumably threatening the order and the well-being of the society.

³ Ibid.

⁴ Campbell, Michael, Brody, James, *Rock and Roll: An Introduction*, 2007, P. 201

The further development of heavy metal music and its subculture only emphasized their anti-mainstream narratives. The increasing heaviness of the sound went along with bluntly expressed lyrics that often openly criticized the mainstream society with its orders. Heavy metal valued and promoted the expression of strength, freedom, masculinity, and self-liberation.⁵

Certain bands, and later entire subgenres known as “extreme metal” intentionally targeted the most “taboo” topics as an ultimate form of protest and self-liberation. The “extreme” side of those bands was manifested not only through extremely heavy and aggressive sound but also controversial lyrics, album covers, music videos, related artworks, and live performances. The main narratives of extreme metal subgenres varied from graphic descriptions of gore and murder, usually common in death metal, to black magic rites and anti-Christian concepts, usually present in black metal.

Though some extreme metal musicians claim to follow anti-mainstream religions such as Satanism or Paganism and support ideological approaches such as nihilism and misanthropy, other bands only use such symbols for artistic purposes. Eventually, extreme metal represents a solid diversity not only within its subgenres but also within its ideological approaches and remains a specific topic even within heavy metal studies.

Overall, heavy metal music was not about celebration of “peace and love” but about emphasizing the rough and the dark side of human existence. That being said, it was also not a form of artistic complaining or self-victimization, but the opportunity to ascend above the misery and struggles through self-empowerment and self-liberation manifested via its musical, verbal and visual narratives. And the form in which heavy metal artists chose to express their protest initially intended to shake the foundation of mainstream society with its traditional rules and values.

1.2 The Heavy Metal Controversy

The growing popularity of heavy metal caught the attention of parents and education systems since many of fans of the brand new music genre were minors. Because of the already known controversial reputation of heavy metal, parents, teachers and religious groups became concerned for the moral health of young people, and the moral health of society in general.

⁵ Weinstein, Deena, *Heavy Metal. A Cultural Sociology*, PP. 100-143

The genre was often accused of promoting drug abuse, alcohol, sexual promiscuity, blasphemy, violence, suicide, and self-harm. The more popular heavy metal was becoming in popular culture, the more hostile was the public opinion about the genre. But since it initially had a purpose to trigger the audience by sounds, provocative lyrics and imageries, the parental concern should not have been unexpected as a backlash from the traditional society. Besides, live performances of many heavy metal bands were also quite intense, especially with raging crowds and violent looking mosh pits,⁶ that may easily provoke concerns and anxiety in the viewers, being unaware about the concepts of heavy metal as a genre.

As the ‘moral panic’ progressed, heavy metal was banned in several American schools. Many religious activists also openly spoke against heavy metal, claiming that they did so in order to stop the dissemination of “the devil’s music” among children.⁷ However, the more negative attention was given to heavy metal by the media, the more attractive it became for the younger generations, since it spoke about the issues that society tried to swipe under the rug.⁸ The edginess of heavy metal narratives deeply resonated with the rebellious nature of teenagers, especially those who came from the working class and struggled to find their place in the adult world.

Within a couple of decades, heavy metal became popularized across Western Europe and North America, and then moved towards South America, Africa, and the Middle East. However, in spite of its growing popularity, the general perception of heavy metal in the mainstream society still held many misconceptions. The lack of knowledge about the genre and the mainstream media often describing heavy metal in a derogatory way, played a crucial role in forming negative stereotypes about the music and its subculture.

In 1985 the moral panic about rock and heavy metal reached its climax, when Tipper Gore, the spouse of then American senator Al Gore, formed The Parents Music Resource Center (The PMRC). After being exposed to some controversial lyrics and

⁶ *Mosh pit* (or *moshpit*) is an area in front of a stage where very physical and rough dancing takes place at a rock concert, by Merriam-Webster dictionary, at <https://www.merriam-webster.com/dictionary/mosh%20pit>

⁷ Weinstein, Deena, *Heavy Metal. A Cultural Sociology*, 1991, PP. 245-263; Martin, Linda, Segrave, Kerry, *Anti-Rock. The Opposition to Rock’n’Roll*, 1993, PP. 48-58; 177-184

⁸ Kahn-Harris, Keith, *Extreme Metal: Music and Culture on the Edge*, Oxford: Berg, 2007

videos of popular musical artists, she immediately decided to take action in order to stop the distribution of “not family-friendly” tunes. The PMRC was formed by Gore and other wives of American senators at that time. The group intended to “police” popular music, that might be easily assessed by children, and mainly targeted rock and heavy metal. However, the PMRC was not a just group of concerned parents speaking against rock, heavy metal, and other popular genres. The marital status of Tipper Gore and other members of the PMRC, allowed them to access the publicity and involve the US Senate in the discussion against certain music genres.

In 1985 the US Senate scheduled an official hearing, which allowed the PMRC to present their claims in order to “police” the music industry by adapting a certain rating system for the records. Their intention was to prevent potential access of children to “adult” or “harmful” music, however, it was not realistic for the music industry to adapt a rating system similar to the motion picture association. Overall, as the hearing progressed, the PMRC was accused of violating freedom of speech and attempting to legalize censorship policy against music records.

Invited to the hearing, rock musicians such as Frank Zappa, Dee Snider, and John Denver testified that agendas of the PMRC directly contradicted the First Amendment of the American constitution. It was also outlined that the assumptions of the PMRC members about rock music were mainly based on fantasies, fears, and misinterpretations.⁹ Eventually, the music labelling sticker was adapted by the Record Industry Association, since it feared not to receive support from the government in their company against piracy.

Nevertheless, the moral panic became even more intense in the 1990s, after several teenagers took their lives allegedly claiming in their death notes that the metal music they had been listening to had commanded them to commit suicide. The aftermath was severe not only for the parents who lost their children but also for the musicians who were blamed for their deaths. Now, it was not just a matter of music taste or conflict between generations, but a number of serious legal investigations, where metal musicians still had to fight for their freedom of speech and expression, and the

⁹ From the testimonies of Frank Zappa, Dee Snider and John Denver at Record Labelling Hearing before the Committee on Commerce, Science, and Transportation United States Senate, 19 September 1985, available at <http://joesapt.net/superlink/shrg99-529/>

judges had to determine whether music indeed could have a capacity to compel someone to kill themselves.

Meanwhile, the popularity of heavy metal in popular culture was still rising, and the controversy surrounding metal music and its subculture was only feeding its anti-mainstream narratives.

1.3 Freedom of Speech and Heavy Metal

Freedom of speech is one of the most crucial elements of modern democratic societies, which is guaranteed by international law and the local constitutional laws of various states. It provides and secures the right to speak freely without intervention or oppression from the government or other authorities.

The concept of freedom of speech implies the meaning that any form of speech has to be protected by law. Most commonly speech is manifested with the help of verbal tools such as spoken or written texts, however, it can also be expressed through non-verbal tools, such as images or performances.

Artistic speech falls into both of these categories since art represents a versatile spectrum of visual and verbal forms of expression. The nature of art itself can be extremely ambivalent and subjective that it is hard or even impossible to give it a solid interpretation. On the other hand, the legal practice requires precise definitions, which makes cases that demand an interpretation of certain artworks challenging for the authorities. Since art is not a legal category but requires legal protection as a form of speech, the law often has to provide definitions and meanings of non-legal terms. Besides, the boundaries of artistic speech can also be fluid often falling on the edge of being morally acceptable, yet entitled to full legal protection.

In some legal systems, artistic freedom even receives a special legal regulation. For example, the German constitution distinguishes “freedom of art” as an independent category from the general regulation of freedom of speech.

Heavy metal music being a form artistic speech and expression is an example of such an ambivalent art, that often challenges social norms and boundaries. Its verbal, visual and sonic narratives are arranged to represent the opposition to the mainstream by breaking the boundaries of social acceptability, morality and questioning the relevance of all its norms.

When the PMRC attempted to establish measures that would prevent free distribution of some rock and metal records in stores, and the question of freedom of

speech in relation to music was brought to the spotlight. The tension was increasing after the music industry ended up accepting the “Advisory Sticker” developed by the PMRC, which led to de facto censorship when many retailers started to remove labelled music from their stores avoiding any type of potential controversy.

The case of the PMRC revealed that freedom of artistic speech was not really secured by the First Amendment of the US Constitution but was easily bypassed and manipulated by the group with the access to power. An interesting aspect to consider in this context was, that the PMRC were acting based on their personal assumptions about rock and metal music, putting the genres into the category of ‘harmful’ and ‘tasteless’ tunes. Although rock and metal were not the only music genres that once provoked a moral panic and became a target of ‘witch hunting’ in the Western world, yet they obviously possessed unique musical and artistic features that constructed their further narratives. And once those narratives were constructed, they also contributed in the construction of opinions and stereotypes about heavy metal in the mainstream society.

Anti-heavy metal movements became even stronger by the 1990es, when several heavy metal artists were blamed for manipulating their respective audiences to commit murder or suicide. Musicians as Ozzy Osbourne and Judas Priest had to testify in front of the court after it was speculated that their music contained subliminal messages. Once again, the constitutional value of freedom of speech was the only legal point of controversy since the courts had to identify the boundaries within which heavy metal still could communicate with society. The cases of Osbourne and Judas Priest originally created a new precedent in the American legal practice since the topic of subliminal messages had never been discussed in relation to freedom of speech and artistic expression.

The German legal practice also had to deal with the limits of freedom of speech regarding music and related artworks of several heavy metal bands. For example, Rammstein became a highly controversial German band in the late 1990s and early 2000s, especially after their music became a subject of legal restrictions.

Eventually, the ambivalent nature of freedom of speech itself according to the Russian constitutional law also had to face enough issues related to heavy metal music. From the Soviet times, rock and metal were a subject of harsh criticism as a part of “the capitalist culture” leaking from the West. These music genres and their subcultures gained severe stereotypes in the local mainstream cultures being

considered a threat not only to traditional social values but also to the political and economical well-being of the country. Sadly, these stereotypes were preserved for generations even after the collapse of the Soviet Union. The modern Russian law also imposes a number of restrictions, that provoked controversies in relation to several rock and heavy metal artists. Additionally, even in the modern-day, some Russian religious activists maintain their substantial influence in the anti-heavy metal protests by organizing pickets, banning concerts, or sometimes even physically assaulting musicians.

1.4 Current relevance in academia

Although the theoretical background of freedom of speech may appear transparent, its practical application often raises questions related to legal contradictions and overlaps with other constitutional values. Besides, local social, political, and even cultural climates can dictate their own paradigms, influencing the implementation of the international standards of freedom of speech.

The prohibition of censorship implies the idea that speech and other forms of expression are free from governmental control, however speech can be limited in order to protect public peace and the well-being of society. And in addition to constitutional limits, other restrictions might be imposed by the local governments. It has been an issue for scholars to focus on the instances where freedom of speech interacts with other constitutional values, specifically when this leads to legal issues. Art is also a form of speech through which its creators can creatively express their visions of reality. It can be motivating, inspirational, depressive, but in each case, it intends to evoke certain emotions in its recipient. Munkittrick asserts, that art always carries a powerful message, even if it does not use a textual language as its tool.¹⁰

Throughout history, music has been a significant part of life for different peoples and cultures around the world. There were special rhythms and tunes played at weddings, funerals, wars, or victory celebrations. All of them served the purpose of creating atmospheres which evoked certain feelings and emotions in people, and thus, conveyed a particular message about the event. Music has always been uniting people,

¹⁰ Munkittrick, David, *Music as Speech: A First Amendment Category unto Itself*, P. 666, HeinOnline; Accessed 7 July 2017.

because it identifies a group and marks the individual as its constitutive element.¹¹ The same statement could be applied to different music genres which exist in contemporary cultures.¹² They develop communities, separating “us” from “them”, establish solidarity and understanding of “us” as a distinct group.¹³ Besides being united by the music, these groups may develop particular behavior patterns, dress codes, and ideologies forming so-called “music based subcultures” and even *countercultures*. Those subcultures use music to express resistance, and heavy metal is a vivid example of artistic cultural and subcultural resistance.

1.4.1. Theoretical Background

The contemporary cultural legal studies are represented by the works of Rosemary Coombe, Mark Van Hoecke, Marett Leiboff, Cassandra Sharp, Drucilla Cornell, Nancy Fraser, Peter Goodrich, Gayatri Spiva, Marie Ashe, Sarah Knox, Christyn Davis, Leslie Moran, Emiliios Christodoulidis, Johan van der Walt and other scholars. The modern issues linked to freedom of speech and artistic expression are credited in the books of Paul Kearns, Kembrew McLeod, Anthony Lewis, Michael Curtis, Timothy Garton, Samuel Nelson, Larry Alexander, Floyd Abrahams, and David Shipler.

Art as a form of creative cultural resistance was highlighted by Nadine Bloch, Mary Muller, Gill Perry, Paul Wood, Jean Robertson, Suzanne Lacy, Gavin Grindon, etc. The studies of moral panic are signified by the classic works of Stanley Cohen and developed by Grant Rodwell, Mathieu Deflem, Roger Lancaster, Mary Young, Sarah Wright Monod, Amanda Rohloff, Erich Goode, etc.

First and most popular academic books in heavy metal studies belong to Deena Weinstein and Robert Walser. Several years later the branch was significantly developed by other authors, such as Keith Kahn-Harris, Mark LeVinem, Titus Hjelm, Alex Skolnick, and other. The contemporary heavy metal studies unite versatile academic and non-academic researches all over the world. Among them are Toni-Matti Karjalainen, Florian Heesch, Gerome Gilbert, Nelson Varas-Diaz, Amanda Barnett, Alexandra Kolesnik, and many others.

¹¹ Ibid. P. 669-670.

¹² Ibid. P. 670.

¹³ Ibid.

The purpose of the dissertation is to reveal direct and indirect interactions between freedom of speech/expression and the heavy metal discourse. It considers legal practices, legislations, and government policies related to the issues of heavy metal controversy. In order to achieve these goals, this study will:

- describe freedom of speech and expression as constitutional values;
- identify the reasons behind their limits and restrictions;
- identify “de facto” censorship;
- analyse the legal practice on collisions between freedom of speech and other constitutional values;
- examine the history of heavy metal, its narratives, and problems emerged by the heavy metal discourse as a form of cultural resistance;
- observe the heavy metal moral panic;
- distinguish the legal matters risen the heavy metal controversy;
- analyse the interaction between the discourses of freedom of speech, the moral panic, and heavy metal as a form of cultural resistance;
- conclude how heavy metal music is treated and perceived in the democratic legal systems on the example of the chosen countries.

The object of the study is a complex configuration of social and legal relations that emerge from the institute of freedom of speech and heavy metal music as cultural resistance;

The subject of the study is the constitutional concept of free speech and artistic expression applied to the controversial narratives of heavy metal music;

The theoretical basis of the study is formed upon classical and modern works of constitutional law, sociology, cultural studies, and interdisciplinary discourse analyses. The dissertation is also based on the practical knowledge of legal theory, criminal law, and administrative law.

The methodological basis of the study is represented by general scientific and special methods of cognition. The general scientific dialectical method enabled a comprehensive study of freedom of speech, expression, censorship, and art of resistance, as well as made it possible to describe their features, components, and interactions.

Formal methods of logical thinking, such as description, comparison, classification, analysis of the problem, and synthesis of the results, as well as the methods of induction and deduction allowed to characterize the studied phenomena.

The formal legal analysis of constitutional norms, state laws, court practices, and other documents provided the understanding of constitutional limits of freedom of speech and expression in the chosen countries.

The comparative legal analysis observed the differences in the constitutional laws and judicial practices.

The critical discourse analysis established the framework for understating practical narratives of freedom of speech and artistic expression; narratives of moral panic; and narratives of resistance in heavy metal music.

The comparative discourse analysis observed the relationship between the discourse of free speech and expression, the discourse of moral panic, and the discourse of resistance of heavy metal music.

1.4.2 Legal Background of the Study

The official legal background of the current research is represented by the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the European Convention of Human Rights (1950), as well as the Constitution of the United States (1787), The Basic Law for the Federal Republic of Germany (1949), The Constitution of Russian Federation (1993), the federal laws of the USA, Germany, and Russia, governmental acts, laws of the local federal states and provinces, acts of municipal authorities, and judicial practices. These documents establish the main legal framework for the official understanding of freedom of speech and artistic expression and its role in Western democratic societies.

1.4.3 Scientific Novelty

Formal legal studies, as well as heavy metal studies, have not yet highlighted the matters of freedom of speech and expression in the context of heavy metal music.

This dissertation aims to develop the ideas and approaches that would contribute to the academic fields of constitutional law, legal theory, critical legal studies, cultural legal studies, and heavy metal studies. It aims to reveal not only issues of freedom of speech raised by heavy metal music but also the problems of freedom of speech applied to the heavy metal controversy and moral panic.

2. Development of Heavy Metal: History, Discourse, and Moral Panic

*Art to me is a question mark. I don't think it should ever be an answer...
If you are an artist, your goal is to affect people, whether that's in a negative way or
positive way... That is the role of the artist in society.*
Marilyn Manson.¹⁴

*If, as is often assumed, Metal is only about fulfilling adolescent power
fantasies, its appeal would be mainstream, not subcultural.*
Jeremy Wallach.¹⁵

2.1 Terminology of heavy metal

In order to provide a better understanding of the interaction between the discourses of heavy metal music and freedom of speech, in the first place, it is important to uncover the origins, history, and musical evolution of the genre. It is also necessary to acknowledge that the term “heavy metal” may imply different contextual meanings.

First, the term “heavy metal” defines a subgenre of rock music that emerged in the late 1960s and the early 1970s in the United Kingdom and the United States. The specific characteristics of heavy metal were distorted guitars, intense vocals, aggressive technical rhythms and loudness. Upon its further development, heavy metal splits into various subgenres such as glam metal, thrash metal, death metal, doom metal, black metal, nu metal and etc. In that sense, heavy metal or simply metal signifies the entire diversify of styles and subgenres, referring to the entire music scene as a whole. Besides, nowadays heavy metal is no more viewed just as a subgenre of rock, but an independent genre with all statistical diversity.

Second, the term “heavy metal” is often used to describe the earliest subgenre of metal that broke into popular culture in the 1960s and 1970s. Nowadays, that era is also known as “old school” or “classic” metal.¹⁶

¹⁴ From the interview with Marilyn Manson, Marilyn Manson teaches a class, available at <https://www.youtube.com/watch?v=EhnoKmbc1Tk>, Accessed 14. 10.2018

¹⁵ Wallach, Jeremy, *The Horror and the Allure: Metal, Power, Gothic Literature, and Multisubjectivity*, “Connecting Metal to Culture. Unity in Disparity”, Bristol, UK, 2017, P.101.

¹⁶ Weinstein, Deena, *Heavy Metal. A Cultural Sociology*, 1992, P. 8.

Weinstein acknowledges that “the origin of the term “heavy metal” is not easily traceable.”¹⁷ It was derived from the specific sound, lyrics, and critical opinions. She cites Geezer Butler, the bassist and a founding member of Black Sabbath, who remembered that some American critic used it as a derogatory term.¹⁸ “This wasn’t rock music. It was the sound of heavy metal scratching.”¹⁹ Geezer asserts that someone in England just picked up that phrase and turned it into “the whole thing heavy metal.”²⁰

The phrase “heavy metal” was also used in 1968 in the song “Born To Be Wild” by Steppenwolf, that later became a bicker anthem. Its author, Mars Bonfire states that the phrase “heavy metal thunder” used in the song was describing “the experience of driving a car or a motorcycle on the desert highway in California.”²¹ Later Bonfire confirmed that “recording of “Born To Be Wild” helped to establish a style of rock music in which the vocals were sung with intense distortion, as well as guitar patters were distorted “as of equal importance to the vocal.”²² Bonfire continues that since more records like that were heard, one rock magazine reviewer noticed its stylistic similarities by using with the phrase “heavy metal” from “Born To Be Wild”²³

The modern music press still has a tendency to label bands based on their specific sound. In the early 2000s, when a massive flow of metal crossovers took over the scene, new subgenres as metalcore, deathcore or nu metal were in the magazine front lines. Nevertheless, some artists we not in favour of that labelling, pointing that heavy metal will always be heavy metal, no matter how many transformations it would have gone through. For example, Mitch Lucker, the original vocalist of Suicide Silence denied the label of deathcore. In the interview in Slovenia from 2011 he claimed: “We play heavy metal. We’ve always played heavy metal... Heavy metal’s been around since Black Sabbath... Even prior to that, heavy metal will always be around, heavy

¹⁷ Ibid. P. 18

¹⁸ Ibid.

¹⁹ Ibid.; Quated on “Metal Shop: Black Sabbath 20th Anniversary Special,” broadcast on WVVX, 7 April 1990.

²⁰ Ibid.

²¹ Weinstein, 1992, P. 19; From private correspondence with Mars Bonfire, 1 November 1990.

²² Ibid.

²³ Weinstein, P. 20; From private correspondence with Mars Bonfire 14 November 1990.

metal will never die. So, we are heavy metal band...”²⁴ He also pointed out that labels such as “deathcore” were created by young kids who spent too much time on the internet and willing to give names for everything they hear.²⁵

In other words, the name “heavy metal” has many origins, that absorbed many different meanings. Obviously, the thickness of the music was one of the main reasons why the genre was called “heavy.” Besides, the local environment of Birmingham, the hometown of the first heavy metal bands, was overwhelmed with industrial manufactures of heavy metals, in the literal sense. The background history of that time period will be better described in the following paragraph. Overall, the creation of the name “heavy metal” in many ways signifies the creation of cultural narratives, shaped by sounds, lyrics, local environments, and obviously, the impact of the media.

2.2 Expansion of heavy metal to popular culture

Though some scholars argue about the starting point of heavy metal as an independent genre, the majority agrees that its eruption happened in the late 1960s and early 1970s in the United Kingdom and the United States. It is also commonly accepted that Black Sabbath was a pioneer band, that invented the genre of heavy metal by establishing its fundamental musical, lyrical and visual characteristics.

Black Sabbath was formed in Birmingham, a provincial town in England with a developed industrial infrastructure. Even after decades since the beginning of musical journey, the members of Black Sabbath remembered their hometown as a place where the smells of the manufactures prevailed in the air.²⁶

The original line up of Black Sabbath included Tony Iommi (guitars), Bill Ward (drums), Greezer Butler (bass) and Ozzy Osbourne (vocals). All of the band members were coming from the working class, utterly fitting the description of a British blue collar youth.

In the interview of 2010, Iommi remembered that everyone in the world at that time was speaking about the good, but ignoring the other side of life that was not that

²⁴ Interview with Mitch Lucker at Gala hala, Ljubljana, Slovenia, from 22 February 2011, <https://www.youtube.com/watch?v=UaoqxIRukiI> at 10:00.

²⁵ Ibid.

²⁶ From “BBC Proto/Early Heavy Metal documentary” as a part of “Heavy Metal Britania” 2010.

happy.²⁷ Ward also affirms that life in such harsh conditions was totally not inspiring the thoughts about peace and love.²⁸ Aston was a rough area of Birmingham, and the music of Black Sabbath was a direct reflection of the reality around the four young and aspiring musicians.

Black Sabbath's lyrical themes were generally based on horror films, the occult, and fascination with darkness. After the band gained a certain local recognition, they became influential for other musicians in the scene, in terms of sounds, lyrics, and performing styles. Since many youngsters shared the same miserable reality, Black Sabbath inspired them to express themselves in a similar way forming their own music bands.

Rob Halford, the lead singer of Judas Priest confirmed how desperate was life at the beginning of their career. The future was not promising at all, however, music was the only way to escape and express those overwhelming emotions.²⁹

The New Wave of British Heavy Metal (the NWOBHM) started from the late 1970s signifying the rise of new British heavy metal bands such as Iron Maiden, Diamond Head, Saxon, and many others. In the modern day metal, bands that belonged to the NWOBHM, alongside with the very early heavy metal bands are known as traditional, classic, or "old school" heavy metal. During that era, the evolving music scene and the subculture were still predominantly represented by white, male, working-class youth.³⁰ Rough power and masculinity were in the core of its musical, verbal, and visual narratives, which later became one of most essential components of the heavy metal music, subculture and its entire discourse.³¹

Outside of England, the new and uncompromising music easily conquered the hearts and the minds of rebellious North American youth. Already by the 1980s, heavy metal bands were reaching the tops of music charts in the USA.³²

²⁷ Ibid. At 23:45 min.

²⁸ Ibid. at 24:08.

²⁹ Ibid. At 25:23.

³⁰ Weinstein, 1992, PP. 100-117.

³¹ Bayer, Gerd, *Heavy Metal in Britain*, 2009, PP. 24-25.

³² Walser, Robert, *Running with the Devil. Power, Gender and Madness in Heavy Metal Music*, 1993, P.11.

Southern California became a birthplace and the thriving center of so-called “glam” or “hair” metal.³³ The L.A.-based bands such as Mötley Crüe, Ratt, and W.A.S.P. quickly gained a local recognition and then international success.³⁴ Their bold attitude and even a straightforward disregard of accepted norms and morality could not be left without attention. The spirit of rebellion was quintessential for the glam metal scene, however, they were not coming from the rainy and desperate landscapes of gloomy England. Quite on the opposite, their inspiration was initiated from the sunny beaches of California.

The American glam metal scene of the 1980s was associated with endless parties and a hedonistic lifestyle. In its narratives, hedonism was a form of protest against the daily routine and escapism from unnecessary suffering. Glam metal musicians were breaking the rules of behaviour, performance and even the original dress code of metal performers, that previously consisted of rough jeans and studded leather. As a music journalist Chuck Klosterman once noticed, the Californian rockers took the essence of the original heavy metal, but made it glamorous.³⁵ Indeed, the name of this subgenre directly reflected its visual aspects: besides the provocative music, the glam metal aesthetic was exploiting unconventional and even odd visual looks. It was a trend for male musicians to wear tight feminine clothes combined with a provocative facial makeup and wild hairstyles. The entire visual side of glam was totally contradicting with the “traditional” heavy metal narratives and dress codes, that celebrated a rough power and masculinity.

Glam metal presented a new concept of protest. Though it did not exploit the themes of occult, fear, or war, it still clearly spoke against society and its imposed standards. The bands sang about sexual adventures, drugs, alcohol, freedom beyond the norms and all the forms of physical gratification. Obviously, that music instantly turned into a subject of massive criticism, especially since their predominant audience consisted of young people and even underaged teenagers. Though most of glam metal musicians of that time could not be described as positive role models, their music definitely brought a fresh twist to the growing American metal scene of the 1980s and 1990s.

³³ Ibid.

³⁴ Ibid. P.12.

³⁵ Interview with Klosterman for “Heavy: The Story of Metal” VH1, 2006.

It might be a paradox, but not only the society was not in favour of glam metal. It also received a lot of negative criticism from fellow musicians of other subgenres. Their intolerance was motivated by the fact that glam “betrayed” the original concept of heavy metal, making men look like women and abandoning its rough and masculine “code.” According to them, bright makeup, crazy hairstyles, and leopard-coloured clothes were not about the “true” representation of metal music.

Thus, ascending from the anti-glam movements, thrash metal appeared as another influential subgenre. Same as glam, thrash was born in California in the early 1980s, and unlike glam, but similar to the NWOBHM, its constructive narratives were based on the celebration of masculinity, chaos, and radicalism.³⁶ Anthrax, Metallica, Megadeth, Slayer and others bands were among the pioneering representatives of the new subgenre. The typical features of thrash metal were fast rhythms, intense drums, and aggressive guitars.³⁷ Its lyrical concern was mostly about “down to Earth” topics, such as isolation of individuals, corruption of power, harm inflicted by humanity to the environment and to one another.³⁸ Thrash became one of extreme metal subgenres, that went far beyond with experimenting with sonic, verbal and visual transgression.

Developing, diversifying and making extreme metal even more controversial, the notorious death metal appeared in the American scene in the middle 1980s. In popular culture it became infamous for its extremely brutal music, inhumanly deep vocals, and often overly graphic lyrics and artworks. Most commonly death metal bands used distorted low-tuned guitars combined with powerful drumming techniques such as blast beats and growling vocals. The lyrical themes of death metal could highlight different problematic topics such as crime, religion, or political conflicts. It was not sugar-coating the horrors of war, violence, torture and murder, on the contrary, it turned them into a key narrative element. Moynihan and Soderlind compare the thematics of death metal to “slasher film style violence,”³⁹ that characterises horror films where a murderer usually uses bladed tools for slaying a group of multiple victims.

³⁶ Ibid. P. 50

³⁷ Ibid.

³⁸ Ibid.

³⁹ Moynihan, Michael, Soderlind, Didrik, *Lords of Chaos: The Bloody Rise of the Satanic Metal Underground*, 1998; P. 27

Black metal is another subgenre of extreme metal that provoked not only a moral controversy, but once actually considered as a threat to the society due to its utterly transgressive narratives. Black metal was emerged in the early to mid 1980s in England and Scandinavia. Conventionally, the pioneering bands of the subgenre were Venom, Bathory and Merciful Fate.⁴⁰ Also, Slayer, Hellhammer and Sodom significantly influenced musical style and performance of black metal.⁴¹

Though the occult themes were originally present in the narratives of Black Sabbath and other oldschool bands, it was black metal that brought the topic of occult and Satanism to a brand new level. The subgenre openly exploited Satanic symbolism combined with blatantly anti-Christian lyrics. Besides that, misanthropy, war, death and destruction were also its common lyrical themes. The sound of black metal, as well as the entire atmosphere of the genre was dark and sinister, which was achieved by low guitar tuning, high shrieking vocals, and a raw (lo-fi) music production. However, what made black metal probably the most notorious subgenre of all time, was its Norwegian scene of the early 1990s and several bloody events that occurred within its community. That community was predominantly revolved around the band Mayhem and the Oslo-based music store Helvete owned by Mayhem's lead guitarist Euronymous. The ideological base of the scene was formed upon political and anti-Christian extremism. The Norwegian black metal came to the public light after a number of church arsons happened across the country, allegedly related to the local black metal scene, and also after the brutal murder of Euronymous at the hand of fellow musician Varg Vikernes in 1993.

However, not every metal band supported violence and extremism, making the music on the first place, a tool of personal expression, rather than some form of ideological or political propaganda.

Thus, the early and middle 1990s signified the New Wave of American Heavy Metal (NWOAHM), which represented a huge musical and thematic diversity within the scene. The era expanded until the early/middle 2000s being known for different new subgenres such as groove metal, nu-metal, metalcore, deathcore, and other crossovers. This time period valued musical authenticity, which allowed free experimentation with a sound of the bands and development of their signature styles. Many

⁴⁰ Ibid, P. 10

⁴¹ Ibid.

representatives of the NWOAHM were mixing elements and features from different subgenres, sometimes even beyond rock and metal music. For example, popular crossovers of the NWOAHM were metalcore (metal+hardcore), deathcore (metalcore+death metal), or nu-metal (metal+hip-hop).⁴² The era brought to the scene a lot of new bands such as As I Lay Dying, All That Remains, Deathtones, Devil Driver, Lamb of God, Linkin Park, Korn, Killswitch Engage, Slipknot, Trivium, and many others.

Though there were already decades between the era of Black Sabbath and the NWOAHM, yet the quintessential narratives, such as protest, rebellion and escape have never been lost even though the years. Just like Black Sabbath and other early heavy metal bands, musicians of the later generation played music to express opposition and unwillingness to accept the rules of their reality. For example, Corey Taylor, the lead vocalist of Slipknot, described his hometown Des Moines as a rural area with plenty of churches and cemeteries, but with no place for young people. Accourting to Taylor, that environment only encouraged them to become stronger.⁴³ The guitarist of Lamb of God, Mark Morton remembered that hearing gunshots on Saturday night was a part of their local landscape, so next day no one would even wonder what happened.⁴⁴

Through all its history metal music might have been split into different subgenres with ideological differences and even polarity, however, its original essence remained unchanged. Metal was meant to give power to the powerless, liberate the oppressed and value everyone labeled as “outcast” by the society.

2.3 Heavy Metal as a Subculture

2.3.1. Subcultural Formations

From the very beginning, heavy metal was risen to stand against the mainstream, its imposed values, and suppression of the outcasts. But soon it tuned out, that it was not just powerful music, but the entire scope narratives, manifesting power, resistance, and opposition. Upon the growing popularity of metal bands on both sides of the ocean, heavy metal becomes an influential music-based subculture.

⁴² Metal: A Headbanger’s Journey, 2005. Disc Two: “Metal Genealogy Chart”, directed by Sam Dunn.

⁴³ Interview from Metal: A Headbanger’s Journey, 2005

⁴⁴ Ibid.

However, heavy metal was not the first music and fashion-based underground subculture of the 20th century in the western world. There were teddy boys in the 1950s, mods and rockers in the 1960s and early 1970s, and obviously punks in the middle 1970s in the UK. All of those subcultures were influenced by certain music, fashion, attitudes, and lifestyles. Besides, not all of these subcultural formations wanted to coexist peacefully. For example, a number of violent conflicts happened between mods and rockers in 1964, which later became a subject of Stanley Cohen's work "Folks Devils and Moral Panics." Punks were also openly demonstrating hostility towards the mainstream culture, society, and the law, which significantly influenced their representation by the public media.

But it was not only the media that was interested in subcultural formations. Subcultures became a subject of multiple academic researchers, including the Centre of Contemporary Cultural Studies at the University of Birmingham (The CCCS). The Center focused on the role of classes and their counter resistance, as a central element of subcultural formation. As a matter of fact, the CCCS was formed in 1964 in the hometown of Black Sabbath, just a couple of years before their outbreak into the British underground scene.

The CCCS had a crucial role in the developing at that time cultural studies up until its closure in 2002. One of its most significant works "Resistance through rituals: youth subcultures in post-war Britain" was written by its scholars Stuart Hall and Tony Jefferson. The work intended to unleash the ideological discourses revolving around the class segregation,⁴⁵ and was significantly influenced by classical Marxism.⁴⁶ According to that approach, the upper class started to form the "mainstream" standards in post-war British society, when the less affluent class was left behind, making it pursue its own interests. Supporting the Marxist theory, Clarke states that "conflicts of interest arise, fundamentally from the difference of structural positions of classes in the productive realm, but they "have their effect in social and political life."⁴⁷ In those circumstances, when the working class is not fully capable to claim their interests and has no influential power in the society, subcultures begin to rise as the answer to suppression, playing a role of self-liberating and self-

⁴⁵ Muggleton, P. 16.

⁴⁶ Ibid.

⁴⁷ Clarke, J., "Style" in S. Hall and T. Jefferson, *Resistance Through Rituals: Youth Subcultures in Post-War Britain*, London, 1986, P.38; Muggleton, P. 16.

empowering communities. Muggleton agrees that “in the CCCS approach, is a structure with the causal power to generate subcultures as counter-hegemonic responses to specific historical contradictions.”⁴⁸

Phil Cohen in “Subcultural conflict and working-class community,” points out the influence of economic and social changes in London’s East End in the late 1950s and early 1960s, that popularized the image of the working class,⁴⁹and hence, their subcultural formations. Cohen observes “how economic restructuring and post-war redevelopment schemes combined to dismantle the traditional supports of a working-class culture.”⁵⁰ During that time, many of the local families moved away to the outskirts of London, and their small local businesses were destroyed by large-scale concerns. That process “polarized” the working class itself: some pursued a goal to move up into the working-class elite, when the others had to downgrade into the “rough.”⁵¹

Subcultures are also associated with deviance. Before the CCCS, subcultures were studied within the Chicago school of sociology, that linked their formation to the theory of social disorganization. The theory itself suggests that the level of crime rates is closely connected to geographical and ecological conditions.⁵² According to it, the physical deprivation of neighbourhoods with a high crime rate leads to its further criminalization. Crime is most likely linked to the collective social climate of neighbourhoods, rather than to individual behaviours and characteristics.⁵³ Connecting that theory to subcultural formations, scholars as Park, Burgess and Wirth suggested that certain environments affect not only the crime rates, but also provokes deviant behaviours in the local populations.⁵⁴⁵⁵ Since the local societies are isolated

⁴⁸ Muggleton, David, *Inside Subculture. The Postmodern Meaning of Style*, 2000, P. 20.

⁴⁹ *Ibid*, P. 12

⁵⁰ *Ibid*, Cohen, 1984, P. 103.

⁵¹ *Ibid*.

⁵² Shaw, C. R. and H.D. McKay. (1942). *Juvenile delinquency and urban areas; A study of rates of delinquents in relation to differential characteristics of local communities in American cities*. Chicago: University of Chicago Press.

⁵³ *Ibid*.

⁵⁴ Park, R. E., & Burgess, E. W. (1921). *Introduction to the science of sociology*. Chicago, Illinois: University of Chicago Press. Project Gutenberg

⁵⁵ Park, Robert E. (1937). *"Cultural Conflict and the Marginal Man", introduction to "The Marginal Man" by Everett V. Stonequist*. New York: Charles Scribner's Sons.

from the bigger or “mainstream” society, the level of local deviance increases by “nurturing” itself and sets its own local behavioural norms.

Upon further development, subcultures shape into a form of a cultural distinction. The modern approach does not view them as resisting or deviant groups in particular, but groups that claim their own self-identity within the dominant culture. Thornton states that “contrary to youth subcultural ideologies, “subcultures” do not germinate from a seed and grow by force of their own energy into mysterious ‘movements’ only to be belatedly digested by the media. Rather, media and other culture industries are there and effective right from the start. They are central to the process of subcultural formation.”⁵⁶ Subcultural self-identification is manifested through certain symbolic elements, such as music, fashion, and other visual and behavioural modes.

Subcultures go through transformations over time due to internal (for example shifts in music styles, fashion modes, etc.) and external influences (influences of the media, political climate, etc.) Sometimes changes in the mainstream culture also provoke transformations within subcultures, when they start to respond to its new narratives and trends. Based on those responses, subcultures expand their essence and increase the volume of their subcultural and even cultural legacy.

Besides, subcultures also influence the mainstream, especially through their artistic side. Many music and fashion trends, originally developed by subcultures, nowadays can be easily found on the mainstream market. Howes explains it by the fact, that many commercial retailers seek to profit from the growing popularity of originally subcultural trends.⁵⁷ This process became even faster in the era of the internet and social media. For example retailers as H&M, Zara, Forever 21 or others, often include elements of punk, goth, rock, and heavy metal fashion into their collections, which become available to an unlimited scope of consumers.

This phenomenon is a double-edged sword for subcultural formations. From one side it shows their massive influence on the mainstream culture when their subcultural legacy turns into cultural and even global content. On the other, it ruins the entire philosophy and values of subcultural formations, that never intended to become a part of the mainstream. Especially when their elements are adopted by the masses, that

⁵⁶ Thornton, Sarah, *Club cultures: music, media and subcultural capital*. Cambridge, UK: Polity Press, 1995; P. 117

⁵⁷ Howes, David. *Cross-cultural consumption: global markets, local realities*. New York: Routledge, 1996.

might not even be aware of their actual origin. That case resembles the problem of cultural appropriation, or more precisely, subcultural. Such phenomenon can also be seen as the decay of subcultures and their legacies, as they become adopted, adapted, and then converted by the mainstream in order to fit their commercial pursuits.

Nevertheless, whether subcultures become a part of the modern mainstream or stay obscure, they already had a significant impact on contemporary popular culture. And whether that impact was reached through music, fashion, alternative values, or lifestyles, subcultures were always standing out of the grey mass, challenging its “normality”, revolutionizing the old patterns, and even embodying the future and the progress.

2.3.2 Subcultures and Countercultures

Previously it was emphasized that resistance and opposition to the mainstream are the central targets for subcultural formations. Since subcultures erupted from the working class, being oppressed in the system of capitalism, subcultural formations became some sort of the last stand for the oppressed in order to establish their own freedom. It was outlined that subcultures appear within bigger cultures and separate themselves from the dominant values of the bigger culture. And though every subculture stands for its alternative definitions and values, not every subculture can be described as counterculture.

Often countercultures are developed from subcultures, and both, subcultures and countercultures may co-define and overlap each other. However, the difference between these definitions lies in the way how they interact with the mainstream.

Though subcultures do not support the mainstream values, replacing them with certain alternatives, yet they accept the mainstream culture and its norms. For example, subcultures such as goth or grunge being based on certain music and fashion, also developed alternative values and lifestyles that differ from the mainstream.

The grunge subculture appeared from grunge rock in the middle 1980s in Washington. Its name spoke for itself, since grunge music was opposed to traditional “polished” studio records, where music artists aimed to reveal the “ugliness” and depravity of the world without any filters.⁵⁸ Grunge lyrics were dark and even

⁵⁸ Félix-Jäger, Steven: *With God on Our Side: Towards a Transformational Theology of Rock and Roll*, Wipf and Stock Publishers , 2017, P. 136.

nihilistic,⁵⁹ based on hard and severe emotions such as fear and misery. They spoke about abuse, abandonment, solitude, betrayal, infringement of rights and the ultimate desire for freedom.⁶⁰⁶¹

Similarly, the goth subculture developed in the early 1980s in the United Kingdom and was inspired by the fans of gothic rock. Its main narratives were cultivated from Gothic literature, horror films, myths about demons, vampires, and other dark creatures.⁶² Goths express their fascination with death and darkness through music and visual styles. Death is not only not feared by goths but celebrated as the enviable part of humanity through all its history. The subculture attempts to reveal that the topic of death should not be avoided or sugar-coated by the mass culture.

Both, the grunge and the goth subcultures established alternative sets of values through their visual, literary, and musical narratives. However, none of them attempts to change the values of the mainstream and does not see it as a threat to their well-being. On the contrary, the grunge and the goth peacefully co-exist with the mainstream, yet creating a form of cultural opposition within their own frames.

On the other hand, countercultures openly stand against the norms of the mainstream. They may also develop own music and dress codes as a form of self-expression, however, their main focus is not just self-expression, but the demonstration of intolerance towards the mainstream culture. Music and fashion in that case are the tools to reveal the values and even certain agendas of countercultures.

A vivid example of music-based counterculture is punk rock, that emerged in the middle 1970s in the United Kingdom. That was aggressive and chaotic music that shook the society and drastically impacted the popular culture. It started as exceptionally underground movement, expanding its network through small venues, such as pubs, where non-mainstream bands could easily invited to perform.⁶³ The

⁵⁹ DiBlasi, Alex. *Grunge, Music in American Life: An Encyclopedia of the Songs, Styles, Stars and Stories that Shaped Our Culture*, 2013. P.P. 520-52

⁶⁰ Perone, James E. *The Album: A Guide to Pop Music's Most Provocative, Influential, and Important Creations* 4 Volumes: A Guide to Pop Music's Most Provocative, Influential, and Important Creations, ABC-CLIO, 2012

⁶¹ Fournier, Karen, *The Words and Music of Alanis Morissette*, ABC-CLIO, 2016.

⁶² Goodlad, Lauren M. E.; Bibby, Michael, *Goth: Undead Subculture*, Durham, North Carolina: Duke University Press. PP. 1–37.

⁶³ Laing, Dave. *One Chord Wonders: Power and Meaning in Punk Rock*. PM Press, 2015. P. 18

lyrics of punk bands were blunt and straightforward, openly speaking about social and political issues. Individual freedom and anti-establishment values are crucial for the subculture.

2.4 Heavy metal as discourse

Heavy metal music and its subculture remained quite obscure until the early 1990s, however, with the rise of a new academic field named heavy metal studies, the situation was drastically changed. “Heavy metal studies” is an umbrella term, uniting different scholarly disciplines and research areas dedicated to heavy metal music and its subculture. Most commonly these studies are related to musicology, music history, cultural and social studies, anthropology, or psychology. Researches in economics and legal studies are rarer, probably because those fields have a less academic overlap with the heavy metal discourse. Nevertheless, this dissertation aims to reveal the interaction between heavy metal and the constitutional freedom of artistic expression in modern democratic societies as a part of a bigger legal culture. For that reason, this chapter will present the most crucial elements of heavy metal narratives, their meanings, and purposes in order to draw the outline of heavy metal as a music counterculture affecting the legal cultures and vice versa.

One of the earliest and “classic” works in heavy metal studies belongs to an American sociologist Deena Weinstein, whose famous book “Heavy Metal. A Cultural Sociology” was published in 1991. Weinstein precisely describes the history, origins, ideology and aesthetics of the genre, digging deep underneath the meaning behind its dark narratives. She also succeeds to present the main elements of heavy metal discourse within three dimensions: the sonic, the verbal and the visual. And in order to reveal the main dimensions of heavy metal discourse, the following paragraphs will present its key elements constituting its dominant narratives.

2.4.1 Power

The main element of the sonic dimension of heavy metal is “power, expressed as a sheer volume.”⁶⁴ Loudness has to be overwhelming “to sweep the listener into the sound, and then lend the listener the sense of power that the sound provides.”⁶⁵ Walser also agrees that “loudness mediates between the power enacted by the music

⁶⁴ Weinstein, *Deena, Heavy Metal. A cultural sociology*, 1991; PP. 22-43.

⁶⁵ *Ibid.* 22

and the listener's experience of power." According to Weinstein, at least for a heavy metal fan, the loudness of this music is not deafening, irritating or painful, but empowering.⁶⁶

Obviously, it is musical instruments, vocals and sound gear, that constitute the sonic dimension of heavy metal. In other words, these are the main tools that make heavy metal indeed "heavy". Walser argues that the most important aural sign of heavy metal is the sound of extremely distorted electric guitar⁶⁷. In physics, the distortion itself of a sign of high power: any electronic sound player turned to full volume does not sound "clean". "This electronic distortion results when components are overdriven" and "have to amplify or reproduce a signal beyond their capacity to do so "cleanly".⁶⁸

Another important elements are vocals and a vocal timbre. Distortion does not occur only in electronic devises, but also in a human body. Human screams and shouts are produced by "vocal distortion through excessive power, as the capacity of vocal chords are exceeded"⁶⁹. Walser concludes that distortion is "a sign of extreme power and intense expression" produced through a significant effort⁷⁰. He also cites a famous music producer Reinhold Mack: "Distortion gives that feeling of ultimate power. The more distortion you get, the more satisfying it is. There is something slightly superhuman, psychologically speaking, about the sustain, the nearly endless notes."⁷¹ Walser also defines timbre, volume, mode, harmony, rhythm and melody as the constitutive elements of heavy metal discourse⁷².

Vocal timbre also matters in heavy metal. Though not all the subgenres require a savage vocal distortion such as growling or screaming, yet the vocals in heavy metal are always about a strong emotional expression. "Vocalists project brightness and power by overdriving their voices (or by seeming to), and they also sing along

⁶⁶ Ibid.

⁶⁷ Ibid. P.41

⁶⁸ Ibid. P. 42

⁶⁹ Ibid. P. 42

⁷⁰ Ibid.

⁷¹ Ibid; Mack quoted in Chris Gill, *Dialling for Distortion: Sound Advice from 10 Top Producers*, Guitar Player, October 1992, P. 86.

⁷² Walser, Robert, *Running with the Devil. Power, Gender and Madness in Heavy Metal Music*, 1993. P.41-56.

sustained notes to suggest intensity and power; sometimes heavy metal vibrato is used for further intensification”⁷³. Weinstein also affirms “though heavy metal code of the singer is distinctive”, “one major requirement is the explicit display of emotionality”, which contrasts with principally unemotional vocals in punk rock⁷⁴. Along with Walser, she argues that the voice of a heavy metal singer must sound powerful,⁷⁵ and cooperate with guitars in “one of tension”⁷⁶.

Walser presents rhythm in heavy metal as another motivational element. He links the research of Graham from 1971, where the author describes the rhythm of rock music similarly to the rhythm of a war march⁷⁷. Graham affirms, as aggressive drum beat of military bands helps to mobilize soldiers for war, the rock beat “concentrates young people’s energies on less harmful, but equally mindless activity.”⁷⁸ However, Walser disagrees with Graham at the point of “mindless activity”, redefining it from “mindless” to “rather single-mindedness.”⁷⁹ Thus, heavy metal appears to rouse physical energy,⁸⁰ it provokes not only a feeling of the outer power, but embraces the feeling of power from within.

The sonic characteristics of heavy metal are obviously a part of its non-verbal narratives. The music provides a physical experience of power to the listener by bringing the sound to the edge and intensifying every feeling and emotion. These features contribute to the identification of heavy metal from other music genres. Though narratives of power are present in other music styles, especially in the underground genres, heavy metal (and most notably extreme metal) brought sonic manifestations of power to the superior level.

The visual dimension supports the sonic power.⁸¹ It is represented by “a wide range of visual artifacts and effects that display its inherent meaning.”⁸² It emphasises the

⁷³ Walser, P. 45

⁷⁴ Weinstein, P. 26.

⁷⁵ Ibid.

⁷⁶ Ibid. P. 25.

⁷⁷ Walser. P. 49; Graham, James D., *Rhythms in Rock Music*, Popular Music and Society I:I, 1971, P. 37.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Walser, P. 49.

⁸¹ Weinstein. P. 27.

⁸² Ibid.

emotions arisen by the images inducing resemblant feelings and associations. The visual dimension consists of artworks, band logos, album covers, photographs, music videos, dress code, visual elements of live performance such as light, stage sets, choreography and costumes.⁸³

Weinstein describes traditional heavy metal album covers in the following way: “the dominant color is black... Red is the second most popular color. The color scheme is not gentle, relaxing, or merely neutral. Rather intense, exiting, or ominous.”⁸⁴ “The heavy metal code specifies that what is depicted must be somewhat ominous, threatening, and unsettling, suggesting chaos and bordering on the grotesque.”⁸⁵

Heavy metal dress code also emphasizes strength, roughness and uncompromising attitudes. The early metal performers from the 1970s wore traditional “street clothes”, such as jeans and T-shirts combined with a long hair on male musicians.⁸⁶ In the middle 1970, the next version of heavy metal outfit was a biker look, introduced by the band Judas Priest.⁸⁷ Leather and studs were only complimenting the roughness of a heavy metal style. Weinstein points: “Rebellion against the dominant culture is the visual kick to compensate for the lack of the sonic power of the stereo system or of the live heavy metal performance. The ominous power of the album cover and the vital power of the stage costume is supplemented by the video’s rebellious images”⁸⁸. The verbal dimension is as complex represented by band names, album and song titles, and lyrics.⁸⁹ Weinstein affirms, because heavy metal unit of discourse is not a song or an album, but a band, the name of the band is a significant part of the genre.⁹⁰ She states that the name Black Sabbath was paradigmatic for heavy metal. The band’s original name was Earth, reflecting a hippy concept. However, there was already another band with the same name at that time, so in order to prevent confusions, the group was renamed to Black Sabbath in 1969. As it was previously mentioned, Black

⁸³ Ibid.

⁸⁴ Ibid. P. 29.

⁸⁵ Ibid.

⁸⁶ Ibid. 30

⁸⁷ Ibid.

⁸⁸ Ibid.31

⁸⁹ Ibid.

⁹⁰ Ibid. 32.

Sabbath was also a name of a horror film, intentionally chosen to stand against the “peace and love” hippy credo, dominating in the youth culture at that time period.⁹¹ After a huge popularity of Black Sabbath, hundreds of bands started to choose ominous names, provoking strong association with darkness, evil and mayhem themes.⁹² For example: Annihilator, Anthrax, Death, Death Angel, Grim Reaper, Iron Maiden, Mayhem, Megadeath, Poison, Venom, etc. Weinstein emphasizes religious references such as “angel”, “hell”, “saint” as elements of band names.⁹³ According to her, these names evoke their own source of power: the power of the forces of chaos and the power to conjure and play with those forces.”⁹⁴

Album and song titles serve the same purpose to reflect the ominous aesthetic of heavy metal.⁹⁵ The lyrics are meant to be heard, rather than read. Songs embody the meaning of a vital power, which is more important than any meaning presented in the lyrics⁹⁶.

Though the lyrical themes might be different depending on the subgenre, yet scholars distinguished the dominant textual narratives of heavy metal. Obviously, the traditional narratives of darkness, death and destruction remain at the core. Arnett affirms that heavy metal lyrics are "overwhelmingly dominated" by "ugly and unhappy" themes which express "no hope" for the future.⁹⁷ Weinstein proposed to categorize heavy metal lyrics into two groups: the Dionysian theme, that falls into celebration of “sex, drugs and rock’n’roll”, all kind of pleasures and vacuous lifestyle and the Chaotic theme, which refers to the traditional narratives of “death and darkness”⁹⁸. “The Dionysian is juxtaposed to a strong emotional involvement in all that challenges the order and the hegemony of the everyday life: monsters, the underworld of hell... injustice, death and rebellion.” The Chaos embodies “the power of disorder” expressed via deviance, rebellion, fight, madness and suicide⁹⁹. Those

⁹¹ Ibid. 33.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid. 34

⁹⁷ Sylvan, Robin, *Traces of the Spirit: The Religious Dimensions of Popular Music*, NYU Press, 2002

⁹⁸ Weinstein, P. 35-43.

⁹⁹ Ibid. P.35.

lyrics indicate “that despite human efforts to create order, their endeavors will be frustrated sooner or later.”¹⁰⁰ Both, the Dionysian and the Chaos “are empowered by the sonic values of the music to fight a never-ending battle for the soul of the genre and to join together in combat against the smug security and safety of respectable society.”¹⁰¹ It proves that all the heavy metal narratives are united by a strong emotional baggage, violently expressed in order to be heard and thrown to the outer world. However, the contemporary heavy metal presents a versatile spectrum of lyrical themes, that do not necessary fall into the Dionysian or the Chaos characteristics yet carry a strong emotional background. However, the themes of occult, religion, war, violence, sex, drugs, alcohol, some social and political struggles, became most problematic being associated with the major moral panic that happened exactly during the rise of the genre in the middle 1980s.

2.4.2 Resistance

Alongside power, resistance is another important component of the heavy metal discourse. In other words, power in heavy metal is always set against something or someone in order to confront rival forces, ideologies, institution etc. Resistance is often manifested alongside with the narratives of power. Heavy metal embraces everything that is usually considered destructive, frightening and undesirable, manifesting resistance against the mainstream society and challenging its values. Those narratives reach the audience through all the sonic, the visual and the lyrical dimensions of power, distinguished by Weinstein.

The sonic dimension is embodied by so-called audio-resistance, e.t. the traditional aural features of heavy metal. As Walser noticed, the sound has to be loud and overwhelming in order to overpower other noises.¹⁰² The sound of distortion contradicts with conventional traits of popular mainstream music, triggering attention and strong emotions in the audience, rather than relaxing it.

Resistance in the visual dimension is presented by the images, that would not please but rather frighten and disgust the viewer. Shock value is a significant part of the visual resistance. Thus, many bands prefer a dark palette in their artwork, photos, music videos and merchandise. The imageries of blood, gore, decay, abandonment

¹⁰⁰ Ibid. P.42.

¹⁰¹ Ibid. P.35.

¹⁰² Walser, PP. 41-46.

serve the same purpose. Obvious examples of the visual resistance are the notorious album covers of Cannibal Corpse and other extreme metal bands, Alice Cooper's "self-decapitation" in front of the audience, or dead animals as used as stage decorations by some black metal bands.

The verbal narratives of resistance are evidently manifested by the lyrics. Heavy metal speaks about everything suppressed and prohibited, whether it is disagreement with a certain political ideology, social and religious values or just differences in the lifestyle. The power of overwhelming emotions is incarnated through textual messages, sharing them with the outer world. All these aspects define heavy metal not only as a music subculture, but also a music counterculture.

2.4.3 Freedom

Another theme related to the heavy metal discourse is freedom. The narratives of resistance are often escorted by the ideas of liberation or at least alleviation from struggles. Resistance in the heavy metal discourse is set against different 'oppressive forces' such as society, government, religion, parental control. etc. Liberation is also manifested at all of the three dimensions of the heavy metal discourse distinguished by Weinstein.

However, freedom in heavy metal narratives has different faces. It depends on the subject, or what the narrator seeks to be 'free from' and whether they propose any solution, seeking to become free for any alternative reality.

For example, analysing the song "Runnin' with the Devil" by Van Halen, Walser comes to the conclusion: "the lyrics emphasize that running with the Devil is a trope for having freedom; the music glorifies the image by implying power as well."¹⁰³ He affirms that the narratives of freedom in the song are presented as "a lack of social ties: no love, no law, no responsibility, no delayed gratification."¹⁰⁴ And so, according to Van Halen, fantasy is the only way to escape from social conventions.¹⁰⁵ The message in the song presents 'freedom from' social boundaries and sees fantasy as a 'tool' to achieve that freedom. At the same time, the fantasy, even being an abstract definition, might be the initial goal of the narrator, manifesting 'freedom for' the fantasy. Walser

¹⁰³ Walser, P.51

¹⁰⁴ Ibid. 52

¹⁰⁵ Ibid.

concludes that “heavy metal revolves around identification with power, intensity of experience, freedom and community.”¹⁰⁶

It is easier to identify ‘freedom from’ in the lyrical narratives, since it is more direct and precise. For example, expressions as “we don’t wanna take it”, “deliver us from evil”, “remove from me this deception” are signifying a straight forward dissatisfaction of the narrator. In that case ‘freedom for’ might be only presumed in the listener’s imagination, since the narrator does not express what they are willing to see instead of those undesired circumstances.

‘Freedom for’ in the lyrical context is not always clear and precise, but might be presumed if a band follows certain ideologies. For example, the themes of Satanic black metal usually reveal anti-Christian and Biblical topics, stories of Armageddon, the battle of the good and the evil, etc. It can be understood that they speak for the liberation of religious suppression (‘freedom from’) and acceptance of human nature with all its flaws (‘freedom for’), or its own interpretation and presentation of religious values.

Another example of the ‘freedom for’ narratives are the bands influenced by straight edge or vegan movements. When their lyrics speak about the harm of drugs or horrors of the meat industry, the listener may automatically presume their willingness to build a healthy society with respect of the animal rights (‘freedom for’).

2.4.4 Challenge

According to the Cambridge dictionary, challenge is “an invitation to compete or take part, especially in a game or argument.”¹⁰⁷

Power and resistance in heavy metal initially embrace challenge. Resistance and challenge often go alongside each other, however they have different targets. The main goal of resistance is to manifest opposition against some dominant and oppressive forces, when challenge in heavy metal is a product or a side-effect of resistance. It implies not only disagreement but also claims a response from the rival forces, triggering their feelings, questioning authenticity and putting their power and values on trial.

¹⁰⁶ Ibid.

¹⁰⁷ Cambridge Dictionary, at <https://dictionary.cambridge.org/dictionary/english/challenge>

Challenge might be positive and negative, depending on the subject. When some band records a song or films a music video with a single purpose to trigger the audience, that would manifest a negative challenge, since those narratives lack a proposal for improvement and positive transformation. At the same time, when a band uses shock value without sugarcoating problems of war, poverty, discrimination, infringement of human and animal rights etc, it manifests a positive challenge, since those narratives target the flaws for the sake of improvement.

However, sometimes it is uneasy to define challenge as positive or negative since it completely depends on the narrator's view. For example, the same notorious Satanic black metal is set against Christian dogmas, seeing them as an evil mechanism of social manipulation. Meanwhile, it is arguable if their controversial tools justify the purpose to free society from religion, since accepting or rejecting any religion is entirely subjective.

In Weinstein's classification of heavy metal dimensions, challenge as a narrative is also manifested at all of the three levels.

Verbal challenge is presented in the lyrical messages.

Visual challenge is closely linked to shock value and intention to break the traditional code of visual art and performance. It is expressed by images of the "forbidden" in order to provoke negative feelings in a viewer, and expect them to question accepted artistic norms and boundaries. For example, Cannibal Corpse claiming that their controversial album covers were nothing but an ugly piece of art, challenged the society to redefine the formant of traditional art and its limits.

Sonic challenge manifested by sonic power and musical features of heavy metal, that differ from traditional musical canons. The sound of instruments and vocals, the loudness and the rhythms, the intention to instigate certain emotions in the audience are calling out all the conventional music standards.

2.4.5 Transgression

According to the Oxford dictionary transgression is "an act that goes beyond the limits of what is morally or legally acceptable."¹⁰⁸ At this point, transgression is a negative challenge from the mainstream perspective, because heavy metal questions

¹⁰⁸ Oxford Learner's Dictionary at

<https://www.oxfordlearnersdictionaries.com/definition/english/transgression>

the norms, which is considered harmful and dangerous by the other side. However, it often points on the issues, that remain ignored by the society.

Transgression is present in all the dimensions of the heavy metal discourse, it is a tool of challenge and resistance. It represents everything that differs from “norms”, which basically defined heavy metal as a genre: musical features, lyrical narratives, visual artwork and performance. Transgression provokes moral panics and questions traditional forms of art and music.

2.4.6 Obscurity

Since heavy metal was the music of a working class counterculture, the genre belonged to the underground scene, that initially did not seek a huge popularity or recognition. The main reason behind playing heavy metal was expression against the dull, corrupted and oppressive world around the industrial areas. Weinstein called heavy metal as a subculture of “proud pariahs,” who were not afraid to stand against the mainstream not fitting its manufactured conventions.

All those features were making heavy metal unknown and obscure for the rest of the society, before the foundation of heavy metal studies and before it leaked to the mainstream radio.

Though things were changed since the first academic works on heavy metal were published, and “radio friendly” forms of the genre are often played alongside with pop, rap and r’n’b music, yet many of heavy metal stereotypes remain present until today.

Some extreme metal bands still prefer to remain underground considering the mainstream popularity as betrayal of the ideology of “true metal”. For them obscurity is a significant part of self-identification with the music scene and the subculture.

2.5 Fear and shock value

From the very beginning the narratives of horror and fear became a crucial part of the heavy metal manifesting resistance, transgression and challenge at all the described dimensions of its discourse.

The narratives of protest gained many different forms with the development of the genre, becoming more direct about its issues and concerns (for example disagreement with a certain political regime of social circumstances). However, the original narratives of protest in the music of Black Sabbath predominantly targeted the dark side of human mind, erupting its own concerns and fears. Even the name Black

Sabbath was inspired by Mario Brava's horror film from 1963. Hence, comparing those early narratives to the manifestation of protest of some later bands, it is possible to say that the methods of Black Sabbath were rather "hidden."

After Black Sabbath achieved a huge musical and commercial success, many other bands used the narratives of fear to reach the audience. Fear is a strong emotion that signals danger and triggers an immediate reaction in order to preserve oneself. Thus, the heavy metal discourse targeted not only the problems of the outer world, but also intended to make every individual feel the fear hidden within their own minds.

At the same time the dark and the unknown has always been attracting people for centuries. Almost every place in the world has its own urban legend, and our great-grandparents were always excited to share horror stories sitting around the fire. There was fear, but also attraction to the darkness and desire to feel those strong emotion over and over again. That what made heavy metal so popular, and though some people disapproved and judged heavy metal for its darkness and transgression, it was still receiving their attention. Such phenomenon is often called 'shock value', which was used by artists, musicians and performer even before creation of heavy metal music.

The popularization of shock value started with so-called 'shock rock', "a bastard cousin of heavy metal" as it was described by a journalist Alex Distefano.¹⁰⁹ Sometimes shock rock is viewed as a separate genre, but in many occasions that term is used to describe special themes and characteristics related to performance, appearance, personality and behavior of the artist. The narratives of shock rock are present in many subgenres, starting from the old-school to the modern extreme styles, such as death metal, black metal, deathcore or grindcore.¹¹⁰

Alice Cooper is known as "the father of shock rock". Since 1964 Vincent Furnier was a frontman of a band named Alice Cooper, that later became his own legal name. Cooper was famous for macabre stage performances, that included mutilation of dolls, giant boa constrictors and guillotines.¹¹¹ Cooper's intimidating image was achieved by special stage make up, costumes and artistic performance. The musician remembers, that at the beginning of his music career nobody ever tried to be a bizarre villain in

¹⁰⁹ Distefano, Alex, *Top 10 Shock Rock bands of all time*, available at www.ocweekly.com; Accessed 10 October 2018

¹¹⁰ Ibid.

¹¹¹ Ibid.

heavy metal. According to Cooper, the audience needed a rock villain, who he decided to become.¹¹² A fellow musician Frank Zappa (who was also involved in a major heavy metal in the middle 1980s), once told Cooper: “Everyone hates you - that means the kids will love you”.¹¹³ And though Cooper definitely succeeded to become a sinister rock villain, in the later autobiography he admitted that apart from the shows he was just an ordinary guy.¹¹⁴

During the next decades, shock value was adopted by many other musicians. It was presented by different provocative actions on and even off stage, including blasphemy, sexual simulations, destruction of property, dreadful and intimidating images of performers and the art itself targeting to trigger and even disgust the major audience.

The band KISS, formed in 1973 in New York, was all about theater combined with shock and controversy. Gene Simmons, who was the founder of the band has always been in the center of media attention. Simmons was The Demon in his stage alter-ego and was frequently judged for lacking moral standards and promoting sexual promiscuity. Simmons openly spoke about his sexual conquests, waggled tongue, breathed fire and spat blood on stage. Unlike Alice Cooper, Simmons behaved in a similar way apart from the concerts, retaining the image of a shocking persona.¹¹⁵

Ozzy Osbourne, who started a solo career after leaving Black Sabbath, became another iconic and scandalous rock figure. In 1982 during the show in Des Moines, Osbourne bit off the head of a bat, that was thrown on stage from the crowd.¹¹⁶ The singer claimed, that he had mistaken an animal for rubber toy, however the press instantly “crowned” him as “a mad man” in heavy metal. Osbourne’s further career was no less controversial, followed by massive criticism for promoting occult, drugs and alcohol.

Brian Hugh Warner, known as Marilyn Manson started as a frontman of a shock rock project in the early 1990s. Manson’s looks and performances were significantly

¹¹² Interview with Alice Cooper for “Heavy: The Story of Metal” VH1, 2006.

¹¹³ Klypchak, Brad, *How you gonna see me now. Re-contextualizing metal and moral panics*, Heavy Metal Controversies and Countercultures, 2013, P.41.

¹¹⁴ Ibid, P. 43.

¹¹⁵ Ibid. P. 44.

¹¹⁶ Ozzy Osbourne bites the head off a bat - Gruesome rock legends, by Matthew Wilkwing, January 2016, available at <http://ultimateclassicrock.com/ozzy-bites-the-headoff-a-bat-grusome-rock-legends/>, Accessed 12 October 2018

inspired by Alice Cooper. However, representing the later generation of rock musicians, Manson brought the performance to the next shocking level. He used to throw rotten meat to the crowd, demonstrated sexual perversions and blasphemously displayed religious symbols at the concerts.¹¹⁷ He was not just a villain in heavy metal, but “Antichrist Superstar”, as he referred to himself. The media image of Manson was nothing but an evil Satanist and a drug addict. Many of his shows were cancelled even at the beginning of his music carrier.

Extreme metal subgenres, often balancing on the edge of sanity, morals and even law, embraced shock value as a basic instrument to reach the audience and also attract the attention from the rest of the society. Starting from the early 1980s, it developed several subgenres, such as death metal, black metal, thrash metal and doom metal, evolving the sonic, the verbal, and the visual transgressions of the genre.¹¹⁸ Those bands were focused on the combination between shocking musical features with no less shocking lyrics and live performances. The exaggerated aggression of music collaborated with the narratives of fear, but this time with a greater intention to provoke disgust and devastation in the listener. The label “extreme” speaks for itself, pointing that those subgenres were supreme in manifestation of musical heaviness, lyrical provocativeness and often ideological extremism. Its transgression can be found in the deeper references to Satanism and the darker aspects of human existence, crossing the line of “traditional” ways to speak about death, war or suicide.¹¹⁹ The visual transgression of extreme metal is a bloody, horrific artwork¹²⁰ that supports the narratives of musical transgression. According to Kahn-Harris, all these characteristics serve the purpose to violate the existing cultural, artistic and social boundaries.¹²¹

Death metal and black metal are probably most notorious extreme subgenres in the whole heavy metal history. Though these two subgenres once had negatives ideological and musical tensions, the both succeeded in the context of shocking not

¹¹⁷ Ibid.

¹¹⁸ Schaap, Julian, Berkers, Pauwke, "Grunting Alone? Online Gender Inequality in Extreme Metal Music" in *Journal of the International Association for the Study of Popular Music*. Vol.4, no.1 (2014) p. 101

¹¹⁹ Ibid. P. 103.

¹²⁰ Ibid.

¹²¹ Kahn-Harris, Keith, *Extreme Metal: Music and Culture on the Edge*, Oxford: Berg, 2007

only fans, but the entire society. For example, the early Norwegian black metal was known for its extremist anti-Christian ideology, that expanded beyond the lyrics and musical performances. The scene was terrorizing the country with arsons of the Christian churches in the early 1990s. Though there was no direct evidence of their involvement in many occasions, their reputation was already frightening after two brutal murders and a suicide committed by the members of the Black Circle.¹²²

In 1993 another blood-freezing accident happened in a German town Sondershausen, when the members of a National Socialist black metal band Absurd murdered a 15-year-old student. It was claimed that the members of Absurd were motivated by the Norwegian black metal, also using the music to promote their radical ideas.

Such precedents appeared shocking even for most of the global metal scene, placing the Early Norwegian black metal into a special niche as an ideologically extreme subgenre and community. In that case the artistic expression and intention to shock turned into a felony, only strengthening the stereotypes about metal music as an instigator of anti-social behavior and violent crimes.

The terror of the early Norwegian black metal and the case of Absurd showed how transgression of the heavy metal discourse crossed the line of artistic expression turning into a real criminal offence. However, the purpose of this study is not to justify illegal actions and crimes committed by metal musicians that go beyond their musical and artistic creations. The purpose of this study is to observe when metal music itself becomes a subject of legal battles about its lawfulness and social reception. In other words, how far the shock value and the transgression of heavy metal, in general, are able to expand according to the law of freedom of speech?

2.6 Controversy and Moral Panic

This chapter characterized heavy metal discourse through the narratives of power, resistance, challenge and transgression set against the mainstream society and its imposed standards. The genre of “proud pariahs” rose from a public judgement and negative criticism, only strengthening its position as artistic resistance.

¹²² “The Black Circle” or “The Black Metal Inner Circle” was a cult-like group of militant Satanists organized by the original leader of Mayhem, Euronymous, whose activities were funded by his record shop “Helvete” in Oslo in the early 1990s.

Though the western heavy metal scene is nominally protected by freedom of speech, a moral panic and anti-heavy metal movements in the United States, made the government reconsider the policy of artistic limits in the middle 1980s.

Parents were afraid that children are encouraged to do drugs, consume alcohol and neglect family values. The church saw heavy metal as a Satan worshipping music and community, provoking aggressive behavior and leading to a moral downfall of the human kind.

In spite of a huge number of misconceptions about heavy metal, the genre indeed was representing itself as a truly intimidating musical antagonist of popular culture. As it was mentioned earlier, the visual, the sonic, and the lyrical dimensions of heavy metal were nothing alike with the traditional understanding of “good” music and its components. Its color scheme was predominately black, its sound was not pleasing the ears of older generations and its lyrics were often too blunt and explicit.

In the middle 1980s and the early 1990s, at the rise of the subculture, there were several concerns about the genre in the Western world. It was believed that heavy metal:

- promoted violence, self-harm and other form of anti-social behavior;
- promoted sexual promiscuity and disrespect of family values;
- was weakening the role of religion and promoted occult beliefs.

All of these concerns could be justified as a rightful social backlash to the heavy metal narratives of challenge and resistance. However, sometimes moral panics go too far, what in many ways happened to heavy metal, when the initial positive intentions to protect the order turned upside down.

2.6.1 Folk devils of heavy metal

The term “moral panic” was introduced by Stanley Cohen in the book ‘Folk Devils and Moral Panics’ in 1972. Cohen describes ‘moral panic’ as a phenomenon when “a person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in

existence long enough but suddenly appears in the limelight.”¹²³ He affirms that moral panic does not imply that a phenomenon does not exist, however, it is based on fantasy, hysteria, and delusion or was induced by the power groups. The meaning and significance of a phenomenon is tremendously exaggerated by moral panics compared to more serious problems.¹²⁴ Their targets or arch-enemies according to Cohen are so-called ‘folk devils’, individuals or groups who provoke a fear in society by possessing particular traits and developing certain narratives. ‘Folks devils’ are viewed as an evil force that threatens the order and social well-being.

Cohen defines five main stages in the moral panic progression:

1. there is a target of moral panic, someone, something or a group that is considered as a threat to social norms and interests;
2. the treat is being highlighted by the media and recognized as a symbol;
3. the image of that symbol emerges a public concern;
4. the government and other authorities are getting involved;
5. the moral panic is over, which leads to social changes.¹²⁵

As example, Cohen analyses the encounters of mods and rockers, who were two conflicting subcultures in Britain in the 1960s. Both of them embraced the sense of freedom representing radical social shifts in the British society at that time. Rockers were riding motorcycles, wore protective leather clothes and listened to rock’n’roll of the 1950s.¹²⁶ A similar “bicker look” was later adopted to heavy metal dress code. On the other hand, mods preferred modern fashion, music and rode scooters. Unlike rockers in a shabby leather clothes, mods’ style was neat and tidy, which included classical suits, shirts and ties. For the music preferences, mods were mostly listening to soul, rhythm and blues, ska and beat music from the 1960s.¹²⁷

Both of the subcultures received a huge media attention after their violent confrontations in Southern England in 1964, when many of mods and rockers were arrested and put under custody. Th newspapers pictured them as frenetic savages that shook and threatened the public peace and safety.

¹²³ Cohen, 1972, P.9

¹²⁴ Cohen, 2002, vii

¹²⁵ Ibid.

¹²⁶ Stuart, Johnny, *Rockers!*. London: Plexus,1987, P. 2

¹²⁷ Mods, Rockers and Bank Holiday Mayhem, BBC Documentary, 2014, Part.1, Available at <https://www.youtube.com/watch?v=sbNf6UnvY6A> , Accessed 15 December 2018.

Although the riots were real, Cohen argued that their potential damage was exaggerated, since those fights were not more threatening than some ordinary bar brawls.

Cohen describes “folk devils” as groups that stand against certain rules and values, possessing the features of deviance. Such features are prominent for most of the working class originated youth subcultures, such as rockers, mods, punks, etc. Each of them attempted to destroy the old and in a certain way to establish the new order according to their own values. However, as the shock wave of moral panic is decreasing, these subcultures are no longer seen as danger, yet they still may continue impacting the popular culture.

The moral panic over satanic ritual abuse began in the USA in the 1980es. Cohen described it as “one of the purest cases of moral panic” in his work.¹²⁸ The allegations were based on the reports about physical and sexual abuse of people in the context of Satanic rituals. The panic evolved after spreading of the conspiracy theories about the worldwide satanic elite, however, no evidence could prove any of those allegations. Eventually, it was concluded that the Satanic ritual abuse panic was based on rumours and folk legends, that were rapidly spread by the media.¹²⁹

The heavy metal controversy of the middle 1980es also responds Cohen’s definition of moral panic. There was a group of young people coming from the working class that did not want to follow the traditional code of behavior, attempting to segregate themselves from any sort of control. As the outcast, they challenged the society, triggering it with its own fears, flaws and weaknesses. That group was quickly highlighted by the media as a potential threat, which soon provoked a public concern. The public media was overwhelmed by stories about Satanic sacrifices, glorification of violence and suicide in heavy metal. After the PMRC was formed taking further measures against heavy metal music, the government was involved into the controversy. But finally, when it was failed to present any sort of evidence about negative impacts of heavy metal on human mind or behavior, the genre was accepted and eventually influenced the contemporary popular culture. Hence, the moral panic was over.

¹²⁸ Cohen, Stanley, *Folk devils and moral panics: the creation of the Mods and Rockers*. New York: Routledge, 2002, P. xv

¹²⁹ Fraser, G.A, *The Dilemma of Ritual Abuse: Cautions and Guides for Therapists*. American Psychiatric Publishing, Inc, 1997, PP. 105–117.

Heavy metal music and subculture turned into a classic form of “folks devils,” since it possessed all the relevant features of deviance and contradiction with accepted norms, described by Cohen. Both, the old school and the modern bands claimed that their music was born from pain and despair, not a suitable place for happy mainstream tunes. Since no one would listen to ordinary working citizens, music was the only way for self-expression and escapism at that time.

Deviance or transgression in heavy metal comes from the intention to oppose itself to traditional norms and values. It questions those values, turns them upside down and throws back to the world seeking some form of redemption. In other words, deviance in heavy metal has a purpose, which creates its entire discourse of power and resistance. The backlash from the society signified that the voices of the outcast were heard, and a moral panic only intensified the heavy metal discourse and its influence in the popular culture.

The heavy metal moral panic reached its peak with the foundation of the Parents Music Recourse Center, the official hearing in the American Senate and creation of the infamous music labelling sticker that exists until today.

3. Heavy Metal and Freedom of Speech

For metalheads around the globe, metal is more than music. More than identity.

Metal is freedom.

Sam Dunn, 'Global Metal', 2008.

3.1 The worldwide adaptation

The heavy metal discourse finally reached its goal by challenging the traditional social norms and giving the voice to the oppressed. The subculture of heavy metal united young courageous people around the entire world, becoming a symbol of strength and rebellion. It did not matter where it was played, but how many people were encouraged to stand for themselves inspired by the powerful music.

Sam Dunn in his second documentary 'Global Metal' (2008) vividly showed the adaptation of heavy metal music and its culture in Asia, Africa and South America. Dunn interviews musicians and fans from Brazil, Japan, India, China, Indonesia, Israel, Iran and The United Arab Emirates. Though each of those countries have versatile historical, political, cultural and religious backgrounds, the documentary reveals that people from all those different cultures found a special connection to the energy of heavy metal music.

The interviews showed that everyone in the world who discovers heavy metal, sees it as the music of strength and rebellion, once again proving the original paradigm of power and 'proud pariahs' presented by Weinstein.

What differs their adaptation of heavy metal from the west (Western Europe and North America) is their local political, social and religious circumstances, that played a significant role in the evolution of the local metal scenes. For example, the Brazilian musicians claimed that "heavy metal came along with democracy" since Brazil was under dictatorship until 1985, where freedom of speech was completely suppressed.¹³⁰ Heavy metal with all its relevant concepts became some sign of liberation they were begging for.¹³¹ Plus, the poor living conditions and a hopeless environment of the favelas were exactly where heavy metal would find its place.

¹³⁰ "Global Metal"(2008), at 7:00

¹³¹ Ibid at 7:25

In India, where Bollywood dominates the mainstream music, the local metal scene grew as the answer to imposed social and religious standards. The interviewed Indian musicians claimed that their music must be strong, and that is why they related to metal.¹³² They identify themselves as people with a different way of thinking, not following the society with its dogmas.¹³³

In China the local bands also see heavy metal as music that gives them freedom to express strong and dark feelings.¹³⁴

According to the interviews in Indonesia, the country became concerned about heavy metal, since those concerts were considered as a form of political demonstration.¹³⁵ After a huge live performance of Metallica, all the international concerts were banned in Indonesia. However, it did not stop the local bands from growing into a political underground scene.

In Israel, heavy metal is also seen as a sign of freedom and liberation.

In Iran heavy metal is forbidden as anti-social and anti-moralistic western music. The interviewed musicians reported that people get arrested not only for playing concerts but also for having long hair and wearing T-shirts of western metal bands.¹³⁶ According to the musicians from Dubai, they have more artistic freedom than their Iranian counterparts. However, they still find heavy metal as a mechanism to speak about oppression, the way to change reality and unite people free from politics.¹³⁷

In 2009 Mark LeVine published a report on censorship of heavy metal in the Middle East, North Africa, South-East Asia and China, that proves many of the interviews from Dunn's documentary.¹³⁸ LeVine explores the roots, restrictions and bans on heavy metal¹³⁹ outside of the Western world.

First, Le Vine points on the coexistence of heavy metal and Islamic law, where besides the official ban on alcohol consumption (which is associated with heavy

¹³² 33:11

¹³³ 34:33

¹³⁴ 41:20; 49:18

¹³⁵ 59:00

¹³⁶ 1:17:00

¹³⁷ 1:25:00

¹³⁸ LeVine, Mark, *Headbanging against repressive regimes, censorship of heavy metal in the Middle East, North Africa, South-East Asia and China*, September 2009, published by Freemuse.

¹³⁹ Ibid. P. 7

metal), the music itself is seen as a “getaway drug”¹⁴⁰, that prevents people from rational behavior.¹⁴¹ On the other hand, heavy metal is seen as a threat not only because of its “anti-Islamic” values, but for that fact that it unites people with unconventional opinions, encouraging their different revolutionary ideas and actions against the order. LeVine states that in many cultures members of the metal and relates scenes have a function of “organic intellectuals”, holding academic degrees and political awareness, where the music gives them an opportunity to reach the larger mass of societies, resisting against the government and corporate control.¹⁴²

3.2 Heavy metal in western democratic systems

Dunn and LeVine precisely outline the hardship of heavy metal musicians and fans the countries of the MENA (the Middle East and North Africa), where the music is banned by the government without any constitutional protections unlike it is in the west. There, the heavy metal narratives of power, freedom, resistance, challenge and transgression play the role of a direct liberator, going alongside with the political discourse of liberation.

But returning back to heavy metal in the West, which officially recognizes democratic values, constitutional freedoms, human rights movements, and at least declares no official ideology, how does the heavy metal discourse can challenge their political and legal systems?

The previous chapter mentioned the impacts of a moral panic of 1985 as one of the first public encounters of heavy metal with the public authorities. But in spite of the attempts to restrict heavy metal, there was one major legal obstacle: freedom of speech and expression, that found a reflection in the western constitutions. Though freedom of speech is not absolute and has a number of constitutional limits, it encourages the diversity of opinions as a tool of political and social progress. From that perspective, if it does not cross certain limits, even most shocking bands are encouraged to present their alternative views and opinions without being banned or restricted. The Eastern countries, presented in Dunn’s documentary and LeVine’s report are actually fighting for their legal freedom to express themselves. But though

¹⁴⁰ Ibid. P. 29

¹⁴¹ Ibid.

¹⁴² Ibid. P. 19.

metal and other related controversial music scenes are not banned in the West, and freedom of speech and expression protects the artists from censorship and governmental intervention, things might get tricky at the point where such an obscure and ambiguous music collides with the public judgement driven by misconceptions and moral panics.

In 1985 the Parents Music Resource Center (the PMRC) forced the American Senate to question the moral side of popular music. Surprisingly, their issues were mostly related to rock and heavy metal, which was pointed out by the PMRC members during the official hearing. However, when musicians Frank Zappa and Dee Snider testified about potential lyrical misinterpretations and freedom of speech according to the First Amendment, the entire agenda of the hearing was suddenly ruined. Though the PMRC released the advisory sticker, the truth behind the heavy metal controversy was exposed in public during the hearing. This case presented an example of moral panic linked to power abuse of the PMRC, that provoked a de facto censorship when many retailers started to avoid selling albums labeled by the advisory sticker.

However, not all bands saw the label as a negative mark. For some rock musicians, the sticker became a sign of rebellion, pointing on their controversial nature, once again revealing the identity of “a proud pariah”. But the main question still remained: why the legal system was helpless at that point, protecting artists only de jure but not de facto. Since the PMRC was not a political organization, its excuses to push a “recommendatory” label could not be classified as censorship in the legal sense. So, the victory of a moral panic, successfully bypassing the law was witnessed in that case.

As it was mentioned before, heavy metal was not the first music genre that provoked a massive moral panic in the west. Jazz, blues and rock’n’roll were objects of harsh criticism during their rise in popular culture decades earlier. Punk and rap were also under attack for their marginal political attitudes and often explicit ways of self-expression. Though heavy metal as a music counterculture shared some musical and linguistic narratives with those genres, the way it chose to influence the society was differed from the other underground genres.

Heavy metal narratives may touch political issues, but unlike clearly political culture of punk, heavy metal is often described as non-political.¹⁴³ Epp considers the heterogeneity of heavy metal culture as an important argument against its political classification,¹⁴⁴ because the scene was split into multiple narratively diverse subgenres since the beginning of the 1970s.¹⁴⁵ That heterogeneity was not only about subgenres, but different fan cultures, so that it is hard to speak about heavy metal as a subculture with a clear political message.¹⁴⁶ Epp and Davidson acknowledge that some bands, especially in the extreme scene of thrash, death and black metal are more or less political.¹⁴⁷ However, heavy metal as a whole is not a political movement, but certainly a location of alternative themes and opinions.¹⁴⁸

In spite of being diverse and heterogeneous, heavy metal subculture has common symbolic values.¹⁴⁹ It includes a certain dress code (though it also differs from sub-scene to sub-scene), common gestures as “the devil’s horns”, a collective feeling of unity and togetherness, which was reinforced by the moral panics and stereotypes.¹⁵⁰ The main features of heavy metal discourse, such as power, strength, freedom etc., encourage related personal traits in its followers, such as physical and mental strength, courage, power of will, etc.

Since the MENA countries see heavy metal as a sign of freedom and liberation, which lies within the roots of its original discourse, then the constitutional freedom of speech in the west significantly contributed to heavy metal evolution.

Freedom of speech and expression expanded artistic horizons for many creators, whose works would have never seen the light in the countries with totalitarian regimes. As the underground scenes were not legally banned in the West, it contributed to their musical and ideological development. None of the music-based subcultures were “outlaw” unless their views and political agendas were threatening

¹⁴³ Epp, Andre, Diversity in Metal Politics, *Connecting Metal to Culture. Unity in Disparity*, 2017, P. 84.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Davidson, Justin, *Extreme Politics and Extreme Metal: Strange Bedfellows or Fellow Travellers?*, *The Metal Void First Gatherings*, PP. 175-210; Epp, P. 85.

¹⁴⁸ Epp, P. 85.

¹⁴⁹ Ibid. P. 84.

¹⁵⁰ Ibid.

public peace and social well-being. However, there it comes to the breaking point because the law itself often struggles to identify the limits of artistic expression, and to make the difference between “truly threatening” messages and just aesthetically disturbing content. Moral panics in that case only add fuel to the fire of misconceptions, creating even more negative stereotypes and often misleading the authorities in making rational decisions.

Even in the democratic states with freedom of speech, heavy metal subculture remains a proud pariah. First, it happens because its narratives are intentionally set against the mainstream culture, provoking its disturbance. Second, heavy metal subculture is still obscure for some part of the mainstream, whose knowledge about heavy metal is based on negative stereotypes. Third, because the heavy metal narratives of resistance, challenge, and transgression expanded further away finding new targets within changing social realities, which maintains its provocative image.

Alongside with the human rights, constitutional freedoms, and diversity of opinions, modern democracies value a cultural diversity, which is related to supporting and respecting different ethnicities and national identities. However, the term ‘cultural diversity’ might be reconstructed in relation to alternative subcultures. Since democracy encourages the diversity of opinions, artistic expressions, and cultural identities, all these categories are related to music-based subcultures, that have a strong statement of opinion, values, dress codes, and even traditions. Thus, so-called ‘subcultural diversity’ is derived from freedom of artistic expression. They serve the society as a source of social, cultural, and political opposition, which theoretically supports the concept of democracy and development. Hence, intentionally or not, freedom of speech and artistic expression established on the constitutional level, create a conducive environment for the underground music scene as a (sub)cultural resistance.

Since heavy metal discourse can not be described as entirely political, then its cultural resistance is manifested on many versatile levels. Freedom in that case means not only the absence of external oppression, but also the internal freedom and disobedience the rules and inculcations. It has the means of self-improvement, emancipation and resistance.¹⁵¹ It sees the individual not as a passive product of the

¹⁵¹ Hecker, Pierre, *Turkish Metal. Music. Meaning and Morality in a Muslim Society*, 2012; Epp. P.95

society, but someone “who can detach and protect oneself from the constructed cultural industry and reflect and question the everyday routine”.¹⁵²

As heavy metal is not homogeneous and represented through versatile musical and ideological approaches, it is impossible to provide a singular description its the agenda as creative cultural resistance. However, it is necessary to acknowledge that heavy metal provides the means, the tools, and the platform to express unpopular opinions. Its narratives of power (including shock value) emphasize those messages, making them reach the masses and attract the public attention.

3.3 Heavy Metal and the Constitutional Freedoms

As it was stated previously in this chapter, heavy metal being a supporter of unpopular opinions intentionally collides with the mainstream culture, creating tensions, conflicts, and controversies. The mainstream society, on the other hand, responds with a backlash, which may turn into a moral panic. The role of law, and especially the freedom of speech and expression in that case is to segregate unpopular opinions, artistic provocativeness, and fears from true threats to the public order.

Though any unconventional art, especially any controversial underground music subculture may become a subject of moral panic and accusations, it is necessary to distinguish the features particularly inherent to heavy metal discourse, that hide a potential challenge the contemporary laws of free speech. Those controversial narratives are spread through different subgenres and vary in their shapes and forms.

3.3.1 The horror narratives

The development of heavy metal discourse is primarily related to the horror themes originally introduced by Black Sabbath and other following bands in the scene. The narratives of horror, fear, death, the underworld, etc., are hardly considered as subjects of legal restrictions unless it they are related to age restrictions.

However, the society became concerned about the way how those ‘narratives of darkness’ may potentially influence the younger generation and their contemporary culture. At the beginning of a moral panic in the 1980s, these narratives were usually

¹⁵² Nohr, Rolf, *Music is The Food for Love, Metal als transmoderne Sinnstiftung in Metal Matters. Heavy Metal als Kultur und Welt*, PP. 307-326.

viewed as a threat alongside with the narratives of occultism and intentions to shock and disturb the audience;

3.3.2 Intentions to Shock and Disturb

Weinstein points out that transgression in heavy metal emerges through repellent imageries presented in band names, song lyrics, artworks, album covers, etc. Indeed, since the middle 1960s even until today many metal bands intentionally want to appear disturbing and provocative, using transgression as a tool to archive success and recognition. A crucial role in that case, belongs to extreme metal subgenres, that always pushed the heavy metal transgression to its limits. Graphic depictions of gore, murder, mutilated human and animal corpses, satanic sacrifices could not leave anyone without a certain reaction. Many notorious album covers were banned in Europe and replaced with alternative versions more acceptable for publication. Those bands were claiming about the violation of artistic expression, saying that the works were nothing but ugly disturbing pieces of art. On the other hand, the public concern presented by the parents, education workers, and religious activists had a different opinion, seeing those works simply blasphemous and aesthetically disgusting. Since some western countries had a precedent of banning metal albums and their covers, it is possible to speculate that the law of those states absorbed the public concern that overlapped freedom of artistic expression. Many of those bans were motivated by child protection laws and policies.

3.3.3. Occultism and Blasphemy

It might seem quite contradictory to distinguish occultism as an issue in the western countries since many of them recognize not only freedom of speech, but also freedom of religion. The PMRC defined 'the occult' as a separate problematic topic in heavy metal music. Though 'occultism' is an umbrella term for different philosophical concepts and confessions, the PMRC was mostly triggered by arguably anti-Christian narratives in the lyrics and visual images. Obviously, such claims received a support from the church and religious activists, who started massive protesting actions literally burning the records of popular artists in the public.

Considering the diversity of subgenres and their promoted ideas, there is no one way to define 'occultism' in heavy metal. In the first documentary 'Metal. Headbanger's journey' (2005), Sam Dunn presented different bands using the occult themes, and

each of them were giving a different meaning to that subject. For some interviewed bands it was just a part of a horror show, a Halloween on stage. However, for some representatives of the black metal scene, anti-Christianity and Satanism were a part of their personal beliefs and even political agendas.

From the legal point of view, the constitutional freedom of conscience implies a free will to follow any confession, or not to profess any spiritual ideas at all. Beliefs are completely personal and the state is not entitled to prosecute for not following any locally traditional confession. But freedom of conscience is often linked to freedom of expression since many believers and non-believers decide to express their views as opinions. In that scenario, the law prescribes the limits since some opinions might breach public peace by inciting religious hatred. Some democratic states even have anti-blasphemy laws entitled to protect the feelings of believers. Those laws distinguish insult of religious feelings in a separate category of criminal or administrative offences, detached from the general insult or incitement of hatred. Though scholars may argue about the constitutionality of such laws, those legal systems usually refer to the respect of official confessions as a historical legacy, which has to be protected by the law. Nevertheless, it breaches the principle of equality since those laws primarily protect religious believers leaving atheists and agnostics behind that consideration. Those laws also justify religious activists to fulfil their anti-heavy metal agendas pointing on the sacredness of their beliefs protected by the official law. It would not take much to cancel a concert claiming that the music insults someone's beliefs when the government itself supports such narratives. And consequently, the countries that recognize blasphemy laws (for example Russia and Poland), have a major number of precedents when rock and heavy metal concerts were cancelled under the pressure of religious protests.

3.3.4 Sexual Explicitness

Though heavy metal was not the first music genre criticized for exploiting sexual themes, yet they became a sufficient part of its narratives. Freedom in heavy metal discourse served different purposes for different artists, which also included sexual freedom, especially in the absence of marital responsibility. Though nudity and sexual explicitness were present in the art since ancient times, society was concerned about heavy metal because of its growing popularity among young people, when some of them were even underaged.

Child protection policies vary from one country to another, so there is no singular way to describe such restrictions. Some countries have official child protection laws with the official age rating systems developed by the government. Other states practice unofficial ratings that completely depend on the creator and the distributor.

The way how heavy metal challenged the law at this point has to be reviewed from the perspective of each particular legal system. For example in the United States, that never had an official law on film rating (the rating systems were developed by the film industry), the precedent of the PMRC raised the question about the relevance of developing a similar rating system for the music industry. In Germany with its complex child protection laws and organizations, some provocative bands were officially restricted by being added to the special resister in the German government.

Apart from child protection policies, some countries may have restrictions on obscene contents in general. However, those laws are more relevant to exclusively adult-oriented works and pornography, rather than for sexual provocativeness in popular music.

3.3.5 Incitement of Violence and Self-harm

Every time the media mentioned that some serial killer or a school shooter listened to Black Sabbath, Marilyn Manson, Rammstein, or other rock and metal artists, the publicity instantly blamed the music. Though heavy metal has the ability to intensify emotions, there is no scientific proof that it directly provokes people to commit violent crimes. Most likely, the people prone to violence find it as a motivation to release their dark fantasies that were present in their mind way before listening to that music. And as it was shown in the previous chapter, heavy metal presents a magnificent discourse of power and empowerment, but its usage and interpretation are completely individual. Besides, there were many cases that will be revealed in the following chapters, when the artists' messages were misinterpreted and twisted by society and even by the authorities.

The western legal systems establish responsibility for incitement of violence, however, in most cases, it requires a certain proof that the message had a direct intention to provoke a public disturbance. Such regulations exist to prevent the dissemination of extremist ideas established in the national state laws.

Though some bands in heavy metal may support extremist ideas, it is still impossible to describe the entire scene as politically radical, since it is exceptionally diverse not only musically, but also ideologically.

Another public accusation claimed that some heavy metal bands used subliminal messages to manipulate the listener's emotions and behaviour. The moral panic was only strengthened, when several American teenagers committed suicide after listening to heavy metal music. In the early 1990s the artists Ozzy Osbourne and Judas Priest had to go under the trial to testify against those accusations. Eventually, the investigation proved the songs were free from subliminal messages, and even the lyrics had no reference to murder or suicide. Those precedents also had an impact on the American judicial practice of artistic freedom of expression, and the following chapter will concentrate on their legal outcomes.

3.3.6 Drugs and Alcohol

This topic is also quite ambivalent. On one hand, heavy metal is not the first underground music scene with the presence of alcohol and drugs. The same can be observed in other music-based subcultures, such as rap, punk rock, and techno rave scenes. Since music is not only a tool to fight against oppression but also a way to escape reality, where drugs and alcohol serve to reach that purpose even faster. On the other hand, considering the entire anti-mainstream discourse of the subculture, consumption of drugs and alcohol may also present a form of a protest. It might be some sort of disagreement with the society, that preaches to live a decent lifestyle by having a regular job, a strict schedule, and self-discipline, which often leads to burnouts and depression.

Anyway, the legal regulation of those matters is also constituted by child protection policies, which vary from one country to another.

The general overview of the heavy metal narratives that potentially contradict with different legal norms often go alongside and even “derive” from each other. For example, the themes of occult, witchcraft and Satanism were developed from the general narratives of fear, horror and darkness. The intention to shock and disturb in heavy metal may also include dark and occult themes, as well as sexually explicit imageries.

3.4 Legal Challenges

Heavy metal discourse of cultural resistance had a significant impact on the contemporary popular cultures. Societies functioning within the frames of local traditions, morals and laws are facing challenges triggered by resisting subcultures not only in a political, but in other non-political scenes.

Though there are many studies dedicated to heavy metal as a social and cultural challenger, nothing was done yet about the heavy metal discourse as a challenger of modern legal systems, which is the main purpose of this dissertation. From the first glance it seems that there is no special relation between heavy metal and the law, than the relation of law with other forms of music and art. However, as the social and cultural studies signified heavy metal as a special and unique (sub)cultural discourse, in the same manner, it has to be viewed from the point of legal studies.

Law is also a cultural product that absorbs local values, traditions, and social influences. When modern ideologically diverse western societies are pushing versatile narratives to the public arena, the law has to serve as an arbitrator between two or more conflicting parties in order to maintain the order, balance and safety. This concept mainly describes freedom of speech reflected in the democratic constitutions, which is considered crucial and encouraged within its limits. Those limits are meant to define the balance between conflicting narratives in case if the unrestrained freedom crosses the line of other constitutional values and endangers the public order. Any controversial art, whether it represents a resisting underground subculture or not, attempts to push certain boundaries for the sake of different agendas, touching sensitive topics and taboos to reach its goals. But a certain subcultural ideology defines those goals manifested by the specific relevant narratives.

Social concerns and moral panics triggered by the heavy metal discourse also touched the legal aspects, where freedom of speech played a crucial role. The moral panic demonized heavy metal portraying it as a true threat, which developed the most popular stereotypes and misconceptions about this music and the subculture. At the same time the law, established as a regulator of conflicting interests and a keeper of the balance may have also been confused by those stereotypes and misinterpretations. The PMRC forced their music labelling system by manipulating the Senate and bypassing the First Amendment. However, when the American law does not develop legally enforced rating systems for music and films, other countries do have certain legislation that regulate age restrictions and distribution of particular contents.

The question is, whether the law as a cultural product even in the modern day societies could be influenced by a moral panic, misconceptions, and stereotypes. Heavy metal serves as a good example as diverse predominantly non-political (in the West) music subculture with a strong discourse of cultural resistance.

Based on the most controversial narratives of the heavy metal discourse presented in the previous paragraph, this dissertation intends to observe the way how the law of freedom of speech responds to those issues in the three countries with constitutionally established democracies. The legal challenges lie within the constitutional limits of freedom of speech and expression existing in each chosen country; within negative stereotypes that may influence the court practice on interpreting heavy metal music; and within the issues not related to heavy metal controversy, such as technical, linguistic, moral and other difficulties to interpret certain meanings and definitions.

4. Heavy Metal in the United States and the First Amendment

The function of rock'n'roll is to annoy parents...

Warner Brothers Records.¹⁵³

I know personally no form of popular music before, which has had as one of its central elements the element of hatred.

Dr. Joe Steussy, professor of music at the University of Texas.¹⁵⁴

Based on the descriptions of heavy metal controversy and its challenges towards the modern democratic legal systems, this chapter will analyse how these problems were faced and arguably solved in the United States. It is crucial to distinguish how heavy metal evolved and triggered the American society, because many North American bands played a significant role in development of the genre, influencing and inspiring musicians around the world.

At the same time, the USA recognizes a comprehensive system of constitutional values and historically emphasized the importance of human rights in their new independent democratic society. Freedom of speech found its representation in the First Amendment to the American Constitution (1787), that also declared the prohibition of any form of censorship.

When heavy metal started to conquer the USA, its narratives of cultural resistance questioned and challenged many the norms and traditions, provoking a negative backlash from the society. Massive protests and even the acts of album burning were showing how serious the issue was at that time, that required some sort of solution from the authorities. Those encounters led to the questions: how far art can go in its creative resistance?; what narratives should have been considered potentially harmful?; what are the limits of the First Amendment?; and how far the power of law can expand in order to protect art from de facto censorship?

¹⁵³ Marsh, *the New Book of Rock Lists*, P. 503.

¹⁵⁴ Record Labelling Hearing before the Committee on Commerce, Science, and Transportation United States Senate, 19 September 1985, 117, available at <http://joesapt.net/superlink/shrg99-529/>

4.1 Dangerous Tunes

In 1989 during the talk show William H. Yarrol of the Applied Potentials Institute of Aurora, Colorado, contended that all rock musicians were members of the Church of Satan and their music subconsciously affected the minds of listeners by the applied subliminal messages.¹⁵⁵ After that event, California state representative Phil Wyman received several complaints from constituents, who claimed to pay attention at that topic. After that, Wyman introduced a bill into Californian legislature that would warn and protect potential music consumers from subliminal messages.¹⁵⁶ He and his supporters were affirming that rock music could manipulate human behavior and turn to the side of the anti-Christ.¹⁵⁷ A similar bill was also introduced to the House of Representatives by Robert Dornan, the congressman of California.

Although the initial matter of their concerns were potential subliminal messages, soon after they paid attention on sex and violence in song lyrics and music videos.

Rick Allen and his family did not like the song “1999” by a pop singer Prince, so that Allen brought that issue to the local Parent Teacher Association chapter. In 1984 that local organization united with other PTA chapters in attempts to oblige record companies to label material that contain any signs of vulgarity, sex and violence.¹⁵⁸ Warner Brothers Records were the only company that responded to those claims. Their answer was rather unexpected, but simple and bold, saying: “The function of rock’n’roll is to annoy parents. This just improves that nothing changes.”¹⁵⁹

The same year, the national PTA president, Elaine Steinkermayer sent an anti-rock resolution to twenty-nine record companies with a letter, asking to establish a rating system for music, alike the rating system used by the Motion Picture Association of America.

The Record Industry Association of America (RIAA) responded to Steinlermayer, that for them was it was not physically possible to label every single record. Unlike the film industry, that had to deal with less than four hundred submissions per year, the music industry was receiving over twenty-five thousand songs over the same

¹⁵⁵ Nuzum, Eric, *Parental Advisory. Music Censorship in America*, P. 15.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid. P. 16

¹⁵⁸ Ibid. P. 17

¹⁵⁹ Marsh, P. 503

amount of time. Besides, the RIAA considered such claims as “dangerous precedent” and ignored the resolution.¹⁶⁰

That was only the beginning of a massive “witch-hunting” campaign against rock, metal, and some other edgy and provocative music genres. Nevertheless, all the attempts to suppress its distribution were not successful, until the Parents Music Resource Center took an action against the entire American music industry, even reaching to the American Senate.

4.2 Censorship War

In September 1985 the Senate in Washington D.C. had an unusual hearing about moral concerns and appropriateness in popular music. The way how that issue was brought to the Senate was even more odd.

Tipper Gore, who was at that time a spouse of then the US Senator Albert Gore, was the leader of the campaign. Gore and several other wives of the senators brought the concern about contemporary popular music to the public. According to them it was harmful to the society, morals and values of the younger generations.

In 1985 Gore and her supporters formed the Parents Music Resource Center (the PMRC), a non-profitable organization, established to advocate for the labelling of music recorders, considered harmful, offensive or inappropriate.¹⁶¹

The history of the PMRC started earlier in 1984, when Tipper Gore purchased for her 11 year-old daughter an album “Purple Rain” of a pop singer Prince. In her book Gore remembers: “When we brought the album home, out it on our stereo, and listened to it together, we heard the words to... “Darling Nikki”: “I knew a girl named Nikki/guess [you] could say she was a sex friend/I met her in a hotel lobby/Masturbating with a magazine.” The song went on and on, in a similar manner. I couldn’t believe my ears! The vulgar lyrics embarrassed both of us. At first I was stunned - then I got mad!”¹⁶²

That incident triggered Gore so much, that she started to examine other popular artists, which made her pay attention on a heavy metal band Van Halen. The band’s

¹⁶⁰ Holland, *Congress Can Regulate Lyrics*, P. 70.

¹⁶¹ Nuzum, P. 13-14.

¹⁶² Gore, Tipper, *Raising PG Kids in an X-Rated Society. What parents can do to protect their children from sex and violence in the media*, 1987, P. 3.

video “Hot for Teacher” was streamed in MTV and according to Gore, the amount of sex and violence in it was “too much to handle”.¹⁶³

The PMRC claimed their main agenda was not about control of sex and violence in the media, but only some of its sources easily acceptable for children and teenagers. The organization claimed that rock music was subversive to the values, that constituted the fabric of American society.¹⁶⁴

Many authors, including Nuzum, admit that there was no attempt to label, for example any opera of county artists, and no one in the PMRC complained about theatre, painting or sculpture. They were motivated by the idea that teenagers do not buy paintings or attend theatres alone, but they can buy millions of freely available records.¹⁶⁵

The PMRC made the list of so-called “Filthy Fifteen”, that included the popular songs considered potentially harmful and eligible for rating restrictions. The rating system was also proposed by Gore and her supporters, and would classify records into several categories, depending on their content:

X - for songs containing explicit or suggestive sexual references;

D/A - for glorification of drug and alcohol abuse;

V - for violence;

O - for the reference to occultism.

The list of “Filthy Fifteen” itself included the following artists and songs:

1. Prince, “Darling Nikki” - X (sex);
2. Sheena Easton, “Sugar Walls” - X (sex);
3. Judas Priest, “Eat Me Alive” - X (sex);
4. Vanity “Strap On Robbie Baby” - X (sex);
5. Mötley Crüe, “Bastard” - V (violence);
6. AC/DC, “Let Me Put My Love into You” - X (sex);
7. Twisted Sister, “We’re Not Gonna Take It” - V (violence);
8. Madonna, “Dress You Up” - X (sex);
9. W.A.S.P., “Animal (Fuck Like A Beast)” - X (sex/language);
10. Def Leppard, “High’n’Dry (Saturday Night)” - D/A (drug and alcohol use);

¹⁶³ Nuzum, P. 13-14.

¹⁶⁴ Kennedy, David, *Frankenchrist versus the State: The New Right, Rock Music and the Case of Jello Biafra*, *The Journal of Popular Culture*, 1990, P. 136.

¹⁶⁵ Nuzum, P. 20

11. Mercyful Fate, “Into the Coven” - O (Satanism);
12. Black Sabbath, “Trashed” - D/A (drug and alcohol use);
13. The Mary Jane Girls, “In My House” - X (sex);
14. Venom, “Possessed” - O (Satanism);
15. Cindy Lauper, “She Bop” - X (masturbation).

The list included nine rock and metal artists, that were Judas Priest, Mötley Crüe, AC/DC, Twisted Sister, W.A.S.P., Def Leppard, Mercyful Fate, Black Sabbath and Venom. Three of these bands were originally from the United States.

After announcing the list of “Filthy Fifteen”, the further actions of the PMRC could be called nothing but a censorship war against music industry, that mainly targeted rock and metal artists. The controversy got a huge resonance in the media, that was often refereeing to Gore as a “book burner”. In her own defence, Gore told The New York Times that she only wanted to warn and educate parents about the new alarming trends in music, because children living in a modern society deserve respect and sensitive treatment. For that reason the PMRC promoted the agenda of labelling sexually explicit materials.¹⁶⁶ Their demands to the Recording Industry Association of America (RIAA) included:

1. Printing lyrics on album covers;
2. Keeping albums with explicit covers under the counter;
3. Establishing a rating system for the records, alike the film rating;
4. Establishing a rating system for concerts;
5. Reassessing the contacts of performers who engage in violence and explicit sexual behavior on stage;
6. Establishing a citizen and record-company media to pressure broadcasters not to air any “questionable talent”.¹⁶⁷

The President of the RIAA at that time, Stanley Gortikov, responded to the claims of the PMRC, stating that such restricting policy would be impractical. Because, unlike the Motion Picture industry, which rates 325 films per year, the record industry releases about 25,000 songs annually, which would require a process of rating 100 tunes a day.¹⁶⁸

¹⁶⁶ *Curbing the Sexploitation Industry*, New York Times, 138:46943, March 1988. sec. II, 4.

¹⁶⁷ Nuzum, P. 22

¹⁶⁸ Wolmuth, Roger, *Parents v. Rock*, *People Magazine*, September 1985, P. 44.

However, the anti-rock movement was growing even bigger expanding the moral panic through the states. Music retailers were under pressure of religious activists who wanted to eliminate rock and metal from the market. Walmart stores started to remove rock magazines and controversial albums from the shelves. The companies Sears and J.C. Penney announced the refusal to distribute the records that received the label from the PMRC.¹⁶⁹

The feedback from the musical artists was rather hostile than supportive. Gene Simmons of KISS commented that rock music was beside the point, and the PMRC was proving how a small group could dictate a moral tone to the masses.¹⁷⁰ However, there were also some the PMRC proponents, for example a pop singer Pat Boone claimed that a healthy, majority-approved censorship was necessary in every society.¹⁷¹

Barry Lynn of the national American Civil Liberties Union (the ACLU)¹⁷² explained: “They want “voluntary agreements”, not censorship. To label an album is to really send a message to stores not to sell it and radio stations not to broadcast it. Under these circumstances an artist’s freedom of expression isn’t worth very much.”¹⁷³ An attorney Louis Sheinfeld considered the actions of the PMRC scary, as they appealed on the natural parental fears. “They say rock music causes babies to have babies, teenagers to go on drugs, and teenagers to commit suicide. No one believes that these problems that these problems will go away if you suppress records. They are elevating fear over reasons.”¹⁷⁴

But the “censorship war” did not stop on that point. The squad of “the Washington wives” threatened the RIAA if they did not take any preventive actions to “police” itself and the records. Ira Glasser, the executive director of the ACLU commented on that situation: “What they are doing is using the threat of legislation to force voluntary compliance. And the treat of legislation does not exist, since no such legislation

¹⁶⁹ Nuzum, P. 23

¹⁷⁰ Ibid. P. 48

¹⁷¹ Wolmuth, P. 50

¹⁷² The American Civil Liberties Union (ACLU) is a non-profit organization to defend and preserve the individual rights and liberties, guaranteed to every person in the country by the Constitution and the laws of the United States.

¹⁷³ Backer, Susan, *First Page of Crusades, The Album Network*, July 3, 1987, P. 1.

¹⁷⁴ Clark, *As Nasty As They Wanna Be*, P. 1486.

would survive a Constitutional challenge. The only purpose is to try and create self-censorship in the music industry.”¹⁷⁵

The grotesque nature of the PMRC was even more emphasized by the fact that their members were mentioning Elvis Presley and Buddy Holly as their favorite musicians, ignoring the history, that those artists were subjects of similar attacks in the past.¹⁷⁶ Eventually, the PMRC reached to the US Senate, which led to the announcement of the official hearing of the issues.

4.3 Exposure

On September 19, 1984, the PMRC together with US senators assembled to discuss problematic issues in the modern popular music. Musicians Dee Snider, Frank Zappa and John Denver were invited as key witness from the music industry.

The Chairman of the Committee John Danforth opened the hearing, declaring that the subject of discussion would be a content of some rock music, that “glorifies violence in various forms, sexual violence, advocates for the use of drugs”, but not all rock music.¹⁷⁷ He also added that the hearing was not intending to promote legislation, but provide a forum for the issue and reach the national attention.”¹⁷⁸

Susan Backer, another member of the PMRC, testified that rock music from the 1950s could not be even compared to the contemporary at that time rock artists. She affirmed that the modern music go too far by having “a new element of violence towards women”¹⁷⁹ and “the proliferation of songs glorifying rape, sadomasochism, incest, occult, and suicide by a growing number of bands, that illustrates this escalating trend, that is alarming.”¹⁸⁰ Backer named “Suicide Solution” by Ozzy Osbourne and “Don’t Fear The Reaper” by Blue Oyster Cult as songs encouraging teenagers to commit suicide.¹⁸¹

¹⁷⁵ NMCDF fact sheet, 1986.

¹⁷⁶ Nuzum, P. 22-23.

¹⁷⁷ Ibid, Opening Statement by the Chairman, P.1.

¹⁷⁸ Ibid.

¹⁷⁹ Record Labelling Hearing before the Committee on Commerce, Science, and Transportation United States Senate, 19 September 1985, 11, available at <http://joesapt.net/superlink/shrg99-529/>

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

Tipper Gore continued: “We are asking the recording industry to voluntarily assist parents who are concerned by placing a warning label on music products inappropriate for younger children due to explicit sexual or violent lyrics...”¹⁸² “A voluntarily labelling is not censorship. Censorship implies restricting access or suppressing content. This proposal does neither.”¹⁸³

Dr. Joe Steussy, a professor of music at the University of Texas, invited to the hearing, testified that music “affects moods, emotions, attitudes, and resultant behavior” and “today’s heavy metal music is categorically different from previous forms of popular music. It contains elements of hatred, a meanness of spirit. Its principal themes are, as you have already heard, extreme violence, extreme rebellion, substance abuse, sexual promiscuity, perversion and Satanism. I know personally no form of popular music before, which has had as one of its central elements the element of hatred.”¹⁸⁴

Frank Zappa, who was the first speaker from the music industry, claimed to clarify the initial purpose of the entire hearing. After the Chairman Danforth refused to answer Zappa’s question, whether it was about a new legislation proposal, Senator Exon explained: “There is one Senator that might be interested in legislation and/or regulation to some extent, recognizing the problems with the right of free expression.” However, “the suggestion made by the original panel was some kind of arrangement for voluntarily policing this in music industry as the correct way to go.”¹⁸⁵

After that Zappa started his speech: “The PMRC proposal is ill-conceived piece of nonsense which fails to deliver any benefits to children, infringes civil liberties of people who are not children, and promises to keep the courts busy for years dealing with the interpretative and enforcement problems inherent in the proposal design.”¹⁸⁶ “No one has forced Mrs. Backer or Mrs. Gore to bring Prince of Sheena Easton into their homes. Thanks to the Constitution, they are free to buy other forms of music for their children... The PMRC has created a lot of confusion with improper comparisons between song lyrics, videos, record packaging, radio broadcasting, and live

¹⁸² Ibid. 12

¹⁸³ Ibid. 13

¹⁸⁴ Ibid. 117

¹⁸⁵ Ibid. 52

¹⁸⁶ Ibid. 53

performances.”¹⁸⁷ Zappa added that there was no reason for the hearing and the Senate should not have wasted their time for “somebody’s hobby project.”¹⁸⁸ He had nothing against printing lyrics on album covers, but that would lead to other difficulties, because record companies did not own them automatically and the copyright belonged to the publisher.¹⁸⁹

Zappa was also confused about the purpose of the hearing as there was no project of any new legislation, neither any other interference prescribed from the government. For that reason it was unclear why a so-called “voluntarily regulation” was discussed by the Senate. Thus, Zappa pointed: “it is a matter of taste for every individual parent and how much sexual information that parent want to give their child, at what age, at what time, in what quantity.”¹⁹⁰ In conclusion, the PMRC simply wanted to decide for other parents what music their children should listen to.

The next testifying witness was a folk singer John Denver. He opened the speech by saying that he was strongly against to any kind of censorship,¹⁹¹ mentioning two personal incidents that happened because of lyrical misinterpretation. Denver’s song “Rocky Mountains” was banned from many radio stations considered as drug related, however, they were simply about the celebration of life and nature.¹⁹² Denver’s film “Oh God” was named blasphemous, so some newspapers refused to print its advertisements and some theatres did not want to put the name of the film on the marquee. However, Denver affirmed that there was not intention to name the God in vain.¹⁹³ According to him, the problem pointed by the PMRC were real and deserved their concern, but they addressed themselves not to the problem, but to its symptoms. Because “explicit lyrics and graphic videos are not so far removed from what is seen on television every day and night, whether it be soap operas or on the news...” Denver insisted, it was only a parental responsibility for their children’s upbringing, paying attention to their interests, responding to their needs. Denver recognized that

¹⁸⁷ Ibid.

¹⁸⁸ Ibid. 54

¹⁸⁹ Ibid. 54-55.

¹⁹⁰ Ibid. 57

¹⁹¹ Ibid. 65

¹⁹² Ibid.

¹⁹³ Ibid.

parents have a greater influence on their children than anything else could possibly have.¹⁹⁴

The third and the final speaker from the music industry was Dee Snider, the lead singer of a heavy metal band Twisted Sister, that was among the list of “Filthy Fifteen”.

Snider opened the speech by saying: “I would like to tell the committee a little but about myself. I am 30 years old, I am married, I have a 3-year-old son. I was born and raised Christian and I still adhere to those principles. Believe it or not, I do not smoke, I do not drink, and I do not do drugs.”¹⁹⁵ Snider claimed that all the accusations against his music were based on lyrical misinterpretation and addressing all of them in front of the committee.

The Accusation 1 was claiming that the song “Under the Blade” was about sadomasochistic exploits, however Snider explained that it was about the fear of a throat surgery.¹⁹⁶

The Accusation 2 charged the song “We are not gonna take it” for a violent content. Snider also argued that there was no violence in his lyrics. Though the music video for that song contained some cartooned violent actions of a child in protest to his father, yet Snider questioned the logic of restrictions against the song, when the violence was only in the video.¹⁹⁷

The Accusation 3 was Tipper Gore’s comment about Twisted Sister’s merchandising T-shirts, that according to Gore was depicting a woman in handcuffs. But Snider denied that such merchandising design even ever existed.¹⁹⁸

Alike Zappa and Denver, Snider argued that it was only a parental issue to sort the music they want their children to listen to.¹⁹⁹

Though the claims and the promoted agenda of the PMRC seemed ridiculous and unfavourable for musical artists and the music industry, some time later the RIAA had to approve the labelling stickers. That agreement was reached upon the RIAA needing support from the Congress in order to pass the “Home Recording Act”. It was more

¹⁹⁴ Ibid. 66

¹⁹⁵ Ibid. 73

¹⁹⁶ Ibid. 74

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid. 75

essential for the music industry at that time, because development of cassette recorders in the 1980s enabled many users to tape radio broadcasts, which according to the RIAA was a form of piracy diminishing their profits.²⁰⁰ Thus, soon “The Tipper’s sticker” appeared on the records.

Again, Frank Zappa commented on that point, that the record companies were willing to chop up artists’ civil rights, so they would not lose any potential profits from their anti-home taping and piracy campaign.²⁰¹

In 1994, the RIAA reported: “The Parental Advisory Program continues to offer a sound, sensible and constitutionally legal alternatives to censorship legislation.”²⁰² That hearing in the Senate revealed the public opinion on rock and heavy metal music at that time. Zappa, Denver and Snider were obliged to testify under pressure not only from the PMRC, but also from the senators, some of who were related to the PMRC activists by marriage. The video recording of the hearing proves hostility and a biased attitude towards rock music from the publicity at that time, including the members of the American Senate.

However, as the further history revealed, the PMRC not only promoted an absurd regulatory agenda, but even advertised rock and heavy metal by bringing it to the public eye. The heavy metal beast was fed by a bigger range of attention, that involved not only rebellious teenagers and their conservative parents, but the entire country including the authorities.

4.4 The Aftermath

After the PMRC and the RIAA finally reached the agreement, some American states began to develop legal restrictions against artists labelled by the notorious sticker.

On November 14, 1985, the city of San Antonio, Texas, passed a law, prohibiting young people under age of 14 from attending concerts of the artists, whose music was marked by the PMRC, unless they were accompanied by a parent. Besides, any advertisements for such sort of events had to carry the same warning sign.²⁰³

Similar legislations passed in Florida, but soon were recognized unconstitutional.²⁰⁴

²⁰⁰ Belcik, 22.

²⁰¹ Nuzum, 25.

²⁰² RIAA, the Annual Report 1994, P. 18.

²⁰³ Nuzum, 34

²⁰⁴ Ibid.

By 1986 several states considered to develop the bills that would either restrict or ban albums with the parental advisory label.²⁰⁵

Judith Toth, a Democrat from Montgomery County, introduced the Maryland bill to ban the sale of obscene records, tapes or discs to people under the legal age. She insisted on such regulations, refereeing to the Criminal Code of Maryland, that prohibited to sell books with obscene or sexually explicit content to minors.²⁰⁶

Meanwhile, the anti-rock social campaign was also going on, and after the victory of the PMRC, the protesters felt better support and approval of their rightfulness. Forty-eight teenagers from Christian families in Lakemont, N.Y. went to picket the State House in Annapolis, carrying the signs as “Rock music almost ruined my life” and “Stop murder music.”²⁰⁷

Toth explained that her proposal was inspired by the PMRC and though she did not win the battle with the music industry, but managed to keep them “so tied up that they don’t know what hit them.”²⁰⁸

In February 1986, Frank Zappa once again testified at the hearing, but this time before the Maryland State Senate Judiciary Committee, concerning the logic and constitutionality of music labelling. Eventually, the bill was rejected.²⁰⁹

In 1993, South Carolina, New Jersey, Arizona, Florida, Oregon, New York State, and in 1994, Missouri and Alaska were also considering legislation, relying on the RIAA label to determine what records had to be censored. That legislation would have saved them from difficulties of the actual listening to every single album release.²¹⁰

The label “Explicit Lyrics” became a synonymous of obscenity, that several major retail chains (Camelot Music&Video, Sears, J.C. Penney, Disc Jockey, etc.) refused to

²⁰⁵ Ibid. 34-35

²⁰⁶ MD Code, Criminal Law, Paragraph 11-102, Formerly cited as MD Code Art. 27, Paragraph 416B; MD Code Art. 27, Paragraph 416G, Paragraph 11-102, Adult sexual displays- Selling or offering to sell to minors.

²⁰⁷ Maryland, for now, will not regulate lyrics. Special to the New York Times, published 6 April 1986, available at <http://www.nytimes.com/1986/04/06/us/maryland-for-now-will-not-regulate-lyrics.html> Accessed 11 June 2020.

²⁰⁸ Kennedy, *Frankenchrist vs. The State*, P. 139

²⁰⁹ Nuzum, 35.

²¹⁰ Chastagner, 19.

carry records with those labels.²¹¹ Others, as Trans World, Tower, Musicland, Waterloo, Record Bar or Sound Exchange declared, that though there was no legal regulation yet, they would not sell those records to the minors. Those stores required the proof of age from their customers and laying responsibility on employers if they sell such records to the minors.²¹²

It resulted that even many record companies became extremely selective about the artists they wanted to work with, attempting to reduce the production of labelled materials. Alternatively, they preferred artists to sanitize their content in order to make themselves commercially acceptable.²¹³

4.5 Self-censorship

The PMRC was insisting on developing a rating system for music records, that would be resemble to the rating system of the motion pictures in the USA. According to their own claims, they wanted to achieve a voluntary agreement with the RIAA, in other words to impose the idea of a strict self-censorship to the music industry. However, the film rating system in the United States, taken as example by the PMRC, was developed in completely different circumstances and was initially serving a different purpose, rather than simply protecting the social morality. It was not manifested from any social claims or pressure, but was created to protect the film industry from the actual censorship laws and restrictive measures.

In 1915, in *Mutual Film Corporation v. Industrial Commission of Ohio*, the Supreme Court ruled that the free speech protection in the Ohio Constitution was resemble to the First Amendment, but did not extend to motion pictures. The case was brought by Mutual Film Corporation, when in 1913 Ohio established a statute requiring a number of rules and regulations for films exhibited in the state. The court dismissed the claims of the plaintiff, explaining that the exhibition of motion pictures was a business conducted for profit. Hence, it excluded any matter of free speech. The judge also pointed that the question of freedom of speech had never been raised in any prior cases concerning licensing of theatres and circuses.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

In 1922 the president of Motion Pictures and Distributors of America (MPPD), Will Hays declared, that public censorship would fail due to the fact that American nation was founded upon the principle of freedom. According to Hays, a non-governmental association as the MPPD needed to develop some moral and artistic standards on its own.²¹⁴ For that matter, the film industry would be better as self-regulated.

The MPPD was found in 1922 and united six major Hollywood studios in order to support their businesses. In 1930 the association introduced The Production Code or the Hays Code for the regulation of explicit sexual and violent scenes in movies.²¹⁵

In 1934 the Hays Code became an unofficial standard for the American film industry. Though was not prohibited to produce films without following those guidelines, such content would not be displayed in the cinemas owned by the MPPD.

The Code established 12 ethical and moral principles for American cinematography, that included the types of content inappropriate for the public display:

1. Crimes against law should have not been presented with a sympathy or justifying unlawful actions. Detailed scenes and methods of crime should have not be presented;
2. Sex scenes should not had debased the institute of marriage. If adultery was a necessary part of the pot, it should have been censored. Scenes of passion were appropriate only in case of necessity without intention to arose any lustful desires. Sexual perversions were prohibited;
3. Vulgarity (the low, disgusting, unpleasant, though not necessary evil subjects) should have always been treated for the dictates of a good taste and a regard for the sensibilities of the audience;
4. Obscenity in words, gestures, reference, song, jokes, or by suggestion (even likely to be understood by a part of the audience) was forbidden;
5. Pointed profanity (including the words God, Lord, Jesus, Christ, unless used reverently, as well as Hell, damn, etc.), or any other profane vulgar expression was forbidden;
6. By costume regulations, full nudity was forbidden;
7. Dances suggesting or representing sexual actions were forbidden, and dances with indecent movements were regulated as obscenity content;
8. Religion should have not been ridiculed in any film;

²¹⁴ *Hays says Public Censors Will Fail*, The New York Times, 25 July 1922. 5 October 2017.

²¹⁵ *Ibid.*

9. By locations, the treatment of bedrooms might be governed by good taste and delicacy;

10. By national feelings, the use of the Flag should have been consistently respectful. The history, institutions, prominent people and citizenry other other nations should have been represented fairly;

11. Titles should have not been salacious, indecent or obscene;

12. Repellent subjects might be treated within the careful limits of good taste.

The Hays Code was representing the existing at that time moral and social standards. For example, it was not only strict with erotic scenes, but was completely prohibiting any portrays of white slavery, miscegenation, child birth, themes of sex hygiene and venereal deceases. It was emphasizing the protection of human morals as the main target, affirming that entertainment had impact on human bodies and souls. As example, its creators affirmed that healthy sports as baseball golf get healthy reactions from the audience, when cockfighting, bullfighting or bear baiting received unhealthy responds from the crowd. It was also mentioned the negative effect of gladiatorial fights and obscene plays on ancient nations of Roman times.

The Code was enforced until 1950s when foreign films started to invade American cinemas. It was slowly weakening its power, because many foreign film makers did not support the Hollywood standards. Besides, the creation and the further existence of the Code was only a result of the court decision detaching motion pictures from The First Amendment. However, in 1952 in *Joseph Burstyn, Inc. v. Wilson*, the Supreme Court overruled that decision, stating that motion pictures did fully receive constitutional protection under The First Amendment.

The Code became unnecessary and soon was neglected. Moreover, it was even impossible to retain all of its requirements for the cinematography of the 60s.

Many decades later in 2011, a Russian cinema reviewer Mikhail Trofimenkov commented, that even until today the name of the Hays Code is a cursing word in the professional film industry. It did not concern the morals, but was set against social realism.²¹⁶ Trofimenkov provides the example of how presentation of drugs was regulated by the Code: “Because of its evils consequences, the drug traffic should not

²¹⁶ Трофименков М. С., *Из всех искусств для нас не-искусством является кино*, Коммерсантъ Weekend N. 47, 9 December 2011, P.16

be presented in any form. The existence of the trade should not be brought to attention of the audience.”²¹⁷ But the critic also admitted that the Code indeed helped to protect the film industry not only from the governmental censorship, that did not exist, but from multiple decentralized censors, such as local authorities, religion activists and lobbies.²¹⁸

In 1968, now newly renamed to the Motion Picture Association of America (MPAA) introduced a new film rating system. Alike its ancestor of the 1930s, this rating system was a volunteer self-regulation and did not require any legal enforcements. It was classifying films into four categories, depending on their appropriateness for people of certain ages. Each category was marked with a letter, that was also appearing as a label to identify the audience of admission.

In 1968-1970 the MPAA used the following film classification:²¹⁹

G: suggested for general audiences;

M: suggested for mature audiences;

R: restricted audience, persons under 16 not admitted, unless accompanied by parent or adult guardian;

X: persons under 16 are not admitted.

Since 1990s, “M” was changed to “PG”, “X” to “NC-17” and “PG-13” (some material may be inappropriate for children of 13 years old and under) was also added to the system.

The modern day film rating system in the USA is ruled by the Classification and Rating Administration (CARA), which is an independent division of the MPAA.²²⁰ The MPPA confirms that the film rating system is necessary for providing parents the information whether a certain film would be appropriate for their children. It also affirms that films open the eyes of a new generation to different places, cultures, ideas,

²¹⁷ The Motion Picture Production Code of 1930 (Hays Code).

²¹⁸ Трофименков, 2011.

²¹⁹ Kennedy, Matthew, *Roadshow!: The Fall of Film Musicals in the 1960s*. OUP USA, 2014, P. 183.

²²⁰ *Classification and Rating Rules*, Classification and Rating Administration. January 1, 2010. PP. 6-8. Archived from the original on December 4, 2014. Retrieved November 30, 2014.

when parents play an important role to ensure that children have a positive and enriching experience.²²¹

According to the MPPA, this rating system is assigned by a board of parents who consider such factors, as violence, sex, language and drug use unfavorable for the minors, and believe that the majority of American parents would also support these boundaries.²²² Thus, the modern film rating consists of the following categories:²²³

G: suggested for general audience, all ages are admitted, nothing would offend parents to be viewed by children;

PG: parental guidance suggested, some material may not be suitable for children, parents are urged to give restrictions;

PG-13: parents strongly cautioned, some material may be inappropriate for pre-teenagers;

R: restricted, contains adult material, parents are urged to learn more about the film before taking their young children with them;

NC-17: no one at the age of 17 and under is admitted, clearly adult content.

However this rating system is volunteer, and the theatres have no legal duties to ensure that children have no access and do not watch R-rated films. There are also no legal consequences for teenagers or their parents, if a child under 17 watches a NC-17 film.²²⁴ Except for some states, that have laws of responsibility for showing obscene material to the minors.²²⁵ Therefore, theatres are able to restrict the access of to certain films by not selling tickets to the underaged, but only if it has a non-discriminatory background.²²⁶

²²¹ Official Website of the Motion Picture Association of America, at <https://www.mppaa.org/film-ratings/>. Accessed 13 June 2020.

²²² Ibid.

²²³ <http://filmratings.com/> Accessed 13 June 2020.

²²⁴ Coble, Christopher, "Are Movie Rating Legally Enforceable?" at https://blogs.findlaw.com/law_and_life/2015/05/are-movie-ratings-legally-enforceable.html, accessed 13 June 2020.

²²⁵ Ibid.

²²⁶ Ibid.

Some films might be left without rating (classified as “unrated”), but they are rejected from a public broadcast. Non-members of the MPAA are also welcome to submit films for the rating.

In conclusion, it was the Hays Code that for the first time introduced the idea of self-censorship. That measure was necessary at that time in order to protect the film industry from non-governmental pressure, when commercial films were excluded from the First Amendment. Though it had some flaws, it accurately reflected the moral standards, the mood and the dominating narratives of American society at that era. It is noticeable, that the Code was created by the film industry itself and was not developed and enforced by some lobbies or social groups in power, unlike the agendas of the PMRC. And the only reason why the Hays Code was created and the film industry became vulnerable to social dictate at that time, was its exclusion from the First Amendment, which was also not relevant to the music industry in the middle 1980s.

In a similar way the modern film rating system developed by the MPAA has no forced agendas and mechanisms. Those rules were developed by the film industry itself, acknowledging its commercial and technical capabilities.

On the contrary, the RIAA had no choice but to admit the guidelines developed and enforced by the PMRC under pressure of the Senate. In that case, it is hard to call such measures “volunteer self-regulation” in spite of all the claims from the PMRC, especially after the government was involved. The First Amendment was present and was fully protecting the musical artists of “Filthy Fifteen”, which was clearly acknowledged by Zappa, Denver and Snider during the hearing.

4.6 The legal matters

The First Amendment was a critical point of discussion during the PMRC hearing. It was argued whether Gore’s claims were truly related to censorship, in spite of her and other members insisting on “self-regulatory” measures and not attempting to ban any music from being released and distributed.

The previous sub-chapter showed a historical example of self-censorship from the creation and the role of the Hays Code in film industry in 1930s. Again, it has to be acknowledged that existence of the Code was directly related to legal exclusion of commercial films from the constitutional protection. It only can be argued whether the

film industry would have had to develop such strict self-regulatory measures, if The First Amendment had been in force at that time.

Nevertheless, the PMRC were persistent in their claims, even admitting the supremacy of The First Amendment, but covering their intentions under the term “self-censorship”.

It is arguable if self-censorship is a legal matter. In psychology this term is linked to a groupthink theory, developed by Irving Janis. A groupthink occurs, when a group of people makes irrational decisions under pressure of verifying, whether their behavior responds to “mental efficiency, reality testing, and moral judgement.”²²⁷ That is when an author controls their own speech to avoid criticism and negative attention, as well as being afraid to offend someone or beach the public order.

Cook and Heilmann refer to the distinction between public and private self-censorship.²²⁸ Both types of self-censorship occur for the matter of appropriateness, based on taste, civility and morality.²²⁹ In public self-censorship, the censee adjusts their expression according to the public censor. In private self-censorship the roles of censee and the censor are fulfilled by the same agent.²³⁰

According to Cook and Heilmann, The First Amendment is not applicable to private self-censorship, because that way of restriction involves the suppression of attitudes within one individual.²³¹ However, they argue that the principle of free speech can be applicable on public self-censorship, where the censor is a public agent, such as a government or public authority, and the censees are private individuals or corporations.²³²

The self-regulation of the Motion Picture Association is example of public self-censorship in order to protect film industry from public castigation, especially in the 1930s, when films were excluded from The First Amendment. Obviously it was a volunteer action of self-regulation, but comparing to the situation of the PMRC with its imposed standards for the RIAA, it is hard to call those measures volunteer.

²²⁷ Janis, Irving, *Victims of Groupthink*, New York, Houghton Mifflin, 1972, P. 9

²²⁸ Cook, Philip, Heilmann, Conrad, *Censorship and Self-Censorship*, 2012.

²²⁹ Ibid. P. 2

²³⁰ Ibid. P.1

²³¹ Ibid. P.25

²³² Ibid.

From one hand the censor was a public organization, which responds to the definition of public self-censorship, from the other, the potential censee was indeed exposed for the public castigation right in front of the American Senate. It is needless to say, that that precedent occurred with the censee having fully enforced constitutional protection.

The text of The First Amendment states: “Congress shall make no law... abridging the freedom of speech, or of the press.”²³³ It is clearly pointed that no speech can be censored by the government, when other restrictions, that are not censorship in legal understanding, are excluded from that subject. However, Nuzum criticizes that argument, considering that the government ought to control any discriminatory suppressions against artists, especially when one social group dictates moral standards to another.²³⁴ He emphasizes that thousands of artworks contain references to sex, violence and other social taboos, more than rock music has ever contained.²³⁵ For that matter, if someone wants to outlaw or suppress sex or violence, they must go far beyond music.²³⁶

To the reference of Cook and Heilmann’s understanding of public self-censorship and the applicability of The First Amendment, the entire legal system (and especially the courts) ought to play a role of arbiter with a duty to resolve any contradictions between a potential censee and a public censor. The judicial practice is entitled to interpret the boundaries of The First Amendment, as well as its relevance in each particular case.

It is difficult to presume, what decision would have been made by the Constitutional court if a potential case the RIAA v. the PMRC would have been brought into action. Obviously, it would have been emphasized on the First Amendment, since no forced restrictions of freedom of speech are legitimate in the United States. But since the case of the PMRC did not reach any judicial institutions, this chapter will provide the analysis of the limits of the First Amendment in relation to the issues of the PMRC and other attacks on rock, metal and other forms of popular music. It is also going to

²³³ Ruane, Kathleen Ann, *Freedom of Speech and Press: Expressions to The First Amendment*, CRS Report for Congress, 8 September 2014.

²³⁴ Nuzum, P. 7.

²³⁵ Ibid. P.8

²³⁶ Ibid.

observe contradictions and difficulties of judicial practice in defining those limits and interpreting art with its related meanings in the legal sense.

The next sub-chapters are dedicated to the legal limits of The First Amendment that are directly or indirectly related to the claims of the PMRC. They will present the case studies, crucial for the US judicial system in order to bring the light on the question why the claims of the PMRC were constitutionally irrelevant.

Thus, as the main concerns of the “Washington wives” were revolving around sex, violence, drugs and occult in rock music, the following sub-chapters are going to examine the related legal limits of freedom of speech in the United States, such as: obscenity, fighting words and true threats, as well as the matters of blasphemous and drug-consuming content.

4.6.1 Obscenity

The American law refers to “community standards” for classifying questionable artworks on the subject of obscenity. Though there are legally established criteria of obscene materials, that are excluded from The First Amendment, some artworks must also respond to community standards, that might differ from one state to another. If materials do not respond to local regulations in one state, still being acceptable in the others, it still can be banned on the territory of that state.

The U.S. Supreme Court defined “obscene” a material, that is predominantly “prurient” (appealing to impure sexual desire) according the contemporary community standards. It is “patently offensive” in its portrayal of sexual acts and lacks “serious literary, artistic, political, or social value”, when considered as a whole.²³⁷ The concept of obscenity refers only to hard core pornography.

The earliest definition of obscenity was adopted from the 1866 British standard. In 1986, the United States Supreme Court reviewed the case involving the New York publisher Lew Rosen, who was convicted for selling nude pictures of women. In the case the Court defined obscenity in the following way: “the test of obscenity in this, whether the tendency of the matter charged as obscenity to deprave and corrupt those whose minds are open for such immoral influence, and into whose hands a publication of this sort may fall.”²³⁸

²³⁷ Miller v. California, 413 U.S. 15 (1973)

²³⁸ Regina v. Hicklin, L.R. 2 Q.B. 360, 1868.

In 1957 in *Roth v. United States*, the U.S. Supreme Court excluded obscenity from the First Amendment. However, artistic materials, that might possess unorthodox, controversial and even hateful ideas, but redeeming social value or importance are fully protected by the First Amendment, because they encroach upon the limited area of more important interests.²³⁹ The Court also developed the “obscenity test” for the rating of questionable artworks. The test included the following criteria in order to recognize obscenity:

A. The dominant theme of the material taken as a whole appears to a prurient interest in sex;

B. The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;

C. The material is utterly without redeeming social value.²⁴⁰

The decision asserts that sex and obscenity are not synonymous. Obscene materials deal with sex in a manner of appealing to prurient interest in order to excite lustful thoughts.²⁴¹

In 1966 in *Memoirs v. Massachusetts*, the book “Memoirs of a woman of pleasure”, also known as “Fanny Hill” went on trial for obscenity. It was written by John Cleland and published in 1748, and later named as the first pornographic novel.²⁴² The appellant’s complaint (aka the book itself) was against the decision of the Supreme Judicial Court of Massachusetts, that according to the claims erred at ruling that the novel was obscene and excluded from The First Amendment.²⁴³

It was necessary to seek how the novel would have been gone thorough the Roth test in order to prove that it truly was “utterly without redeeming social value.”²⁴⁴ Justice Douglas stressed that fact that were no constitutional guidelines for the legal

²³⁹ *Roth v. United States* (No. 582) 354 U.S. 476 (1957), PP. 354 U.S. 481-485, PP, 354 U.S, 484-485, available at <https://supreme.justia.com/cases/federal/us/354/476/case.html> Accessed 14 June 2020.

²⁴⁰ *Ibid.* P. 354 U.S. 487

²⁴¹ *Ibid.*

²⁴² Margolis, Eric, *Obscenity Case Files: Memoirs v. Massachusetts*, 2013, available at <http://cblf.org/2013/07/obscenity-case-files-miller-v-california/> Accessed 14 June 2020.

²⁴³ “*Memoirs v. Massachusetts 1966*”, *Supreme Court Drama: Cases that changed America*. Encyclopedia.com, 11 March 2017, <http://www.encyclopedia.com>

²⁴⁴ Justice Burger on *Miller v. California*, *Constitutional Law*, 5th edition, Redlich, Attanasio, Goldstein, P. 1151, 2008.

definition of obscenity. The Court had to deal with a large scope of tastes and standards of literature, that might differ from one person to another.²⁴⁵

The novel itself was telling a story of a 15-year-old English prostitute Fanny Hill, who was seeking for the understanding of love. She struggles after the death of her parents and decides to sell her body for living. In the end of the story, the main character realises that sex without love is empty and meaningless and ends up marrying her first lover.²⁴⁶

During the discussion, Justice Brennan recognized the novel for having a cultural value, mentioning the testimony of the first witness:

“I think it is a work of art...; it asks for and receives a literary response... presented in an orderly and organized fashion, with a fictional central character, and with a literary style... I think the central character is...what I call an intellectual..., someone who is extremely curious about life and who seeks...to record with accuracy the details of the external world, physical sensation, psychological responses..., and empiricist...I find that this tells me things...about the 18th century that I might not otherwise know.”²⁴⁷

According to that testimony, the main character was a sensualist, exploring her sexual attractions, which she sold for fun, for money, for lodging and keep, for an inheritance, and finally for a husband.²⁴⁸ If she was curious about life, her curiosity extended only to the pursuit of sexual delight wherever she found it.²⁴⁹

“Other experts presented by the defence, testified that the book emphasizes the profound “idea that a sensual passion is only truly experienced when it is associated with the emotion of love” and that the sexual relationship “can be wholesome, healthy. Experience itself”, whereas in certain modern novels “the relationship between sexes is seen as another manifestation of modern decadence, infertility or perversion.”²⁵⁰

²⁴⁵ Ibid. P. 1154

²⁴⁶ Margolis, 2013.

²⁴⁷ *Memoirs v. Massachusetts*, 383 U.S. 413 (1996), Appendix to the opinion of Justice Brennan, P. 383 US 447.

²⁴⁸ Ibid. P. 383 US 448

²⁴⁹ Ibid.

²⁵⁰ Ibid.

Hence, the book was interpreted as “a minor fantasy”, deluding as a guide to conduct, but respectful of our delight in the body..., an inserting footnote in the history of the English novel.”²⁵¹

According to the Roth test, the Supreme Court recognized “Fanny Hill” having a literary value. The case was sent back to Massachusetts for a retrial.²⁵²

In 1973, *Miller v. California* redefined obscenity from “utterly without socially redeeming value” to that which lacks “serious literary, artistic, political, or scientific value.”²⁵³

The appellant conducted a mass mailing advertisement of illustrated erotic books. The brochures were sent in an envelope to a restaurant in Newport Beach, California, thought it did not request for them. The manager of the restaurant complained to the police.²⁵⁴

The Supreme Court recognized that the State had a legitimate interest in prohibiting dissemination or exhibition of obscene materials when the mode of dissemination carried with a significant danger of offending the sensibilities of unwilling recipients or exposure to juveniles.²⁵⁵

Justice Burger commented that the implicit history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance, refereeing to *Chaplinsky v. New Hampshire*:

“There are certain well-defined and narrows limited cases in speech, the prevention and punishment of which have never been through the rise any constitutional problem. These include the lewd and obscene... It has been well-observed that such utterance are no essential part of any exposition of ideas, and are if such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by social interest in the order of morality...”²⁵⁶

After that the Court developed the following guidelines for the Roth test:

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ *Miller v. California*, 413 U.S. 15, 1973, PP. 23-24.

²⁵⁴ Justice Burger on *Miller v. California*, *Constitutional Law*, 5th edition, Redlich, Attanasio, Goldstein, P. 1150, 2008.

²⁵⁵ Ibid.

²⁵⁶ *Chaplinsky v. New Hampshire*, 3165 U.S. 568, 571-572, 1942, Emphasis by the Vourt in Roth v. United States opinion.

A. Whether the average person, applying contemporary community standards would find that the work, taken as whole, applying to the prurient interest;²⁵⁷

B. The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state of law;

C. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, the First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary.²⁵⁸

In *Paris Adult Theatre v. Slaton* respondents filed a suit against Georgia Civil law to enjoin the exhibiting by petitioners of allegedly obscene films in adult movie theatres. The theatre clearly warned the potential viewers of sexual nature of the films and required the visitors should have been at least 21 years old of age. Theater owner filed the appeal to the U.S. Supreme Court.

However, the U.S. Supreme Court upheld the decision of the Supreme Court of Georgia, confirming that:

A. Obscene material is not speech entitled to the First Amendment protection based on *Miller v. California*;²⁵⁹

B. Conduct involving consenting adults was not always beyond the scope of governmental regulation;

C. States have a legitimate interest in regulation commerce in obscene materials and their exhibition in places of public accommodation, including “adult” theater;²⁶⁰

D. Exhibition of obscene materials in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theatre cannot be equated with a private home; nor in there a privacy right is arising from a special relationship, such as marriage. Nor can the privacy of the home be equated with a “one” of “privacy” that follows a consumer of obscene materials wherever he goes.²⁶¹

²⁵⁷ Roth v. United States, *supra*, at 489.

²⁵⁸ Miller v. California, PP. 24-25.

²⁵⁹ Paris Adult Theatre I v. Slaton (No. 71-1051), 413 U.S. 49, P. 54, 173,

²⁶⁰ Ibid. PP. 57-59

²⁶¹ Ibid. PP. 65-67

The the term “obscenity” still did not receive a legal definition, the courts refer as “obscene” to the content that explicitly shows depictions of sexual acts, sex organs and has no purpose but to arouse prurient desires.

In *Jacobellis v. Ohio*, The Supreme Court ruled that only “hard core” pornography could be excluded from the First Amendment. Though the term also does not have any official legal definition, in that sense the Court referred to the content that explicitly shows depictions of sexual acts, sex organs and has no other purpose but to arouse prurient desires. That definition is clearly reflecting the same features as in the previous judicial attempts of describing “obscenity”.

The case *Jacobellis v. Ohio* was brought against the manager of the motion picture theater, who was convicted under a state obscenity law of possessing and exhibiting allegedly obscene film “The Lovers” (1958).

Justice Stewart commented that the film could not be recognized as obscene, because: “ I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description “hard core pornography”, and perhaps I could never succeed in intelligibly doing so. But I know when I see it, and the motion picture involved in this case is no that.”²⁶²

Eventually it was ruled that the film indeed received the First Amendment. Justice Brennan also explained why it had no traits or resemblance to obscene content: “We have applied that standard to the motion picture in question. “The Lovers” involves a woman bored in her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State’s objections are based almost entirely upon that scene. The film was favourable reviewed in a number of national publications, although disparaged in others, and was rated at least by two critics of national stature among the best films of the year in which it was produced. It was shown in approximately 100 of the larger cities in the United States, including Columbus and Toledo, Ohio. We have viewed the film, in the light of the record made in the trial court, and we conclude that it was not obscene within the standards enunciated in *Roth v. United States*.”²⁶³

²⁶² *Jacobellis v. Ohio*, 387 U.S. (1964) at 197

²⁶³ *Ibid*.

4.6.1 a Restrictions for the Underaged Audience

Even being protected by the First Amendment, some speech might be restricted in order to protect physical and psychological well-being of minors.²⁶⁴ However, these restrictions must be accomplished by narrowly drawn regulations without unnecessary reference to The First Amendment. For that matter, even non-obscene content in a legal sense might be limited, if it is still inappropriate for the underaged audience. For example, the government might prohibit selling of such materials to the minors, or broadcasting “indecent” language on the radio and television during the time when children are likely in the audience (between 6 a.m. and 10 p.m.)²⁶⁵

4.6.1 b Law and Community Standards

In the United States the borderline between the protected and the unprotected speech is also related to so-called community standards. They exist to define the guidelines for interpreting messages and their meanings if the speech presents an ambivalent content. Community standards may also be applied to fully protected speech, in case its content is classified for appropriateness to the minors. However, the realm of community standards is often obscure as it generally refers to moral interpretations.

In *Roth v. United States and Miller v. California*, the Supreme Court mentioned that the work should be recognized as obscene if “to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest” and whether it is “patently offensive”.

However, Blecha finds these definitions questionable, because it is unclear who that “average person” could be and how they are identified. Besides, he wonders what is the meaning behind the terms “prurient”, “artistic” and “value” and how community standards have to be established in diverse multicultural societies with diverse ethnic subcultures?²⁶⁶

In some occasions the term “average person” may refer to the concept of jury selection, where each member is chosen to represent the diverse publicity and exercise common sense. Also “average” relates to the understanding of “common”,

²⁶⁴ *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

²⁶⁵ Ruane, P. 22

²⁶⁶ Blecha, Peter, *Taboo Tunes. A History of Banned Bands and Censored Songs*, 2004, P. 33

“moderate”, “ordinary” and “normal”. Thus, it could be assumed that “average” is a person of legal age, mentally sane, possibly from the middle class with a common understanding of human well-being.

Definition of “value” depends on the interpretation what message is provided by that explicitness. Though the artistic works from *Memoirs v. Massachusetts* and *Jacobellis v. Ohio* contained sexually explicit materials, the court recognized that they also included another than “a prurient interest” message, which was valuable for the understanding and rating of the works in question. Hence, if sexual explicitness is used as artistic tool to express some other positive meaning, than a direct lewdness, the work is not obscene and has a value in the legal understanding.

Frankenchrist v. the State occurred as a vivid precedent in the aftermath of the PMRC. The court had to overcome similar challenges and contradictions in order to define “obscenity” and “prurient interest” in the artwork. The case has shown that it was still unclear where lies the borderline between a true artistic value and some presumably malicious intentions to dissolute the audience.

In 2 June 1986, Jello Biafra, the lead singer of a punk rock band Dead Kennedys was charged with violating section 313.1 of the California state penal code of “Distribution of Harmful Matter to Minors.”²⁶⁷ It was the first time when the case was filed against a record album in the USA, which could have establish a new legal precedent affecting all musicians, artists, writers, film makes and performers.²⁶⁸

The band’s second album “Frankenchrist” used as artwork a poster of a Swiss artist H.R. Giger, that presumably depicted a sexual intercourse in a blunt and explicit way. That painting was entitled “Landscape No. XX: Where Are We Going?”²⁶⁹

In December 1985, Tammy Scharwath, who was fourteen at that time, purchased that album for her 11-year-old brother. The album’s cover revealed a self-made warning sticker: “ Warning: the inside fold-out to this record cover is a work of art by H. R. Giger that some people may find shocking, repulsive, and offensive. Life can be that way sometimes.”²⁷⁰

²⁶⁷ Kennedy, P. 131

²⁶⁸ Ibid.

²⁶⁹ Biafra, Jello, *The Far Right and the Censorship of Music: An Attack on the Freedom of Expression*, from the Harvard Law Record, April 1987, Vol. 84. No. 8

²⁷⁰ Kennedy, P. 131

The mother of Tammy and her brother, Mary Ann Thompson decided that the poster was pornographic and complained to the State District Attorney office. The Assistant Los Angeles City Attorney, Michael Guarino immediately took the action of prosecution, claiming that the artwork in the album was indeed “utterly without socially redeeming importance to minors.”²⁷¹ As it was consequent from the accusation, the artwork had to go through the Roth test for investigation and exposure of its hidden intentions behind the meaning, that also had to be identified by the court. Guarino’s accusation was based on Californian law, that defined harmful matters as material, which appeals to “prurient interests, i.e. a shameful or morbid interest in nudity, sex or excretion, and is patently offensive to the prevailing standards in the adult community as a whole in respect to what is suitable materials for minors and it utterly without redeeming social importance.”

Criminal charges were leveled against Biafra, as well as against the ex-general manager of the record company, the distributor, the wholesaler in Los Angeles, and a 67-year-old man, who owned the record pressing plant, that manufactured the posters and inserted them on the albums.²⁷² However, the record store was not charged, as it managed to remove the album from shelves at the right time.²⁷³

In *Grinsberg v. New York*²⁷⁴, the Supreme Court ruled that the State has a power to adjust the definition of obscenity as it is applied to minors, for even there is an invasion of protected freedoms: “the power of the state to control the conduct of children reaches beyond the scope of its ability over adults.”²⁷⁵ It was also concluded that “constitutional interpretation has consistently recognized that the parents’ claim to authority in the rearing of their children is basic in our society...”²⁷⁶

During the investigation, Biafra explained that the arguable image had never been used as an album cover, because the band knew how harmful or explicit it was in any way. However, for Biafra it had only a political meaning:²⁷⁷ “It’s the greatest metaphor I’ve ever seen for consumer culture on parade... The painting portrayed a

²⁷¹ Morris, Chris, *Porn charges leveled at punkers’ LP poster*, Billboard (Vol. 96, No. 24), P.1

²⁷² Biafra, 1987.

²⁷³ Ibid.

²⁷⁴ *Grinsberg v. New York*, 390 U.S. 629 (1968)

²⁷⁵ *Prince v. Massachusetts*, 321 U.S. 158 (1944), 321 U.S. 158, 321 U.S. 170. PP. 390 U.S. 638-639.

²⁷⁶ Ibid.

²⁷⁷ Kennedy, P. 134

vortex of exploitation, that vicious circle of greed where one of us will exploit another for gain and wind up looking over our shoulder lest someone do the same to us in return... I felt that we should include this piece or art work as a kind of crowning the statement of what the record was trying to say musically, lyrically and visually.”²⁷⁸

For a note, the artist who created that work, H. R. Giger was known in the USA for Academy award winning design for the 1980 film “Alien”. The painting in question widely circulated in Europe and now resides in a private collection in Paris. It was featured in the book “20th Century Masters of Erotic Art”, which was available at public libraries.²⁷⁹

The question was clear, if the painting was indeed pornographic and obscene or had some value protected by The First Amendment. According to Kennedy, it was truly uneasy to observe the image immediately, that was often viewed even upside down. One observer thought that it depicted bean sprouts poking from kidney beans. Another saw sticks in the mud.²⁸⁰ On the opposite, the persecuting attorney insisted that it was showing dead body parts.²⁸¹ Susan Backer from the PMRC claimed that she saw “deceased genitalia engaged in an anal intercourse.”²⁸²

The trial was scheduled for August, 11 1987 with the prosecution intending to prove that the painting: appealed to prurient interest; would be deemed offensive to minors by the average Californian adult; was utterly without redeeming value.²⁸³ On the other hand, the defence claimed all those charges were violating The First Amendment.

The curial point in the case was that Judge Susan Isacoff allowed to consider the poster in the context of the lyrics. After a blazing battle between the sides, the juries had to report about being hopelessly deadlocked.²⁸⁴ In spite of the demands from the prosecution for a new process, the judge denied the request and declared a mistrial.²⁸⁵

²⁷⁸ Biafra, P. 11

²⁷⁹ Kennedy, P. 134

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Baker, P. 1

²⁸³ Bolles, Don, *Censorship L. A. Style*, The L. A. Weekly, August 1-7, 1986, P.27 and Iorio, Paul, *Rock'n'Roll on trial: Jello Biafra goes to court*, Cashbox, August 15, 1987.

²⁸⁴ Kennedy, P. 144

²⁸⁵ Ibid.

Some time later after the process Biafra commented: “Forcing the issue is always worth it. Hope this slams the door on the misuse of judicial power in underground artists with an oppositional point of view.”²⁸⁶ He explained why Giger’s painting was used as an album artwork: “My God, here it is, this is how we treat each other every day in a consumer-oriented society, intentionally or as a self-defence mechanism. This is a consumer culture on parade!”²⁸⁷ Biafra also made a remark, that the Constitution implied that it was up to the individual to make a decision what should be included into their artwork, but not the State or self-appointed parents in Washington to make it for them.²⁸⁸

4.6.2 Violence and Offensiveness

Alongside with the concerns about sexual explicitness, the PMRC pointed on the issues of violence and offensives in the contemporary popular music.

According to the US Supreme Court, the speech does not receive The First Amendment, if it contains incitement of violence, true threats or fighting words. But is a legal definition of “violence” similar to the way it was interpreted by the society being taken over by a moral panic?

In criminal law “incitement” is understood as instigation, persuasion or moving another to commit a crime.²⁸⁹ As an illegal action, incitement is described as inchoate offence, a crime of preparing or seeking to commit another crime, where harm might be caused or might not.²⁹⁰

Masses Publishing Co. v. Pattern (1917) was the first decision of the US Supreme Court that draw a line between politically correct speech and true threats to national security. The case presented advocacy of illegal activity under The First Amendment. At the issue was the federal Espionage Act of 1917, which prohibited citizens from counselling or advising violation of the law. The Court found that the New York postmaster’s refusal to allow circulation of the antiwar journal “The Masses” under the statute violated the First Amendment. Judge Hand stated: “To assimilate agitation, legitimate as such, with direct incitement or resistance, it to disregard the tolerance of

²⁸⁶ Ibid.

²⁸⁷ Biafra, 1987.

²⁸⁸ Ibid.

²⁸⁹ <http://legal-dictionary.the freedictionary.com/incite>

²⁹⁰ Ibid.

all methods of political agitation which in normal times is a safeguard of free government.”²⁹¹

In *Brandenburg v. Ohio*, the Supreme Court established the criteria to determine the features and the circumstances when inflammatory speech is intending to advocate illegal actions.

In 1964 Clarence Brandenburg, the leader of the Ku Klux Klan in Ohio, publicly proclaimed: “if our President, our Congress, or Supreme Court continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance (sic) taken... The nigger should be returned to Africa, the Jew returned to Israel.”²⁹² Justice Douglas noticed that “the question in every case is whether the words used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils, that Congress has a right to prevent. It is a question of proximity and degree.”²⁹³

Brandenburg was found guilty for violating Ohio state law. However, the US Supreme court reversed the conviction, holding that the government cannot constitutionally punish advocacy of force or law violation.²⁹⁴ It established a so-called Brandenburg test to identify when inflammatory speech intends to advocate illegal actions, as a basic rule of restrictions. The test determined that the government may prohibit the that speech advocates for the use of force or crime, only if the speech satisfies both of the two elements:

1. The speech is directed or inciting or producing imminent lawless action;
2. The speech is likely to incite or produce such action.

In *R.A.V. v. City of St. Paul*, the Supreme Court named three reasons why threats of violence against individuals are outside of The First Amendment:

1. Protecting individuals from the fear of violence;
2. From the distribution that fear endangers;
3. From the possibility that the threatened violence will occur.²⁹⁵

²⁹¹ *Masses Publishing Co v. Patten*, 244 F 535, 1917, PP. 42-42

²⁹² *Brandenburg v. Ohio*, 492, 395 U.S. 444. P. 449-447.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 378, 1992

In *Watts. v. United State*, the Supreme Court held that only “true” threats are not protected by The First Amendment.²⁹⁶ In that case the defendant expressed his disapproval of the military draft in the public by saying: “If they ever make me carry a riffle, the first man I want to get in my sights is L.B.J.”²⁹⁷ He was convicted for violating a federal statute was prohibiting “any threat to take life or to inflict bodily harm upon the President of the United States.” However, the Supreme Court revised that decision, interpreting the statute “with the commands of The First Amendment clearly in mind,”²⁹⁸ it found that the defendant’s speech did not have a “true threat”, but had indulged in mere “political hyperbole.”²⁹⁹

Hate speech is a communication, that carries no meaning, other than the expression of hatred for some group, especially in circumstances, in which the communication is likely to provoke violence.³⁰⁰ Under the American law, hate speech is protected by The First Amendment, unless it is direct, personal, and either truly threatening or violently provocative.

In *Chaplinsky v. New Hampshire*, the Supreme Court excluded fighting words from The First Amendment, defining such speech as: “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place,” or “call him by any offensive or derisive name.”³⁰¹ The Court motivated that decision by pointing that fighting words are breaching the peace by provoking the addressed person to commit violent actions.³⁰²

In *R.A.V. v. City of St. Paul* also excluded from The First Amendment a speech or symbolic expression, that arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. The Court narrowed the definition “fighting words” to direct, personal insults, that provoke actions of violence as immediate response.

²⁹⁶ 394 U.S. 705, 708, 1969 (per curiam).

²⁹⁷ Ibid. at 706

²⁹⁸ Ibid. at 707

²⁹⁹ Ibid. At 708

³⁰⁰ <http://definitions.uslegal.com/h/hate-speech/>

³⁰¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 1942

³⁰² Ibid.

Hence, the definition clarified, that fighting words or statements by their meaning intend to “inflict injury or tend to incite an immediate breach of the peace.”³⁰³ However, a speech that causes only emotional injury receives The First Amendment, no matter how offensive it is.

In *Snyder v. Phelps*, the Westboro Baptist Church was sued by the father of a military veteran for organizing a picket at his son’s funeral and showing hateful anti-gay signs.³⁰⁴ In the decision, the Court stated, that those signs were mainly addressed not to personal, but public issues, thus received the First Amendment.

In *Virginia v. Black*, three defendants were convicted for violating Virginia’s law for two separate acts of cross burnings. The Court distinguished the idea behind those actions served to threaten and intimidate potential victims and the Ku Klux Klan’s “messages of shared ideology.” It was pointed, that as the intention to intimidate was proven, then a cross burning was a criminal offence.³⁰⁵

In *Wisconsin v. Mitchell*, the Supreme Court held, that penalties for racially-motivated crimes do not violate criminal defendants’ First Amendment rights, because they were based on actions, rather than expression of opinion.³⁰⁶

True threats are another category of unprotected speech. By a legal definition, true threats are threats, that a reasonable person would interpret as a real or serious communication of intention to inflict harm.³⁰⁷ In simple words, the statements “I am going to kill you” addressed from one person to another, or “I am going to bomb this plane” announced at the airport do not receive the First Amendment protection.³⁰⁸ Yet, the courts would often struggle to define the borderline between a protected expression of hateful words and a speech that indeed represents intention to cause a potential harm. Because in many cases the use of “threatening words” can refer to metaphoric or hyperbolic expressions, thus, the definition “true threats” is always open for interpretation. A proper example is the earlier mentioned case *Watts v. United States*, where the Supreme Court found that the defendants speech that claimed

³⁰³ Ibid.

³⁰⁴ *Snyder v. Phelps*, 562 U.S. 443, 2011

³⁰⁵ *Virginia v. Black*, 538 U.S. 343, 2003.

³⁰⁶ *Wisconsin v. Mitchell*, 508 U.S. 476, 1993

³⁰⁷ <http://www.merriam-webster.com/legal/true%20threat>

³⁰⁸ Hudson, David, *True Threats*, 2008 available at <http://www.firstamendmentcenter.org/true-threats/> Accessed 20 June 2020.

to him to appear with a gun in front of the 36th President Lyndon B. Johnson, was a symbolic hyperbole, rather than a true threat.

Due to interpretation difficulties, the lower courts had to adopt various tests for identifying “true threats” in a questionable speech. In *Jones v. Arkansas*, the court of the state established the following factors:

1. The reaction of the recipient of the speech;
2. Whether the threat was conditional;
3. Whether the speaker communicated the speech directly to the recipient;
4. Whether the speaker had made similar statements in the past;
5. Whether the recipient has a reason to believe that the speaker could engage in violence.

4.6.3 Subliminal messages and heavy metal on trial

When the previous paragraphs analysed several crucial cases to understand the way how freedom of speech is applied in the legal practice, yet most of them were not related to the dimension of music. This paragraph is dedicated to the matters when heavy metal music itself was involved in the legal prosecution. Indeed, a moral panic in the middle 1980s brought heavy metal a huge publicity, including the involvement of the American Senate. However, none of those matters yet involved judicial mechanisms in order to solve those contradictions.

In 1989 two legal suits were filed against a British heavy metal band Judas Priest, accusing the band for using a subliminal message in the song “Better By You, Better Than Me.” Four years earlier, in December 1985, two teenagers from Nevada, James Vance and Raymond Belkap, shot themselves after listening to Judas Priest for six hours. Both of them had a complicated relationship with their parents and previously suffered from physical violence at home. According to the case, after a confrontation with Vance’s parents, the teenagers ran to a church playground. Belknap killed himself by pulling the trigger into his chin and Vance injured himself by severely damaging his face.³⁰⁹

Vance’s parents and their lawyers, including the Nevada attorney Ken McKenna alleged that a subliminal message “do it” was inserted into the song, which triggered the young men for a suicide attempts.

³⁰⁹ *Vance v. Judas Priest*, No. 86-5844, 1990; *Robertson v. Judas Priest*, No. 86-5844, 1990

As the case proceeded, the court had to identify if subliminal messages were truly used on the record, and whether subliminal messages could be a subject of The First Amendment. The experts from the plaintiff's side presented a testimony, reporting that some songs from the album "Stained Class" contained backmasked messages, and the song "Better By You, Better Than Me" included a subliminal message "Do it" at a certain point of the lyrics.³¹⁰

The court had to acknowledge that the legal practice had previously never developed a direct precedent, that would decide if a subliminal communication was protected by The First Amendment.³¹¹ Eventually, the case made the court come to the conclusion, that subliminal communication did not receive The First Amendment due to the following grounds:

1. Subliminal communication does not advance any purpose of free speech;
2. An individual has the First Amendment right to be free from unwanted speech;
3. The listener's right of privacy outweighs the speaker's right of free speech, when subliminal speech is used.³¹²

The judge explained that subliminal communication does not advance any purpose of free speech because they are designed to manipulate the behavior of listeners without their knowledge.³¹³ Regarding to the second ground, people have the right to be free from intrusive speech and when they are bombarded by subliminal messages, they have no opportunity to make a conscious decision to hear or to ignore them.³¹⁴

The lead singer of Judas Priest, Rob Halford denied the allegations claiming there were no subliminal message used in the album "Stained Class". However, he admitted using a backwards phrase on "Hell Bent for Leather" in 1979, but that was not the record related to the case matter.

The expert witness from CBS records, Anthony Pellicano, testified that the phrase "do it" was a result of Halford's inhalations and exhalations in combination with a single strum of a guitar chord.³¹⁵

³¹⁰ Vance v. Judas Priest, No. 86-5844, 1990, 10.

³¹¹ Ibid. At 3-4.

³¹² Ibid. At 21.

³¹³ Ibid. At 25.

³¹⁴ Ibid. At 33.

³¹⁵ Vance v. Judas Priest, No. 86-5844, 1990; Robertson v. Judas Priest, No. 86-5844, 1990, at 19.

Eventually, the court concluded that the song “Better By You, Better Than Me” had no subliminal message. It also acknowledged that the phrase “do it” could not be intentionally imitated by a drumbeat, because CBS records proved, that the album “Stained Class” was recorded in 1978, when a hidden practice of subliminal command was even technologically impossible.³¹⁶

As the plaintiff could not prove that the music urged the teenagers to shoot themselves under the Brandenburg test, the case was dismissed. The court concluded that the phrase “do it” was a result of a random sound combination and the song had no intentional commands that would instigate to commit suicide.³¹⁷

In May 1993, the plaintiff appealed to the Nevada Supreme Court, but it upheld the previous decision of the district level in favour of CBS Records and Judas Priest.³¹⁸

A similar case was filed against a former frontman of Black Sabbath, Ozzy Osbourne. In *McCullum v. CBS, Osbourne* was accused for urging three teenager for committing suicide by the song “Suicide Solution.” It also has to be mentioned that the song was charged with the same accusations by the PMRC.

In October’ 26 1984, John McCollum shot and killed himself while laying in bed and listening to Osbourne’s music. John was 19 years old at the time and previously had problems with alcohol, as well as serious emotional problems.³¹⁹ Alleging that the music was a proximate cause of John’s suicide, his father Jack McCollum filed charges against Ozzy Osbourne and a label CBS Records.³²⁰

The plaintiff provided a computer analysis of the song “Suicide Solution” from the Institute for Bio-Acoustic Research, claiming that the record contained an instrumental interval with a hidden message: “Ah know people. You really know where it’s at, You got it, Why try, why try, Get the gun and try it, Shoot, shoot, shoot (repeated for approximately 10 seconds.)³²¹

Though defendants confirmed that the masked lyric line was present on the record, the court solved the case in favour of Osbourne and CBS, stating that:

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Vance and Robertson v. Judas Priest, No, 22771, May 1993.

³¹⁹ McCollum v. CBS, Inc., No. B025565, 202 Cal. App. 3d 989, 1988.

³²⁰ Ibid.

³²¹ Declaration of Thomas Anderson in Support Thereof and Proposed Amended Complaint at 6. McCollum. No. C571832, 1986.

1. Musical composition, which expressed the view that suicide was acceptable were entitled to the First Amendment protection;
2. John McCollum's suicide was not a reasonable foreseeable consequence, which would render CBS and Ozzy Osbourne liable for negligence;
3. There was no evidence that CBS and Ozzy Osbourne intended or participated in John McCollum's suicide.³²²

It is also necessary to acknowledge, that during the process the defendant's attorney made a remark about the theme of suicide in art and literature. For example, many classical literary works involved characters, such as Hamlet, Romeo and Juliet or Anna Karenina, who intentionally chose to commit suicide. However, those books still remain as examples of literary masterpieces.

Though *McCollum v. CBS* was solved in favour of the defendant, the parents of another teenager Michael Waller filed another charge against Osbourne. On May 1986, Waller died as the result of self-inflicted pistol wound to his head.³²³

Unlike the district court in the McCollum's case, the court of the Middle District of Georgia ruled that the plaintiff could pursue a subliminal message and insisted on re-examination of Osbourne's song.

CBS had to provide a written testimony from Ozzy Osbourne, that stated: "The lyrics actually explain... The evils of alcohol and its devastating effects on people. I wrote the song as an artistic response to the alcohol-induced death of my friend (Bon Scott). It is common in all forms of pop and rock music that the middle bridge section is used to provide a break... The ad-libbed lyrics I sang in the "interlude" are as follows: "I know people/ You really know where it's at/Bodge/Get the flaps out/Soot, soot, soot."³²⁴ Osbourne explained that the words "bodge", "flaps" and "soot" were terms for sex in a British slang.³²⁵

Two expert witnesses from the plaintiff's attorney had to analyse the record for subliminal messages. However, both of them affirmed that the message on the record in question was not subliminal, but rather "unintelligible" and "barely audible." Thus, it made the defendant's attorney claim, as the lyrical characteristics were changed

³²² *McCollum v. CBS, Inc.* At 187.

³²³ *Waller v. Osbourne*, 763 F. Supp. 1144, 1991.

³²⁴ Affidavit of John "Ozzy" Osbourne in Support of Defendants' Joint Motion for Summary Judgement at 1-2, *Waller v. Osbourne*, Nov. 1990.

³²⁵ *Ibid.* At 3.

from “subliminal” to “unclear”, then no liability could be imposed for singing unclear lyrics.³²⁶

Assuming the fact that any unclear lyrics could be found to contain a subliminal message, the judge resolved the case in favour of Osbourne and CBS Records.

The court decision also included an interesting remark on rock music in particular: “In all candor the court must also observe that the lyrics are great in many songs that come under the heading of rock music seem to foster an outlook of life that emphasizes alienation, cynicism, rebellion, and futility. In a world full of traps for the unwary teenager such as rampant drug and alcohol abuse and a “new morality” that stresses the importance of doing anything that feels good, an addiction to music of this sort could be another step in a path of self-destruction. Nevertheless, whether the defendants’ album “Blizzard of Oz” could fit this description, or whether the court approves of rock music in general or of this particular brand of it, is irrelevant. The sole duty of this court in this lawsuit is to determine whether subliminal message appear in the song and whether the music in question is afforded First Amendment protection. On the other hand one man’s meat is another man’s poison (or woman’s as the case may be.) Many young people find just as much relaxation and pleasure from rock music without the dearly lyrics of “Suicide Solution” as the rest of us get from the music of Beethoven, Gamble Rogers, Whitney Houston, or Hank Williams - as the case may be.”³²⁷

Hamilton v. Osbourne was a similar precedent to the previous cases, which was filed alongside *Waller v. Osbourne*. Based on the previous experience, the U.S. Court of Appeals for the Eleventh Circuit on Atlanta, Georgia, combined both of the matters on appeal, affirming the decision of the federal district court.³²⁸ In October 1992, the plaintiff was denied an appeal in the US Supreme Court.

Eventually, the judicial practice recognized Osbourne’s lyrics to deserve the protection of The First Amendment.

³²⁶ Reply Memorandum in Support of Defendants’ Joint Motion for Summary Judgement at 2-4, *Waller v. Osbourne*, Nov. 1990.

³²⁷ 763 F. Supp. 1153, *Waller v. Osbourne*, Nov. 1990

³²⁸ *Waller v. Osbourne/Hamilton v. Osbourne*, 958 F. 2d 1084, rehearing denied, 964 F. 2d 1148, 11th Cir. 1992.

4.7 Summary

The American precedent of social and legal encounters of heavy metal should be considered crucial for the further research in that field. First, because North America (along with the UK) is a home country of the heavy metal music, that importantly influenced its development. Second, because it was the United States, where anti-metal protests gained a huge media attention, igniting a massive moral panic around the globe.

Heavy metal was called different names since it broke into American popular culture. It became a salvation and a wake up call for the desperate youth. On the contrary, it was an outrageous filth for some parents and religion groups, intending to suppress the genre. Though it was not the first moral panic in the American society, driven from a certain music, the ideological concepts of heavy metal, that were primarily obscure in the mainstream, that made those confrontations even stronger.

The PMRC targeted heavy metal as a social threat, when heavy metal musicians claimed the opposite, viewing their musical expression as the answer to the same oppressive social dogmas. Though a moral panic of the middle 1980s also involved pop, punk and hip-hop artists, it was rock and especially heavy metal, that remained in the center of attention for its predominantly dark and shocking visual aesthetics, combined with aggressive sonic features and provocative lyrics. It was proved by the PMRC in the list of “Filthy Fifteen”, where rock and heavy metal songs outnumbered other genres.

From the legal point of view, heavy metal is changeling music genre, leaving a lot of space for doubting and interpretation. It targeted the jurisdiction and the limits of The First Amendment, simultaneously tasking the legislator how far such forms of art are allowed to go, especially with a vague artistic entity.

The earlier legal practice has shown, that not every art, that embraces elements of controversy, provocation, violence, and erotica is legally insulting, obscene, or threatening to the public order. It takes multiple tests in order to investigate the initial meaning and purpose of the art, yet even the courts struggle with formulating legal terms of non-legal matters. From that standpoint, each case has to be reviewed and interpreted independently, however, it is obvious that the music of “Filthy Fifteen” list was not the subject of those tests and would not be excluded from The First Amendment. Besides, the references to so-called “community standards” prove, that

those standards might fluctuate within the changes of moral paradigms, hence the guidelines of legal practice are also shifting within the time.

Heavy metal music with all of its narratives of resistance and transgression is protected by the First Amendment in a relatively stable way. The exceptions are applied according to regular legal norms, that serve to protect the public safety, morals, and minors. The interpretation of the music in every questionable matter has to be done independently, and as the cases of Judas Priest and Ozzy Osbourne have revealed, all the necessary expertise is required. From the other hand, this chapter has shown that the legal system itself often struggles to provide the definitions and identify the boundaries between “acceptable” and “endangering” forms of art, which once again proves that the courts would rather review every individual issue independently, than create a precedent. That policy plays a positive role for heavy metal music as a representative of a social and cultural opposition, which means that in spite of all the accusations from the society, the heavy metal discourse still stands a chance to provide an evidence and clarify its name and reputation in front of the American law.

5. Heavy Metal in Germany: Impacts and Legal Regulation

Besides the general principle of freedom of speech, Germany declares freedom of art as another constitutional value.

5.1 Development of rock and heavy metal in Germany

After heavy metal had primarily spread across the Anglo-American world, its popularity began expanding further in Europe.

Today, Germany is considered one of the countries with a well-developed heavy metal scene and according to Encyclopaedia Metallum,³²⁹ it occupies the ninth position in the rating of “most metal” European countries³³⁰.

Inspired and influenced by Anglo-American counterparts, German heavy metal adopted many of its features as well as added its own emphasis combining local historical and cultural narratives. It could be argued that German heavy metal roots lie with Deutschrock (German rock), which was conceived in the 40s. The following period of the Nazi regime postponed its development since the media and the culture of that time was severely censored and controlled by the government. However, German rock was resurrected and became popular again by the 1950s.

Deutschrock features several subgenres that differed from the American rock music. For example, Krautrock or “kosmische Musik” (“cosmic music”), which emerged in the 60s and blended several genres of experimental rock³³¹, such as psychedelic rock, the avant-garde, electronic music, funk, minimalism, jazz improvisation, and world music styles.³³²

³²⁹ Encyclopaedia Metallum, the unofficial source on metal music and metal bands world wide, however it is widely recognized as a reliable information in the world metal community, <https://www.metal-archives.com/browse/country>

³³⁰ The calculation was done by measuring the ratio between the number of bands (both active and inactive) divided by the country’s population in millions. Using this metric, the global top 5 countries are Finland, Sweden, Norway, Greece, and Estonia.

³³¹ Savage, Jon, *Elektronische musik: a guide to krautrock*, The Guardian. Retrieved 14 June 2016, available at <https://www.theguardian.com/music/musicblog/2010/mar/30/elektronische-musik-krautrock>, Accessed 23 November 2018

³³² Reynolds, Simon, Krautrock, "Melody Maker, July 1996 available at <http://reynoldsretro.blogspot.com/2013/03/krautrock-melody-maker-july-1996-by.html>, Accessed 23 November 2018

Neue Deutsche Welle (“New German Wave”) was a genre of West German rock music that came out in the 70s as a derivation from post-punk and new wave music with electronic influences.³³³

Ostrock (“East(ern) Rock”) was the name of an East German movement that also appeared in the 70s as the result music trends of the Western part of Germany sneaking into the GDR.³³⁴

Since the 1990s, Neue Deutsche Härte (“New German Hardness”) evolved as a crossover of alternative metal, groove metal with electro/techno elements being affected by Neue Deutsche Welle.³³⁵ The genre received its name from the music press after the album of Rammstein “Herzeleid” (“Heartache”) came out in 1995. Other than Rammstein, notable representatives of the genre include bands like Härteare, Megaherz, Stahlhammer, Stahlmann, and Fleischmann.

Another subgenre with a German origin is Mittelalter-Metal or Medieval metal. It appeared in the middle 1990s and involved a variety of folk and medieval instruments in combination with “traditional” metal instruments such as electric guitars and technical drums. Examples of medieval metal are Subway to Sally, In Extremo, and Schandmaul.

German punk rock also gained a huge popularity since it appeared in the 1970s and was predominantly influenced by British punk music and subculture.

German rock also adopted and transformed rock music by adding some of its own character and ways of expression. Yet, in spite of cultural, historical, and linguistic differences, the German rock still had much in common with its Anglo-American colleagues. First of all, rock and heavy metal was consistently about loudness, fierce temper and personal freedom. That spirit was also one of the main characteristics of German rock and metal collectives.

Alongside with local subgenres, the German metal scene adapted many of “original” styles of rock and metal, coming to Europe from Great Britain and North

³³³ Kilpatrick, Nancy, *The Goth Bible: A Compendium for the Darkly Inclined*, New York: St. Martin's Griffin, 2004, chapter 5, "Music of the Macabre," p. 84.

³³⁴ Ibid.

³³⁵ Schmidt, Axel; Neumann-Braun, Klaus (2008) [First published 2004]. *Die Welt der Gothics: Spielräume düster konnotierter Transzendenz*, (*The World of the Gothics: Leeways of Darkly Connoted Transcendancy*), 2nd ed., Wiesbaden, pp. 269–270.

America. Thus, death metal, thrash metal, groove metal, metalcore and many others became popular in the German metal scene.

Germany also hosts several large scale metal festivals, such as Wacken Open Air or Summer Breeze which annually attract fans from all over the world.

In 2016 Metal Hammer magazine published a list of the Top 10 best German metal bands from a variety of subgenres which included Scorpions, Accept, Rammstein, Kreator, Helloween, Sodom, Destruction, Necrophagist, The Ocean, and Heaven Shall Burn³³⁶.

5.2 Controversy

Although Germany does not have a documented experience similar to the PMRC case in the United States, there have been several precedents that indicate a certain degree of concern over the impact of heavy metal music on the society.

Formed in 1994 in Berlin, the band Rammstein (literally translated as “ramming stone”) started playing more industrial and aggressive music compared to other bands in the German metal scene of the 1990s. Until today Rammstein remains one of most iconic metal acts not only in Germany but even worldwide, and throughout their history they have consistently been playing with taboos and social boundaries in their music. The band has frequently been criticized for addressing provocative themes in their music and engaging in inappropriate behavior.

Rammstein is indeed using shock value to their advantage by exposing the audience to themes of sadomasochism, homosexuality, paedophilia, incest, necrophilia, cannibalism and sexual violence. In spite of criticism, the band does not want to censor themselves on purpose. First, because of the mentioned shock value that created the controversial image of Rammstein in the media, and second, as the band have stated, they play to mock the darkest sides of the human nature.³³⁷

³³⁶ Dom Lawson for Metal Hammer, July 20, 2016, available at <https://www.loudersound.com/features/the-top-10-best-metal-bands-from-germany:Accessed23November2018>

³³⁷ Mejia, Andrea, *A Kinky Snow White, An Orgy Of Men, And Other Shocking Videos By Rammstein*, Germany's Most Controversial Band, October 2017, available at <https://culturacolectiva.com/music/controversial-rammstein-music-videos/; Accessed 23November2018>

For example, the music video for the song “Sonne” from the album “Mutter” (2001) presents a twisted vision of the Disney movie “Snow White and the Seven Dwarfs”. The video presents Snow White sadistically abusing the dwarfs, who in turn enjoy fantasizing about her.³³⁸ Another explicit video was made for the song “Mann Gegen Mann” which tells a story about struggles of a homosexual man.

One of the most controversial Rammstein music videos is “Mein Teil”. It shows the band locked in a dark room behaving provocatively. What makes it even more terrifying that the song’s lyrics deal with the real story of Armin Meiwes, also known as the “Rotenburg cannibal”, a convicted German murderer who killed and partially consumed his victim in 2001. The band’s original plan was to include real recordings of Meiwes devouring human flesh in the video, but they did not receive the permission from the police due to the material’s confidentiality. However, even without those scenes, the video was disturbing enough to be rejected from airplay at MTV Germany.

The list of Rammstein’s controversial music goes on and on. Their album “Liebe ist für Alle Da” (“Love is Here for Everyone”) became a subject of harsh criticism by the Federal Review Board for Media Harmful to Minors³³⁹ for sexual explicitness.

Other than violence and sexual explicitness, the propagation of Nazi symbols is another sensitive and controversial topic within the German social and legal context. What makes it more complicated, that it is not always easy to identify whether each use of these symbols can be classified as propaganda. One good example of this from the metal music scene is a case that occurred in July 2008 at the Wacken Rocks Seaside concert in Aurich. There, the frontman of the British band Motörhead, Lemmy Kilmister, was photographed wearing a Nazi cap.³⁴⁰ The incident provoked a strong judgement and criticism of Kilmister by the media, but the musician firmly denied all accusations of him being a Nazi. Kilmister claimed that he personally collected military uniforms from several countries around the world, not specifically Nazi paraphernalia. He also stated: “don't tell me I'm a Nazi 'cause I have uniforms...I just don't understand racism, I never thought it was an option.”³⁴¹

³³⁸ Ibid.

³³⁹ German: Bundesprüfstelle für jugendgefährdende Medien (BPjM)

³⁴⁰ Michaels, Sean, *Motörhead's Lemmy in Nazi photoshoot scandal*, the Guardian, 2008, available at <https://www.theguardian.com/music/2008/jul/11/news.culture>; Accessed 24 November 2018

³⁴¹ Ibid.

In 2016, after the Swedish metal band Sabaton was accused of promoting Nazism. The singer and frontman of the band Joakim Broden found it necessary to speak out for Metal Hammer magazine. Sabaton had previously been labelled as Nazi, which made them struggle to have their music released. However, Broden stated that exploring parts of Nazi Germany history was only a part of the band's storytelling narratives, comparing that nobody had ever attempted to ask if Stephen Spielberg was a Nazi just because he made a film about the Holocaust".³⁴² The band's first album was denied from release in Germany, because the use of the word "Nazi" itself was interpreted as a promotion of (Neo-)Nazi ideology. But after Sabaton submitted the lyrics, the publisher found them "quite interesting" and approved the release.³⁴³

Another example of this can be tied to the Italian rock band Frei.Wild, which enjoys great popularity in Germany. Originally from Brixen (South Tyrol, Italy), the band consists of five German-speaking musicians.

In August 2018 thousands of German fans travelled to see Frei.Wild at Alpen Flair, a three-day music festival in northern Italy.³⁴⁴ One of the most contentious and successful bands in Germany, they sang about love for the homeland and challenged the postwar taboos against public expression of national pride.³⁴⁵ Their songs are written in German, but being native to the Italian region, Frei.Wild were able to express nationalist sentiments for a German audience while partially avoiding negative encounters that would a German band would face for making similar statements.³⁴⁶ For example, the songs "Südtirol" ("South Tirol") and "Land der Vollidioten" ("Land of Complete Idiots") disapprove the removal of crosses from schools out of respect for non-Christian children. The lead singer and songwriter Philipp Burger claimed that he intentionally named one of the songs "Antiwillkommen" ("Anti-Welcome") for the sake of being provocative, after Angela

³⁴² Lach, Stef, *Sabaton recall 'Nazi' controversy*, August 17, 2016, Metal Hammer, available at <https://www.loudersound.com/news/sabaton-recall-nazi-controversy>; Accessed 24 November 2018

³⁴³ Ibid.

³⁴⁴ Rogers, Thomas, *A Rock Band Flirts With German Taboos, and Finds a Huge Following*, The New York Times, 2018, available at <https://www.nytimes.com/2018/08/01/arts/music/freiwild-germany.html>; Accessed 24 November 2018

³⁴⁵ Ibid.

³⁴⁶ Rogers, 2018.

Merkel allowed a large number of refugees to enter Germany in 2015.³⁴⁷ Frei.Wild has repeatedly been associated with Neo-Nazism by parts of the German press. Eventually, the band was nominated for the Echo Prize (the German equivalent of the Grammys), but was withdrawn due to the controversy.

A German politician Sven-Christian Kindler claimed that Frei.Wild supported the extremist right-wing movement and that listening to music like theirs would plant racist, xenophobic, and nationalist thoughts in the heads of young people.³⁴⁸ Burger denies any accusations of anti-Semitism levelled against his band, pointing to the huge number of fans from Israel.³⁴⁹

One of the strictest restrictions applied on freedom of speech in Germany is the child protection policy, which compared to the USA, goes far beyond “parental advisory” stickers. Though the sticker was adopted by some European artists as a form of self-censorship, it has no legal meaning in Germany. However, Germany developed a number of other legal mechanisms in order to protect minors, and those will be described in this chapter.

Analysing most notable cases that involved controversy around rock and heavy metal in Germany, it becomes obvious that in many ways rock and heavy metal provoke a similar reaction from the German audience that is similar to the moral panic in the United States. In a series of moves resembling the PMRC claiming to restrict the access of minors to explicitly violent, sexual or blasphemous content, the German activists also insisted on restricting its distribution within the country. Alongside with local artists being subjected to public criticism, some of those ‘unwanted works’ were also coming from North America. For example, the previously mentioned band Cannibal Corpse was severely criticized for their extremely graphic album covers, which most of viewers would find terrifying. German distributors had to replace those artworks with alternative images in order to address social concerns and restrictions of the German child protection law.

This chapter aims to observe the ways in which German legislation and judicial practice interpret issues related to heavy metal narratives, as well as social concerns and moral panics. It also aims to reveal whether there is a difference in understanding

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

and interpretation between the German and the American courts. For that matter, the following paragraphs will present freedom of speech, the system of child protection laws, and other legal restrictions applicable on artistic freedom in Germany. It is also important to observe the position of German courts on topic of controversial forms of art, music, theatre and literature. There are not many cases where heavy metal artists were involved in trials on the question of constitutional freedom of speech and expression. However, there are some interesting precedents related to the understanding of heavy metal controversy from the legal point of view. As it was done in the previous chapter on the United States, it is important to establish the legal grounds for understanding of interpreting blasphemy, hate speech and obscenity according to the German court practice.

5.3 Freedom of Speech and Freedom of Art

Similar to the American Constitution, the German Basic Law established the system of principles that serve to protect the democratic order of the country. As the equivalent of the American First Amendment, Art. 5 “Freedom of expression, art and sciences” presents freedom of speech as a crucial and highly valuable human right that guarantees a democratic practice of communication.³⁵⁰ The article established so-called “communicational rights”³⁵¹ to provide equal opportunity for every person to say what they think without any obligations to explain their judgements.³⁵²

Art. 5 (1) determines freedom of expression, freedom of opinion, freedom of access to public information, freedom of press, freedom of audiovisual broadcasting and freedom of cinema. All of these rights receive equal constitutional protection. The paragraph also states the prohibition of censorship.³⁵³

Art. 5 (2) established the limits to Art. 5 (1) “in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.”³⁵⁴

³⁵⁰ Jouanjan, Oliver, *Freedom of Expression in the Federal Republic of Germany*, Indiana Law Journal: Vol. 84: Iss. 3, Article 5, P. 867, 2009.

³⁵¹ Ibid. P. 866.

³⁵² BeckOK Grundgesetz/Schemmer, 38. Ed. 15.8.2018, GG Art. 5 Rn. 4

³⁵³ Basic Law of The Federal Republic of Germany, Art. 5. Sec. 1

³⁵⁴ Ibid. Sec. 2

Art. 5 (3) protects freedom of art and science,³⁵⁵ declaring that “arts and sciences, research and teaching shall be free.”

Once again, though Art. 5 (1) ultimately declared “no censorship”, Art. 5 (2) lays out circumstances under which the freedoms provided by Art. 5 (1) can be limited – namely in order to protect minors, public safety or personal honor.

Although Art. 5 divides freedom of speech, art and science into separate paragraphs, in practice these “types” of freedom might overlap with each other. In case of musical and vocal compositions involving several creators, artistic freedom might go beyond Art. 5 (3). For example, a song itself, evidently being a form of art, still can involve a certain statement of opinion and having free opportunity for the media broadcast. Thus, freedom of art, declared in Art. 5 (3), might be closely linked to the freedoms declared in Art. 5 (1). It also points out the potential of art as a tool of influence and transformation in the society.

In order to understand the role of each of the constitutional rights declared in Art. 5, it is necessary to focus on their particular meanings:

Freedom of opinion in Art. 5 (1) is a free expression of opinion through speech, writing and images. The European Court of Human Rights differentiated ‘opinion’ from ‘declaration of facts’.³⁵⁶ According to the European Court, opinions, unlike declarations of fact, have to comprise a value judgement.³⁵⁷ The Federal Constitutional Court of Germany also commented that in contrast to declarations of fact (*Tatsachenbehauptungen*), opinion expresses a judgement towards certain facts, ideas or persons and contains a subjective point of view of a speaker.³⁵⁸ Nevertheless, this distinction does not define a strict domain of Art. 5, where only opinions with a value would receive its protection. Judgement value obviously prevails, irrespective of whether that judgement is “right”, “wrong”, or what its evidential background is.³⁵⁹

³⁵⁵ *Ibid.* Sec. 3

³⁵⁶ *Lingers v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 20, 1986.

³⁵⁷ *Ibid.*

³⁵⁸ Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 266 (289) (F.R.G.) (“Soldiers are Murderers” decision).

³⁵⁹ Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Mar. 14, 1972, 33 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 1 (14) (F.R.G.)

Nevertheless, opinions without a judgemental value are also protected, unless their content falls into restrictions from Art. 5. The Federal Constitutional Court of Germany emphasized the difficulty to distinguish between expression of opinion and affirmation of fact, as both can be contained within a given statement. These elements can be separated but only if doing so does not falsify the entire statement. When that is not possible, the statement must be considered, on the whole, as an expression of opinion.³⁶⁰

The Constitutional Court of Germany emphasized not only the democratic importance of freely expressed opinions but also its contribution to the individual development of a speaker, even if their speech remains private.³⁶¹ Though freedom of opinion protects those who use speech, images, or writing to express themselves in public, it does not protect those who use media to put pressure on others. Legal scholar Jouanjan expounds on this, stating that the right to express the positive freedom opinion is laced with a negative freedom: the right to withhold an opinion.³⁶² However, for example, the warning message on cigarette packages does not infringe upon the tobacco companies' freedom of expression, because those cautions were not established by industries but by public authorities.³⁶³ Thus, commercial speech and advertising are not excluded from the main principle of freedom of expression.³⁶⁴ Freedom of art (along with freedom of art, science and teaching) is separated in the paragraph 3 of Art. 5 from the general declaration of freedom of speech in Art. 5 (1). As a matter of fact, the restrictions of Art. 5(2) are not applicable on freedom of art, and Art. 5 (3) itself declared that art must be free. It might sound paradoxical to assume that art does not face any restrictions by the German Constitutional law, and indeed, freedom of art is not absolute. However, those restrictions must be applied by the courts in relation to each particular case. Further, this chapter will reveal the circumstances of those limits.

³⁶⁰ VerfG Apr. 19, 1994, 90 BVerfGE 241 (248).

³⁶¹ Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) June 26, 1990, 82 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 272 (281) (F.R.G.).

³⁶² Jouanjan, 2009, P. 871.

³⁶³ Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Jan. 22, 1997, 95 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 173 (182) (F.R.G.).

³⁶⁴ Jouanjan, 2009, P. 837

‘Art’ can be defined as a ‘free creation’, in which impressions and experiences of the artist are brought to mediate their perception through a certain form of language³⁶⁵. Primarily it is not a communication, but expression of an individual personality of the artist.³⁶⁶ A point of critique that can be levelled against this definition is that it does not provide reliable criteria to define what constitutes an artistic activity. Although a material concept offers a certain definition of art, it appears too imprecise in the judicial application, because it offers an incomplete typology rather than a definition.³⁶⁷

As the value of opinion is important for understanding freedom of speech and artistic expression, it is necessary to assume that art itself needs to contain a certain “value” in order to be granted legal protection under Art.5. To a degree, this is similar to the American law, where a controversial work is protected by the First Amendment if it proves to possess a redeeming cultural, social or political value. Hence, the purpose of artistic works as well as the intentions of the artist are crucial for its legal examination. In cases of doubt, it is advisable, to use other criteria to define what the work of art is presenting and to remember the purpose of the guarantee of freedom.³⁶⁸

The subjective criteria of classification of art also depend the factor of a pluralistic society with flexible values, where the opinion of the majority does not always play the main role in the definition of art. Historically, art has often stood against majority views, and it can be expected to continue doing so in the future.³⁶⁹

5.4 Child protection law and restrictions

The Jugendschutzgesetz or the Protection of Young Persons Act is a main German legal act, devised to protect children and young people from danger in the public and inform young people of their rights. It serves as an orientation aid for parents, guardians, and educators on policies and curfews.³⁷⁰

³⁶⁵ BeckOK Grundgesetz/Kempfen, 38. Ed. 15.8.2018, GG Art. 5 Rn. 159-161

³⁶⁶ BeckOK Grundgesetz/Kempfen, 38. Ed. 15.8.2018, GG Art. 5 Rn. 159-161

³⁶⁷ BeckOK Grundgesetz/Kempfen, 38. Ed. 15.8.2018, GG Art. 5 Rn. 161

³⁶⁸ BeckOK Grundgesetz/Kempfen, 38. Ed. 15.8.2018, GG Art. 5 Rn. 163

³⁶⁹ BeckOK Grundgesetz/Kempfen, 38. Ed. 15.8.2018, GG Art. 5 Rn. 165

³⁷⁰Germany’s Youth Protection Act ‘Jugendschutzgesetz’ at <https://www.stuttgartcitizen.com/columns/ask-a-jag/germanys-youth-protection-act-jugendschutzgesetz/>, Accessed 26 November 2018

Chapter 3 of the Act provides regulation of media in order to prevent young people from exposure to undesirable influence from literature and other printed media, music, videos, DVDs, films, and internet presentations. It regulates the presence of minors in cinemas, who “shall be solely permitted with parental guidance” if they are younger than six years old; children as of six years are at performances finished later than 8 p.m.; adolescents below the age of 16 years are at performances finished after 10 p.m.; adolescents as of 16 years are at performances lasting beyond midnight.

Paragraph 12 of Chapter 3 declares the necessity of labelling video games. The materials shall not be accessible in the public for children and adolescents, unless they have been cleared and labelled for the respective age group by the supreme state authority or an organization of voluntary self-control or unless they are labelled “Information Programme” or “Educational Programme”.

Data mediums which are unlabelled or labelled “Not released for young people” by the supreme state authority or an organization of voluntary self-control must not be offered or rendered available to children or adolescents, must not be offered or rendered available in retail stores, stands or other points of sale outside business rooms usually not visited by customers or in mail order schemes. Data mediums containing extracts of films and games may be distributed in conjunction with periodicals if the distributor clearly indicates via labelling that the materials do not include anything that could have a potentially undesirable impact on young people.

The implementing organs of the child protection policy in Germany are the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and the Federal Review Board for Media Harmful to Minors (Bundesprüfstelle für jugendgefährdende Medien).

The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth serves to protect children and young people’s rights to furtherance of their personal development and welfare. Their mission is to ensure that all children and young people in Germany have the conditions and circumstances they need for a safe and healthy childhood.³⁷¹

The Federal Review Board for Media Harmful to Minors (Bundesprüfstelle für jugendgefährdende Medien or BPjM) is the agency subordinate to the Federal

³⁷¹ Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, at <https://www.bmfsfj.de/bmfsfj/meta/en/children-and-youth/112106>. Accessed 24 November 2018

Ministry of Family Affairs, Senior Citizens, Women and Youth. Its purpose is to fulfil the provisions of the Protection of Young Persons Act. The Board is responsible for placing potentially harmful media under legal prohibition, so that these media are accessible only to adults but not to children; promoting of media education which promotes human worth; and encouraging public awareness about media protection for young people.

The Board has a right to limit the destitution of the media if it is recognized as harmful and potentially damaging to minors with a required indexing procedure. The indexing is legally relevant to Section 18 (1) of the Protection of Young Persons Act, which prescribes the registration of media with a potentially damaging effect by the Review Board and inclusion to the List of Publications Harmful to Young Persons. Indexing is required for media and other publications with immoral and brutalizing content which is deemed to instigate violence, crime, racism, contains a detailed presentation of acts of violence or murder, and/or encourages people to act in a violent way as the only tool to achieve justice. In addition, the Board defined the following factors to constitute endangerments for minors: violation of human dignity, discrimination against groups of people, glorification or trivialization of National Socialism, glorification or trivialization of drug use, glorification or trivialization of excessive drinking, suggestion of self-injurious behavior (promoting of eating disorders, suicide)³⁷².

The procedure of indexing has to respect freedom of art, science, research and teaching. Nevertheless, alongside with those rights, the child protection is a crucial political course and constitutional value that prevails in the case of colliding interests. The Federal Review Board and the Youth Protection Act respects the standards of the German Criminal Code, that serve not only to fulfil the child protection policy but to maintain public peace and safety in general. Thus, the indexing policy serves to ban contents that involve:

1. Dissemination of propaganda material of unconstitutional organizations (Section 86 of the German Criminal Code);

³⁷² The Federal Review Board for Media Harmful to Minors (Bundesprüfstelle für jugendgefährdende Medien - BPjM), General Information, available at <https://www.bundespruefstelle.de/bpjm/meta/en>, Accessed 25 November 2018

2. . Holocaust denial, incitement to hatred (Section 130 of the German Criminal Code);
3. Attempt to cause the commission of serious offences (Section 130a of the German Criminal Code);
4. Depictions of violence that violate human dignity or express glorification of violence (Section 131 of the German Criminal Code);
5. Pornography (Section 184 (1) of the German Criminal Code);
6. Pornography depicting violence or sodomy (Section 184a of the German Criminal Code) or child or juvenile pornography (Sections 184b and 184c of the German Criminal Code);
7. Glorification/trivialization of war;
8. Media portraying people who are dying or who are being or have been exposed to severe physical or emotional trauma in a manner that violates human dignity and presenting actual events and developments, although there is no overriding public interest that would justify the choice of such reporting practices;
9. Presentation of children and adolescents in unnatural, sexually provocative physical postures;
10. Media which might have a severely damaging impact on the development and education of children and adolescents into responsible personalities in society.³⁷³

After the indexing, the materials recognized as Media Harmful to Young Persons are published in the Federal Gazette. That data becomes a subject to strict restrictions of sales and distribution, banning of advertisement, but the material in question still might be available for adults. According to the official website, the Board intends to develop a strategy for “an intelligent risk management.” That policy includes providing information and counselling on contents and phenomena harmful to minors; guidance for children and young persons; educators and media education professionals; advancement of the technical protection of minors in the media; as well as precautionary measures for providers.

Besides the Youth Protection Act and The Federal Review Board, the German law has a number of principles and regulations to freedom of art when it comes to colliding interests that go beyond the protection of minors. As it was mentioned above,

³⁷³ Ibid.

the Criminal Code establishes a number of situations in which freedom of art has to be limited in order to maintain public safety or respect of human dignity. The fact that freedom of art has a different constitutional status than freedom of speech in terms of restrictions, the German courts have a duty to investigate and interpret every individual questionable work. That interpretation also is independent of the Federal Review Board, besides the courts are entitled to sustain or dismiss its decisions as supreme legal authorities.

The following paragraphs intend to elaborate on the position of the judicial system towards matters of restrictions of art in Germany. The focus will stay on heavy metal controversy, revealing how heavy metal has conflicted with German society and challenged its legal system.

5.4.1 Rammstein

The controversy about the German metal band Rammstein went so far that some of its music was added to the Index, being recognized as explicitly provocative and harmful for minors.

In 2009, the entire album "Liebe ist Für Alle Da" was declared explicit for its sexual and violent content by the Federal Review Board, receiving the Index number (case 22 L 1899/09).³⁷⁴ But in May 2010, the administrative court of Cologne (Verwaltungsgericht Köln) reversed the ban on the album. It was stated that the Board had not met the constitutional requirements for the indexing of an art work and it was questionable whether the cited reason of risk of harm to minors was applicable according to § 18 Abs. 1 Satz 1 JuSchG.³⁷⁵ It was explained that though the CD included an image of the lead guitarist with a nude woman sitting on his lap (the insider booklet picture), the court did not find the entire album to contain any detailed, coherent depictions of violence, which when compared to excesses of violence known from the relevant cinematic, photographic or literary media, could be deemed to have a harmful effect on the youth. On the subject of the booklet picture, the court pointed out that the Board themselves had mentioned the "artificial" character of the presentation, comparing it to other pornographic representations, some of which are

³⁷⁴ Rechtsprechung zu § 25 JuSchG, available at <https://dejure.org/dienste/lex/JuSchG/25/1.html>

³⁷⁵ VG Köln: Anordnung der aufschiebenden Wirkung bei Indizierungsentscheidung, Beschluss vom 31.5.2010 - 22 L 1899/09 (rechtskräftig), BeckRS 2010, 49774 ◇ ZUM-RD 2010, 649 ◇ LSK 2010, 340208 (Ls.) ◇ K & R 2010, 527 (Ls.), at <https://beck-online.beck.de/>

considerably more drastic in their statement. In response the court suggested that the images should not be interpreted as “artificial” or “staged” because such assumptions were not based upon clear reasons and circumstances.

The court concluded that the case lacked a clear overweight of the interests for protecting minors and for that matter, the artwork in question had an artistic value.

Though Rammstein has often been at the center of attention due to their controversial and ambivalent artistic messages, the legal approach requires a better understanding of what kind of imageries are considered truly harmful and explicit according to the German law. That includes not only the protection of minors but also the legislator’s views on public moral health.

5.4.2 Free art and pornography

The Rammstein case of 2010 briefly revealed the attitude of the court that in order justify restricting the public’s access to an artwork, that artwork would need to feature a certain degree of “pornography” or “obscenity”. Though the court did not provide any concrete definitions, the case showed that the court was quite insistent about deciphering the meaning behind the image and gauging the presence of artistic value. It also pointed out that the artwork in question was nothing like other forms of ‘actual’ pornographic content. Nevertheless, it is necessary to observe the ways how the judicial practice in Germany solves and defines those issues of inappropriate content, and what legal challenges usually have to be faced in those matters.

Unlike the numerous “obscenity tests” in the American practice, German courts do not give a definition of “obscenity”, “obscene contents” or “prurient interest”. After 1974, the Bundestag liberalized the anti-pornography laws, and the production and distribution of most “hardcore” films became legal.³⁷⁶

The contemporary regulation of pornography is mostly related to the child protection policy and its distribution is regulated by the aforementioned the Youth Protection Act and Art. 184 of The German Criminal Code. It is illegal to sell, display or distribute pornographic materials to persons under the age of 18, which is punished by up to one year of imprisonment or a fine. Kommers points out that the basic approach of German courts on the regulation of pornography is related to the concept of

³⁷⁶ Kommers, Donald, *The Constitutional Jurisprudence of The Federal Republic of Germany*, 2012, P. 524

protection of human dignity, rather than finding a ‘prurient interest’ behind the work. He supports Reimann who claims that the position of German courts towards sexual explicitness is rather liberal, as sex and sexual behaviour represent a natural part of human life. However, if it turns out that the artistic work is sexually objectifying human body, courts tend to find that unacceptable because such objectification dehumanizes the character.³⁷⁷

*The Mutzenbacher case*³⁷⁸ was a ruling decision of the Federal Constitutional Court of Germany on November 27, 1990, that illustrated not only the judicial attitude on sexually explicit contents but also provided general directions about the legal frames of freedom of expression.

The novel named ‘Josephine Mutzenbacher’ or ‘The Story of a Viennese Whore, as Told by Herself’ became a classic of pornographic literature after its anonymous publication in 1906 in Vienna. When German publishing houses acquired the rights to publish the novel in the 60s, it caught the attention of the BPJM. The book was suspected to be harmful for minors as it depicted explicit scenes of promiscuous actions and behavior, child prostitution, and incest. Besides, sexual explicitness was presented in a comical way, as a matter of little importance. The book was included into the list of harmful media until the Rowohlt publishing house filed an appeal to the Federal Constitutional Court.

On November 27, 1990, the Court ruled that in spite of the obvious pornographic scenes in the novel, it still received the protection of Art. 5 (3). The BPJM was obliged to remove the novel from the list after the court pointed out the necessity of “balancing against artistic freedom even if the writing obviously is capable of greatly endangering children or youths morally”³⁷⁹ and the fact that “art and pornography did not exclude each other.”³⁸⁰

The legislature itself did not sufficiently regulate the issues that are essential to exercise that basic right, and for that matter the legislature itself is required to strike a balance between artistic freedom and youth protection in the realm of writings that

³⁷⁷ Ibid.

³⁷⁸ BVerfGE 83,130

³⁷⁹ BVerfGE 83, 130 1 BvR 402/87 Mutzenbacher decision, 27 November 1990, available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=628>, Accessed 23 October 2019

³⁸⁰ Ibid. At III.1

endanger youth.³⁸¹ As for the Board, the court stated the indexing in the Mutzenbacher case was illegitimate and violated the Art. 5 (3). The case lacked the competing legal interest (protection of children and youths) and these concerns caused by the novel were not sufficiently justified in the case.³⁸²

The Court also affirmed that the violation of Art. 5 occurred due to the fact that “the legislature had not itself sufficiently regulated the issues that were essential to exercise of the basic right”.³⁸³

“When artistic freedom conflicts with another constitutional right, the two must be brought into an appropriate balance with the goal of optimization. The principle of proportionality has special significance in that process. Further, one must bear in mind that, just as artistic freedom is influenced by the value conceptions of the Basic Law's Art. 1(1), it in turn helps mold the Basic Law's view of humanity. Therefore, one must bear in mind when producing the requisite concordance that artistic freedom itself places limits on the competing constitutional interest's exercise and scope of application”³⁸⁴

When artistic freedom clashes with the interests of child and youth protection, however, the concordance demanded by the constitution cannot be reached simply by relying on prior interpretations that determined justice for other works. Artworks can have effects not only on an aesthetic, but also on a real level. Children and youths in particular will often be unable to judge an artwork's full meaning. This is true not only for unstable youths prone to such endangerment, but also for children and youths who, through disposition or education, are largely protected against damaging influences anyway.³⁸⁵ It is not a consequence of recognizing this, however, that the concern of youth protection always be granted primacy over other issues.³⁸⁶

According to Art.6 (2) of the Basic Law, the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in their performance of this duty. The decision in the *Nudist Colony Case* confirmed that the legislature may intervene in the parental rights of education

³⁸¹ Ibid.B.I.3a.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ BVerfGE 77, 240 [253]

³⁸⁵ Ibid.

³⁸⁶ BGH, NJW 1983, p.1194 - 1195

only with regard to Article 6 (2) of the Basic Law and only if parental measures constitute a substantial endangerment to adolescents. In that case, the Court determined the youth protection policy, but justified the right of parents to educate their children in a nudist culture.³⁸⁷

On the contrary, in *the Heinrich Case*, the Court upheld the decision of the Board about assessing an artwork as a harmful material and adding it to the index list. The complainant brought the issue to court after receiving brochures from some anonymous sender which contained nudity and were therefore potentially harmful for minors. The Court stated that juvenile writings, which mainly include immoral works of art and glorify crime, war and racial hatred, were legitimately included in a list and shall be restricted from public display as well as advertisement and direct mailing of such materials, but advertisements in specialized places of the book trade are permissible. This case is similar to the American precedent from *Miller v. California*, which pointed out the necessity to restrict any form of dissemination of obscene materials that would render these easily accessible for minors. Those forms of dissemination also include direct mailing.³⁸⁸

The prohibition on advertising contained in Section 5 (2) of the GjS³⁸⁹ constitutes an inadmissible interference with the general right to privacy of Article 2 of the Basic Law, because not only business advertising against young people but also against adults is prohibited. The prohibition on advertising is further incompatible with the right to freedom of expression guaranteed by Article 5 (1) of the Basic Law and is also contrary to Article 12 (1) of the Basic Law.

The general principle of equality was violated because, for example, under Section 182 of the Criminal Code, the seduction of a respectable girl would be threatened with the same punishment; on the other hand, prosecution for the seduction would only take place at the request of the parents or the guardian of the seduced. This would result in paradoxical consequences.

³⁸⁷ BVerfGE 7, 320, 1958

³⁸⁸ Chief Justice Burger's opinion on *Miller v. California*, Constitutional Law, fifth edition, Redlich, Attanasio, Goldstein, P. 1150, 2008.

³⁸⁹ Gesetz über die Verbreitung jugendgefährdender Schriften und Medieninhalte, Distribution Act writings harmful to young people and Media content, 12 July 1985.

The statement that § 6 (1) GjS is so vague that it can no longer be regarded as a sufficient standardization of a criminal offence. Criminal law, as well, cannot entirely refrain from using general terms that cannot be clearly formally described in general and that make special demands on the interpretation of the judge. Without the use of such liquid terms, the legislature would not be able to adequately respond to the diversity of life. They are indispensable and their use is legitimate within certain limits.³⁹⁰ The “writings endangering adolescents” mentioned in Section 1 (1) of the GjS are presented as “immoral and criminal offences” which are related in § 6 Abs. 1 GjS 11, 234 (237) BVerfGE 11, 234 (238) restricting war and racial hate-glorifying writings. The words “obviously heavy” in § 6 Abs. 1 GjS also make it clear that only unambiguously youth-endangering pieces should be restricted. Thus, the smut literature can also be interpreted within the scope of such restrictions.

The standard of assessment for the constitutionality of the prohibition on advertising contained in Section 5 (2) GJS is not Article 2 (1) of the Basic Law, but Article 5 of the Basic Law. The individual may rely on the interference of public authority in his freedom on Art. 2 (1) Basic Law only insofar as this does not refer to a sphere of life protected by special provisions of fundamental rights.³⁹¹ The particular provision of fundamental rights, behind which the general right of personality in this context withdraws, is Art. 5 Basic Law. However, the right of the complainant guaranteed in Art. 5 to freely express and disseminate their opinion in speech, writing, and pictures, and to inform themselves freely through generally accessible sources, is not infringed upon because this right, according to Art. 5 (2) of Basic Law, finds its limitations in the provisions of the general laws and in particular in the legal provisions for the protection of the youth. The prohibition of advertising enshrined in § 5 Abs. 2 GjS is covered by this reservation of law.

5.5 Incitement of Hatred

‘Volksverhetzung’ is the German equivalent of ‘incitement of hatred’ and is regulated under paragraph 130 of the German Criminal Code. As Art. 5 of the Basic Law established restrictions against a speech that involves personal insults, the Criminal Code in the § 130 Abs. 1 provides the definition of speech that infringes public safety:

³⁹⁰ BVerfGE 4, 352 [357 f.]

³⁹¹ BVerfGE 6, 32 [37]

Whosoever, in a manner capable of disturbing the public peace:

1. Incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or
2. Assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, shall be liable to imprisonment from three months to five years.

The article provides two basic elements that distinguish incitement of hatred from other offences that are subjects of constitutional limitation. Incitement of hatred might occur if the meaning of the content breaches the public peace or violates a personal human dignity of a German citizen.

The judicial practice has a duty to define in which context “incitement of hatred” has to be interpreted, whether it is derived from constitutional freedom of assembly, association, art or science.³⁹² The Court must examine the content and the intention of speech, and whether the limitation is actually applicable. Brugger points to the principle of proportionality in judicial practice, arguing that in terms of regulation of potentially hateful speech, the court must:

- A) be aware that the means of regulation and prohibition used by the government are suitable for the further legitimate governmental action;
- B) make sure that there are no other less restrictive measures of regulation for the same public purpose;
- C) make sure that there is an appropriate relationship between the public good to be achieved and the institution upon the otherwise protected right.³⁹³

As it was mentioned before, protected speech under the law is any speech that postulates an opinion, i.e. which represents a value judgement. At the same time, it does not exclude from protection a simple declaration of facts. The judicial practice

³⁹² Brugger, Winfried, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 2003, P.

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³⁹³ Ibid. P.10

supports the doctrine that even a sharply and hurtfully expressed opinion still enjoys the constitutional protection.

Opinions are characterized by an element of taking a position and of appraising³⁹⁴. To this extent, demonstration of their truth or untruth is impossible. They enjoy the basic rights protection regardless of whether their expression is judged to be well-founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless.³⁹⁵ The basic rights protection also extends to the statement's form. An expression of opinion does not lose this protection by being sharply or hurtfully worded.³⁹⁶

Thus, it is crucial to define the content of speech that contains a subject of hatred. Speech could be recognized as "hateful" if it "tends to insult, intimidate or harass a person or groups or is capable of instigating violence, hatred or discrimination."³⁹⁷ The main characteristic of hate speech is the intention to stir negative feelings and emotions directed towards individuals or groups. In the German judicial practice, hate speech is considered as the expression of an "opinion" in the constitutional sense and its hurtful and aggressive features are not enough to deprive it from the protections afforded by Art. 5. However, speech loses protection if the intention and the speaker's "conduct" overpowers their "speech" and "coercion" replaces "preservation".³⁹⁸ Such cases have to illustrate the difference between "opinion" and "boycott" or "discrimination". Brugger provides an example of the *Lüth Case*, where the call for a boycott was based on oral preservation, and for that reason the Court found that speech was protected under Art. 5.³⁹⁹

³⁹⁴ cf. BVerfGE 7, 198 [210]; 61, 1 [8]

³⁹⁵ BVerfGE 33, 1 [14 ff.]

³⁹⁶ BVerfGE 90, 241, 247, Decision of 13 April 1994, Holocaust Lie Case = Decisions 620, at 625. See also BVerfGE 61, 1, 7, Decision of June 22, 1982, Election Campaign Case = Decisions 244, at 247: "[The] point of expression of opinion is to produce mental effects on the environment, to act, to mould opinion and to persuade. Accordingly, value judgements, which always seek to secure a mental effect, namely to persuade others, are protected by the fundamental right of Art. 5 (1), first sentence, GG. The protection of the fundamental right relates primarily to the speaker's own opinion....It is immaterial whether his utterance is 'valuable' or 'worthless', 'right' or 'wrong', emotionally or rationally justified...." cited by Brugger, P.11.

³⁹⁷ Zimmer P. 17 and Brugger, P. 11

³⁹⁸ Brugger, P.12

³⁹⁹ Ibid

The Chapter 14 “Libel and Slander” of the German Criminal Code established a criminal responsibility for individual or collective defamation or insult. According to Sec. 185 “an insult shall be punished with imprisonment not exceeding one year or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years or a fine”. Sec. 193 regulates the expression of fair comments and defense, pointing out that “critical opinions about scientific, artistic or commercial achievements, utterances made in order to exercise or protect rights or to safeguard legitimate interests, as well as demonstrations and reprimands by superiors to their subordinates, official reports or judgements by a civil servant, and similar cases shall only entail liability to the extent that the existence of an insult results from the form of the utterance of the circumstances under which it was made.”⁴⁰⁰ The meaning of the statement again, refers to the balance of constitutional interests.

An exemplary case that depicts the judicial attitude on hatred and offensive speech was the *Soldiers Are Murderers Case* from 1995. In the 1930s, Kurt Tucholsky, a writer known for anti-Nazi and anti-militaristic views, had stated that “soldiers are murderers”. Over time this phrase turned into an iconic slogan for future generations of pacifists. The controversy began when the same slogan was used by several individuals. The question that had to be answered in court was, if wielding the slogan could be interpreted as an attack against the dignity and reputation of members of military forces. All four defendants accused in the case filed constitutional complaints, insisting that the previous decisions of ordinary courts violated their right of free speech under Art. 5 of the Basic Law.

The Constitutional Court found those complains reasonable, stating that the previous decisions had not paid sufficient regard to the basic right of the complainants under Art 5 (1).⁴⁰¹ First of all, Art. 5 gives everyone the right to express and disseminate their opinion freely in word, writing, and picture, whereas opinion is characterized by the subjective attitude of the person expressing themselves on the subject of the statement.⁴⁰² However, freedom of opinion must always take second place if the statement violates the human dignity of another. This principle is also valid for artistic

⁴⁰⁰ Ibid.

⁴⁰¹ BVerfGE 93, 266 - 312 I. Senate Soldiers-murderers 1 BvR 1476, 1980/91 and 102,221/92, 10 October 1995.

⁴⁰² Ibid. At I.

freedom, because human dignity is not capable of being weighed against any individual basic right⁴⁰³. The same rule is applicable for insulting statements.

The Court pointed out that not every rude form of criticism qualifies as abuse, but that it could also be “personal disparagement beyond polemical and overstated criticism”⁴⁰⁴, which is why each individual case requires examination of all the circumstances. Nevertheless, in case of “soldiers are murderers” the Court explained that, first of all, the slogan was not aimed against the soldiers of the Federal Army in particular, but referred to soldiers in general. Also, it made clear that killing in war is not impersonal, but a deed done by human hand.⁴⁰⁵ Second, the slogan was deemed to have a wider context. It was argued that it predominantly concerned itself with the destruction of human life, amongst soldiers as well as in the civil population, as an accepted consequence of the maintenance of armies and the associated readiness to carry out war, whether for the purposes of attack or defense.⁴⁰⁶ On the other hand, it was not a question of criticism of especially reprehensible individual behavior or even of character defects of soldiers. From the context of the criminalized statements, there are no grounds at all for equating soldiers with murderers in the sense of fulfilling the subjective characteristics of murder of § 211 German Criminal Code.⁴⁰⁷

5.6 Regulation of Blasphemy

In Germany, religious defamation is covered by Article 166 of the Strafgesetzbuch, i.e. the German criminal law. Any public or written defamation of religion or ideology in a manner that is capable of disturbing the public peace is punished with up to three years imprisonment or a fine.⁴⁰⁸ The same penalty is provided for public or written dissemination of a church or other religious or ideological association within Germany or their institutions or customs.⁴⁰⁹ The article does not protect religious feelings of the individual or the factual content of religious or ideological confessions, but public peace.

⁴⁰³ Ibid. At III. 2.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid. At IV. 1.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ German Criminal Code, Art. 166 (1)

⁴⁰⁹ German Criminal Code, Art. 166 (2)

To some extent, this law represents a reflection of the Nazi past (1933-1945), when millions of people belonging to ethnic, religious, and ideological minorities perished in the Holocaust.

The law regulates a profane abuse of religious and ideological creeds disturbing and endangering public peace.⁴¹⁰ Confessional content encompasses basic doctrines and beliefs of a religious or ideological community as well as the individual beliefs of an individual.⁴¹¹

First of all, insult exists in asserting disgraceful facts, which also covers particularly serious cases of defamation.⁴¹² In the German legal system disturbance of public peace is understood as a deterioration of social climate, when people can no longer live in a society without fear of being discriminated against for the sake of their faith, etc., and to be exposed to vilification against which one ultimately cannot defend themselves.⁴¹³

Despite the unconditional granting of the freedom of art in Art. 5 (3), that principle loses its prerogative in the collision between constitutional values, since tolerance is the main value of the Constitutional law in Germany.⁴¹⁴ It is therefore necessary to judge each case individually to allow a sensible balance between the freedom of art and the interests of § 166.⁴¹⁵ If it results in favour of artistic freedom, then it automatically excludes the meaning of insult under Paragraph 166.⁴¹⁶

Religious and ideological creeds directly represent and constitute personal values for the life of the individual, and in this sense they differ from opinions on political or social issues.⁴¹⁷

⁴¹⁰ Schönke/Schröder/Bosch/Schittenhelm, 30. Aufl. 2019, StGB § 166 Rn. 1

⁴¹¹ Schönke/Schröder/Bosch/Schittenhelm, 30. Aufl. 2019, StGB § 166 Rn. 4

⁴¹² Schönke/Schröder/Bosch/Schittenhelm, 30. Aufl. 2019, StGB § 166 Rn. 9

⁴¹³ Schönke/Schröder/Bosch/Schittenhelm, 30. Aufl. 2019, StGB § 166 Rn. 12

⁴¹⁴ BeckOK StGB/Valerius, 41. Ed. 1.2.2019, StGB § 166 Rn. 13, BVerwG NJW 1999, 304

⁴¹⁵ BeckOK StGB/Valerius, 41. Ed. 1.2.2019, StGB § 166 Rn. 13

⁴¹⁶ Ibid. (BGH GA 1961, 240; OLG Cologne NJW 1982, 657 (658); OVG Koblenz NJW 1997, 1174 (1175); MüKoStGB / Hörnle No. 20; Schönke / Schröder / Lenckner / Bosch, No. 10, supra, LK-StGB / Dippel, No. 31; Fischer, No. 16: Grounds for justification, see also § 193, 38ff.).

⁴¹⁷ Dölling/Duttge/König/Rössner, Gesamtes Strafrecht 4. Auflage 2017, at 41.

5.6.1 Insulting of Confessions

In 1981, the Higher Regional Court of Cologne developed the guidelines for the lower courts on interpreting insulting religious confessions⁴¹⁸. The case that brought this about was an appeal about a comic depicting Mary, Joseph, and the Christian God as a voice coming from the sky. In said comic, Mary informs Joseph about her pregnancy, which she states she was going to terminate. The headline of the next panel stated: “...On the edge of the knife ... But it went well again!”⁴¹⁹

The publication of those comics was met with criticism by Catholic movements. Activists were protesting in front of several churches the following Sunday, which provoked several anonymous threats to the editors and the clerk of the comic magazine.

The task of the High Regional Court of Cologne was to identify whether the publication of the comics was somehow threatening or disturbing the public peace, what kind of act it could be labelled as, and under what circumstances it could be classified as insult.

It was emphasized that a work must represent a ‘real threat’ to the public peace and coexistence of different groups of the population. According to the nature and content of the insult, taking into account the specific circumstances from the point of view of an objective observer, there must be a justified fear that the peaceful coexistence of parts of the population connected by a common confession would be disturbed.⁴²⁰ Thus, the manner in which that expression was formed as well as all the related circumstances have to be taken into consideration.⁴²¹ The peaceful coexistence of different population groups can be disturbed both by the fact that the legitimate trust of those concerned with the respect of their convictions is affected, and by the fact that a statement is likely to promote intolerance in third parties against the followers of the insulted confession.⁴²²

⁴¹⁸ OLG Köln, Urteil vom 11-11-1981 - 3 Ss 704/81

⁴¹⁹ Ibid.

⁴²⁰ Ibid; Lenckner, in: Schönke-Schröder, StGB, § 166 Rdnr. 12

⁴²¹ Ibid;

⁴²² Ibid; f. Lenckner, in: Schönke-Schroder, StGB, § 166, paragraph 12, Rudolphi, in: SKStGB, § 166, paragraph 15, see also § 130 StGB: OLG Celle, NJW 1970, 2275; OLG Hamburg, NJW 1975, 1088, MDR 1981, 71, OLG Koblenz, MDR 1977, 334, OLG Schleswig, MDR 1978, 333, see also to § 140 StGB: BGH, NJW 1978, 58 and OLG Braunschweig, NJW 1978, 2046

The Court pointed out legal definitions of insults and circumstances under which they might occur. First, it was posited that the concept of insult does not express disregard.⁴²³ The insult must be presented as a rude and gross expression and accusation of a disgraceful behavior,⁴²⁴ as insults can lie both in the assertion of disgraceful facts⁴²⁵ and in particularly derogatory value judgements.⁴²⁶ But they can also lie in the fact that the content of a confession, that which is regarded as sacred by the faithful is being besmirched. For example, by comparison with things that are considered immoral, generally offensive or ridiculous. By contrast, the negation or denial of what is revered as sacred is certainly not an insult. Whether an utterance is particularly hurtful depends essentially on the circumstances of the individual case.

The interpretation also depends not on the subjective reaction of a follower of the attacked confession, but on whether, after the objective judgement of an evaluator devoted to religious tolerance, in the utterance such a significant reduction of the confession of others can be found as a threat of public peace. In fact, § 166 of the Criminal Code does neither protect the religious feeling of the individual nor the objective content of the religious confession, but only public peace⁴²⁷. It is not the violation of tolerance or of fairness and decency that establishes criminal liability, but only the threat to public peace.

In terms of conflict with Art. 5 (3) as caricatures represent a form of art, the limits of artistic freedom must be defined by weighing the colliding constitutional values against each other. For this reason, in works of art only a particularly crude statement can be regarded as an insult. Hence, once again, every individual case requires a careful analysis in regard to all the circumstances to achieve a balance between the freedom of art and the interests of § 166 StGB⁴²⁸. For the caricatures in the aforementioned case, the lower court had to determine whether they were truly

⁴²³ BGHSt 7, 110 to § 96 StGB; Dreher-Tröndle, StGB, 39th ed., § 166, No. 3 in conjunction with § 90a, No. 3) Heimann = Trosien, in: LK, 9th ed., § 166, No. 9, Rudolphi, in: SKStGB, § 166, No. 9

⁴²⁴ BGHSt 7, 110 to § 96 StGB, Rudolphi, in: SKStGB, § 166, paragraph 9

⁴²⁵ see BGH, GA 1956, 316

⁴²⁶ Rudolphi, in: SKStGB, § 166, No. 9, Heimann = Trosien, in: LK, 9. Aufl., § 166, paragraph 9, Lenckner, in: Schönke-Schröder, StGB, 10th ed., § 166, paragraph 9

⁴²⁷ Lackner, StGB, 14th ed., § 166 note 1

⁴²⁸ Lenckner, in: Schönke Schröder, StGB, § 166, paragraph 10

threatening public peace or if they merely represented a denial of the Christian doctrine.⁴²⁹

For example, the pictures might have been meant to ironically depict the relationship of Mary and Joseph, and the topic of abortion could have been regarded by the artists themselves as a "joke", not a seriously considered action. If the court had determined that the work contained insults towards the Christian faith or especially the Catholic confession, and that in doing so it was capable of disturbing the public peace, then the objective facts of § 166 Criminal Code would have been met, since this would have qualified the images as insults by dissemination done by writings.

Another qualifying factor in this regard is that the material has to be distributed to a sufficiently large group of people so as to no longer be controllable by the perpetrator⁴³⁰. However, it was noticed that the caricature was published in other magazines before and did not provoke any negative impact. That fact was ignored by the lower court⁴³¹.

5.6.1 a Lüdinghausen/Münster case

When in 2016, 66-year-old retired teacher Albert Voss was driving home in Muenster, his car was clearly displaying anti-Christian slogans: "The church is looking for modern advertising ideas. I can help", "Jesus, our favorite artist: hanging for 2,000 years and he still hasn't got cramps", and "Let's make a pilgrimage with Martin Luther to Rome! Kill Pope Francis. The Reformation is cool".⁴³²

After the incident an named local filed a complaint with the police. After that, Voss' car was seized and his driving license was suspended. Voss argued that the messages displayed on his vehicle were protected by his right to free expression. He also described himself as an atheist, and claimed that his duty was to present an alternative point of view on religion.⁴³³

In 2016, the court of Luedinghausen had to determine whether Voss' actions were blasphemous and peace-breaching. In particular, it had to identify if the slogans did

⁴²⁹ Ibid.

⁴³⁰ BGHSt 13, 258 = NJW 1959, 2125; Lenckner, in: Schönke-Schröder, StGB, § 184, paragraph 57

⁴³¹ Mitgeteilt von Richter am OLG Dr. Bick, Köln

⁴³² AG Lüdinghausen (Einzelrichter), Urteil vom 25.02.2016 - 9 Ds-81 Js 3303/15-174/15, at II

⁴³³ Ibid; Rudolphi, in: SKStGB, § 166, paragraph 14

insult the Catholic church and the papacy, the worshipping of Christ and the symbol of the cross, and if a religiously tolerant assessor would find them offensive.⁴³⁴

The defendant argued that he intended to inform the public that the Christian faith was based on questionable elements. Thus, at least since summer/autumn 2014, he had decided to place various slogans on the rear window of his car in an attempt to enlighten the population to this end.

The court found that Voss publicly denounced religious institutions, namely the papacy, Christ's worship or the suffering of Christ, in a manner likely to disturb public peace.⁴³⁵ According to the course decision the insult did take place as such actions were considered to be contempt from the point of view of a religious tolerant assessor.⁴³⁶ In the slogan the defendant insulted the papacy by crude expression but also via the call to kill the pope. Thus, the right to life and the position of the head of the church was denied.⁴³⁷ Furthermore, it ridiculed the worship and the suffering of Christ.⁴³⁸

Both of the displays constituted verbal abuse of the public, because an unknown number of people who were in the public transport space could view the notes on the rear window. The verbal abuse also took place in a manner of disturbing the public peace, as the actions had the capacity to shake the trust and respect towards religious beliefs.⁴³⁹ Such behavior might promote intolerance to third parties, who might consider such insults acceptable and non-punishable. This could have contributed to creating a sense of insecurity, where members of a religious community could have felt their freedoms threatened. Voss was found guilty and punished with the payment of a fine.⁴⁴⁰

5.6.1 b Maria-Syndrome Case

On December 2, 1996, the Higher Administrative Court Rheinland-Pfalz ruled that the general regulatory authorities shall be entitled to prohibit the performance of a

⁴³⁴ Ibid.

⁴³⁵ Ibid. At IV

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid. at V

play which denounces the religious confession of others in a manner likely to disturb public peace. Such insult also gives a consideration of the freedom of art, when beliefs that are sacred to some are portrayed in a contemptible light and besmirched.⁴⁴¹

‘The Maria-Syndrome’ musical was written by Michael Schmidt-Salomon, and it was originally set to premier on May 28, 1994. However, the day before, the author was informed that the play had been banned. The musical still remains forbidden until today. Schmidt-Salomon expressed that he did not understand the reasoning behind the prohibition, questioning why modern politicians and lawyers followed what he regarded as the arguments of Christian fundamentalists:⁴⁴² “I think this has a lot to do with the radical change in modern societies. The churches recognize that people cannot believe anymore in their myths. Some politicians don’t know how to handle the vacuum of values.”⁴⁴³

According to the author, the play was meant to mock humanity, its morals, blind beliefs, and ideology, showing that in actuality “it’s all between our legs”⁴⁴⁴. The plot begins with a young, virgin novice Ann-Marie becoming pregnant after sitting on a toilet seat on which, unbeknownst to her, her cousin John left his sperm emissions beforehand. After nine months, she attends a therapist, claiming that she never had any impure contact with a man. However, the therapist does not believe her, assuming that Ann-Marie was raped and lost her memory as that experience completely contradicted her self-image and was destructive for her mental health. The doctor calls the phenomenon “Maria syndrome”, which Ann-Marie misinterprets as a suggestion that she carries the God’s son.

When the child is born, everyone expects him to become a new Messiah. As he gets older, he becomes a great scholar but still cannot make miracles happen. At the age of thirty, he suddenly meets his father who tells him about “the toilet accident”. Right away, “the Messiah” turns into “the son of a toilet”, and cannot escape mockery and pressure. Eventually, God appears to him in the form of a toilet seat, after which he finds himself a job at a public lavatory.

⁴⁴¹ Verbot einer öffentlichen Aufführung - Das Maria Syndrom, Urteil des Oberwaltungsgerichts Rheinland-Pfalz vom 2 Dezember 1996 - 11 A 11503/96

⁴⁴² <http://www.maria-syndrom.de>, interview with Michael Salomon, Accessed 10.04.2019

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

On December 2, 1992, the author of the play claimed to review the reasons behind the prohibition, however was not successful. He insisted that the ban infringed upon the fundamental right to freedom of art protected by Article 5 (3) of the Basic Law.⁴⁴⁵ But although the court took into account the freedom of art, it came to the conclusion that the actual performance of the play would constitute a criminal offence under section 166 of the Criminal Code. Yet, the plaintiff re-appealed the decision, insisting that the musical did not intend to insult any confession or anyone's religious feelings. It was not against a concrete confession, belief or ideological creed, but rather a plea for tolerance and a fight against any religious dogmatism.

In 1998, another appeal was dismissed by the Higher Administrative Court of Rhineland-Pfalz. It found the play to publicly denounce the values of a religious confession in a manner likely to disturb public peace.⁴⁴⁶ Though the play represents a form of art, the plaintiff could not successfully invoke the freedom of art under Art. 5 (3) of the Basic Law. Admittedly, neither the limitations of Art. 5 (2) with regard to freedom of expression, information and the press of Art. 5 (1), nor those of Art. 2 (1) and (2) of the Basic Law apply to freedom of art. The court relied on the unity of the constitutional value system, where it is important to identify the core of ethical standards in relation to a criminal behavior that breaches public peace. The idea of tolerance is fixed by paragraphs 1 and 2 of Art. 4 of the Basic Law.

The examination of "the Maria-Syndrome case" revealed that the factual requirements of the penalty provision of § 166 (1) of the Criminal Code were met.⁴⁴⁷

1. The play attacked concepts of Christianity, especially the Catholic confession, its basic doctrines and creed, by referring to virgin birth, Mary, Jesus, and God. Although the plaintiff pointed out that he used fictional characters, the story is based on the idea of virgin birth, the novice and her son are depicted as the chosen by God. The deliberate parallelism between biblical stories and the plot of the play becomes clear not only on the basis of the names and terms used (e.g. "Maria syndrome") but also in

⁴⁴⁵ Verbot einer öffentlichen Aufführung - Das Maria Syndrom, Urteil des Oberwaltungsgerichts Rheinland-Pfalz vom 2. Dezember 1996 - 11 A 11503/96

⁴⁴⁶ Oberverwaltungsgerichts Rheinland-Pfalz: Oberverwaltungsgerichts Rheinland-Pfalz: Verbot einer öffentlichen Aufführung- Das Maria-Syndrom(ZUM-RD 1998, 148)

⁴⁴⁷ Oberverwaltungsgerichts Rheinland-Pfalz: Oberverwaltungsgerichts Rheinland-Pfalz: Verbot einer öffentlichen Aufführung- Das Maria-Syndrom(ZUM-RD 1998, 148)

the second act of the play, in a statement made by the psychoanalyst after seeing the pregnant Ann-Marie. He states that there has only been one similar case in history before, when the Holy Virgin Mary was successfully convinced that her pregnancy was of a divine origin. This leads him to refer to the suffering of the patient as “the Maria Syndrome”, which she takes to be a literal statement. Later, the narrator (Ann-Marie) affirms that her son was raised in the knowledge of being destined by God to deliver humanity from their sufferings.

The play also features many other direct references to the Bible. Besides the plot, the poster advertising the play published in a newspaper in 1994, was depicting Ann-Marie dressed as a nun with the cross in the background.

2. The play “Maria Syndrome” does insult the confession of others within the meaning of Art. 166 of the Criminal Code. The protection of artistic freedom requires a restrictive interpretation of the term “insult”. Art. 166 can not restrict any criticism, regardless of whether it bears the form of a satirical expression or caricature with a hyperbolic meaning. Considering the basic right of artistic freedom, only particularly rude expressions are considered as insults.

“The Maria Syndrome” conveys contempt for Christian beliefs, expressed by besmirching topics that are considered sacred by many believers. And if the author intended to be critical towards religion, the depictions of inappropriate scenes overlapped those intentions making the play insulting and inappropriate.

Before being banned in 1994, the premier of the play was supposed to take place at a public venue, which means that the event would have been accessible to everyone. As per the court’s ruling, messages like the ones contained within the play should not be addressed to those who would consider them insulting, and hence, a public performance of the play could have led to a disruption of public peace.

3. The insult described above is likely to disturb the public peace. There were legitimate grounds for fearing that the feelings of believers would be affected and, moreover, that the performance would provoke an increase of intolerance among third parties. Everyone should be able to follow their faith without fear of being defamed. Therefore, with special regard to the freedom of art, the “Maria Syndrome” should be considered as a risk to public peace, whereby fairness and decency are no longer respected in the religious debate.

In fact, even if the play had been performed only in front of an audience that would not have felt insulted, it would still have endangered the public peace, as knowledge

of the play could have spread to the wider public via magazine articles, critical reviews, or through accounts by those who attended the performance. If there were other works that contained abuse or denigration but were not officially restrained, in this particular case the plaintiff cannot cite them as a precedent, because that belongs to the discretion of the regulatory authorities and, moreover, the principle of equal treatment does not guarantee equality in the wrong.

5.6.1 c Karlsruhe Case and Magazine Publication

The Karlsruhe precedent provided crucial guidelines for the German judicial practice in order to establish legal boundaries for insulting of confessions as a legal offence. It was solved by the High Regional Court of Karlsruhe in 1986.⁴⁴⁸

The defendant was accused of intentional insult of the Catholic religion by publishing an article in 1984 titled “Mitten in Deutschland - Die Geschichte einer weiß blutigen Hochzeit” (“In the middle of Germany - The story of a white bloody wedding”) in a periodical magazine “Communale” of Heidelberg.

“Communale” was a weekly magazine and had been noted for its critical commentary. Its readers were predominantly students, sociologists, political professionals, and people who sought information beyond the daily press.

The article contained a detailed description of preparations for the first communion. The author presented an ironical attitude in his narrative, using such expressions as “organ torture”, and “ridiculous train” of children going to the altar.

In the following paragraphs the author disclosed his thoughts and feeling observing the process. He felt angry watching and listening to the monotonous service. It is obvious that he does not give it any spiritual meaning, as he describes that the preacher began to “howl awfully”. In the author’s view, the children were severely lectured by the priest.

“Smoke stood over the altar and now the children had to drink the blood of their master and eat his flesh. A young girl, a young boy are married to a god! But no, sooner had they finished this disgusting meal as the believers rushed in hungry packs to the altar, tearing themselves for blood and body...” “I could not take it anymore

⁴⁴⁸ OLG Karlsruhe: Beschimpfen von Bekenntnissen NS+Z 1986, 363

and fled from the running streams of blood that flooded from the open tabernacle, from this slaughterhouse.”⁴⁴⁹

The court stated that the applicability of the “insulting” definition in that case was limited in the following respects:

1. The provision of Art. 166 of the Criminal Code is not related to a confession, the church or its institutions, not even the religious feeling of the church members, but the public peace in the form provided through the idea of tolerance. This is important for understanding the restricted interpretation of the term “insult”, in particular for the assessment of the degree of severity from which an utterance becomes insulting and for the assessment from the objective point of view of a neutral, tolerance-oriented observer.
2. A restrictive interpretation of “insult” is also necessary for protection of the freedom of art according to Art. 5 of the Basic Law. However, art does not always take precedence. The content and limits of conflicting legal interests of the Basic Law are to be determined by judicious mutual consideration in accordance with constitutional principles, whereby the circumstances of the individual case determine which legal substance concretely deserves precedence. In any case, the interaction of the legal interests requires that artistic statements make greater demands on the insult than with other statements.
3. Based upon these conclusions, the article in question did not fulfil the requirements of the definition of insult. There was no judicial mistake in the judgements of the first instance and the interpretation of the article as a satire is free from legal errors.

Thus, the court did not find the article insulting, as the author’s attacks towards the Eucharist did not fulfil the required characteristics of an insult as a legal offence.

The article in question was interpreted to present criticism of the Eucharist as an ecclesiastical institution. In this context, the bread and wine as the body and blood of Christ are also addressed for criticism. This reference points out that criticism is essentially not in contradiction to the Catholic doctrine of faith. Criticism of the faithfulness of the Eucharist as such does not yet mean insult. The critical idea of the article, presented in satirical form, is to view the actions of the Eucharist not from the perspective of religious symbolism and faith but to describe it scientifically. The

⁴⁴⁹ Ibid.

alienation is then further increased by the description of the alienated process in a crude manner.

In this specific conflict between the legal interests of Art. 4(1) and (2) and Art. 5 (3) of Basic Law, priority is granted to Art. 5. What influences this ruling is the court's view that the aim, nature, and extent of the alienation are still within the limits of gross tastelessness, which are tolerable from the point of view of Art. 5. For the rest, § 166 of Criminal Code cannot apply, at least inasmuch as the magazine article was not capable of disturbing the public peace, as far as the court could determine.

The Munich High Regional Court states that public peace can be disturbed if from the point of view of an objective observer⁴⁵⁰ there are reasonable ground for fear that the peaceful coexistence of parts of the population linked by a common confession is disturbed.

5.7 Other Limits

The practice of the German courts in the matters of limiting freedom of speech, opinion, and art has revealed the importance of acknowledging the following aspects: First, that the basic right of free art must be viewed with respect to the private law and the right of personal dignity; Second, Art. 5 (3) is excluded from the limits provided by Art. 5 (2). Hence, the judicial practice has a duty to provide a legal interpretation of a given piece of art in every individual case. Every detail and circumstance must be taken into account, including the intention, the language as well as the relevance of the venue/location, the time and the audience when it comes to a particular artistic display or performance.

An illustrative example of the way how courts are entitled to solving the question what should be interpreted as art is presented in *the "Ernie's case."* Ernst Wilhelm Wittig or Ernie, was a football stalker from Bielefeld and was usually active in Ostwestfalen region.⁴⁵¹ During the 90s and 2000s, Wittig gained public notoriety for repeatedly entering the playing field during Bundesliga football matches, wearing nothing but shoes and a baseball cap. Obviously his behavior resulted in confusion and disgust from many fans and the organizers of football matches. Wittig claimed

⁴⁵⁰ Ibid. At Anmerkung 2

⁴⁵¹ Scheffer, U., *Materials on the panels for the "Art and Criminal Law"*, exhibition: Panel "Art and artistic freedom" - "The Ernie Case", P. 2 ff., <http://www.kunstundtrafrecht.de>, Accessed 15.05.2019

that the act of running naked across the field was his way of artistic expression, comparing himself to a nude opera singer performing on stage.⁴⁵² However, the Higher Administrative Court of Muenster dismissed his defence recognizing that such behavior did not receive Art. 5 (3). The decision was made based on different concepts of art formulated by the Federal Constitutional Court.⁴⁵³ It mentioned that *the case of "The Anachronistic Procession"*, presented the formal concept of art. According to this, a work can be recognized as art only if it represents the activities and results of painting, sculpturing, writing poetry, etc. It took into account *the Mephisto Case*, defined art as a free creative process, where artists express their feelings and experiences through a perceptible form.

The local court did not find Ernst Wittig's actions to fulfil those requirements. Moreover, it stated there was nothing creative or artistic about the plaintiff's nude appearances in public spaces.⁴⁵⁴

In February 2006, a notorious performance entitled as "Death of a rabbit" took place in the center of Berlin. The performance included the killing and the decapitation of two rabbits. And as soon as the animals were dead, the viewers were offered an "artwork", named "Rabbit in formol", which consisted of a glass jar filled with the head of a dead rabbit in formaldehyde, and was on offer for a price of 9,800 Euro. It was also reported that the other remains of the rabbits were served and eaten at a dinner some days later.⁴⁵⁵

The event provoked a major media scandal and after one year the Tiergarten local court fined the performers for violating Sec. 17 no.1 and no. 2 of the German Animal Welfare Act.⁴⁵⁶ In spite of their appeal, stating that the killing of rabbits was part of an artistic performance, the court dismissed their claims, pointing out that their actions

⁴⁵² Ibid.

⁴⁵³ Ibid.

⁴⁵⁴ Münster Higher Administrative Court, op. cit., p. 1180 f.

⁴⁵⁵ Cf. Tiergarten Local Court, "Kunst und Recht" 2007, p. 116; Berlin Higher Regional Court, "Neue Zeitschrift für Strafrecht" 2010, p. 175; see also the press release entitled Animal Welfare versus artistic freedom: rabbits slaughtered in Monster Basement, "Spiegel Online", 4 June 2007, <http://www.spiegel.de/panorama/justiz/tierschutz-vs-kunst-kaninchenmeucheln-im-monsterkeller-a-486660.html> (accessed: 15.11.2019)

⁴⁵⁶ Ibid.

were deemed a slaughter of vertebrates without any reasonable cause.⁴⁵⁷ While the court acknowledged that goals like meat production constitute reasonable grounds for the slaughter of animals, it found that the action in question did not qualify in that sense. The fact that the rabbits were eaten during a dinner some days later did not change the situation, because turning the act of killing into a performance had been the main target of the defendants.⁴⁵⁸

Freedom of art also did not help their appeal to succeed, because of the interaction between state goals (Art. 20a of the Basic Law) and fundamental rights (Art. 5(3) in particular).⁴⁵⁹ For that matter, the restriction of fundamental rights in the interest of animal welfare is not objectionable for reasons of proportionality. A criminally enforced prohibition of pointless killings can be used to understand the overall social impact of the animal welfare concern.⁴⁶⁰

5.8 Summary

This chapter shed light on how Germany was influenced by the originally Anglo-American music genre of heavy metal, developing its new subgenres and establishing a local scene. Comparing the heavy metal controversies, the study found that German society in many ways responded similarly to the United States. While there was no experience akin to the PMRC's actions, in Germany the rise of heavy metal subculture was often met if not with hostility then with concerns from parents, the churches, religious activists, and older generations in general. The same themes of death, violence, obscenity, and blasphemy became focal points of German critiques of metal music. At the same time, German heavy metal shared a lot of other topical similarities with its equivalents in other countries, speaking about power, resistance, the ability to stand against repressive regimes, rules and control.

In spite of having no similar precedent to the PMRC group and their attempts to manipulate the government, the German limits of freedom of speech and art are substantially more detailed compared to the practice of limiting the First Amendment in the USA. This is particularly evident in terms of Germany's protection of minors,

⁴⁵⁷ KG, Beschluss vom 24. 7. 2009 - (4) 1 Ss 235/09 (150/09), at 1.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid. At 2.

⁴⁶⁰ Ibid.

which is the predominant force driving restrictions of explicit contents. Compared to the United States, where the labelling of music and films is not mandated by the law, Germany has a legally enforced institution, entitled to rating and labelling potentially harmful for children's development content.

However, this chapter has shown that the labelling of the Federal Review Board, as well as the inclusion of contents to the Index, can be argued judicially. It has also revealed that the courts retain the power to revert decisions of the Board, providing independent decisions in terms of interpreting questionable works.

The regulation of freedom of art is further complicated due to the fact that Art. 5 (3) declares that art in Germany is free, and the restrictions of Art. 5(2) are not applicable to freedom of art. Thus, the courts have to review each particular case independently to find out whether its content stands in conflict with private law, degrades human dignity or breaches public peace. Human dignity is the highest value according to the German Constitutional law, which overlaps freedom of art in the collision of constitutional values.

Unlike American courts, German judicial practice does not introduce the term "obscenity", nor does it develop tests for rating sexually explicit works. Works of such nature can only be limited on grounds of them disrespecting personal honor, dignity, and for the purpose of protecting minors.

The German courts also do not provide a definition of "blasphemy" as a criminal or administrative offence. Blasphemous actions are punished by the law only if they disturb or have a potential to threaten public peace or if they contain a personal insult aimed religion, religious communities or religious institutions.

As the case of *Death of a rabbit* has revealed, freedom of art in Germany can be limited not only in cases where the values of human rights are at risk but also when animal rights and legally enforced common sense of animal consumption are violated. As with any other forms of art and music genres, these limitations are applicable to heavy metal music and related artworks, too. These works have to be legally interpreted as harmful to minors, threatening public safety, humiliating human dignity or present a slaughter of vertebrates without any reasonable causes in order to warrant indexing. However, the legal interpretation of every single work has to be done independently with respect to the constitutional freedom of art and its limits.

It follows that heavy metal controversies are entitled to the same legal procedures and deliberations as the other cases which this chapter discussed. It is noteworthy that

while there has been anti-metal activism in Germany, mainly driven by pro-Christian movements and parental concerns, the judicial practice has not shown any particular positive or negative attitude towards heavy metal compared to other controversial forms of art. The infamous case of Rammstein underlines that decisions of the Federal Review Board may not always be relevant and can be dismissed by the courts.

To stay within the boundaries of legality, shock value in metal has to stay within the limits of freedom of art in Germany, must not cross the line of public safety, human dignity, protection of minors or animal rights. This last aspects may be particularly relevant for metal performances, given that there have been occasions when some bands used bodies or body parts of deceased animals as stage decorations. Such practices are especially popular among black metal collective who use them to emphasize the macabre essence of the genre and show the real presence of death. With regard to the case *Death of a Rabbit*, it could be presumed that such practices are only deemed illegal if the animals were slaughtered only for “the purpose of art”. However, most of the animals carcasses used as stage decorations by metal musicians are leftovers from slaughterhouses or animals that were killed by the the meat industry only to then be purchased by bands for another purpose. Under these circumstances there are no grounds upon which the actions of metal bands qualify as “slaughter of vertebrates without any reasonable cause”, as the animals would be “legally” slaughtered beforehand.

Overall, there no singular view how heavy metal music is treated within the German legal culture, as well as there is no legal definition of ‘art’ itself. However, it is noticeable that Art. 5 (3) of the Basic Law, excluded from the general limitations of Art. 5 (2), provides a lot of room for legal interpretations and conflicting opinions. Art is generally valued as a free opportunity of self-expression and can be limited only in regard with specific matters cited earlier in this chapter.

Metal bands in Germany often rely on self-censorship to avoid potential legal troubles otherwise they are allowed to submit their music for the rating to the Federal Review Board. The PMRC sticker can also be found on CDs in German music stores, however it has no legal force and serves only as an alternative source of information about the content.

6. Heavy Metal and freedom of speech in Russia

Rock and heavy metal were leaking to the USSR even if they were banned as anti-Soviet music. The collapse of the Iron Curtain opened the country for free adaptation and local development of these genres.

6.1 Music and Subcultures in the USSR

The development of rock and metal music in the USSR and Russia is closely related to the countries' internal political climate and historical background in different period of history. Part of the cultural ideology of the Soviet era was presented by showing hostility towards Western non-communist countries. Yurchak points out that banning cultural artifacts from 'across the border' led to the creation of the so-called 'imaginary west' in the minds of Soviet citizens. It was produced locally within the Soviet Union and existed only at the time when the real West remained beyond reach.⁴⁶¹

In spite of the government's attempts to suppress foreign music and art in Soviet Union, jazz managed to leak through the borders. Although it was harshly criticized as a product of bourgeois culture, it was still taken and transformed by some musicians being adapted to the Soviet realities.⁴⁶² The music was often rearranged, renamed, and played by local orchestras. Jazz became popular among the young generation and was often performed at the "student recreational evenings" organized by Komsomol committees in colleges and universities. Other than that, it was not easy to spot jazz players, because of the "amateur" status of student bands as they were not registered in state philharmonic societies⁴⁶³. Yurchak, however, argues that the issue of foreign originated music lay not in the music itself but its interpretation. He cites the memoirs of Vladimir Freihtag, who was the leader of a student jazz band at Leningrad University: "at one of those evenings in the 50s they repeated 'In the Mood' three times in a row ... at the request of the excited Komsomol members, who lost all self-restraint."⁴⁶⁴ The occasion ended up with the university party denouncing the dance due to "the explicit manifestation of the students' excitement about that

⁴⁶¹ Yurchak, Alexei, *Everything was forever, until it was no more*, 2005, P. 159

⁴⁶² Ibid. 166.

⁴⁶³ Ibid. 167

⁴⁶⁴ Feihtag 1999, 69-70

music” and the band was threatened with expulsion if they ever again played that “low-taste American music.”⁴⁶⁵ Freitag believed that although the Western jazz had bourgeois origins, it was perceived differently by the Soviet youth, and that it did not pose a threat to the USSR.⁴⁶⁶

Despite political attempts to “proletarianize” the culture and diminish all its Western influences, the local youth started to create their own music and fashion-based subcultures. “The imaginary west” manifested in their clothing style, local music, and films. For example, one of the style-based popular subcultures was Stilyagi⁴⁶⁷ (from Russian “stil” meaning “style”) which emerged in the 1940s⁴⁶⁸. Stilyagi's aesthetic was influenced by American films shown in Soviet cinemas.⁴⁶⁹ Nowadays compared to hipsters due to some resemblance in musical and fashion preferences, Stilyagi were indeed ideological predecessors of the first wave of hipsters in Russia⁴⁷⁰.

Stilyagi emphasized their extravagant outfits as part of their subcultural identity, considered too overdressed for social and fashion standards of that time period. They made their own clothes, including colorful knitted sweaters, tailored pants and home-sewn ties, ornate with images including “a silver spider web design, palm trees, monkeys, even girls in bathing suits.”⁴⁷¹ Rather than being tolerated, it is more accurate to say Stilyagi were deprecated, receiving many labels and stereotypes. They were viewed as “windy” and “shallow” people and were even called “parrots” and “monkeys”. The Soviet press portrayed them as “a small and insignificant group of deviationists, bourgeois sympathizers and uneducated loafers.”⁴⁷² The media suggested that their looks were connected to a deficient education⁴⁷³. The state-run satirical magazine *Krokodil* once wrote: “The stilyaga knows the fashions all over the world, but he doesn't know Griboyedov.... He's studied all the fox trots, tangos,

⁴⁶⁵ Yurchak, P. 167.

⁴⁶⁶ Freitag 1999, 68, Yurchak, 2005, 170.

⁴⁶⁸ Troitsky (1988); Stites and von Geldern (1995); Edele (2003).

⁴⁶⁹ Yurchak, 170.

⁴⁷⁰ Новак, М. В., М. А. Игнатов. Субкультуры в современной России и визуальное потребление: региональный аспект. // Научные ведомости Белгородского государственного университета. Серия: Философия. Социология. Право 28.9 (180) (2014).P. 146

⁴⁷¹ Yurchak, 170, Troitsky 1988, 2-3. Aksyonov (1987, 13

⁴⁷² Yurchak, 172,

⁴⁷³ Ibid.

rumbas, and lindy hops in detail, but he confuses Michurin with Mendeleev, and astronomy with gastronomy”⁴⁷⁴. There were several attempts to suppress the subculture. Komsomol patrolled the streets in order to catch young people wearing those kinds of “abnormal” looks.⁴⁷⁵ As result, such “abnormal” young people could be excluded from Komsomol, which was considered a huge disgrace at that time, along with disapproval and public shaming.

Stilyali was a fashion and style based counterculture, opposed to the local social order of its time and suppressed by the dominant ideology. In many ways it shared similar traits and features with more recent music-based subcultures such as rock, heavy metal or punk. This is especially true in terms of social reception as all of those sub- and countercultures were condemned as unmannered, uneducated, and tasteless. However, no anti-west policy could stop the technological progress. The invention of the short-wave radio enabled Russian people to access foreign programs. Compared to the Western television and FM/AM radio, which were able to provide access almost exclusively to the information produced and rebroadcast locally, the Soviet short-wave radio could receive signals from thousands of miles away⁴⁷⁶. This provided ample material for the local consumption of programs which were produced abroad,⁴⁷⁷ and as a result the Soviet youth was able to expose itself to the “forbidden” foreign programs and music. Listening to foreign broadcasts was acceptable and even encouraged by the soviet regime as long as the materials in question were considered as good cultural information and not bourgeois or anti-Soviet propaganda⁴⁷⁸. Most of those permitted programs were ideologically neutral⁴⁷⁹ and had a huge impact on the development of the local jazz and rock scenes.⁴⁸⁰

There was no way back as “westernisation” was taking over the Soviet youth culture, especially in the underground music communities. However, the prejudices about “good” or “bad” Western music still existed.⁴⁸¹

⁴⁷⁴ Yurchak,

⁴⁷⁵ Ibid.

⁴⁷⁶ Yurchak, P. 176

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid. 180

⁴⁸¹ Ibid.185.

In 1961, composer P. Kantor wrote in a widely published calendar: "We are not against good foreign songs" such as "genuine light music, that should be joyful, gracious, and melodic" and "good jazz when it is playing beautiful folk tunes." However, one should distinguish them from bad foreign songs, such as "the wild music of rock and roll and other such works of the bourgeois "art" with their "distasteful songs full of wild sounds, convulsive rhythms, and repulsive moaning" that only "wake up in human beings excessive frivolity and gloomy indifference."⁴⁸² Yurchak points out that the main musical transformation happened due to the fact that the later Soviet generation appropriated Western jazz and rock music as its own cultural forms.⁴⁸³ These genres became not only popular, but also gained a personal significance and became "invested with local meanings and cultural values, and contributing to the production of a whole generational identity."⁴⁸⁴

6.2 Development of Rock music

After western music became popular among the Soviet youth, the dissemination of re-recorded tapes increased drastically, as there was no strong anti-piracy law at that time. Viktor remembered himself re-recording Black Sabbath, Alice Cooper, Bryan Ferry, and paying "the owner" two and a half roubles per record.⁴⁸⁵ Everyone could purchase a copy of their favorite music at the flea market. According to Viktor "the police [in Smolensk] in theory controlled the activity of buying and selling records, but in practice they mostly did not care."⁴⁸⁶ Another musician from Leningrad, remembered that "nobody permitted it, but nobody prohibited".⁴⁸⁷

Though foreign rock music was still criticized, there was no legal prohibition to access those records locally. The state record company Melodia was releasing some western rock and pop artists in the compilation series entitled "Around the World" ("Vokrug sveta").⁴⁸⁸ However, some "bourgeois" names of compositions were

⁴⁸² P. Kantor, "0 legkoi muzyke" [On Light Music], daily tear-off calendar, October 30, 1961, quoted in Ptiuch, December 1998, 21., Yurchak, 185

⁴⁸³ Yurchak, P. 187

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ McMichael (2005a; 2005b) about the music series *Krugozor* in the 1970s.

changed for local releases. For example, in the 1950s, Melodia renamed the jazz composition “American patrol” to “On Guard” (“Na zastave”) to avoid the word “American.”⁴⁸⁹ In the 1960s and 70s, many western tracks on pop compilations were identified either as a “folk tune” (“narodnaia pesnia”) or a “song of protest”.⁴⁹⁰

Due to a language barrier and inaccurate translations songs were frequently misunderstood. That was also giving a lot of room for fan interpretations often giving foreign songs a new local meanings.

Similar to jazz, the genre of *rock* was appreciated by many young local musicians. In the late 1960s and 1970s, rock bands appeared in schools, residential clubs, palaces of pioneers, summer camps, colleges, and institutes all over the country.⁴⁹¹ Just like early jazz bands from the 1950s, young rock bands had an “amateur” status, which meant they were not officially registered and considered unprofessional.⁴⁹² They had no access to professional record studios and had to release their music on self-recorded tapes⁴⁹³. Their early performances were covers of western bands in the original English language, however later they began writing their own songs in Russian. Though the covering of foreign music was successful, Ustinov asserts that their original music was decent only lyrically.⁴⁹⁴ He states that the local Soviet bands had a raw sound, because it was difficult to write songs better than, for example the Beatles.⁴⁹⁵

As a matter of fact, a primary meaning of the Russian word “pok” means “fate”, “doom” or “destiny”, compared to the original English “rock” coming from “rock’n’roll”, which describes a musical rhythm as “swaying”, “swinging” and “rolling”. That might be a coincidence, but Troitskii argues that western rock was literally more about rhythms, when Soviet and Russian rock was about deep lyrics and the expression of pain, struggling and other deep emotions. The other reason why Soviet rockers emphasized the lyrics was their low quality equipment coupled with

⁴⁸⁹ Freihtag, V., Recall the similar technique above of renaming jazz songs employed by Soviet orchestras in the 1950s, 1995.

⁴⁹⁰ Yurchak, 190.

⁴⁹¹ Yurchak, 192.

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Hazle 48,49; Ustinov, Etot russkii, p. 183

⁴⁹⁵ Ibid.

the unavailability of better technical equipment. It did not allow musicians to produce complex sounds and their compositions were predominantly based on only guitars and simple drum beats.⁴⁹⁶

The growing rock scene was met with the same issues as jazz decades earlier. There was “a feeling that rock music, like jazz, was not compatible with socialism.”⁴⁹⁷ Komsomol was given the right to control newly opened rock clubs, and it was even rumored that it acted under unspoken supervision of the KGB.⁴⁹⁸ Later in the 1980s during the time of “perestroika”, the involvement of the KGB in the control of the rock club was revealed publicly.⁴⁹⁹ Ironically, the state’s attempt to control the development of bands did to some extent bolster their progress by concentrating them in one place, namely within in the local rock subculture of Leningrad in the 1980s.⁵⁰⁰

After Komsomol admitted its failure to establish control over the western rock music, they attempted to find new tools to restrict the local rock subculture. The journal ‘Young Communist’ wrote: “Today we do not know the real scale on which taped music is distributed. The current exchange of tapes is very intensive and widespread. There have emerged spontaneous informal clubs, in which information, advertising, and exchange unite young workers and students of colleges and schools.”⁵⁰¹ The same magazine pointed out the necessity to improve control over the national distribution of tapes with rock music, saying that they might have foreseen that in advance and promising not to repeat the past mistakes.⁵⁰² Nevertheless, Yurchak claims that instead of analysing why this music became so popular, what it meant for the Soviet youth and what was actually behind the lyric, once again Komsomol “continued insisting that this music should be interpreted at the constative level of discourse that is, as a literal manifestation of “bourgeois values” among naive or morally corrupt groups of youth.”⁵⁰³ Yurchak also notes that the authoritative

⁴⁹⁶ РОК-МУЗЫКА В РОССИИ. Энциклопедия Кругосвет, available at https://www.krugosvet.ru/enc/kultura_i_obrazovanie/muzyka/ROK-MUZIKA_V_ROSSII.html, Accessed 23 October 20189

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ Yurchak, 192.

⁵⁰⁰ Ibid. 193

⁵⁰¹ Makarevich 1987,21, Yurchak, 212

⁵⁰² Ibid.

⁵⁰³ Yurchak, 213

discourse of Komsomol had already failed from the beginning. According to him, the only way to break that vicious circle of misunderstanding and suppressing the Soviet youth and their culture was the rupture in the entire socialist regime.⁵⁰⁴

Indeed, that rupture occurred in the late 1980 as the socialist system started to fall apart irreversibly.⁵⁰⁵ Yet, Komsomol was acting within the same patterns trying to prevent the spreading of rock music. The Central Committee was sending instructions to the local city committees and raikoms of Komsomol, requiring them to intensify control over the repertoires of the local discotheques.⁵⁰⁶

In 1985 “The approximate list of foreign musical groups and artists, whose repertoires contain ideologically harmful compositions” was sent by the Obkom (regional committee) of the Nikolayev region in Ukraine to city and district committees in that region.⁵⁰⁷ The document was marked “for internal use only”, making it unavailable to the general public. The fact that Komsomol issued such instructions was generally unknown until the 1990s.⁵⁰⁸ The document identified 38 western artists whose tape-recorded music was being circulated among the Soviet youth and was considered problematic by the authorities.⁵⁰⁹ The list also pointed out particular ideological problems associated with each band and artist. Those ‘unacceptable narratives’ were included the themes such as punk, violence, vandalism, eroticism, religious obscurantism, religious mysticism, racism, neo-fascism, cults of strong personality, sex, homosexuality, nationalism, anticommunism, anti-Soviet propaganda, and the myth about the Soviet military threat.⁵¹⁰ The list of 38 artists was not meant to be exhaustive but rather to provide examples.

Looking at the genres of artists from the list, it is evident that rock and metal was targeted more so than other genres, and in that regard it arguably resembled the PMRC’s “Filthy Fifteen.” It included 11 heavy metal artists, approximately 7 artists whose music could be described as rock (most of them were a mix of rock with other

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid. 216.

genres), 8 could be described as punk, 6 were disco and the others included pop, R&B, soul, dance, reggae, blues, new wave and even opera.⁵¹¹

The heavy metal bands included in the list were accused of featuring violence, religious obscurantism, vandalism, cult of strong personality, neo-fascism, anticommunism and anti-Soviet propaganda in their music and performances.

Yurchak finds it paradoxical that the USSR government tried to maintain the cultural policy by allowing cultural innovation and creativity but contained unwanted results.⁵¹² Lyrical misinterpretations were quite common. For example, the album “1983” by Pink Floyd was seen as a “distortion of Soviet foreign policy”, as it was misinterpreted to be about framing the Soviet involvement in Afghanistan as “Soviet aggression in Afghanistan.”⁵¹³ The album was labeled “ideologically harmful” because of the short reference, “Brezhnev took Afghanistan,” which suggested occupation and aggression, and the parallel that the song drew between this and the other wars, which the Soviet media characterized as “imperialist.”⁵¹⁴ Nevertheless, other songs by Pink Floyd were ideologically acceptable.⁵¹⁵

However, after the Olympic games took place in Moscow in 1980, turning it into an international and inter-cultural center, rock and metal music became more tolerated in the Soviet culture.

In 1982 the first rock club was founded in Leningrad (now St. Petersburg). Later several more rock clubs were open in Moscow developing the local rock and heavy metal scene. The most popular genres of that scene were at that time were classic rock’n’roll (bands as Zoopark or later Bravo), lyric folk-rock (Mashina Vremeni, Chaif), jazz rock (Arsenal), punk rock (Avtomaticheskie Udovletvoriteli), hard “new wave” (Televizor) and heavy metal (Aria, Cherni Kofe, Cherni Obelisk, Korroziya Metalla).⁵¹⁶

⁵¹¹ To the reference of Perron, who was the 21st in the list, it was unclear whether they meant the German opera singer Carl Perron (1858 - 1928) or some other artist.

⁵¹² Yurchak, 213.

⁵¹³ Ibid, 216

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

6.3 Development and adaptation of Heavy Metal

After the collapse of the USSR, rock music became more readily available to Russian citizens and young people in Russia were interested to discover its heavier and more underground subgenres. Thus, heavy metal reached a new height of popularity in Russia in the early 1990s.

Unfortunately, the development of heavy metal in Russia has yet to receive academic attention. While, as Hazle points out, there are some scholarly works about Russian punk, nothing has been published about Russian heavy metal.⁵¹⁷

The motive behind playing rock and metal in Soviet Russia was similar to its popularity in Western Europe and North America. As Walser and Weinstein affirm in their works in the early 1990s, heavy metal as a form of hard rock, was born from despair as a tool to manifest rebellion and liberation from suppressive regimes. However, Troitskii argues that the Soviet youth in the 60s and 70s did not face the problems that typically triggered the youth in the West, such as capitalist labour exploitation, racism and religion.⁵¹⁸ They found another target of rebellion instead: parental control.⁵¹⁹ At the same time, he points out that the Soviet regime extensively violated personal freedom, discouraging any displays of individuality. Thus, music took on an important function as a tool of self-expression and individualization. According to Troitski, this was the reason why lyrics became more significant for Russian rock than rhythm or melody. Speaking your mind openly was dangerous in the Soviet times, but rock and heavy metal were encouraging artists to embrace and express their true values, even playing on the edge of the forbidden.

McMichael mentions that the local version “gets adapted to the imported genre”, “taking what was necessary in order to be authentic”, which also included “a linguistic move in order to be intelligible and meaningful to its audiences within the local context.”⁵²⁰

Soviet and Russian heavy metal emerged from local rock scenes and was influenced by Western artists. Much like rock music, which was met with severe social hostility, heavy metal quickly caught the ire of locals.

⁵¹⁷ Ibid.

⁵¹⁸ Troitskii, Rok, n.p.

⁵¹⁹ Ibid.

⁵²⁰ McMichael, Polly, *Translation, Authorship and Authenticity in Soviet Rock Songwriting*, The Translator, Vol. 14(2), 2008, p. 213. 175; Hazle P. 49.

In the 1980s, the popular youth magazine ‘Rovesnik’ published negative articles about heavy metal on a monthly basis, however as heavy metal was slowly becoming a part of the local alternative culture, the magazine became more tolerant and even supportive of the genre.⁵²¹ Heavy metal, as well as rock and punk, was frequently, but falsely linked to fascism. For example, it was believed that AC/DC’s song “Back in Black” was the anthem of the American Nazi Party.⁵²²

The first Soviet band, fitting traditional features of heavy metal was Rossiiane in the mid/late 1970s.⁵²³ Also, groups like Zemlyane, Iurii Morozov, and Vysokosnoe Leto had a markedly ‘harder’ sound than their rock counterparts of that time.⁵²⁴ Many of the first bands were concerned about the ‘accessibility’ of their music, keeping the lyrics inoffensive and unambiguous for interpretation.⁵²⁵

Similar to rock, heavy metal was not officially allowed, and the lists of prohibited bands, which had originally only featured foreign Western music, started to include even local artists.⁵²⁶ It was almost impossible to organize local metal concerts by 1984, which changed in 1986 as a part of Gorbachev’s liberalizing reforms.⁵²⁷ After that, many unprofessional including Kruiz and Chernyi Kofe acquired a professional status.⁵²⁸

The first band in Soviet Russia that played heavy metal exclusively without changing style was Legion. According to Encyclopaedia Metallum, it was formed in 1979.⁵²⁹ Later the “soviet army of heavy metal” was growing even bigger, adding to its list such names as Aria, Kruiz, Cherny Kofe, Cherni Obelisk, Master, Korroziya Metalla and others.⁵³⁰

Alongside with the music scene, the subculture of heavy metal was also drastically growing. The local fans were calling themselves ‘metallisty’ (similar to English ‘metallers’ or ‘metal workers’), and similar to the stulyagi, the subculture was mostly

⁵²¹ ‘Let There Be Rock’, *Metal Music Studies*, Vol. 2(3), 2016, p. 379.

⁵²² *Ibid.*

⁵²³ Troitsky, *Back*, p. 73, Hazle, P. 52

⁵²⁴ Hazle, P. 52.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*, Smirnov, *Vremia*, p. 75; see also Viktor Troegubov, *Aria*, (Moscow: NOTA-R, 2005), p. 7.

⁵²⁸ *Ibid.*

⁵²⁹ Hazle, 52; Encyclopaedia Metallum, Legion, <https://www.metal-archives.com/bands/Легиион/316>

⁵³⁰ *Ibid.* 53.

‘home-made’.⁵³¹ The traditional heavy metal attire such as leather jackets, pants, spikes, chains etc., were often self-made and self-customized.⁵³² Unfortunately, the subculture of heavy metal, as well as the genre itself did not receive enough attention from academic studies.⁵³³

Speaking about the Russian heavy metal scene after the collapse of the USSR, it would be probable to assume that the opening of borders and the continuing liberalization of art and freedom of speech led to the further development of all underground genres including rock, metal and punk. Russian musicians started to have free access to Western alternative music, which led to further adaptation and experimentation in the local scene. Besides, since the Soviet regime was no longer present and there was no longer any imposed social and ideology, artists were relatively free to express themselves compared to the previous decades.

After the fall of the “iron curtain” and the collapse of the Soviet regime, the new political and legal orders provided better conditions for the growth of the now Russian underground music scenes. Notably, this resulted in the music spreading from Moscow and St. Petersburg to provincial areas.

The early 2000s brought the era of alternative metal, nu metal and metalcore in Russia, as these genres were simultaneously growing in the Anglo-American countries. Bands like Amatory, Stigmata, Slot, and Tractor Bowling are among the representatives of that period in the Russian metal scene.

At some point, the Russian metal scene was split into two opposite communities. Many young bands tended to produce music according to western Anglo-American standards. That included the style of melodies, rhythms as well as lyrics written in the English language. The other group believed that a ‘true’ Russian rock and metal should exist as an independent genre with its distinct aesthetic identity. Bands that subscribe to this latter idea prefer to maintain the features of rock and metal played in Russia in the 90s, emphasizing the local influence on music. The lyrics of their songs are written in Russian and their meanings assume a prominent position as a significant part of the genre.⁵³⁴

⁵³¹ Ibid, 56.

⁵³² Ibid.

⁵³³ Ibid.

⁵³⁴ Ibid.

6.4 Controversy

During the Soviet period, heavy metal, alongside other originally western music genres, was viewed as a threat to the dominant state ideology. Although this aspect constituted the most common criticism levelled against heavy metal, at the time, a moral panic was also ignited upon beliefs that rock and metal were responsible for spreading obscenity, violence and a self-destructive lifestyle.

The list of banned bands cited by Yurchak did not distinguish “blasphemy” as a social danger probably because the USSR claimed no official national religion and atheism was a dominating belief system of the order. That said, the list did define “religious obscurantism” as a type of harmful propaganda, which was more relevant to that political regime.⁵³⁵ While post-Soviet Russia has been more welcoming towards foreign cultures, the local moral values of older generations have still remained conservative.⁵³⁶

Even in the Anglo-American world heavy metal seemed obscure, and for a country like the Soviet Union which underwent massive political, social and cultural transformation in the 20th century, the genre was arguably even more alien, unknown, and obviously shocking.

As the local youth adopted rock and heavy metal, they contributed into its ‘russification’. But due to different circumstances, such as a language barrier and other misinterpretations, their understanding of rock and heavy metal became strongly shaped by the youth’s local environments. Similarly to the original British bands, the Russian metalheads played and listen to metal in order to protest and escape from the harsh and tough reality. But only after the fall of the USSR and the ‘iron curtain’, Russian metal fans gained better opportunities to expose themselves to other cultures of metal and to understand their ideology of heavy metal by observing its original narratives. As a result of this exposure, the aesthetics of darkness and haunting human fears became more available for adaptation. For example, the band Cherni Obelisk, whose name translates to ‘Black Obelisk’ embraced those characteristics.

⁵³⁵ Yurchak, 214-215.

⁵³⁶ Ibid.

Some other bands even sought to directly imitate their western counterparts, displaying huge musical and visual similarity. For example, the band Aria was often called “Russian Iron Maiden” and even being criticized for plagiarism.⁵³⁷

After the borders were opened, many western bands started to play live shows in Russia, eventually giving local musicians and fans an opportunity to see their idols and inspirations. In 1991, a concert of Metallica in Moscow gathered approximately 1,6 million people.⁵³⁸ Overall, the early 1990s were crucial for the transformation and growth of Russian rock and heavy metal.

However, as the popularity of heavy metal was growing in Russia, it was facing more protests and disapprovals from the post-Soviet society. After religion and the official Russian Orthodox Church were restored, a local moral panic over heavy metal arose similar to the moral panic and anti-heavy metal movements in the USA. Metal was blamed for promoting blasphemy, murder, violence, and obscenity.

In 2006 during a TV broadcast, a priest of the Russian Orthodox church, Dmitri Smirnov, was asked the question, if a good Christian should listen to heavy metal. He answered that the church never banned or prohibited anything for people, however, it defined what was good and what was not. Smirnov compared listening to heavy metal to drug addiction. According to him, its specific rhythm section instigated aggressive behavior in teenagers. The priest stated that heavy metal had no meaning, especially for Russian fans who were not fluent in English.⁵³⁹

In a video uploaded on You Tube in 2017, another Orthodox priest, Andrei Tkachev, received a similar question from a heavy metal fan.⁵⁴⁰ Surprisingly, the priest was more aware about the genre, even claiming that once ago he had attended a concert of some Christian metal band. However, he was terrified, describing heavy metal as non-devotional music. According to Tkachev, heavy metal was “a hellish style, when the

⁵³⁷ <https://www.russianartandculture.com/aria-the-first-soviet-heavy-metal-band-to-achieve-mainstream-success/> Accessed 15 November 2019

https://dangerousminds.net/comments/meet_aria_the_band_known_as_the_russian_iron_maiden
⁵³⁸ <https://www.kerrang.com/the-news/watch-metallica-play-to-1-6-million-russian-fans-in-this-1991-footage/>, Accessed 15 November 2015

⁵³⁹ Может ли христианин слушать хэви-метал?, Фрагмент передачи ТК-Спас "Русский час" от ТК СПАС - 2006-06-06, available at www.youtube.com/watch?v=qO6Yg_PB9V0 Accessed 15 November 2019

⁵⁴⁰ "Тяжёлый металл" - музыка или что? Хэви-метал доказывает наличие темного духовного мира, available at <https://www.youtube.com/watch?v=cAwnCy0lCoA> Accessed 15 November 2019

flame breaks out from under the ground, they all are dressed in black, scary, breaking guitars on stage.”⁵⁴¹ Tkachev claimed that heavy metal proved the existence of hell and Satan because it contained no message of creation, beauty, or spirit when compared to the works of classical composers such as Mussorgsky, Rachmaninov, or Beethoven.⁵⁴²

Religious extremism also plays a part in the public controversy surrounding heavy metal in modern Russia. The So-called Union of Orthodox Banner Bearers (Russian: Союз Православных Хоругвеносцев) is a nationalist-fundamentalist organization established in 1992 as a part of the Russian Orthodox Church. According to their official website, the goals of the organization are “strengthening and spreading of the Orthodox Faith, the restoration of the Autocratic Monarchy, the revival of the Russian National Identity and Imperial Russian Patriotism throughout the Russian Empire.”⁵⁴³ The official logo of the organization depicts three human skulls holding daggers in their teeth. Two crossed bones underneath the skulls bear the letters “СНХ” (the Russian abbreviation of the organization’s name) and the slogan “Orthodoxy or Death” in Church Slavonic and Greek surrounded by the crosses.⁵⁴⁴

The organization openly speaks against LGBT rights, gay parades,⁵⁴⁵ Darwinism and western popular culture. In October 2017, its activists organized a public burning of J. K. Rowling’s book “Harry Potter”, claiming that the novel was anti-Christian.^{546,547}

⁵⁴¹ Ibid.

⁵⁴² Ironically, the composers mentioned by Tkachev delved somber, dark themes in their individual musical pieces. For example, Mussorgsky’s “A Night on a Bare Mountain” refers to the witches’ Sabbath. Rachmaninov also refers to the themes of doom and darkness in the composition “The Isle of The Dead.” Though it is debatable to claim that musical pieces without lyrics had one meaning, which is always free for interpretation, however, classical music indeed often deals with philosophical dark themes. Another example is a symphonic composition “Danse Macabre” by Saint-Saens.

⁵⁴³ The Official website of *The Union of Orthodox Banner Bearers*: rusckie.org: О Союзе православных хоругвеносцев

⁵⁴⁴ Available at https://en.wikipedia.org/wiki/Union_of_Orthodox_Banner-Bearers#/media/File:Union_of_Orthodox_Banner-Bearers_logo,_Orthodoxy_or_Death.png, Accessed 20 November 2019

⁵⁴⁵ Геи оказались в меньшинстве. На их парад пришли милиционеры, пограничники и православны, at <https://www.kommersant.ru/doc/1650226>, Accessed 20 November 2019

⁵⁴⁶ Сожжение книги о Гарри Поттере, available at <http://www.rusckie.org/novosti/2007/novosti-011007.shtml>, Accessed 20 November 2019

Later that month, they organized “The funeral of Darwinism and atheism” by publicly placing a toy monkey in a coffin and burying it outside the city of Moscow.⁵⁴⁸

Though there have been no documented encounters of the Union with rock or heavy metal music, the example of the burning of “Harry Potter” shows quite a hostile attitude towards foreign modern popular culture. According to the activists, the main reason behind the burning was that Rowling was promoting devilish rituals and black magic to young children.⁵⁴⁹

The organization itself receives a lot of negative criticism. On December 21, 2010, by the decision of the Cheryomushkinskiy District Court of Moscow, the slogan “Orthodoxy or death!” printed on their merchandise T-shirts was declared extremist and included in the Federal List of Extremist Materials.⁵⁵⁰

Some representatives of the Russian Orthodox Church support the Union, arguing that the slogan has nothing to do with extremism, but documents the depth of their devotion to orthodoxy.⁵⁵¹ According to them, it symbolizes the orthodox faith as salvation, whereas the absence of that faith leads to death and demise, which as per their statement is a belief and not intended to insult other confessions.

As an interesting fact, Konstantin Kinchev, the frontman of Russian heavy metal band Alisa supports the Banner Bearers. Once he even appeared at a live performance wearing a shirt with the notorious slogan. Kinchev describes himself as an orthodox believer, stating that personally for him, the slogan has no peculiar meaning. He

⁵⁴⁷ Православные отправили Гарри Поттера на костер инквизиции, available at <https://www.kommersant.ru/doc/813242>, Accessed 21 November 2019

⁵⁴⁸ Православные «похоронили» в Москве игрушечную обезьяну, available at https://www.gazeta.ru/news/lenta/2007/10/14/n_1128804.shtml, Accessed 21 November 2019

⁵⁴⁹ Сожжение книги о Гарри Поттере, available at <http://www.pysskie.org/novosti/2007/novosti-011007.shtml>, Accessed 21 November 2019

⁵⁵⁰ Федеральный список экстремистских материалов // Сайт Министерства юстиции РФ, number 865

⁵⁵¹ ИЗВЕСТНЫЕ ПРАВОСЛАВНЫЕ СВЯЩЕННОСЛУЖИТЕЛИ И МИРЯНЕ О ЗНАЧЕНИИ ЛОЗУНГА "ПРАВОСЛАВИЕ ИЛИ СМЕРТЬ!" at <http://www.pysskie.org/novosti/2010/novosti-110710-4.shtml>

remembers the words of Saint Theophan the Hermit: “I don’t know how it is for others, but I can’t be saved without Orthodoxy.”⁵⁵²

Continuing the anti-heavy metal movement, there are also other Russian religious activists who protest against shows of western rock and metal performers. Almost every Russian tour of Marilyn Manson is associated with violent Christian protests. On June 7, 2014, in Novosibirsk, the protesters threw eggs and holy water at Manson and his musicians in front of the hotel.⁵⁵³ As for the motivation behind their actions, they claimed that such performers insulted their sacred beliefs, traditions, and dignity. Eventually, thousands of people went to the city’s central square, holding crosses, religious icons, and posters against Manson.

In June 27 2014 Manson himself responded on Twitter, posting a picture of a huge picket staffed with the military personnel and adding: “Why are the people that proclaim that music inspires violence, the ones that create such entropy?”⁵⁵⁴

The Polish black/death metal band Behemoth provokes similar hostility. The band has been accused of blasphemy, propaganda of Satanism, and insult of religious feelings. Behemoth has never been warmly welcomed in Russia, but after they went on tour in 2014 presenting the new album with a provocative name “The Satanist”, the band faced particularly heavy resistance from local Christian organizations. Their concerts in Khabarovsk, Vladivostok, and Tomsk were cancelled.⁵⁵⁵ In Tomsk the band encountered a group of aggressive Christians, who were physically preventing people from entering the concert venue. Neither the police nor the military forces intervened

⁵⁵² ОТЕЦ Я ТАК СЕБЕ, НО ДЕТИ МЕНЯ ЛЮБЯТ, interview with Konstantin Kinchev, available at http://www.trud.ru/article/04-08-2008/131814_otets_ia_tak_sebe_no_deti_menja_ljubjat.html, Accessed 22 November 2019

⁵⁵³ Russians Protest Marilyn Manson, at <https://www.youtube.com/watch?v=3s296vhVBfw>, Accessed 22 November 2019

⁵⁵⁴ Marilyn Manson Official Twitter, available at https://twitter.com/marilynmanson/status/482628692490084353/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E482628692490084353&ref_url=https%3A%2F%2Ffloudwire.com%2Fmarilyn-manson-shows-russia-canceled-bomb-threats-protests%2F, Accessed 22 November 2019

⁵⁵⁵ КАК В РОССИИ СРЫВАЮТ КОНЦЕРТЫ КУЛЬТОВЫХ МЕТАЛЛИСТОВ ВЕНЕМОТН, AT <http://www.furfur.me/furfur/culture/culture/172680-begemot>, Accessed 22 November 2019

except for establishing a barrier between the protesters and the fans.⁵⁵⁶ One of the witnesses wrote on social media that everything ended when the club director appeared in front of the crowd announcing the cancellation of the concert “for reasons beyond their control.”⁵⁵⁷ When the fans demanded explanations, he pointed to a cross which he wore around his neck, declaring himself a baptised Christian.⁵⁵⁸

The event provoked a substantial media outcry. The band leader Adam Darski posted a video message denying the allegations of satanic propaganda, claiming that everything the band did was nothing but art.⁵⁵⁹

In 2016, upon arriving at the airport in St. Petersburg, Austrian black metal band Belphegor was attacked by Anatoly Artyukh, the local chairman of the Orthodox Christian nationalist organization Narodny Sobor (People's Assembly). The activist had already appeared at the airport before the band's arrival and has been engaged in a verbal argument with the band's fans about their satanic lyrics.

When Belphegor appeared at the gate, they were aggressively approached by Artyukh. He announced his intent to have the concert in St. Petersburg that night cancelled because Belphegor was allegedly promoting Satanism. However, the activist's hostility did not stop at that point, as he suddenly spit into the face of the

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Адам «Nergal» Дарский из группы Behemoth обратился к русским поклонникам, available at <https://www.youtube.com/watch?v=HaZssYC6lSw>, ОТЕЦ Я ТАК СЕБЕ, НО ДЕТИ МЕНЯ ЛЮБЯТ, interview with Konstantin Kinchev, available at http://www.trud.ru/article/04-08-2008/131814_otets_ja_tak_sebe_no_deti_menja_ljubjat.html, Accessed 22 November 2019

⁵⁵⁹ Russians Protest Marilyn Manson, at <https://www.youtube.com/watch?v=3s296vhVBfw>, Accessed 22 November 2019

⁵⁵⁹ Marilyn Manson Official Twitter, available at https://twitter.com/marilynmanson/status/482628692490084353/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E482628692490084353&ref_url=https%3A%2F%2Floudwire.com%2Fmarilyn-manson-shows-russia-canceled-bomb-threats-protests%2F, Accessed 22 November 2019

⁵⁵⁹ КАК В РОССИИ СРЫВАЮТ КОНЦЕРТЫ КУЛЬТОВЫХ МЕТАЛЛИСТОВ ВЕНЕМОТ, АТ <http://www.furfur.me/furfur/culture/culture/172680-begemot>, Accessed 22 November 2019

band's front man Helmuth Lehner. He chased the band to the bus screaming insults in English and Russian and attempting to hit Lehner. The incident was recorded on video and is currently available on YouTube.⁵⁶⁰ The incident garnered negative responses from Belphegor's listeners and metal fans in general, who claimed that the Russian orthodox activists lack any social boundaries and respect.

The scheduled show in St. Petersburg was indeed cancelled just few hours before its scheduled start on April 19, 2016. According to Belphegor's official Facebook statement, the following concert in Moscow was extremely restricted. As the band describes, they "were ordered to remove the already hanging backdrop, then told that stage props such as sculptures and crosses were forbidden, and Helmuth was not allowed to do vocals for the track "Lucifer Incestus."⁵⁶¹ "During the second track, the sound engineer had been forced to mute the vocals for the rest of the show because of our lyrical content."⁵⁶² The vocalist Helmuth Lehner also stated: "I am a musician, not

⁵⁶⁰ Russian orthodox activist attacks Belphegor frontman in Saint-Petersburg at <https://www.youtube.com/watch?v=METmVJhy-Is>, ОТЕЦ Я ТАК СЕБЕ, НО ДЕТИ МЕНЯ ЛЮБЯТ, interview with Konstantin Kinchev, available at http://www.trud.ru/article/04-08-2008/131814_otets_ja_tak_sebe_no_deti_menja_ljubjat.html, Accessed 22 November 2019

⁵⁶⁰ Russians Protest Marilyn Manson, at <https://www.youtube.com/watch?v=3s296vhVBfw>, Accessed 22 November 2019

⁵⁶⁰ Marilyn Manson Official Twitter, available at https://twitter.com/marilynmanson/status/482628692490084353/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E482628692490084353&ref_url=https%3A%2F%2Ffloudwire.com%2Fmarilyn-manson-shows-russia-canceled-bomb-threats-protests%2F, Accessed 22 November 2019

⁵⁶⁰ КАК В РОССИИ СРЫВАЮТ КОНЦЕРТЫ КУЛЬТОВЫХ МЕТАЛЛИСТОВ ВЕНЕМОТН, АТ <http://www.furfur.me/furfur/culture/culture/172680-begemot>, Accessed 22 November 2019

⁵⁶¹ Ibid.

⁵⁶² Belphegor on Facebook, statement from April 14, 2016 at [facebook.com/belphegor/photos/a.10150742729523893/10153727016608893/?type=3&theater](https://www.facebook.com/belphegor/photos/a.10150742729523893/10153727016608893/?type=3&theater), ОТЕЦ Я ТАК СЕБЕ, НО ДЕТИ МЕНЯ ЛЮБЯТ, interview with Konstantin Kinchev, available at http://www.trud.ru/article/04-08-2008/131814_otets_ja_tak_sebe_no_deti_menja_ljubjat.html, Accessed 22 November 2019

⁵⁶² Russians Protest Marilyn Manson, at <https://www.youtube.com/watch?v=3s296vhVBfw>, Accessed 22 November 2019

a fighter, especially in Russia” and “it is of the most important that artists have freedom of expression”, because “throughout history religions and governments have and continue to censor creative works all around the world.”⁵⁶³

Two years earlier another Orthodox activist, Dmitri “Enteo” Tzorionov, gave an interview on the topic of how harmful listening to rock and metal music was. The slogan “Their place is not on stage, but on fire” was used as an epigraph for the conversation⁵⁶⁴.

Similarly to the other activists, Tzorionov argued that rock was nothing but “music from hell”, portraying musicians as evil sorcerers using “infernal sounds” to manipulate people’s minds. He assertively claimed that rock and heavy metal must be banned as they presented sourcea of social destruction, adding that thereafter “we [will] finally build a theocratic state on the ruins of the modern secular Russian Federation, an open and conscious blasphemy will be punished with the highest penalty.”⁵⁶⁵ Tzorionov mentioned the bands The Rolling Stones, AC/DC, Slayer, The Who, Kiss, Led Zeppelin, and Cannibal Corpse as openly blasphemous. According to him, the concerts of those and similar performers must be banned because they not only destroy the morals of society but also insult feelings of the believers.⁵⁶⁶

The controversy about heavy metal was not limited to the actions of religious activists. In May 2010, several media sources were outraged by news about the

⁵⁶² Marilyn Manson Official Twitter, available at https://twitter.com/marilynmanson/status/482628692490084353/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etwteetembed%7Ctwterm%5E482628692490084353&ref_url=https%3A%2F%2Floudwire.com%2Fmarilyn-manson-shows-russia-canceled-bomb-threats-protests%2F, Accessed 22 November 2019

⁵⁶² КАК В РОССИИ СРЫВАЮТ КОНЦЕРТЫ КУЛЬТОВЫХ МЕТАЛЛИСТОВ ВЕНЕМОТН, АТ <http://www.furfur.me/furfur/culture/culture/172680-begemot>, Accessed 22 November 2019

⁵⁶³ Ibid.

⁵⁶⁴ Рок — это «осознанный сатанизм»? available at https://www.colta.ru/articles/music_modern/3928-rok-eto-osoznannyy-satanizm?page=8&part=5, Accessed 22 November 2019

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid.

authorities of the West-Russian city of Belgorod banning heavy metal music.⁵⁶⁷ It was reported that the governor of Belgorod had taken preventive measures against the spreading of satanic beliefs among the youth.⁵⁶⁸ One of the international sources reported that the head of the Consumer Market Department in the Belgorod Municipality, Vladimir Shatilo, “enforced the governor’s request to refuse to host any performances of heavy metal music in cafes, clubs and restaurants by distributing a written statement to them.”⁵⁶⁹ According to that source, this decision was motivated by some research proving that listening to heavy metal was “ideologically destructive” especially for young people.⁵⁷⁰ It stated that the decision was approved not only by the local administration, but was obviously supported by religious organizations.⁵⁷¹

Other members of the administration, however, could not prove the existence of the document signed by Shatilo.⁵⁷² They claimed that nobody had tried to ban heavy metal, but to provide recommendatory guidelines the local clubs, which still retained the right to decide on their own whether to play heavy metal or not.⁵⁷³

Again, the news provoked a critical backlash from the heavy metal community. Dmitry Pereverzev, the guitarist of a rock band Pri Hlop espoused the opinion that heavy metal was about be banned not only as a genre but as ideology in general.⁵⁷⁴ He opined that such confusions may happen because of a lack of knowledge about heavy metal, which according to him carried much deeper meaning than any forms of mainstream music played in clubs. Another rock musician, Dmitry Cherny, added that such prohibitions would only further encourage young people to listen to heavy

⁵⁶⁷ Russia: City bans heavy metal music in CAF at Russia: City bans heavy metal music in CAF at https://freemuse.org/news/russia-city-bans-heavy-metal-music-in-caf/?doing_wp_cron=1576790477.3026258945465087890625, Accessed 22 November 2019.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid.

⁵⁷² АЛЛА ПАНАСЕНКО, Рок и мат - не наш формат! At <https://www.vrn.kp.ru/daily/24493/648265/>, Accessed 23 November 2018

⁵⁷³ Ibid.

⁵⁷⁴ Ibid.

metal.⁵⁷⁵ Concerning Satanism, he stated that it might or might not be featured in any song lyrics depending on the listener, explaining that satanic ideology is particularly featured only by the genre of black metal.⁵⁷⁶

Earlier mentioned American death metal band Cannibal Corpse not only drew heavy criticism in the United States and Germany but also faced legal charges in Russia. In 2014, six of eight planned concerts of the band in Russia were cancelled due to Orthodox Christian protests, which had become even stronger after the re-election of Vladimir Putin, who encouraged promoting Christian values as “the “spiritual bonds” holding the country together.”⁵⁷⁷

6.5 Freedom of Speech and Creativity in Russia

As much as rock and metal musicians struggle to defend their rights of free artistic expression, the Russian legislation of free speech itself remains quite contradicting and often lacks transparent goals and definitions.

Russia became a party of the European Convention on Human Rights on March 30, 1998, that declared freedom of speech in the Art. 10.⁵⁷⁸ The Russian Constitution of December 12, 1993, was meant to establish the brand-new order after the post-Soviet turbulence. It reflected the basic values of democratic states, including internationally declared principles of human rights and, obviously, freedom of speech as one its crucial components. After the strict censorship policy of the USSR, this was supposed to implement a new level of constitutional guarantees.

Part 1 of Art. 29 established freedom of thought and speech, part 2 defined its constitutional limits, part 3 guaranteed freedom of opinion, part 4 established freedom of information, and part 5 established freedom of the mass media and prohibited censorship.

These freedoms are interconnected and systematic. Similarly to the constitutional law of the USA and Germany, they aim to develop equal opportunities for each person to express themselves and facilitate communication between people based on

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ Russia Cracks Down on Death Metal, at <https://www.vocativ.com/world/russia/russia-death-metal-cannibal-corpse/index.html>, Accessed 25 November 2019

⁵⁷⁸ ФЕДЕРАЛЬНЫЙ ЗАКОН ОТ 30.03.98 N 54-ФЗ, the Federal Law of Ratification of the European Convention on Human Rights from 30.03.98 N 54-ФЗ.

competition of ideas and thoughts.⁵⁷⁹ Freedom of thought and freedom of speech in Art. 29 (1) are united and considered as an intact right to think and express thoughts freely without fear of any kind of persecution from the state.⁵⁸⁰

Thought is a product of a human mind that reflects their knowledge of the world and the world itself, embodies ideas, opinions and beliefs.⁵⁸¹ Freedom of thought is thus connected to a spiritual freedom, the inner world of a human being and cannot be regulated by law.⁵⁸² At the same time, “thinking” and “thought” underlie any human activity, define social relationships with other people, society, the state, i.e. they are externally expressed.⁵⁸³ Freedom of thought requires the non-interference of the state into the process of forming opinions and beliefs of a person, protecting them from any other interference and preventing any ideological dictatorship, violence or personal control.⁵⁸⁴

Freedom of speech is a legally guaranteed opportunity to express opinions and views about social, governmental, and other affairs freely through oral or printed words, meetings, and other means.

The concept of “freedom of thought and word”⁵⁸⁵ expresses the constitutional and the legal meaning of “freedom of speech” more precisely, and at the same time that concept is more diverse. “Freedom of thought and word” implies the possibility of free thought, dissent, and free-thinking, and thereby guarantees the human right to criticize generally accepted norms of morality, law, and religion.⁵⁸⁶ Besides, “thought” is understood not only as thought in a literal meaning, but also as feelings and emotions. Likewise, “word” means not only verbal words, but also non-verbal

⁵⁷⁹ Конституция РФ Последняя действующая редакция с Комментариями, под ред. В.Д. Зорькина, Л.В. Лазарева. the Constitution of Russian Federaion. The latest edition of Zorkin V, and Lazarev L. at <http://constrf.ru/>

⁵⁸⁰ Ibid.

⁵⁸¹ Комментарий к Конституции Российской Федерации (под общ. ред. Л.В. Лазарева). - ООО "Новая правовая культура", 2009.

⁵⁸² Ibid.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid,

⁵⁸⁵ The literal translation of Russian meaning “freedom of speech” (“свобода слова”) is “freedom of word”.

⁵⁸⁶ Ibid.

communication between people, which includes the tone of voice, appearance, clothes, pose, facial expressions, movements, gestures, facial expressions, etc.⁵⁸⁷ These forms of expression can be manifested not only through language, but via other sign systems (for example a computer language) and visual images including art, photography, video, etc.⁵⁸⁸

The freedoms established by Art. 29 are granted to Russian citizens, foreigners, people without citizenship and belong to everyone from birth. The main purpose of the article is to protect social and political thoughts and information. The article is related to religious, scientific, artistic thoughts, commercial information, including advertising, and intellectual property. These types of self-expression and information are also regulated by other articles of the Constitution and by the relevant international legal acts. Thus, freedom of religion is also separately protected by Art. 28 and the freedoms of creative activity and intellectual property are protected by Art. 44.⁵⁸⁹

Art. 29 (2) formulates abuses of freedom of thought and speech. Taking into account the historical background of the Russian multinational society, it defines the limits against discrimination.⁵⁹⁰

Art. 29 (3) declares that “no one may be forced to express their opinions and beliefs or to reject them.” Its meaning is closely connected to the past totalitarian regimes. The new constitutional value demands that the state, political parties, social organizations, and people respect the freedom of thought and word.⁵⁹¹

As there are no legal definitions of “good” and “evil”, it is necessary to establish the institution of free speech, which would encourage the competition of thoughts, opinions, beliefs, debates, and discussions.⁵⁹² Nevertheless, each society has a certain consensus on basic universal values, hence, an absolute freedom of speech cannot be regarded as an exclusively positive phenomenon in society. For example, as Justice Holmes of the US Supreme Court notices, even “the most stringent protection of free

⁵⁸⁷ Ibid.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

⁵⁹⁰ Окуньков. Постатей-й коммент-й к Конституции РФ, 2015 at

<https://studfiles.net/preview/6227814/>

⁵⁹¹ Ibid.

⁵⁹² Ibid.

speech would not protect a man in falsely shouting fire in a theater and causing a panic.”⁵⁹³ Since the Russian Constitution and Art. 29 is at least formally based on the values of international law, it also excludes false information from the protection of free speech.⁵⁹⁴

Similar to the American and German constitutional laws, freedom of speech in Russia has a number of limits and restrictions. These restrictions are established by part 2 Art. 29 and connected to other constitutional norms and principles that serve the same purpose. Especially with part 3 of Art. 17, which establishes “the exercise of the rights and freedoms of man and citizen shall not violate the rights and freedoms of other people”, and part 3 of Art. 55, which indicates that “the rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State.”

Besides “freedom of speech, idea and thought” in Art. 29, the Russian Constitution prescribes “the freedom of literary, artistic, scientific, technical and other types of creative activity, and teaching” in part 1 Art. 44. Part 2 of that article guarantees “everyone shall have the right to participate in cultural life and use cultural establishments and to an access to cultural values” and part 3 declares that “everyone shall be obliged to care for the preservation of cultural and historical heritage and protect monuments of history and culture.”

Part 1 of Art. 44 defines only the main types of creative activity, leaving the list open. The difference between each type is quite clear. Scientific creativity aims to discover the laws of nature, society, thinking, develop fundamental (or applied) theories, concepts, mathematical methods, and other scientific results.⁵⁹⁵ Technical creativity involves the creation of new designs, applied technical solutions, devices, substances, etc., that can be used in industry, agriculture, healthcare, other sectors of economy or

⁵⁹³ Justice Oliver Wendell Holmes in *Schenck v. U.S.* 1919

⁵⁹⁴ Окуньков. Постатей-й коммент-й к Конституции РФ, 2015 at <https://studfiles.net/preview/6227814/>

⁵⁹⁵ Конституция РФ Последняя действующая редакция с Комментариями, под ред. В.Д. Зорькина, Л.В. Лазарева. the Constitution of Russian Federaion. The edition of Zorkin V, and Lazarev L. at <http://constrf.ru/>

social dimensions.⁵⁹⁶ Artistic creativity encompasses the creation of literature, music, theater, painting, sculpture, graphics, design, architecture, urban planning, photography and many other activities involving creative work.⁵⁹⁷ Such creative works “communicate” with the viewer or listener through art processed by author’s imagination.⁵⁹⁸

The contemporary legislation does not provide a legal definition of “creativity.” However, its meaning can be sub-divided into two aspects: creativity as a process of creative activity and its result as a certain form or object (physical or non-physical).⁵⁹⁹ In other words, creativity is a part of mental human activity which represents the discovery or creation of something new and original. It is a process and result of deliberate and mindful work.⁶⁰⁰

The right of creativity is defined as the right to pursue of all forms of creative activities according to personal interests and abilities by Art. 10 of the fundamentals of the legislation of the Russian Federation on culture.⁶⁰¹

Taking into account the specific nature of certain types of creative activities, the law prescribes a complex system to regulate and protect the relations arising from the creation and the use of the results of creative activity. So, in terms of artistic creation, the fundamentals of Russian legislation on culture considers creative activity as creation of cultural values and as well as their interpretation.⁶⁰²

The general concept of the Fundamentals assumes that preservation, development, and dissemination of culture, as well as the governmental measures to support it, only manifest in practice when those measures truly lead to fulfilment and protection of everyone’s constitutional right to participate in cultural life.⁶⁰³

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Комментарий к Конституции Российской Федерации (под общ. ред. Л.В. Лазарева). - ООО "Новая правовая культура", 2009. available at <https://constitution.garant.ru/science-work/comment/>

⁶⁰⁰ Ibid.

⁶⁰¹ "Fundamentals of the legislation of the Russian Federation on culture" 09. 10. 1992, Art. 10 "Основы законодательства Российской Федерации о культуре" (утв. ВС РФ 09.10.1992 N 3612-1) (ред. от 18.07.2019)

⁶⁰² Ibid.

⁶⁰³ Ibid.

The representative, the executive, and the judicial authorities have to guarantee the protection of the cultural activity rights, develop and implement the state policy on cultural development, and prevent violations of cultural rights and freedoms. However, these bodies are restricted from interfering with the creative activities of citizens and their associations, state and non-governmental cultural organizations, unless such activities lead to propaganda of war, violence, cruelty, racial, national, religious, class and other intolerance or pornography.⁶⁰⁴

Akin freedom of speech, freedom of creativity is not absolute. This freedom can also be abused, and a creator being a part of society has to respect the rights and freedoms of others, whose rights and interests are protected by constitutional, criminal, administrative and civil laws as well. Though, if any unlawful action involves creative elements, it cannot be granted freedom, because immoral and destructive creativity has to be prohibited.⁶⁰⁵

6.5.1 Restrictions of Creativity

Art. 29 (5) of the Constitution prohibits censorship and guarantees freedom of ideas and speech, however, in practice this is challenging as it demands finding a balance between upholding the rights and interests of creators and the rights and interests of the others.

The problem of overlapping constitutional values, similar to how it was described in the German constitutional system (see chapter 4), is also present in the Russian legislation. There are cases where the freedoms of speech, ideas, artistic expression have to be “sacrificed” to maintain the public order and the rights of other citizens.

Art. 3 of the Federal Law "On the Mass Media" prohibits censorship of mass media, which is defined as “the requirement from the media editorial board on the part of officials, government bodies, organizations, institutions or public associations to pre-coordinate messages and materials (except when the official is the author or

⁶⁰⁴ Конституция РФ Последняя действующая редакция с Комментариями, под ред. В.Д. Зорькина, Л.В. Лазарева. the Constitution of Russian Federaion. The latest edition of Zorkin V, and Lazarev L. at <http://constrf.ru/>

⁶⁰⁵ Комментарий к Конституции Российской Федерации (под общ. ред. Л.В. Лазарева). - ООО "Новая правовая культура", 2009.

interviewee), as well as imposing a ban on the distribution of messages and materials, their individual parts.”⁶⁰⁶

Censorship is also prohibited by the federal law of December 29, 1994, “On Library Science” (Article 12) and the federal law of May 26, 1996, “On the Museum Fund of the Russian Federation and museums in the Russian Federation” (Article 35).

Nevertheless, legal scholars argue that the prohibition of censorship in the Russian legal system only exists nominally. Kulikova insists that modern censorship does exist in spite of all levels of its legal prohibition, being primarily used as indirect pressure on the media and cultural organizations.⁶⁰⁷ The phenomenon of de facto censorship of creativity is present and restrictions are applied on the freedom of dissemination of information by state authorities, public organizations, and self-organized "groups of offended citizens."⁶⁰⁸

In Russia, restrictions of free expression affect several levels and branches of local legislation. The following paragraphs will focus on the most crucial and relevant matters and circumstances under which freedom of speech, expression, and creativity must be limited.

6.5.2 Instigating Speech and Extremism

The Russian law does not operate with the term “hate speech”, however it distinguishes several criminal and administrative offences that refer to that category. First of all, legal restrictions are required when a public speech, piece of art, cinema or literature are recognized as extremist materials.

The Federal Law “On Countering Extremist Activities” from 27 June 2002 aims to protect the rights and freedoms of citizens and non-citizens of the Russian Federation, the foundations of the constitutional order, ensure the integrity and security of the state, determine the legal and organizational foundations of countering extremist

⁶⁰⁶ Закон РФ от 27.12.1991 N 2124-1 (ред. от 02.12.2019) "О средствах массовой информации" (с изм. и доп., вступ. в силу с 01.01.2020), Статья 3. Недопустимость цензуры at http://www.consultant.ru/document/cons_doc_LAW_1511/dbf226faae7b05a718177c78f759fd4696307d56/

⁶⁰⁷ Kulikova, Svetlana, Конституционный запрет цензуры в России. Монография, Penza, 2019.

⁶⁰⁸ Рейфман П. Из истории русской, советской и постсоветской цензуры at https://www.gumer.info/bibliotek_Buks/History/reifm/index.php

activities, and establish responsibility for those activities.⁶⁰⁹ Art. 1 of the federal law defines extremist activity or extremism as actions that include:

- forcibly changing the foundations of the constitutional system and violating the integrity of the Russian Federation;
- public justification of terrorism and other terrorist activities;
- incitement to social, racial, national or religious hatred;
- propaganda of exclusivity, superiority or inferiority of a person on the basis of his or her social, racial, national, religious or linguistic affiliation or attitude to religion;
- violation of the rights, freedoms and legitimate interests of a person and a citizen depending on his or her social, racial, national, religious or linguistic affiliation or attitude to religion;
- hindering citizens from exercising their voting rights and the right to participate in a referendum or violating the secrecy of the vote, coupled with violence or the threat of its use;
- obstruction of the legitimate activities of state bodies, local governments, election committees, public and religious associations or other organizations, combined with violence or the threat of its use;
- committing crimes for the reasons specified in paragraph "e" of the first part of Art. 63 of the Criminal Code of the Russian Federation;
- using of Nazi symbols, or symbolism similar to Nazi attributes or symbols to the point of confusion, or attributes or symbols of extremist organizations (except in cases when these symbols are used to express a negative attitude towards the ideologies of Nazism or other forms of extremism);
- public incitement of the actions cited above or mass distribution of extremist material, as well as their storing for distribution;
- defamatory and knowingly false public accusations of a person of service for public authorities of Russia and its states during the period of their duties
- organization and preparation of these acts, as well as incitement of their implementation;

⁶⁰⁹ Federal Law No. 114-FZ of July 25, 2002 (as amended on December 2, 2019) "On countering extremist activity"

- financing of these acts or other assistance in their organization, preparation, and implementation, including by providing educational, printing and material and technical facilities, telephone and other types of communications or the provision of information services.

The Federal law also defines extremist materials as documents or information of other sources intended for publication, calling for extremist activities or justifying the need for such activities, including the works of the leaders of the National Socialist Workers Party of Germany, the Nazi Party of Italy, publications substantiating or justifying national and/or racial superiority or justifying the practice of committing military or other crimes aimed at full or partial destruction of any ethnic, social, racial, national or religious group.

Art. 3 intends to divide extremism into two main dimensions by taking measures to prevent extremist activities, including the identification and elimination of the causes and conditions conducive to the implementation of extremist activities; and the identification, prevention and suppression of extremist activities of public and religious associations, other organizations, and individuals. Art. 3.1 adds that the Bible, the Qur'an, Tanah, Ganjur and their contents and quotations cannot be recognized as extremist materials.

The law refers to Art. 63(1e) of the Criminal Code, which defines the commitment of a crime motivated by political, ideological, racial, national or religious hatred or enmity or motivated by hatred or enmity against any social group as aggravating circumstances. It establishes special penalties for public calls for national hostility.

Incitement of hatred or enmity, as well as the humiliation of human dignity is regulated by Art. 20.3.1. of the Code of Administrative Offences and Art.282 of the Criminal Code. It is described as actions that aim to incite hatred or enmity, as well as the humiliation of human dignity based on gender, race, nationality, language, origin, religion, as well as belonging to any social group. For them to qualify as administrative offences, these actions have to be committed publicly, including the use of the media and internet, by a person after they have been.⁶¹⁰

⁶¹⁰ "Уголовный кодекс Российской Федерации" от 13.06.1996 N 63-ФЗ (ред. от 02.12.2019) УК РФ Статья 282. "Возбуждение ненависти либо вражды, а равно унижение человеческого достоинства"

These acts can be committed separately or in combination with each other (for example, incitement of hatred and humiliation of dignity based on nationality and origin). In order for them to be identifiable as criminal acts, it is important that they provoke a situation or persistent attitude of hatred or a relatively long state of hostility on the grounds indicated in the article.⁶¹¹

For classifying acts as incitement of hatred or/and humiliation of human dignity, it must be taken into consideration that it is based on the assessment of an individual as a representative of a particular nation, race, etc., and not on its generalizing characteristics.⁶¹²

Insult was recognized as a criminal offence in Art. 130 of the Criminal Code until 2012. However, its penalty was not too harsh and it was rather difficult to prove its commitment in the court.⁶¹³ The main problem was to prove the perpetrator's intention to insult rather than to express their opinion.⁶¹⁴ For this reason, the judicial practice almost never had to solve a case that would deal with insult as the only criminal charge. Usually, insult was committed as an additional offence alongside with a physical harm, death threats or threats to the victim's health.⁶¹⁵ Currently, the Criminal Code provides only two articles for insulting a person, both of which refer to special subjects of the crime. Art. 319 "Insult of an authority representative", protects public relations that first, secure the respectable status of the authorities and second, secure the honour and dignity of the individual.⁶¹⁶ Art. 336 "Insult of a representative of a military service" that protects relations linked to fulfilment and respect of military honour.⁶¹⁷

Since the Criminal Code does not include any article about a regular insult of the individual, Art. 5. 61 the Code of Administrative Offences became the only law that established responsibility for personal insult. It defines three forms of the offence: "insult as humiliation of the honour and dignity of another person, expressed in

⁶¹¹ Комментарий к ст. 282 УК РФ at <http://ukrfinfo.ru/Kommentariy-k-st-282-UK-RF/>

⁶¹² Ibid.

⁶¹³ Статья за оскорбление личности в законодательстве РФ

Источник: <https://bonasens.ru/ugolovnoe-pravo/statya-za-oskorblenie-lichnosti.html>

⁶¹⁴ Ibid.

⁶¹⁵ Ibid.

⁶¹⁶ Комментарий к ст. 319 УК РФ at <http://ukrfinfo.ru/Kommentariy-k-st-319-UK-RF/>

⁶¹⁷ Комментарий к ст. 336 УК РФ at <http://ukrfinfo.ru/Kommentariy-k-st-336-UK-RF/>

indecent form”; “insult in a public statement, demonstrated in a publicly displayed work or the media”; and “failure to prevent insult in a publicly displayed work or media.”⁶¹⁸

In order to understand the way how the Russian judicial practice operates within that legislation and how this legal practice is reflected in heavy metal cases, the following paragraph will analyse the court practice related to the instigation of hatred and extremism.

6.5.2 a Case of the Party “Rodina”

On December 2, 2015, the Higher Court of the Russian Federation decided to de-register the list of candidates of the Political Party “Rodina”, that had been nominated for deputies of the Moscow City Duma of the fourth convocation.⁶¹⁹ The decision was motivated by the fact that the party members had violated the electoral rules during the production of a pre-electoral video, promoting ethical hatred.

The electoral video produced by the liberal-democratic party “Rodina” showed a young blonde woman walking through the street with a baby trolley. Then the camera focused on the trolley crossing watermelon peels thrown on the ground. The next scene showed three black-haired men, presumably of southern origin. As the woman approached them, one said with a strong accent: “Понаехали тут.”⁶²⁰ The men kept throwing peels on the ground, that fell to the feet of the Chairman of the party, Dmitri Rogozin. “Clean after yourself”, said the Chairman and one of his associates asked the southerners if they could understand Russian. The next screen showed a slogan:

⁶¹⁸ КоАП РФ Статья 5.61. Оскорбление, at

http://www.consultant.ru/document/cons_doc_LAW_34661/d40cbd099d17057d9697b15ee8368e49953416ae/

⁶¹⁹ Определение от 2 декабря 2015 г. по делу № 3-562/2015 at

<https://sudact.ru/vsrf/doc/hYuJZj9fyDLB/?vsrf->

[txt=%D1%80%D0%B0%D0%B7%D0%B6%D0%B8%D0%B3%D0%B0%D0%BD%D0%B8%D0%B5+%D0%BC%D0%B5%D0%B6%D0%BD%D0%B0%D1%86%D0%B8%D0%BE%D0%BD%D0%B0%D0%BB%D1%8C%D0%BD%D0%BE%D0%B9+%D1%80%D0%BE%D0%B7%D0%BD%D0%B8+&vsrf-case_doc=&vsrf-lawchunkinfo=&vsrf-date_from=&vsrf-date_to=&vsrf-judge=&_id=1578005411248&snippet_pos=5558#snippet](http://www.consultant.ru/document/cons_doc_LAW_34661/d40cbd099d17057d9697b15ee8368e49953416ae/), Accessed 12.12.2019

⁶²⁰ In a literal translation: “came here”. Emotional meaning of that expression could be signified as “why the hell did you come here”. In Russia this phrase is commonly used to disapprove migration from the Southern-Eastern countries.

“Clean Moscow from the garbage”, with the voice-over repeating: “Clean Moscow!”⁶²¹

That pre-electoral video aimed to address issues concerning migrants in Russia, particularly their illegal employment and the increase of crime rates, which some associated with them. However, the court found that the video stood in violation of the law against extremism.

The President of the Federal National-Cultural Autonomy of Azerbaijanis of Russia, Sadikov, stated that the video offended the feelings of visiting foreign citizens, provoked xenophobia and negative emotions towards certain ethnic groups, including Russians of Azerbaijani origin.⁶²²

On November 22, 2005, the Moscow City Election Commission received a letter from the Chairman of the Expert Council for the Application of Advertising Legislation, A. Kashevarov. According to the letter, the video unethically violated the general norms of humanity and morality, using abusive forms of comparison in relation to nationality and a social category. It was opposing people with Slavic and Southern origins, as Southerners were portrayed in a negative light. He added that the video presented the Southern-Eastern people as violators of the public order and a threat for Russia.⁶²³

The lawyers Eremin and Zhuravskaya, appearing as witnesses in the case, explained that the video would have never been allowed on TV if it was not a part of the elective company because it was clearly inciting ethnic and social hatred.⁶²⁴

6.5.2 b Kolovrat and related cases

In 1994, Denis Gerasimov and Vladimir Akinin founded the rock band Russkoe Getto (“Русское гетто” or “Russian Ghetto”) being inspired by the movement Rock Against Communism (RAC).⁶²⁵ That movement originated in the UK in the late 1970s

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ Ibid.

⁶²⁴ Ibid.

⁶²⁵ Kolovrat at Encyclopaedia Metallum at <https://www.metal-archives.com/bands/Коловрат/26515>

and early 1980s, performing co-called “white power concerts”.⁶²⁶ The song lyrics of those bands were typically focused on propagating racism and antisemitism.

In 1997 Russkoe Getto changed its name to Kolovrat.⁶²⁷ The music changed during the band’s history. In the early 2000s, the group was mostly influenced by thrash metal, but by the 2010s their style had started to involve elements of other metal genres, too. But in spite of musical changes, Russian nationalism remained as their dominating lyrical theme. For example, the songs “1 maya” (“1 мая”, “May 1st) and “Zabastovki” (“Забастовки”, “Strikes”) celebrate white racism and frontier justice; “Ya nenavizhu kommunistov” (“Я ненавижу коммунистов”, “I hate communists”), “Krasni terror” (“Красный террор”, “Red terror”) are focused on anticommunism; “Molodaya ih Russkaya” (“Молодая и Русская”, “Young and Russian”) praises heterosexual love.

In 2010 several compositions of Kolovrat were included in the Federal List of Extremist Materials by the decision of the Dorogomilovsky District Court of Moscow.⁶²⁸ And in 2012 a number of other songs were added to the list by the Cominternovskiy District Court of the city of Voronezh. According to the Russian law, the mass distribution, production or storage for mass distribution of the materials included in the list entails legal liability.

After the band became notorious, courts were overwhelmed with complaints about the illegal distribution of their tracks, especially via social media. The popular Russian internet platform VKontakte, in spite of being infamous due to several copyright scandals in the past, remains a huge music provider online. Its users are allowed to upload audio and video files, thus making them publicly available. Today, the administration of VKontakte controls matters of copyright and distribution of extremist or pornographic materials on their site, however, it is not practically

⁶²⁶ Dyck, Kristen, Reichsrock: *The International Web of White-Power and Neo-Nazi Hate Music*, 2017. P. 19.

⁶²⁷ According to some sources “kolovrat” is an ancient eight-pointed swastika-like symbol, allegedly of Old Slavic origin and used by neo-pagans and some neo-Nazis today. However, there is no scientific evidence to substantiate this claim.

⁶²⁸ Федеральный список экстремистских материалов at <https://minjust.ru/> (Accessed 12 December 2019)

manageable for them to filter every single file on time. Some illegal uploads may remain on the web until other users report them to the administration.

There are several criminal and administrative cases related to the distribution of Kolovrat's music on VKontakte. As the investigations revealed, most of the accused users did not even realize that uploading such music was a legal offence, claiming that they did not want to distribute extremist information or promote neo-Nazi ideas but simply liked the music without listening to the lyrics.

One such case was held by the Naberezhnochelninsky City Court of the Republic of Tatarstan on July 17, 2018. According to the statement of the court, on June 19, 2018, the examination of the Federal security service found that the defendant, Safiulov, who was a member of a local football fan group, posted several audio files of the right-wing music group Kolovrat on his VKontakte page. The materials were openly available to an unlimited number of users and were accessed by more than 500 people⁶²⁹. Safiulov was found guilty by Art. 20.29 of the Code of Administrative Offences, which prescribed a responsibility for the mass distribution of extremist materials included in the published Federal List of Extremist Materials, as well as their production or storage for mass distribution.

Similarly, on July 23, 2018, another Vkontakte user Ermakov was found guilty according to Art. 20.29 of the Code of Administrative Offences for publishing records of Kolovrat on his page.⁶³⁰

On June 19, 2019, another person was found guilty by the Zavodskoy District Court of Orel City. Again, it was pointed out that “the distribution of extremist materials, as well as their production or storage for distribution, is prohibited on the territory of the Russian Federation.”⁶³¹

⁶²⁹ Постановление № 5-754/2018 от 17 июля 2018 г. по делу № 5-754/2018 Набережночелнинский городской суд (Республика Татарстан) at

⁶³⁰ Постановление № 5-70/2018 от 23 июля 2018 г. по делу № 5-70/2018 Гиагинский районный суд (Республика Адыгея) at

⁶³¹ Постановление № 5-67/2019 от 4 июня 2019 г. по делу № 5-67/2019

Заводской районный суд г. Орла (Орловская область) at

https://sudact.ru/regular/doc/9mG2mPXbkuHV/?regular-txt=%D0%9A%D0%BE%D0%BB%D0%BE%D0%B2%D1%80%D0%B0%D1%82®ular-case_doc=®ular-lawchunkinfo=®ular-date_from=®ular-date_to=®ular-workflow_stage=®ular-area=®ular-court=®ular-judge=&_id=1578096389127&snippet_pos=174#snippet

6.6. Child Protection Law

In some ways, the child protection law of Russia developed similarly strict regulations to the German law, establishing one of the most crucial backgrounds for restricting freedom of speech and expression.

The Federal Law “On the Protection of Children from Information Harmful to Their Health and Development” from December 10, 2010, defined several types of information that must be legally restricted according to Art. 5 (2). The list included information that:

- 1) “encourages children to commit actions that pose a threat to their life and (or) health, including harming their health, suicide, or the life and (or) health of others, or aimed at inducing or otherwise involving children in the commission of such actions”;
- 2) “is capable of causing children to desire to use narcotic drugs, psychotropic and (or) intoxicants, tobacco products, alcoholic and alcohol-containing products, take part in gambling, engage in prostitution, vagrancy or begging”;
- 3) “justifies the admissibility of violence and (or) cruelty or encourages carrying out violent acts against people or animals, with the exception of cases provided for by this Federal Law”;
- 3.1) “contains an image or description of sexual violence”;
- 4) “denies family values, promoting non-traditional sexual relations and forms disrespect for parents and (or) other family members”;
- 5) “justifies unlawful behavior”;
- 6) “contains foul language”;
- 7) “contains pornographic information”;
- 8) “is about a minor who suffered as a result of unlawful actions (or inactions), including last names, first names, patronymic, photo and video images of such a minor, their parents and other legal representatives, the date of birth of such a minor, audio recording of their voice, place of residence or temporary residence stay, place of their study or work, other information allowing directly or indirectly to establish the identity of such a minor”.

Art. 5 (3) provides a list of information, the distribution of which is limited among children of certain age categories. It includes information that:

- 1) Is presented in the form of an image or description of cruelty, physical and (or) mental violence (with the exception of sexual violence), crime or other antisocial action;
- 2) causes fear, horror or panic in children, including if the image is presented in the form of an image or description in a degrading human form of non-violent death, illness, suicide, accident, accident or catastrophe and (or) their consequences;
- 3) is presented in the form of an image or description of sexual relations between a man and a woman;
- 4) contains swear words and expressions that are not related to foul language.

According to the law, the classification of informational products is carried out by its producers and (or) distributors independently, including the participation of an expert, experts, and (or) expert organizations of certain qualification before the distribution of informational products on the territory of the Russian Federation.⁶³²

In order to classify information, the following qualities of the material have to be taken into account:

- 1) its subject matter, genre, content, and decoration;
- 2) features that can be a subject of classification of the information into a certain age-restricted group;
- 3) the likelihood that the information will cause harm to the health and / or development of children.⁶³³

The law also classifies information products within an age rating system that consist of five categories:

- 1) informational products for children under the age of six,⁶³⁴

This information is not harmful to the health and (or) development of children (including information products containing episodic non-naturalistic images or descriptions of physical and (or) mental violence justified by its genre and (or) plot (excluding sexual violence) subject to the triumph of good over evil and expression of compassion for the victim of violence and (or) condemnation of violence);

⁶³² Art.6 (1)

⁶³³ Art. 6 (2).

⁶³⁴ Art. 7

2) informational products for children over the age of six,⁶³⁵

This information includes the content of information products for children under the age of six, as well as informational products whose content is justified by its genre and (or) plot including: 1) short-term and non-naturalistic images or descriptions of human diseases (with the exception of diseases) and (or) their consequences in a form that does not degrade human dignity; 2) non-naturalistic images or descriptions of an accident, catastrophe or non-violent death without demonstrating their consequences, which may cause fear, horror or panic in children; 3) episodic images or descriptions of these actions and (or) crimes that do not induce antisocial actions and (or) crimes, provided that their admissibility is not justified and a negative, condemning attitude towards the persons committing them is expressed;

3) informational products for children over the age of twelve,⁶³⁶

This information might contain the content of informational products for children over the age of six, as well as information products whose content is justified by its genre and (or) plot including: 1) episodic depictions or descriptions of cruelty and (or) violence (except for sexual violence) without naturalistic depiction of the process of deprivation of life or mutilation, provided that compassion for the victim is expressed and (or) a negative, condemning attitude to cruelty, violence (with the exception of violence used in cases of protecting the rights of citizens and the interests of society or the state protected by law); 2) images or descriptions that do not prompt the commission of antisocial actions (including the consumption of alcohol and alcohol-containing products, participation in gambling, engaging in vagrancy or begging), occasional mention (without demonstration) of narcotic drugs, psychotropic and (or) intoxicating substances, tobacco products, provided that the admissibility of antisocial actions is not justified; 3) episodic non-naturalistic images or descriptions of sexual relations between a man and a woman that do not exploit interest in sex and do not have arousing or offensive natures, with the exception of images or descriptions of sexual acts;

4) informational products for children over the age of sixteen;⁶³⁷ This information might contain content of informational products for children over the age of twelve as

⁶³⁵ Art. 8

⁶³⁶ Art. 9

⁶³⁷ Art. 10

well as information products whose content is justified by its genre and (or) plot including: 1) an image or description of an accident, disaster, illness, death without a naturalistic display of their consequences, which may cause fear, horror or panic in children; 2) an image or description of cruelty and (or) violence (with the exception of sexual violence) without a naturalistic demonstration of the process of deprivation of life or mutilation, provided that compassion for the victim is expressed and (or) condemning the cruelty, violence (with the exception of violence applied in cases of protecting the rights of citizens and the interests of society or the state protected by the law); 3) information about narcotic drugs or about psychotropic and (or) stupefying substances (without their demonstration), about the dangerous consequences of their consumption with the demonstration of such cases, provided that a negative or condemning attitude towards the consumption of such drugs or substances is expressed and an indication of the danger of their consumption is given; 4) individual swear words and (or) expressions not related to foul language; 5) an image or description of sexual relations between a man and a woman that does not exploit interest in sex and is not offensive in nature, with the exception of images or description of actions of a sexual nature.

Based on how they compare against these criteria, information products have to carry a label called the “Information Product Sign” that distinguishes:⁶³⁸

- 1) in relation to the category of information products for children under the age of six, in the form of the number “0” and the plus sign;
- 2) in the category of information products for children over the age of six, in the form of the number “6” and the plus sign and (or) a text warning in the form of the phrase “for children over six years old”;
- 3) in the category of information products for children over the age of twelve, in the form of the number “12” and the plus sign and (or) a text warning in the form of the phrase “for children over 12 years old”;
- 4) in relation to the category of information products for children over the age of sixteen, in the form of the number “16” and the plus sign and (or) a text warning in the form of the phrase “for children over 16 years old”;

⁶³⁸ Art. 12

- 5) in relation to the category of information products prohibited for children, in the form of the number “18” and the plus sign and (or) a text warning in the form of the phrase “prohibited for children”.

Dissemination of informational products with content prohibited for distribution among children in places accessible for minors is not allowed. Certain administrative, organizational, technical measures and software/hardware means are necessary for protecting children from that information.⁶³⁹ Those requirements have to be established by the government of the Russian Federation (the federal executive body).⁶⁴⁰

A manufacturer or a distributor must place a sign of the age rating and (or) a warning text on information products if their distribution is not allowed among children under a certain age. The warning should also be displayed before the start of a film demonstration, and during film and video demonstration. The size of the information product sign must be at least five percent of the screen area.⁶⁴¹ The size of the sign on physical copies of informational products must be at least five percent of the area of a poster or other announcement of the corresponding entertainment event, announcement of a film or video screening, as well as an admission ticket, invitation or other document providing the right to attend such an event.⁶⁴²

The sign of information products has to be placed for published TV and radio programs, lists and catalogues of information products, as well as on information products available at telecommunication networks.⁶⁴³ Producers and a distributors of media products have the right to conclude a civil contract with the person who provided them those information products. The contract indicates a person who is obligated to rate and mark information products according to the law⁶⁴⁴.

Nevertheless, in spite of providing a detailed classification scheme for determining age-appropriate contents for media products, the law can be criticized for a lack of concrete definitions. For example, it does not characterize the meaning of ‘family values’ and does not identify the difference between ‘sexual relations’ and ‘sexual

⁶³⁹ Art. 10 (2)

⁶⁴⁰ Art. 10 (3)

⁶⁴¹ Art. 12 (2)

⁶⁴² Art. 12 (3)

⁶⁴³ Art. 12 (4)

⁶⁴⁴ Art. 12 (4.1)

acts'. That lack of definitions might lead to diverse interpretations and misleading in understanding of terms. Moreover, it is not easy to classify contents according to that rating system. For example, children under the age of six are allowed to consume content that presents non-naturalistic violence but only if the story presents the triumph of good over evil and demonstrates compassion for the victim of violence and (or) condemnation of violence. However, it is not easy to find concrete examples in the children's literature, where a hero-protagonist would literally express compassion for a defeated villain.

On the contrary, some original Russian folk tales, known by many children even before kindergarten, can arguably be classified as horror stories. And although the violence in their plots tends not to be very graphic, it is not always transparent at which point the violence is morally justified.

An example for this are the folk tales about Baba Yaga, an old evil witch living in the middle of the woods. According to the stories, she practices cannibalism and especially likes lost little children. Her house is standing on chicken legs, it moves around on command, and the fence around it is decorated with human skulls and bones.⁶⁴⁵ It is quite rare for any of her visitors to leave the house alive.

There are other popular Russian folk tales about Zmei Gorinich, a three-headed flying and fire-spitting dragon. These stories classically end with the protagonist killing the creature without raising a doubt about moral aspects of murder. On the contrary, the plot emphasizes his triumph, where the only moral justification of the murder could be the hero's intention to save others from the harm caused by the monster.

It is not uncommon for folk tales around the world to have dark story lines. "Hansel and Gretel", "The Goose Girl" and other stories collected by the Brothers Grimm are known for cruel and twisted plots. Even their 'child friendly' adaptation might seem quite intense for some readers. However, the issue is whether those stories are meant to be legally age-restricted, considering that they have been told to children for generations. According to the existing law, it is quite arguable if those tales would pass for the rating "0+" or "6+".

⁶⁴⁵ Johns, Andreas, *Baba Yaga: The Ambiguous Mother and Witch of the Russian Folktale* (International Folkloristics), International Academic Publishers; New Edition, 2004.

Some authors of children's literature even claim that children want to be scared. Popular Russian author Eduard Uspenski once requested young readers to send him letters with horror stories they created or heard from friends. Surprisingly, he received a huge number of letters. After selecting and editing some of those stories, Uspenski and another author Andrei Usachev published the book "Creepy horror stories for children" (Russian: "Жуткие детские страшилки").⁶⁴⁶ The book was one of the best-selling children's books in the 90s in Russia. Though their content was not realistically graphic, the stories included several descriptions of violence and death scenes without any moral story or condemnation. It is obvious that those stories were written simply to scare the reader. Though the editors did not provide the age of children involved in the creation of the book, its new publication in 2019 was rated as "12+".

The child protection law also makes a remark that certain information might be "justified by its genre and (or) plot" but does not explain exactly what genres and plots might justify "non-naturalistic images or description of physical and mental violence". That gives another opportunity for different interpretations.

In the further Art. 16, the law regulates the distribution of informational products prohibited for children, including pornography. It states that the first and last pages of the newspaper, the cover of other printed materials or packaging of products that involve information prohibited for children under the federal law, should not contain information inflicting harm to the health and (or) development of children.⁶⁴⁷ In stores accessible for under-aged individuals information products in the form of printed materials that contain prohibited information must be distributed in closed packages.⁶⁴⁸ The prohibited information must not be distributed in children's educational institutions and medical institutions, resorts, sports and cultural organizations, organizations for recreation and rehabilitation of children.⁶⁴⁹ Selling, renting, and issuing from public libraries products containing the information prohibited for children is not allowed.⁶⁵⁰ Announcements for films rated "18+", may

⁶⁴⁶ Успенский, Эдуард; Усачев, Андрей, Самые страшные ужасы, Издательство АСТ, 2019.Р. 6-7.

⁶⁴⁷ ФЕДЕРАЛЬНЫЙ ЗАКОН "О ЗАЩИТЕ ДЕТЕЙ ОТ ИНФОРМАЦИИ, ПРИЧИНЯЮЩЕЙ ВРЕД ИХ ЗДОРОВЬЮ И РАЗВИТИЮ" от 29.12.2010 N 436-ФЗ, Art. 16 (1)

⁶⁴⁸ Art. 16 (2)

⁶⁴⁹ Art. 16 (3)

⁶⁵⁰ Art. 16 (6)

only reveal fragments that do not contain any restricted information according to the law.⁶⁵¹

The Federal Law does not apply to:⁶⁵²

- 1) informational products containing scientific, technical, statistical information;
- 2) the dissemination of information which is exempt from access restrictions under the Federal Law of July 27, 2006 N 149-ФЗ "On Information, Information Technologies and the Protection of Information" and other federal laws;
- 3) information products that have significant historical, artistic or other cultural value for society;
- 4) advertisement.

In order to fulfil the requirements of the child protection law, the Federal Law of March 13, 2006 "On Advertising"⁶⁵³ established rules and requirements for public commercials. The advertising must not: encourage to commit unlawful acts; call for violence and cruelty; contain pornographic information⁶⁵⁴. Advertising also does not allow demonstrations of smoking and alcohol consumption; use of swear words, obscene and offensive images and other information restricted by the Federal Law "On the Protection of Children from Information Harmful to Their Health and Development" without specifying the category of this information product.⁶⁵⁵

Art. 21 prohibits advertisements which posit that the consumption of alcoholic beverages is essential for achieving social recognition, professional, athletic or personal success or contributing to an improvement in one's physical or emotional state; condemn abstinence from the use of alcohol; suggest that alcoholic products are harmless or beneficial to human health, including information on the presence of biologically active additives and vitamins in alcoholic products; mention that the use of alcohol is one of the ways to quench thirst; being addressed to the minors⁶⁵⁶.

⁶⁵¹ Art. 16 (9)

⁶⁵² Art. 1

⁶⁵³ Федеральный закон от 13.03.2006 N 38-ФЗ (ред. от 02.08.2019) "О рекламе" at http://www.consultant.ru/document/cons_doc_LAW_58968/

⁶⁵⁴ Ibid. Art. 5 (3)

⁶⁵⁵ Art. 5 (5)

⁶⁵⁶ Art. 21 (1)

Art. 12 (1) of the Federal Law “About information, information technologies and information protection”⁶⁵⁷ also secures child protection in the field of using information technologies.

Art. 15.1 establishes “the unified register of domain names, site indexes of Internet sites and network addresses allowing identification of sites on the Internet network containing information the distribution of which is prohibited in the Russian Federation”. The creation, formation, and maintenance of the register is carried out by the federal executive body that exercises control and supervision functions in the field of mass media, mass communications, information technologies, and communications, in the order established by the government of the Russian Federation.⁶⁵⁸

The grounds upon which informational sources may be included in the register are provided by Art. 15.1 (5). In order to be eligible for inclusion in the register, information has to contain a certain features, which according to the law are: pornographic images of minors and (or) advertisements that involve minors as performers for participation in entertainment events of a pornographic nature; information on methods of development, manufacture and use of narcotic drugs, psychotropic substances and their precursors, new potentially dangerous psychoactive substances, places of their acquisition, methods and places of cultivation of drug-containing plants; information on how to commit suicide, as well as calls for committing suicide; information that violates the law on the prohibition of the organization and conduct of gambling and lotteries using the internet and other means of communication⁶⁵⁹; information containing offers for the remote sale of alcohol products and (or) alcohol-containing food products, and (or) ethyl alcohol; information aimed to instigate, or involve by other means, minors in committing unlawful acts that pose a threat to their life and (or) health or to the life and (or) health of others.

⁶⁵⁷ Федеральный закон "Об информации, информационных технологиях и о защите информации" от 27.07.2006 N 149-ФЗ (последняя редакция), at http://www.consultant.ru/document/cons_doc_LAW_61798/

⁶⁵⁸ Art. 15.1 (2)

⁶⁵⁹ 11 ноября 2003 года N 138-ФЗ "О лотереях"

6.6.1 Cannibal Corpse Case

Cannibal Corpse has been mentioned in every analysis chapter of this thesis as one of most controversial metal bands, which provoked many scandals among parents, church representatives and followers, as well as legal matters. This chapter shows that in Russia, with its complicated political history and cultural background, the band also became a subject of controversy.

Although Russian courts do not have a comprehensive practice in dealing with heavy metal music, the case of Cannibal Corpse from November 28, 2014 is quite a controversial precedent.

The Oktyabrsky District Court of Ufa reviewed the case filed by the appeal of the prosecutor of the Oktyabrsky district of Ufa in defense of an indefinite number of people. The prosecution was supported by the Office of the Federal Service for Supervision of Information Technologies and Mass Communications in the Republic of Bashkortostan, the Office of the Federal Service for Supervision of Consumer Rights Protection and Personal Well-Being in the Republic of Bashkortostan. The task of the authorities was to determine whether the content of the band was appropriate for public display and distribution in Russia. In the final decision the court stated that the lyrics of Cannibal Corpse translated into Russian, illustrations to their songs and albums depicting cruelty, physical and mental violence, and justifying the permissibility of violence and cruelty, etc., had to be prohibited for distribution on the territory of the Russian Federation.⁶⁶⁰

The court decision was based on Art. 5 of the Federal Law “On the Protection of Children from Information Harmful to Their Health and Development”, Art. 5 (4) of the Federal Law “On Advertising”, pointing out that advertising should not: encourage commitment of illegal actions; call for violence and cruelty; contain pornographic information, and part 10.1 of Art. 5(4) that prohibits advertising that features content restricted by the law “On the Protection of Children”, without specifying the age category of that informational product.

Also, Art. 12 (4) of the Federal Law “On Information, Information Technologies and the Protection of Information” determines that the state regulation of information technology is performed according to the principles established to ensure the information security of children. Thus, Art. 15 (1) about the unified register of domain

⁶⁶⁰ Case № 2- 7493/2014 available at <http://www.gcourts.ru/case/29315622>

names, site indexes etc., containing information the distribution of which is prohibited in the Russian Federation, only reinforces the court decision to prohibit the lyrics and the artworks of Cannibal Corpse on the ground of:

- 1) decisions of the federal executive bodies authorized by the government of the Russian Federation, adopted in accordance with their competence in the manner established by the government of the Russian Federation, regarding distribution via the Internet:
 - i. materials with pornographic images of minors and (or) advertisements for involving minors as performers for participation in entertainment events of a pornographic nature;
 - ii. information on how to commit suicide, as well as calls for committing suicide;
- 2) a court decision that has entered into legal force on the recognition of information distributed through the Internet, information that is prohibited in the Russian Federation

It was concluded that the lyrics of Cannibal Corpse translated into Russian, as well as illustrations for their albums and songs contained the images of cruelty, physical and mental violence, justifying violence and cruelty. The provisions of the federal laws “On the Protection of Children from Information Harmful to Their Health and Development” and “On Advertising” were violated. Thus, the court ruled that distribution of the informational materials in question was to be prohibited in the Russian Federation.⁶⁶¹

However, several points of criticism could be levelled against the court decision. It mentioned only the distribution of lyrical translations, but not the original song texts in English, which still remain available online. Potentially, users who do not speak English can still easily access the meaning of the lyrics simply by using electronic translators.

Besides, the court did not ban the band from playing in Russia nor from broadcasting their music live or online. The decision therefore seems incomplete as a means of serving the child protection policy.

⁶⁶¹ Ibid.

6.6.2 Other child protection cases

On June 9, 2017, the Higher Court of Mordovia Republic examined an appeal of an individual entrepreneur on the decision of the judge of the Proletarian district court of the city of Saransk of the Republic of Mordovia of April 21, 2017. The entrepreneur was charged by Art. 6.17 (1) of the Code of Administrative Offences in violation of the legislation on the protection of children from information harmful to their health and (or) development.⁶⁶²

On March 30, 2017, a leading expert of the department of sanitary supervision wrote a protocol of administrative offence, according to which the entrepreneur obtained a batch of books “50 days before my suicide” by Stace Kramer for further commercial distribution. According to the expertise, the book contained information harmful to the health and development of children.

The judge of the district court found the entrepreneur guilty according to Art.6.17 (1) of the Code of Administrative Offences, taking into account the expert opinion that the book “50 days before my suicide” displays features that warrant its inclusion in the category of information products “18 +” rather than the category “16 +”.

However, the Higher Court of Mordovia Republic withdrew that decision, explaining that the objective side of the offence under Art. 6.17(1) of the Code of Administrative Offences is expressed via actions that violate the established requirements about the distribution among children of information products containing information, causing harm to their health and (or) development. It is not possible to understand from the protocol, when and in what terms the entrepreneur violated the child protection legislation. The Higher Court deemed that the regional court had drawn a false conclusion based on assumptions that purchasing the books of Stace Kramer proved the entrepreneur’s intention to sell or distribute those products.

On September 21, 2017, the Regional Court of Penza reviewed another appeal on the decision of the Pervomaisky Regional Court of Penza according to Art.6.17 (1) of the Code of Administrative Offences. The book store “Noviy Knizhniy” Ltd. (ООО "Новый Книжный") did not agree with the decision of the Pervomaisky Regional Court of Penza, pointing out that the conclusions were based on an examination that

⁶⁶² ВЕРХОВНЫЙ СУД РЕСПУБЛИКИ МОРДОВИЯ, РЕШЕНИЕ от 9 июня 2017 г. по делу N 7.1-31/2017

had been performed by a non-accredited expert, which rendered its findings inadmissible as evidence in the case.

Ltd “Noviy Knizhniy” had been distributing the book “Challenge. 70 trials that will change your life”, which had previously been rated “16+” by the publishing house. The Ltd claimed they never sold a copy to anyone under the age of 16. Besides, it stated that the distributor is not obliged to examine the content of the book, if the rating was already provided by the publisher.

The examination concluded that the book did not respond to the rating “16+”, and should have been rated “18+”. The following investigation revealed that the expert, who was the director of the Center for Psychology and corrective pedagogy, was accredited for the right to conduct examinations of information products (printed matters, as well as information disseminated through informational and telecommunication networks, including the Internet). The expert study found the book to contain statements which could be classified as information prohibited for dissemination in accordance with the rules the child protection law. Hence, the indicated sign “16+” did not match the actual content of the book. The Ltd was found guilty according to paragraph 1 of Article 6.17 of the Code of Administrative Offences.

6.7 Expert examination of Informational Products

As it was mentioned, the regulation of the work of expert examination is established by the Federal Law “On the Protection of Children from Information Harmful to Their Health and Development” in Art. 6. The article provides guidelines for exercising classification of information products. The experts are mainly tasked to define the nature of the work and determine how it could potentially affect children of different age groups.

Chapter 4 of the law “Expertise of information products” provides a detailed regulation of the order and performance of the examination. According to Art. 17 (5), persons with higher professional education and special knowledge, including in the fields of pedagogy, developmental psychology, developmental physiology, and child psychiatry, may act as experts for conducting examination of information products, except for persons who:

- 1) have (had) a criminal record for committing violent crimes against a person, crimes against the sexual inviolability and sexual freedom of the person,

against family and minors, willful crimes against public health and public morality;

- 2) are manufacturers, distributors of information products submitted for examination, or their representatives.

According to Art. 18 (5) the information on the expert examination and its results are posted by the federal executive body authorized by the government of the Russian Federation on its official website within two business days from the date of receipt of the expert opinion.

The procedure for the expert examination is established by order of the Ministry of Communications of Russia⁶⁶³ (the federal executive body authorized by the Government of the Russian Federation) in compliance with the requirements of the Federal Law.⁶⁶⁴ According to the order, the conditions for the examination are determined by the contract concluded by the customer with experts.⁶⁶⁵

During the examination, the experts need to address questions:⁶⁶⁶

- as to the presence of information harmful to health and (or) child development;
- on compliance or non-compliance of information products of a certain category information products;
- if the object of the study is information products marked by its manufacturer and (or) distributor a sign of information products;
- on compliance or on the discrepancy of the sign of information products of the category to which it belongs to.

6.8 Regulation of Pornography

Similar to the legislation in the USA and Germany, the Russian law does not provide a definition of pornography and the legal practice struggles with providing comprehensive interpretations.

⁶⁶³ Order of the Ministry of Communications of Russia of 08.29.2012 N 217 "On approval of the procedure examination of information products in to ensure information child safety (Registered in the Ministry of Justice of Russia 10.16.2012 N 25682)

⁶⁶⁴ Federal Law "On the Protection of Children from Information Harmful to Their Health and Development", Art. 17 (6)

⁶⁶⁵ Ibid. Sec.7

⁶⁶⁶ Ibid. Sec.10

The Federal Law “On the Protection of Children from Information Harmful to Their Health and Development”, discussed in the previous paragraph, attempts to establish the legal meaning of information of a pornographic nature. Art. 2 of the Federal Law describes it as “information presented in the form of a naturalistic image or description of the human genitals and (or) sexual intercourse, or sexual activity comparable to sexual intercourse, including such an act committed against an animal.”⁶⁶⁷ At the same time, “a naturalistic image or description is an image or description in any form and using any means of a person, animal, individual parts of the human body and (or) animal, action (inaction), event, phenomenon, their consequences, with attention being paid to details, anatomical details and (or) physiological processes.”⁶⁶⁸ As was discussed before, the law also imposes regulations on how pornographic materials may be disseminated in order to protect minors from obscenity.

Besides the federal legislation, Russian is a part of the International Convention for the Suppression of the Circulation of Traffic in Obscene Publications (12 September 1923), which aims to “to take all measures to discover, prosecute and punish any person engaged in committing any of the following offences”, “and agree that it shall be a punishable offence.”⁶⁶⁹ These offences include distribution, public exhibition, production of obscene objects; their import, convey or export; carrying as a part of business and advertisement.⁶⁷⁰

In order to reach the goals set by the International Convention, Art. 242 of the Russian Criminal Code established responsibility for “illegal production and dissemination of pornographic materials or objects”. According to Paragraph 1 of the article, the punishable action is “illegal production and (or) trafficking across the state border of the Russian Federation for the purpose of distribution, public demonstration or advertising or the distribution, public demonstration or advertising of pornographic

⁶⁶⁷ ФЕДЕРАЛЬНЫЙ ЗАКОН “О ЗАЩИТЕ ДЕТЕЙ ОТ ИНФОРМАЦИИ, ПРИЧИНЯЮЩЕЙ ВРЕД ИХ ЗДОРОВЬЮ И РАЗВИТИЮ” от 29.12.2010 N 436-ФЗ

⁶⁶⁸ Ibid.

⁶⁶⁹ International Convention for the Suppression of the Circulation of Traffic in Obscene Publications (September’12 1923), Art.1.

⁶⁷⁰ Ibid.

materials or objects.”⁶⁷¹ Art. 242.1 establishes responsibility for production and distribution of materials or objects with pornographic images of minors.

However, in spite of a strict control of pornography, the Russian legal practice has neither succeeded in providing its legal definition, nor a legal definition for ‘obscenity’.

After the USSR collapsed, so-called ‘obscene’ films started leaking into the country, along with music, mainstream films and fashion. Back then, there was no law that officially banned pornography in Russia. In order to define whether an object or material was pornographic, a complex expert examination was required which would involve experts such as art historians, specialists in the field of film and video art or television, related to the field of questionable materials.

The need for such examinations was emphasized by decisions of the highest courts, however the courts themselves did not attempt to provide any legal definition or interpretation of pornography. Even today, with Russia being a part of the Convention for the Suppression of the Circulation of Traffic in Obscene Publications, and partially having adjusted the local legislation to meet its requirements, the courts have not provided a definition of pornography, instead relying on expert opinions.

There were several attempts since the mid-1990s to develop a definition of pornography and the related matters, however, none of the proposed bills have been approved.⁶⁷² The academic understandings of pornography is different than the definition from the child protection law. According to Droshkov, pornography is “obscene, cynical portrayal of the sex life of people. Unlike erotic images in pornography, attention is focused on the contacts of the genitals the main content is an image of the anatomical or physiological needs of sexual relations.”⁶⁷³ He also explains that in Russia only the distribution and production of pornographic materials without a proper permission is illegal. However, in the absence of legislative acts regulating the distribution of such products and authorities to issue such permits, any production and distribution pornographic materials is illegal.

⁶⁷¹ Russian Criminal Code, Art. 242 (1)

⁶⁷² Осокин Р. Б. Порнография: опыт легального, доктринального и судебного толкования // Юридическая наука и практика: Вестник Нижегородской академии МВД России. — 2014. — Вып. 1 (25). — ISSN 2078-535

⁶⁷³ Комментарий к Уголовному кодексу Российской Федерации (постатейный) / Отв. ред. В.М. Лебедев. — М. : Юрайт-Издат, 2007.

The Constitutional Court also did not address that question, maintaining the practice of the lower courts to rely on experts in every single case. Simultaneously, experts, who have no legal guidelines, are not only obliged to provide a legal interpretation of questionable materials but also to give a definition of pornography itself.⁶⁷⁴ This leads to confusion because each of the experts might have their own definition, based on their personal vision and experience. Thus, it is questionable if such experts are capable of supplying objective and impersonal interpretations.

For example, when Ltd. 'Pulsar' requested a rental certificate from the Ministry of Culture for several American erotic films, the Ministry rejected the request. It was explained that according to the guidelines on age classification for audio/visual products, established by the Order of the Ministry of Culture on March 15, 2005 (N. 112), there was no need to register rental certificates for films with pornographic content. The Arbitration Court of Moscow supported the position of the Ministry of Culture.⁶⁷⁵ Meanwhile, according to the Arbitration Court of Appeal No. 9, since the contemporary legislation did not define pornography, the question of material classification had to be solved by the expert investigation.⁶⁷⁶

In the end, after the Federal Arbitration Court of Moscow had examined the case, it withdrew the decision of the Arbitration Court of Appeal N. 9 and restored the first decision of the Arbitration Court of Moscow. The cancellation was motivated by the wrong interpretation of the Order of the Ministry of Culture, performed by the Arbitration Court of Appeal N. 9. It was pointed out the need of a written conclusion from the competent authorities providing analysis of questionable scenes on the subject of pornography.⁶⁷⁷

6.9 Blasphemy Law in Russia

As this chapter has revealed, the Russian Orthodox Church and some of its dedicated followers have repeatedly come into conflicts with heavy metal. The controversy

⁶⁷⁴ Осокин Р. Б. Порнография: опыт легального, доктринального и судебного толкования // Юридическая наука и практика: Вестник Нижегородской академии МВД России. — 2014. — Вып. 1 (25). — ISSN 2078-535

⁶⁷⁵ Решение Арбитражного Суда г. Москвы от 17 Мая 2011г. по делу N. А40-12901/11-122-5

⁶⁷⁶ Постановление Девятого Арбитражного апелляционного суда от 2 августа 2011 N. 09 АП-16655/2011 по делу N. А40-12901/11-122-5.

⁶⁷⁷ Постановление ФАС Московского округа от 20 ноября 2011г. по делу N. А40-12901/11-122-5.

touches not only issues of free speech and artistic expression but also the freedom of conscience.

The Constitution of 1993 and the Federal law on Freedom of Conscience and Religious Associations of 1997⁶⁷⁸ declared freedom of conscience and equality before the law, regardless of religion or belief. The law from 1997 outlines that although the Christian Orthodox religion has always been significant for the historical, cultural, and spiritual development of Russia, respect for non-Orthodox Christianity, Islam, Buddhism, Judaism, and other religions is also an integral part of the historical heritage of the country. The law considers it important to promote mutual understanding, tolerance, and respect in the matters of freedom of conscience and freedom of religion.⁶⁷⁹ Art. 148 of the Russian Criminal Code established responsibility for “public actions expressing disrespect for society and committed in order to offend the religious feelings of believers.”⁶⁸⁰

Issues of insulting religion, religious feelings, and other forms of sacrilege became a subject of debate in the public media after the punk rock group Pussy Riot held “a punk prayer” in the Cathedral of Christ the Saviour in 2012. That same year, a draft of a new federal law criminalizing insulting the feelings of believers and desecrating shrines was submitted to the State Duma. The legal draft as supported not only by the majority of Christian and Muslim clergies or religious activists but also by common citizens professing religious beliefs.⁶⁸¹

Previously, actions related to blasphemy had been regulated by Art. 213 “Hooliganism” and Art. 214 “Vandalism” of the Russian Criminal Code. Art. 213 defines ‘hooliganism’ as “a savage violation of public order with expression of a clear

⁶⁷⁸ Федеральный закон "О свободе совести и о религиозных объединениях" от 26.09.1997 N 125-ФЗ (последняя редакция) at http://www.consultant.ru/document/cons_doc_LAW_16218/

⁶⁷⁹ Федеральный закон "О свободе совести и о религиозных объединениях" от 26.09.1997 N 125-ФЗ (последняя редакция) at http://www.consultant.ru/document/cons_doc_LAW_16218/

⁶⁸⁰ "Уголовный кодекс Российской Федерации" от 13.06.1996 N 63-ФЗ (ред. от 02.12.2019), Статья 148. Нарушение права на свободу совести и вероисповеданий at http://www.consultant.ru/document/cons_doc_LAW_10699/3f061fb01a04145dc7e07fe39a97509bd2da705f/

⁶⁸¹ Домбровская О.А. ПРАВОВАЯ ЗАЩИТА ЧУВСТВ ВЕРУЮЩИХ // Научное сообщество студентов XXI столетия. ГУМАНИТАРНЫЕ НАУКИ: сб. ст. по мат. VI междунар. студ. науч.-практ. конф. № 6. URL: <https://sibac.info/archive/humanities/6.pdf> (дата обращения: 18.12.2019)

disrespect for society,”⁶⁸²which might be driven by motives of political, ideological, racial, national or religious hatred.⁶⁸³ Art. 214 defines ‘vandalism’ as “a desecration of buildings or other structures, damage to property on public transport or in other public places,”⁶⁸⁴which likewise might be driven by motives of political, ideological, racial, national or religious hatred.⁶⁸⁵ However, both of those articles primarily served to protect the public order and safety rather than religious feelings of individual citizens or groups.

The new draft presented to the State Duma aimed to establish responsibility for insulting religious beliefs and feelings of citizens, desecration of objects of religious pilgrimage, and places of religious rites and ceremonies. The draft of the new law was, however, not accepted due to a number of reasons. First of all, it contradicted with the principles of the Constitution and the International Law, as it lacked clear definitions of what could be assumed as “religions that are an integral part of the historical heritage of the peoples of Russia”. Considering the multicultural and ethnic diversity of Russia, it was not clear which religions should be deemed integral parts of the historical heritage. Second, the draft also did not succeed in giving a legal definition for religious feelings, and third, similar regulations were already provided by Art. 282 of the Criminal Code, establishing responsibility for humiliation of human dignity based on religion.⁶⁸⁶ The question for the legislator was whether it was relevant to distinguish “insult of religious feelings” into a separate legal category.

⁶⁸² "Уголовный кодекс Российской Федерации" от 13.06.1996 N 63-ФЗ (ред. от 02.12.2019), Статья 213. Хулиганство, в ред. Федерального закона от 08.12.2003 N 162-ФЗ, available at http://www.consultant.ru/document/cons_doc_LAW_10699/9d692997b8cddf26782684f489987701b0daacf3/

⁶⁸³ Ibid. Статья 213 б) (в ред. Федерального закона от 03.04.2017 N 60-ФЗ)

⁶⁸⁴ "Уголовный кодекс Российской Федерации" от 13.06.1996 N 63-ФЗ (ред. от 02.12.2019), Статья 214 (1) Вандализм, в ред. Федеральных законов от 08.12.2003 N 162-ФЗ, от 07.03.2011 N 26-ФЗ, от 07.12.2011 N 420-ФЗ, available at http://www.consultant.ru/document/cons_doc_LAW_10699/16c58fcfeaddf59b31e94654ddfca3bdcdf26657/

⁶⁸⁵ Ibid. Статья 214 (2) (в ред. Федерального закона от 24.07.2007 N 211-ФЗ)

⁶⁸⁶ УК РФ Статья 282. Возбуждение ненависти либо вражды, а равно унижение человеческого достоинства, available at http://www.consultant.ru/document/cons_doc_LAW_10699/d350878ee36f956a74c2c86830d066eafce20149/

Considering that Russia is a secular state by the Constitution, it would be contradictory to establish a so-called institute of ‘protection of religious feelings’ neglecting the feelings of atheists, deists, agnostics, and other forms of spiritual attitudes. Hence, it would be appropriate for the legislation to deal with blasphemy in order to protect public safety and human dignity in general, rather than to protect a particular religion and its followers.

On 11 June 2013 the amendment to Art. 148 of the Criminal Code was approved by the State Duma. The article titled “Violating the rights of freedom of conscience and confessions” was devoted to protecting the constitutional order according to Art. 28 of the Constitution, which guarantees freedom of conscience and religion, including the right to profess individually or collectively or not to profess any religion, the right to choose and spread religious beliefs and act in accordance with them freely. However, that statement is relevant only for those associations and ceremonies that are not prohibited by law.⁶⁸⁷

The objective side of the criminal offence is represented by the unlawful prevention of: 1) the activity of a religious organization or 2) the performance of a religious ceremony. The method of obstruction is not specified. It may depend on who is hindered by the organization or persons. This can be the use of violence or the threat of violence, restriction of freedom, damage to or destruction of things, etc. with the aim of forcing a person to refuse to perform a religious ceremony or to participate in a religious organization, refusal to register a religious organization, intentionally destroying or damaging its property, etc.⁶⁸⁸

A religious organization is recognized as a voluntary association of citizens of the Russian Federation or other persons permanently and legally living in the territory of the Russian Federation, formed for the purpose of joint confession and dissemination of faith and in the manner prescribed by law registered as a legal entity.⁶⁸⁹ However, it does not constitute the crime under consideration that impedes the activity of officially unregistered religious organizations, totalitarian sects, or the performance of pseudo-religious rites that infringe on the personality and rights of citizens.⁶⁹⁰ Religious ceremonies include, for example: worship, baptism, wedding, communion,

⁶⁸⁷ Комментарий к УК Лебедев, available at <https://studfile.net/preview/2042372/page:24/>

⁶⁸⁸ Ibid.

⁶⁸⁹ Ibid.

⁶⁹⁰ Ibid.

confession, participation in prayer, funeral services, religious processions, pilgrimages, etc.⁶⁹¹

The legislation of religious organizations and the right of freedom of religion are debatable due to some contradictory statements that provide a lot of room for interpretation. Fedorova argues that since the category “insulting religious feelings of believers” is introduced to the Russian criminal law for the first time there is a lack of correspondent judicial practice, and so it is not possible to give a clear legal definition what “religious feelings” really are.⁶⁹² She defines “religious feelings” as “a system of life goals, values, attitudes, prohibitions and permissions by which a person is guided in connection with involvement in a particular religious teaching.”⁶⁹³

Fedorova also points out that it is problematic to provide a legal definition of the term “believers.” She argues that the Federal Law on Freedom of Conscience and Religious Associations does not include that term, but rather prohibits any actions that pursue a deliberate insult of the feelings of citizens in connection with their attitude to religion.⁶⁹⁴ It follows that insulting the feelings of atheists and agnostics should be also be prohibited.⁶⁹⁵ However, the disposition of Art. 148 of the Criminal Code contains discriminatory provisions, speaking of an insult to the feelings of exclusively believers, but not atheists.⁶⁹⁶

In order to determine whether an action constitutes a criminal offence according to Art. 148(1), it is important to identify whether the action had a direct intention to insult the feelings of believers. A perpetrator must be aware of the presence of the believers (regardless of their religion) and desire to offend their feelings.⁶⁹⁷ Insult of religious feelings of the believers can be defined as an intentionally humiliating, negative assessment of a religious doctrine that has followers united in religious

⁶⁹¹ Ibid.

⁶⁹² Fedotova, Yulia, ОСКОРБЛЕНИЕ РЕЛИГИОЗНЫХ ЧУВСТВ ВЕРУЮЩИХ: ПРОБЛЕМЫ ПРИМЕНЕНИЯ СТАТЬИ 148 УК РФ, article available at <https://cyberleninka.ru/article/n/oskorblenie-religioznyh-chuvstv-veruyuschih-problemy-primeneniya-stati-148-uk-rf/viewer>

⁶⁹³ Ibid.

⁶⁹⁴ Ibid; О свободе совести и о религиозных объединениях: Федеральный закон от 26 сентября 1997 г. № 125ФЗ // СЗ РФ. 1997. № 39. Ст. 4465.

⁶⁹⁵ Fedorova

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid.

organizations or groups in accordance with the laws of Russia or another state.⁶⁹⁸ The qualification of the crime is based upon two elements: the actual insult and the disrespect for society.⁶⁹⁹

Shnitenkov also criticizes the amendment. According to him, citizens who do not profess any religion and have no religious beliefs are technically capable of expressing their opinion about religion by Art. 28 of the Constitution, but such actions can result in a criminal or administrative responsibility.⁷⁰⁰ For example, if an atheist speaks out about their views publicly, they might be found guilty according to the new Art. 148 of the Criminal Code.

Art. 5.26 of the Russian Code of Administrative Offences was also changed. It establishes responsibility for “obstructing the exercise of the right to freedom of conscience or freedom of belief, including the adoption of religious or other beliefs, or refusal thereof, as well as obstructing the entry into a religious association or the exit therefrom”⁷⁰¹ and “insulting religious feelings of citizens or desecration of articles, marks and emblems relating to the world outlook symbols thereof.”⁷⁰²

Shnitenkov noticed that after the amendments became legally enforced, the emphasis the regulation was changed. Specifically, he argues that the new law addresses insults against religious beliefs through the lens of the freedom of conscience, whereas prior to the changes Art. 5. 26 (2) of the Code of Administrative Offences had considered insulting of religious beliefs separately from violating the right of freedom of conscience and freedom of religion⁷⁰³. Thus, he posits that this contradicts with Art. 28 of the Constitution, which guarantees “the freedom of conscience, the freedom of religion, including the right to profess individually or together with other any religion or to profess no religion at all, to freely choose, possess and disseminate religious and

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid.

⁷⁰⁰ Шнитенков А.В. , Оскорбление религиозных чувств верующих: проблемы законодательной регламентации уголовной ответственности, Современное право N.3 2014, Стр. 107-109, available at <https://www.sovremennoepravo.ru/m/articles>

⁷⁰¹ Code Of Administrative Offences Of The Russian Federation No. 195-Fz Of December 30, 2001, Art. 5.26 (1) available at <https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru073en.pdf>

⁷⁰² Ibid. Art. 5. 26 (2).

⁷⁰³ Шнитенков А.В. , Оскорбление религиозных чувств верующих: проблемы законодательной регламентации уголовной ответственности, Современное право N.3 2014, Стр. 107-109, available at <https://www.sovremennoepravo.ru/m/articles>

other views and act according to them.”⁷⁰⁴ The author compares Art. 148 of the Russian Criminal Code to Sec. 166 (1) of the German Criminal Code, which provides a responsibility for defamation of religion or ideology publicly or through dissemination of written materials in a manner that is capable of disturbing the public peace.⁷⁰⁵ Hence, the danger of such actions is linked to incitement of religious hatred, which eventually violates the public order, rather than freedom of conscience or religion.

6.9.1 Pussy Riot Case

The event that provoked the development of legal prosecution for insulting of the feelings of believers was a performance by feminist punk band Pussy Riot in the Cathedral of Christ the Saviour in Moscow. The band had been famous for its guerrilla performances in public places, filming themselves and after-editing audio tracks, posting music videos on the Internet.⁷⁰⁶ Their lyrics are dedicated to feminism, LGBT rights, and the opposition to Putin’s political discourse.⁷⁰⁷

On February 21, 2012, five members of the band performed a so-called “punk prayer” in front of several witnesses visiting the Cathedral at that time. The faces of the activists were covered with colorful ski masks. They rushed to the altar in an attempt to perform the song «Богородица, Путина прогони» (“Mother of God, drive Putin away”), as a protest against the potential re-election of Vladimir Putin. The activists were stopped by the security and banished from the Cathedral. However, they still succeeded to make a music video, which became available on YouTube.⁷⁰⁸

On March 3, 2012 Nadezhda Tolokonnikova and Maria Alyokhina were arrested and charged with hooliganism. The third member, Yekaterina Samutsevich was arrested on March 16. On August 17, 2012 they were convicted of hooliganism motivated by

⁷⁰⁴ The Russian Constitution, Art. 28, available at <http://www.constitution.ru/en/10003000-03.htm>

⁷⁰⁵ German Criminal Code, available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1483

⁷⁰⁶ Langston, Henry, (March 2012). *"A Russian Pussy Riot"*. *Vice*. Archived from the original on October 27, 2012. Retrieved December 18, 2019. at https://www.vice.com/en_us/article/kwnzgy/A-Russian-Pussy-Riot

⁷⁰⁷ Ibid.

⁷⁰⁸ The performance of Pussy Riot at Christ the Saviour Cathedral (original video) available at <https://www.youtube.com/watch?v=grEBLskpDWQ> and the musical version at <https://www.youtube.com/watch?v=ALS92big4TY>

religious hatred according to Art. 213 (2) and sentenced to two years imprisonment by the Khamovnichesky District Court in Moscow.⁷⁰⁹ On October 10, after filing an appeal, Samutsevich was released on probation and her sentence was suspended, but the other two members remained in prison.⁷¹⁰

Despite the fact, that two expert testimonies argued that their actions did not contain any religious hatred, the judge relied only on the conclusion of the third expert, which supported the side of the prosecution.⁷¹¹ Some of the experts were claiming the case was a disguised political persecution due to the fact that the song performed in the Cathedral was targeted against Putin.⁷¹²

Vladimir Putin himself refused to comment the decision of the court but stated that the modern Russia must protect the feelings of believers, especially after religion and faith had been oppressed during the Soviet regime.⁷¹³

Though the case garnered major attention in the western media, with many western political activists and musicians speaking out for the release Pussy Riot, the decision remained unchanged. Tlokonnikova and Alyokhina were released on December 23, 2013, after the State Duma approved their amnesty.⁷¹⁴

In the legal sense, the case revealed several issues: first, it raised questions as to whether the actions of Pussy Riot could be qualified as hooliganism in general; second, whether those actions were motivated by religious hatred. According to Art. 213 (1) of the Russian Criminal Code the objective side of the hooliganism is a

⁷⁰⁹ Приговор № 1-170/2012 от 17 августа 2012 г. по делу № 1-170/2012, at https://sudact.ru/regular/doc/XhWjrcB5zAN4/?page=2®ular-court=®ular-date_from=®ular-case_doc=®ular-lawchunkinfo=®ular-workflow_stage=®ular-date_to=®ular-area=®ular-txt=pussy+riot&_=1577142241513®ular-judge=&snippet_pos=26762#snippet

⁷¹⁰ Pussy Riot member Samutsevich sentence reduced to probation, at http://www.rapsinews.com/judicial_news/20121010/264941012.html

⁷¹¹ Щетинин Д., ПРАВО НА СВОБОДУ СОВЕСТИ И ЗАЩИТА ЧУВСТВ ВЕРУЮЩИХ: МЕЖДУ БОГОХУЛЬСТВОМ И СВОБОДОЙ СЛОВА, НАЦИОНАЛЬНЫЙ ИССЛЕДОВАТЕЛЬСКИЙ УНИВЕРСИТЕТ «ВЫСШАЯ ШКОЛА ЭКОНОМИКИ» Факультет права, Москва 2017. Р. 31

⁷¹² Ibid.

⁷¹³ Интервью с В.В. Путиным. [Электронный ресурс] // Russia Today. URL: <https://www.youtube.com/watch?v=GaUwM3eScyw>

⁷¹⁴ Staglin, Doug (December 23, 2013). "Freed Pussy Riot members call Russia amnesty a PR stunt". *USA Today*. Retrieved December 23, 2013 at <https://eu.usatoday.com/story/news/world/2013/12/23/pussy-riot-member-released/4173379/>

violation of public order, expressing a clear disrespect for society, which is committed by the use of weapons or objects used as weapons⁷¹⁵ or motivated of political, ideological, racial, national or religious hatred or enmity, or motivated by hatred or enmity against any group.⁷¹⁶ As a matter of fact, none of the performing members used a weapon or any other objects as a weapon, nor did they demonstrably intend to threaten or harm anyone in the Cathedral. It is also hard to qualify their actions as religious hatred because they were not demonstrating any protest against the Church or religion. The messages were clearly political, and the Cathedral was used as a public place for reaching a bigger audience.

As it was mentioned earlier, due to the reason that the case of Pussy Riot was hardly classified by the existing provisions of the Criminal Code at that time, the new amendments were made by the State Duma criminalizing “insult of religious feelings of the believers.” The amendment clearly contradicts with the constitutional recognition of Russia as secular state and freedom of conscience, however the amendment remains valid until today.

6.9.2 Case of Sokolovsky

After the implementation of the new amendment to the Criminal Code, the courts had to deal with a new problem of qualifying actions as “insults of religious feelings” and determining what kinds of actions would be instigating religious hatred. The lesson learned from the case of Pussy Riot showed that it was easy to make a mistake during qualification of a potential misconduct by linking it to a wrong *corpus delicti*.

The case of Sokolovsky was another example of contradictions within Art. 148, which similar to the Pussy Riot case was intensely discussed by the media. On August 11, 2016, blogger Ruslan Sokolovsky published a video on YouTube, showing himself playing a game “Pokemon Go” in the Church on Blood in Honour of All Saints Resplendent in the Russian Land in Yekaterinburg. According to Sokolovsky, he was challenged to do that after the official TV channel “Russia 24” had reported about potential criminal liability for playing games in the church.⁷¹⁷ During the investigation, the blogger also stated that his video “ЛОВИМ ПОКЕМОНОВ В ЦЕРКВИ. ПОКЕМОН ГО

⁷¹⁵ Commentary to the Russian Criminal Code at <http://ukodeksrf.ru/ch-2/rzd-9/gl-24/st-213-uk-rf>

⁷¹⁶ Ibid.

⁷¹⁷ Verdict of the Verkh-Isetsy District Court of Yekaterinburg, 17 May 2017 at <https://zona.media/article/2017/05/17/sokolovsky-prigovor>

пранк” (“Catching pokemons in the Church. Pokemon Go prank”) was a form of protest against religious dogmas. Sokolovsky considered himself an atheist but claimed to have no intention to insult anyone or ignite religious hatred.⁷¹⁸

On September 2, 2016, Sokolovsky was arrested and accused of insulting religious feelings and incitement of religious hatred. The court took into account witness testimonies describing Sokolovsky as a person with extremist views on religion and his negative attitude towards religion and the church in the video.

The expert testimonials argued that the messages of Sokolovsky on his YouTube channel were creating a negative image of certain religious groups such as Christians and Muslims, as well as social groups like member of the clergy and feminists.⁷¹⁹ The way he used the expression “disease” and “low intelligence” was interpreted as presenting religious believers as people with mental issues. Portraying believers in such a negative light was seen as contributing to a type of hostility that could potentially provoke religious hatred.

The experts recognized that the video “Catching pokemons in the Church” contained signs of humiliation of religious dignity in the form of foul language used in the style of a church chant and demonstrating disrespect for the Temple, its ministers and Jesus, whom the video referred to as “a rare pokemon.”⁷²⁰

It was confirmed that Sokolovsky had insulted religious feelings of the believers by “denial of the existence of God”, “denial of the existence of the founders of Christianity and Islam”, “ridiculing of significant religious precepts and rites of Muslims”, “representation and endowment of Jesus Christ with the qualities of Pokemon as characters of not only a computer game and animated series, but also representatives of the bestiary of Japanese mythology”. Sokolovsky’s actions were recognized to have been both targeted and intentional.

The case presented a scientific, but not a legal definition of “believers” and “religious feelings”. The expert theologian Starostin, who worked on the case defined “believer” as “a person who recognizes the existence of God, who relates himself to a particular religion, fulfils the requirements and rules of church, and lives according to the commandments of God, with a religious outlook and worldview.” “Religious

⁷¹⁸ Ibid.

⁷¹⁹ Ibid.

⁷²⁰ Ibid.

feelings” are the emotional attitude of believers to hypostatic beings, attributed properties and relationships to sacred things, animals, plants, to each other, to themselves, feelings are the highest product of the development of emotional processes. Feelings are experiences with a meaning, they are always objective, connected with needs and motives, directly connected with religious faith, soldered to religious ideas, narratives, and therefore have acquired an appropriate orientation, meaning and meaning. Different human emotions (fear, love, admiration, reverence, joy, hope, expectation, etc.) are fused with religious ideas, and a believer experiences love for God, the fear of the God, the joy of communion with God, tenderness to the icon of the Mother of God, a sense of sinfulness, humility, compassion, reverence for the beauty and harmony of created nature, expectation of a miracle, hope for otherworldly retribution, fear, hostility, rejection of Satan, etc.⁷²¹ Though the definitions given by Starostin were not official, the court agreed with those comprehensive explanations.

Sokolovsky was found guilty under Art. 282(1) and Art. 148(1) of the Criminal Code and sentenced to three years and six months of imprisonment. However, the sentence was conditional, with a trial period of three years.⁷²²

It was pointed out by the court, that although the international law of human rights declared freedom of expression, at the same time it stipulated advocacy for national, racial or religious hatred that constitutes incitement of discrimination, hostility or violence; all forms of discrimination based on religion or belief should therefore be prohibited by law.⁷²³

Social protests against the sentence were intense. They claimed that the court was clearly defending the Church and religion by interpreting ‘denial of God’s existence’ as insult.

In December 2016, the Human Rights Center “Memorial” recognized Sokolovsky as a political prisoner. According to human rights activists, his statements deserved to be condemned but could not be a reason for criminal prosecution, because they did not present a serious danger to society.⁷²⁴

⁷²¹ Ibid.

⁷²² Ibid.

⁷²³ Ibid.

⁷²⁴ Дело «ловца покемонов» Руслана Соколовского at <https://zona.media/chronicle/sokolovsky>

6.9.3 Humiliation of religious attributes case

On February 6, 2016, an internet user by the nickname Bazhenov published a 30 second video named "Админы делают ремонт с Божьей помощью" ("Administrators repair with God's help") on social media platform VKontakte. The video showed a man, whose face was hidden under a ski mask, saying: "Hello guys! Today I will teach you how to repair with God's help ...". The man applies a lute on the wall with an Orthodox icon of the Mother of God. When the work is finished, he drops the icon on the floor and, after stepping on it, walks away.

On December 27, 2017, the Angarsk City Court of Irkutsk region recognized the video as extremist material insulting feelings of believers according to Art. (1) 148 of the Criminal Code. However, in the course of the investigation it turned out that the perpetrator, whose actual name was Rybachenko E.G., had committed the crime in a state of mental insanity and was released for a mandatory medical treatment.⁷²⁵ The court banned the video from distribution, pointing out that propaganda of social, racial, national, religious or linguistic hatred and superiority is prohibited by Art. 29 of the Constitution.

According to part 1 and part 6 of Art. 10 of the Federal Law "On Information, Information Technologies and Information Protection", any information is free if it meets the requirements established by the legislation of the Russian Federation. On the contrary, it is prohibited to disseminate any type of information aiming to promote war, inciting ethnic, racial or religious hatred and enmity, as well as other information which constitutes a criminal or administrative liability.

On January 19, 2019, the Kirovsky District Court of Irkutsk explained that the video contained actions and non-verbal information transmitted through these actions, as well as a verbalized obscene definition of the subject of worship, all of which

⁷²⁵ Решение № 2А-135/2019 2А-135/2019(2А-4262/2018;)-М-3949/2018 2А-4262/2018 М-3949/2018 от 16 января 2019 г. по делу № 2А-135/2019 at https://sudact.ru/regular/doc/7EbISH0g1Mxp/?regular-txt=%D0%BE%D1%81%D0%BA%D0%BE%D1%80%D0%B1%D0%BB%D0%B5%D0%BD%D0%B8%D0%B8%20%D1%87%D1%83%D0%B2%D1%81%D1%82%D0%B2%20%D0%B2%D0%B5%D1%80%D1%83%D1%8E%D1%89%D0%B8%D1%85®ular-case_doc=®ular-lawchunkinfo=®ular-date_from=®ular-date_to=®ular-workflow_stage=®ular-area=®ular-court=®ular-judge=&_id=1577496296476&snippet_pos=1122#snippet

offended the feelings of believers. It was argued that the video's communicative goals had been to show disrespect of the Russian Orthodox Church, discrediting the meaning of life for a religious believer of the Orthodox confession. The psychological and linguistic analysis proved that the video contained verbal and non-verbal moves which demonstrated hostility towards the icon of the Mother of God. The use of these tools is a violation of communicative ethics and must have certain limits. The video exposed a hostile attitude towards objects of worship, religious images, objects associated with the Christian religion. For that reason, it was deemed that it could incite religious hatred and propagated the inferiority of people based on certain religious views.⁷²⁶

According to Article 1 of the Federal Law "On Countering Extremist Activities", extremist activity or extremism is an incitement to social, racial, national or religious hatred; propaganda of exclusivity, superiority or inferiority of a person on the basis of his or her social, racial, national, religious or linguistic affiliation or attitude to religion; violation of the rights, freedoms and legitimate interests of a person and citizen depending on his or her social, racial, national, religious or linguistic affiliation or attitude to religion; public calls for the implementation of these acts or knowingly mass distributing extremist materials, as well as their production or storage for mass distribution; organization and preparation of these acts, as well as incitement to their implementation; financing of these acts or other assistance in their organization, preparation and implementation, including by providing training, printing and material and technical facilities, telephone and other types of communications or the provision of information services and documents intended for publication are recognized as extremist materials or information on other media calling for extremist activities or justifying or justifying the need for such activities, including the works of the leaders of the National Socialist Workers Party of Germany, the fascist party of Italy, publications substantiating or justifying national and (or) racial superiority or justifying the practice of committing war or other crimes aimed at the complete or partial destruction of any ethnic, social, racial, national or religious group.

According to the second part of Article 13 of the aforementioned Federal Law, materials are recognized as extremist by the federal court at the place of their

⁷²⁶ Ibid.

discovery, distribution or location of the organization that produced these materials on the basis of a statement by the prosecutor or in the proceedings in an administrative, civil, or criminal case.

6.10 Summary

Moral panic and hostility towards heavy metal in Russia was caused by many similar reasons as that was in the United States and Germany. The society perceived the music and its subculture as profane, promoting violence, destruction, self-harm, disrespect to norms, traditions, and a lack of personal values. However, the difference between Russia and two other countries lies within their cultural, political and social differences, defined by their opposing political ideologies during certain historical periods.

The soviet dogmas considered any of contemporary western music as a threat to socialism, and people listening to it were seen as traitors. Considering the original heavy metal narratives, intentionally provoking even the western audience, it is easy to assume how outrageous it was for most of the soviet listeners.

‘The approximate list of foreign musical groups and artists, whose repertoires contain ideologically harmful compositions’ of 1985, created by Soviet authorities, was compiled as a move against propaganda of violence, neo-nazism, racism and obscenity, which were also issues of concern in the west at the time. However, the same list also contained other categories of harmful materials which differed from the western social and political values, reflecting the soviet ideological standards: religious obscurantism, religious mysticism, cult of strong personality, anticommunism and anti-soviet propaganda. In spite of the fact that rock and heavy metal narratives were originally set against local (western) societies, these genres featured prominently in those parts of the list.

The collapse of the USSR erased a strict controlling regime, including censorship and the anti-west discourse at all levels, starting drastic social, cultural and legal transformations. The newly formed Russia was declared a democratic state and the Constitution from December 12, 1993, established its fundamental principles, including freedom of speech, freedom of opinion and freedom of conscience.

Local artists and musicians gained more freedom to draw inspiration from their western colleagues, who in turn started touring to Russia and other former Soviet states after the borders were officially open.

In spite of the drastic changes in paradigms, in many ways the social prejudices remained the same. On the other hand, local rockers and metallers found their own ways to protest against the issues present in their society at that time. Those ways manifested not only by copying western bands but also via developing original musical features that would later distinguish Russian rock and Russian heavy metal.

The shift of values also occurred on the constitutional level. Church and religion were not suppressed by the new regime, and atheism was no longer promoted, since the Russian Federation was declared a secular state. Overall, there was no more official ideology placed to the core of the constitutional background, and no official censorship from the side of the new government.

Restrictions of free speech and expression were established by the Federal laws in order to serve the public peace and the social well-being. Similar to the American and the German legislations, the new Russian law established a child protection policy and prohibited the propaganda of extremism.

The child protection law established the official rating system of video and audio materials as well a catalogue of features that characterized information recognized harmful for minors. Similarly to the German system of indexing, Russia created an official register of information harmful for children. However, unlike the German indexing procedure, material could be added to the register by court decisions.

Similarly to the USA and Germany, Russia does not have a concrete legal definition of pornography. But unlike the American practice, Russian courts also never attempted to provide a legal definition, instead relying on expert opinions in every particular case. In general, the regulation of pornography in Russia is substantially less developed than in the USA or Germany.

Extremism that incites national, ethnic or cultural hatred also falls under restrictions. The Kolovrat case proved how strict the law is towards art that contains extremist ideology, as well as towards the dissemination of any such art pieces to children.

Russian laws on blasphemy differ from how Germany and the USA address insults against religious confessions. Although the United States and Germany established legal responsibility for insulting religious confessions, the main target of their legislations is the protection of the public safety. On the contrary, the amendment to the Russian Criminal Code criminalized “insulting the feelings of the believers”. The research revealed that this amendment contradicts with the constitutional principle of freedom of conscience. The case studies also showed that any inaccurate public

comment about religion might be considered a criminal or administrative offence, including the denial of religious dogmas.

The latest precedents about metal bands being banned from performance, showed a massive influence of religious groups on the decision-making of club administrators. Moreover, the anti-metal position of religious activists was only bolstered by Art. 148 of the Criminal Code which officially criminalized blasphemy.

The case of banning a death metal band Cannibal Corpse lacked an adequate reasoning, as the banning only of lyrical translations would not prevent dissemination of the band's original messages and the music itself.

Due to these reasons, heavy metal music is an easy target in Russia, where the law of free speech and its restrictions contradict each other at many different levels.

7. Controversial Points and Practice of the European Court of Human Rights

Freedom of expression is all the more important when it comes to conveying ideas which offend, shock, or challenge the established order.

Women On Waves and Others v. Portugal,
no. 31276/05, § 42, 3 February 2009.

After the previous three chapters presented an analysis of heavy metal controversies in relation to freedom of speech, expression and their limits in the United States, Germany, and Russia, this chapter will review the position of the European Court of Human Rights on the related issues.

The European Court of Human Rights was established in 1959 and rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.⁷²⁷ The court monitors the respect of human rights in the 47 Council of Europe member states that have ratified the convention, including Germany (since July 13, 1950) and Russia (since February 28, 1996). The Court fulfils a supervisory function, and is not intended to replace the judicial authorities of the member states by any means.

The European Convention on Human Rights, signed on 4 November 1950, is an international treaty to secure fundamental civil and political rights in the member states. Its provisions are applied not only on the citizens but also on everyone within the state jurisdiction.⁷²⁸ The Convention secures the right of life, the right of fair hearing, the right of respect of private and family life, the protection of property, freedom of expression, freedom of thought, conscience and religion.

Art. 10 (1) particularly refers to freedom of expression as one of the most significant human rights secured by the Convention. According to the article, freedom of expression includes the right to hold an opinion and receive information and ideas freely without interference by the public authorities. This includes the right to express views publicly, for example at protests and demonstrations or through published

⁷²⁷ "The court in brief" (PDF). European Court of Human Rights. Retrieved 11 February 2013.

⁷²⁸ Ibid.

articles, books, radio, TV, the internet and works of art.⁷²⁹ Art. 10 (2) points out the responsibility arising from those freedoms, where freedom of speech and expression may be a subject of certain conditions, restrictions and penalties established by the law. Such restrictions are necessary in order to serve the democratic society, provide national security, protect territorial integrity or public safety, prevent disorder or crimes, protect health and morals, protect the reputation or rights of others, prevent the disclosure of information received in confidence, or maintain the authority and impartiality of the judiciary.⁷³⁰

The European Court of Human Rights refers to freedom of expression as “one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfillment.”⁷³¹ Nevertheless, in its implementation and enforcement, it is a complex right, bounded with limitations and exceptions.⁷³² Just as free speech is considered vital for the functioning democracy, its abuse can be a serious threat for its foundations,⁷³³ which is reflected by Art. 10 (2) pointing out the responsibility that comes with freedom of expression.

At its core, freedom of expression is essential for the progress achieved by the plurality of opinions. It applies to both information and ideas that may be favourably perceived as inoffensive and neutral, as well as to content that may offend, shock, or disturb.⁷³⁴ Moreover, the Court emphasizes that freedom of expression is “all the more important when it comes to conveying ideas which offend, shock or challenge

⁷²⁹ Equality and Human Rights Commission, <https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression>

⁷³⁰ Ibid.

⁷³¹ *Rekvényi v. Hungary* [GC], no. 25390/94, § 42, ECHR 1999-III.

⁷³² Schabas, William, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, P. 444

⁷³³ Ibid.

⁷³⁴ *Palomo Sánchez and Others v. Spain* [GC], nos 28955/06, 28957/06, 28959/06, and 28964/06, § 53, ECHR 2011; *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Lehideux and Isorni v. France*, 23 September 1998, § 55, Reports of Judgments and Decisions 1998-VII; *Murphy v. Ireland*, no. 44179/ 98, § 72, ECHR 2003-IX; *Monnat v. Switzerland*, no. 73604/01, § 55, ECHR 2006-X.

the established order.”⁷³⁵ Because only in the presence of pluralism and tolerance, can a democratic society exist and flourish.⁷³⁶

In order to supervise the respect of Art. 10, the Court goes beyond simply monitoring whether states make their decisions reasonably, carefully, and in good faith.⁷³⁷ The Court practice requires a precise examination of every particular case, in order to clarify the circumstances and if the decision was made by the state did respect of the law and balance of the constitutional values. The Court also must be ensure that the reasons provided by the national authorities justify its interference, and that the national standards applied in the decision were in conformity with the principles of Art. 10.⁷³⁸

The scope of the right of freedom of expression covers both natural and legal persons. No distinction is made with respect to the role played by those who exercise freedom of expression,⁷³⁹ or the aim pursued is to make profit.⁷⁴⁰ In addition to books, newspapers, magazines, and similar publications, freedom of expression applies to speeches, poems, brochures, leaflets, flags, press conferences, letters, slogans, caricatures, paintings, photographs, the constitutions of organizations, submissions by lawyers in court, advertisements, websites, and SMS or text messages sent by mobile phone.⁷⁴¹

The Convention points out not only the political meaning and importance of free expression but also refers to free artistic expression. Art also contributes to the exchange of political, cultural and social information, as well as new ideas of all

⁷³⁵ *Women On Waves and Others v. Portugal*, no. 31276/05, § 42, 3 February 2009.

⁷³⁶ *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos 21279/02 and 36448/02, § 45, ECHR 2007-IV; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 96, ECHR 2009; *Palomo Sánchez and Others v. Spain* [GC], nos 28955/06, 28957/06, 28959/06, and 28964/06, § 53, ECHR 2011; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 78, 7 February 2012.

⁷³⁷ Schabas, William, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, P. 451.

⁷³⁸ *Ibid.* P. 452

⁷³⁹ *Çetin and Others v. Turkey*, nos 40153/98 and 40160/98, § 57, ECHR 2003-III (extracts).

⁷⁴⁰ *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, § 34, 5 March 2009

⁷⁴¹ Schabas, P. 455.

kinds.⁷⁴² For example, published literary works can contribute to the debates of different political concerns. However, an artistic work does not have to be political or contributing to democratic debate to deserve the protection under Art. 10.⁷⁴³ The right of everyone to enjoy the arts affirmed in Art. 27(1) of the Universal Declaration of Human Rights. It can only be honoured to the extent that there is genuine freedom of artistic expression.⁷⁴⁴

Art. 10 is one of four provisions of the European Convention with a restrictions or limitations clause.⁷⁴⁵ Art. 10 (2) states “duties and responsibilities” arising from freedom of expression. The Court explained that those duties and responsibilities “are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the “rights of others.”⁷⁴⁶

It is an essential condition for any restrictions from Art. 10 that those restrictions must have a basis in domestic law.⁷⁴⁷ It includes ‘written law’, including various forms of delegated legislation, and unwritten law as interpreted and applied by the courts.⁷⁴⁸

Another important component of restrictions must be their legitimate purpose or aim.⁷⁴⁹ Those aims are named in Art. 10 (2), which includes the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. However, Schabas points out that in practice this part of the analysis is rarely very important. It is not uncommon for the Court to pass over the issue entirely and directly move to the main debate which revolves around the question whether a given restriction would be “necessary in a

⁷⁴² Karatasv. Turkey [GC], no. 23168/94, § 49, ECHR 1999-IV

⁷⁴³ Schabas, P. 464

⁷⁴⁴ Ibid.

⁷⁴⁵ Schabas, P. 467

⁷⁴⁶ Axel Springer AG v. Germany [GC], no. 39954/08, § 82, 7 February 2012; Aquilina and Others v. Malta, no. 28040/08, § 44, 14 June 2011; McVicar v. the United Kingdom, no. 46311/99, § 84, ECHR 2002-III; Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 66, ECHR 1999-III.

⁷⁴⁷ Ibid.

⁷⁴⁸ Leyla Sahin v. Turkey [GC], no. 44774/98, § 88, ECHR 2005-XI; Sanoma Uitgevers B.V. v. the Netherlands [GC], no. 38224/03, § 83, 14 September 2010

⁷⁴⁹ Schabas, P. 471

democratic society”, finding that the domestic law violated the international standards.⁷⁵⁰

Irrespective of this, in theory such definitions have received a precise description, including the meaning of how “necessary” such restrictions have to be in order to serve a democratic society. The adjective “necessary” implies the existence of a “pressing social need.”⁷⁵¹ Jayawickrama describes the balance of social needs in the following way:

“It is not simply a case of balancing the two interests as if they were of equal weight. Freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a powder keg.”⁷⁵²

The institute of “the protection of health or morals” mainly arises in cases involving artistic expression,⁷⁵³ though those matters are also closely related to commercial speech. For example, commercials targeting audiences under the age of thirteen are highly restricted because that group is most vulnerable for commercial manipulations.⁷⁵⁴ The ban on the advertisement of alcohol and tobacco can be justified on the ground that their consumption was undoubtedly harmful to human health.⁷⁵⁵ The protection of public morals is linked to the legislation against obscenity and the dissemination of pornographic materials, as well as the law providing prior restrictions and ratings for films.

⁷⁵⁰ Ibid.

⁷⁵¹ *Vogt v. Germany*, European Court, (1995) 21 EHRR 205; *Grigoriades v. Greece*, European Court, (1997) 27 EHRR 464; Jayawickrama, Nihal, *The Judicial Application of Human Rights Law*, P.709.

⁷⁵² Jayawickrama, Nihal, *The Judicial Application of Human Rights Law*, 2002, P.709.

⁷⁵³ Schabas, P. 472

⁷⁵⁴ *Irvin Toy Ltd v. Attorney General of Quebec*, Supreme Court of Canada, [1989] 1 SCR 927

⁷⁵⁵ Decision of the Constitutional Court of Lithuania, 6/96, 13 February 1997, (1997) 1 Bulletin on Constitutional Case-Law 61.

All the other restrictions in Art. 10 (2) can also be directly or indirectly linked to freedom of artistic expression, depending on subject, object, theme, and purpose of a given piece of art.

The following paragraphs will present the practice of the European Court of Human Rights on artistic freedom of expression, its interpretation and practical limits.

7.1 Regulation of Obscenity

It was previously mentioned that in the practical implementation of Art. 10 (2), the limits applied to freedom of artistic expression are predominantly related to the regulation of obscenity and public morals. For that reason, it is important to follow the practice of the European Court on the regulation of obscenity in order to distinguish the main moral boundaries of art, as well as their legal meaning and interpretation.

Kearns argues that it is unfortunate for artists that Art. 10 did not distinguish the right of artistic freedom into independent provisions. Instead, political, artistic, and commercial freedoms of speech are informally distinguished by the judiciary of the European Court of Human Rights.⁷⁵⁶ Kearns refers to other authors, who noticed the existence of an informal hierarchy of protection, that favors political expression first, followed by artistic freedom, then finally, freedom of commercial expression.⁷⁵⁷ However, he argues that this hierarchy does not reflect the real practice of the European Court, and that, in fact, artistic freedom has never been practically preferred over the need to protect morality.⁷⁵⁸

The European Court of Human Rights also does not use any system of precedent.⁷⁵⁹ For that reason each individual case has to be viewed and solved independently as according to the continental legal tradition. This complicates the practice even more, since the European Court does not operate under singular definitions but has to derive them from case to case. It is especially difficult dealing with moral-related terms such as ‘public health’ and ‘obscenity’. The European Court of Human Rights also pays

⁷⁵⁶ Kearns, Paul, *Essays on Culture and Legal Censure*, Oxford and Portland, Oregon, 2013, P. 124.

⁷⁵⁷ Ibid.; Colin Munro, *The Value of Commercial Speech* (2003) 62 Cambridge Law Journal 134–58 and Ivan Hare, ‘Is the Privileged Position of Political Expression Justified?’ in Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information* (Oxford, Oxford University Press, 2000) 105–21.

⁷⁵⁸ Ibid.

⁷⁵⁹ Ibid.

attention on every specific detail in every case to differentiate obscenity from other forms of sexual explicitness.

In *Handyside v. United Kingdom*,⁷⁶⁰ the applicant had published a book titled “The Little Red Schoolbook.” The book was written for children, and among other topics it included an advisory on sexual matters. The author was accused of publishing an obscene content according to Obscene Publications Act 1959 and the European Court of Human Rights judged that there was no breach of Article 10 of the Convention. The case presented the principle of subsidiarity which has to prevail when certain decisions have to be made only by the states.⁷⁶¹ Such cases include morality and its purpose for society which has to be developed within the local authorities.

Thus, in *Handyside v. United Kingdom* the Court reasoned that because there was no uniform conception of morals in the contracting states, that should be a matter of local concern only. It added that local authorities were in a better suited to gauging local moral feeling.⁷⁶² On the one one hand, the Court encouraged the contradicting states to cooperate in order to improve their local moral standards. On the other hand, Kearns criticizes that approach, arguing that it jeopardizes artistic freedom of the artists who may create morally controversial works.⁷⁶³ In that situation, the destiny of artists would entirely depend on possibly narrow-minded local opinions.⁷⁶⁴ The author also adds that: “Art is famous for being at the cutting-edge of moral development and reflects critically on the moralities of the status quo. It has a moral function in this regard that the Court in *Handyside* ignores. This function of art should not be made vulnerable at the hands of moral village politics. Artistic vision tends to transcend petty scruples and different concepts of morality in its own unique presentations. This generic artistic method of creating original moral directions is invaluable for society, not least in assisting it in challenging and undoing the evil of moral stagnation.”⁷⁶⁵

In *Muller and others v. Switzerland* the Court had to make another decision on a matter of obscenity. The complaint was brought as a claim of the violation of Art. 10, involving the confiscation of paintings exhibited by a painter, and the sentencing of

⁷⁶⁰ *Handyside v. United Kingdom* E Ct HRR A 24 (1976) 1 EHRR 737

⁷⁶¹ Kearns, P. 125.

⁷⁶² *Ibid*; *Handyside v. United Kingdom* E Ct HRR A 24 (1976) 1 EHRR 737

⁷⁶³ *Ibid*.

⁷⁶⁴ *Ibid*.

⁷⁶⁵ *Ibid*.

the artist and other applicants to a fine for obscene publications.⁷⁶⁶ The Court upheld a previous local decision to that effect, pointing out that the measures taken were necessary for maintaining the democratic order and did not violate Art. 10. Although the decision emphasized the importance of free artistic expression, even if the manifestations of this freedom of expression “offend, shock or disturb”, the particular circumstances of the case were not acceptable. The paintings in question were freely accessible at an exhibition which neither charged an admission fee nor imposed an age limit. For that matter, the European Court agreed that the measures taken were legitimate in order to prevent potential viewers from exposure to paintings prone to “offend the sense of sexual propriety of persons of ordinary sensitivity.”⁷⁶⁷ In regards to the confiscation, the Court ruled that it was not disproportionate since it was not absolute but merely of indeterminate duration.⁷⁶⁸ Thus, the owner could apply to have the confiscation order discharged or varied if the paintings in question no longer presented any danger or if some other, more lenient, measures sufficed to protect the interests of public morals.⁷⁶⁹

In *Akdaş v. Turkey*⁷⁷⁰ the complaint was brought to the European Court after Turkey had banned translations of classic works of literature which contained graphic descriptions of sex, which according to the plaintiff violated the right to freedom of expression. The novel “Les onze mille verges” (“The Eleven Thousand Rods”) was written by Guillaume Apollinaire and contained graphic sexual descriptions, including practices such as sadomasochism, vampirism, and pedophilia. The Turkish publisher was convicted and fined for distribution of obscene materials in Turkey, and filed a complaint to the European Court arguing that the book had been written by literary specialists, did not contain any violent overtones, and that its humorous and exaggerated tone was more likely to extinguish sexual desire than to arouse it.⁷⁷¹

⁷⁶⁶ Case Law Concerning Art. 10 of the European Convention of Human Rights, Human rights files, No. 18, Directorate General of Human Rights Council of Europe Publishing, 2001, P. 47.

⁷⁶⁷ Ibid.

⁷⁶⁸ Ibid; Muller v. Switzerland E Ct HRR A 113 (1991) 13 EHRR 212.

⁷⁶⁹ Ibid.

⁷⁷⁰ *Akdaş v. Turkey*, (application no. 41056/04) 16 February 2010.

⁷⁷¹ Ibid.; European Court of Human Rights judgements on the right to freedom of expression Bulletin XXIX: Focus on obscenity, public morals and freedom of expression, 20 January 2014.

The Court ruled that the conviction indeed violated Art. 10 of the European Convention. It commented that though moral standards may vary depending on the time and place, local authorities would be better suited to making judgments on such matters than the European Court, pointing that the Turkish authorities did not apply the correct standard. The book in question had been officially published in many languages since 1907 and considered as a ‘classic’ work of European literature. Thus, it was unnecessary to ban a literary work of such status and fine its publisher.

In *Karttunen v. Finland*⁷⁷² the European Court upheld the decision of a Finnish court on banning a collection photographs deemed to be child pornography from public display and confiscating them. The case was interesting due to the fact that those pictures of teenage girls and young women in sexual poses had been downloaded from publicly accessible internet sites and the artist intended to use her exhibition to criticize the free availability of such material online.⁷⁷³ The exhibition was closed, the pictures were confiscated, and the artist was convicted for distributing child pornography. However, because the artist had intended the exhibition as a protest, no fine or other sentence was imposed.⁷⁷⁴ She complained to the European Court of Human Rights that the conviction and confiscation of the photographs violated her right to freedom of expression.

The European Court ruled that the local decision did not violate the right of freedom of expression. Though the artist had intended to use those pictures for protest against the availability of child pornography on the internet, the possession and public display of child pornography still constituted a criminal offence in Finland. Though the actions of the artist could be justified due to the need to protect children against sexual abuse, their privacy and for other moral consideration, the applicant’s right to freedom of expression and her good intentions did not justify the possession and public display of child pornography.⁷⁷⁵

*Perrin v. United Kingdom*⁷⁷⁶ dealt with the conviction and 30-month prison sentence of a man who had published a website showing scenes of sex involving excrement,

⁷⁷² *Karttunen v. Finland*, application no. 1685/10, 10 May 2011.

⁷⁷³ European Court of Human Rights judgements on the right to freedom of expression Bulletin XXIX: Focus on obscenity, public morals and freedom of expression, 20 January 2014.

⁷⁷⁴ *Ibid.*

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Perrin v. United Kingdom*, application no. 5446/03, 18 October 2005.

including the eating of excrement, and fellatio.⁷⁷⁷ Though the website was published through a company registered in the United States, using the American servers and complying with US law, the publisher lived in the UK and was prosecuted under UK law on obscenity. He complained to the European Court of Human Rights claiming that his sentence violated the right to freedom of expression. He also argued that because the material was published through a US-based company and was published on US-based servers, he should not have been prosecuted under British law.

The European Court held that the publisher's conviction did not violate Art. 10 and because of the UK residence he was a legitimate subject of the British law. The Court pointed out that the UK law on obscenity was clear enough for the publisher to recognize that the materials he had shared stood in violation to the law. It was also noted that some of those materials were freely available for young people, which was obviously what the law of obscenity set out to prevent.

The fact that the publication was legal in the United States did not play any role since views on public morals and standards may differ from country to country. Besides, the publisher's aim was exceptionally commercial and the materials did not contain any artistic or literary value, nor did they contribute to any political debate.⁷⁷⁸ Based on these notable cases dealing with the problem of obscenity in artistic expression, it is necessary to acknowledge that the European Court itself is not entitled to provide any official definitions or universal guidelines for solving such issues for every member state. Though it has a duty to supervise the local courts with a high degree of common-sense, respecting democracy and human rights, the courts of the member states remain free to interpret which content should be recognized as 'obscene' or other related terms.

It can be inferred from these cases that the European Court of Human Rights distinguishes between "sexual" and "obscene" content wherein the latter is considered harmful for public morals and a healthy functioning society. Though the Court does not develop any official guidelines or judicial precedent, in *Akdaş v. Turkey* it proved that literary value of art pieces may overlap its sexually provocative nature, if that value is obvious or can be demonstrated.

⁷⁷⁷ Ibid.

⁷⁷⁸ Perrin v. United Kingdom, application no. 5446/03, 18 October 2005.

The Court also points out the legal protection of children and childhood, stating that no artistic intention can justify the dissemination of child pornography or exposure of sexually explicit materials to minors.

According to the common practice of the European Court, obscene materials, including those that are deemed to be art, are materials that have no other message or purpose but the intention to provoke a prurient interest. The targeted audience also plays a significant role. For example, in *Handyside v. United Kingdom* the Court was clear about the unacceptability of a purposeful presentation of sexually explicit topics to children. And in *Karttunen v. Finland*, besides the prohibition of child pornography, it critically pointed out that underaged viewers could freely access the exhibition.

Nevertheless, the burden of defining ‘obscenity’ and its constituent features completely falls to the courts of the member states. The European Court of Human Rights operates within the universal democratic legal principles, providing its guidelines for local judgements while respecting their national legal standards.

7.2 Blasphemy

Through the previous chapters issues of blasphemy appeared as a controversial topic not only due to their ambivalent social impacts but also because of blurry legal meaning and legal interpretation. Due to the fact that the European Court of Human Rights is not entitled to re-rule decisions of the courts of the member states, and with all the respect to the local legal standards, its guidelines still may contradict with the local values.

Blasphemy falls into that contradicting category. First, similar to obscenity, from a legal standpoint blasphemy for the most part is only loosely defined, and different legal cultures display substantial variance in their respective understandings of the term. Second, as illustrated by the previous chapters, some countries do not consider blasphemy itself as an illegal offence, unless it equates to public threats or other actions that breach the public order. That being said, some states, for example Russia, do distinguish “insult of religious feelings” in a separate corpus delicti. For that matter, such legislations may view blasphemy as a criminal or administrative offence, where the protected value is not the public peace, but personal feelings of people professing certain religious confessions.

In *Choudhury v. United Kingdom*⁷⁷⁹ the European Court decided that Art. 9 on freedom of religion was not breached by the United Kingdom, since the country's blasphemy law only afforded protection to Christians in spite of religious diversity in the country. The case also dealt with freedom of artistic expression because it revolved around Salman Rushdie's book "The Satanic Verses". According to Kearns, if the Court had come to the opposite conclusion, it would have had to examine whether the book contradicted with the local law, though the potential blasphemy in question was expressed only via artistic means and represented imaginary fictional events.⁷⁸⁰ He adds that it is still not clear whether the actions of fictional characters can be considered blasphemous, which is one step removed from literal blasphemy.⁷⁸¹ Besides, it would technically breach the right to artistic expression of authors if they were punished for blasphemous actions of fictional characters, but not real actions taken in person.⁷⁸²

In *Otto-Preminger Institute v. Austria*,⁷⁸³ the European Court supported the side of the State. The case involved a religiously controversial film, which caricatured iconic Christian figures. Though the film was not made for a huge audience, being exclusively created for art house cinemas, the European Court agreed with the position of Austria. The Court stated that the artistic value of film was not relevant and so Article 10 had not been breached.⁷⁸⁴ In spite of the fact that Article 17a of the Austrian Basic Law protects artistic freedom, the film in question named "Liebeskonzil" was seized and banned by the local provincial authorities on the grounds that cherished religious doctrines had been disparaged.⁷⁸⁵ Once again, the Court referred to local standards, specifying its duty to observe and supervise, but not interfere in the functioning of legal systems of the member states.

However, there is another case, one which was already reviewed in one of the previous chapters, that was brought before the European Court: the 'Pussy Riot case'. The main legal problem debated in the case was the questionable interpretation of the

⁷⁷⁹ *Choudhury v. United Kingdom* (1991) 12 Human Rights Law Journal 172.

⁷⁸⁰ Kearns, 2013, P. 126.

⁷⁸¹ *Ibid.*

⁷⁸² *Ibid.*

⁷⁸³ *Otto-Preminger Institute v Austria* E Ct HRR A 295-A (1994) 19 EHRR 34, E Ct HR

⁷⁸⁴ Kearns, P. 126.

⁷⁸⁵ *Ibid.*

actions of feminist punk band Pussy Riot by the local Russian court. The band members had been engaged in a political protest performance in the central cathedral in Moscow, and their actions were initially qualified according to Art. 213 “Hooliganism” of the Russian Criminal Code. However, upon closer inspection the actions arguably did not fulfil the *corpus delicti* of the article, since the performers had neither been armed nor used any objects as weapons. Besides, it was argued that the band had not been motivated in its actions by political, ideological, racial, national or religious hatred or enmity, nor by hatred or enmity against any group which contradicted with the definition of hooliganism according to Art. 213.

On June 19, 2012, the three convicted band members Mariya Alekhina, Nadezhda Tolokonnikova and Yekaterina Samutsevich filed an application against Russia to the European Court of Human Rights. The applicants alleged that the decision of the local court violated Art. 3, 5 (3) and 6 of the European Convention in the course of their criminal prosecution and Art. 10 since their performance was legally assessed as extremist.⁷⁸⁶ After a comprehensive analysis of the details, the European Court concluded that in the majority of the case there had been a violation of Articles 5 (3), 6 (1), 6 (3), as well as a violation of Article 10 of the Convention due to the fact that a video recording of the performance available on the internet had been banned as extremist material. Overall, the European Court supported the claims of the applicants that the actions in question should not have been classified as a criminal offence, however the Court maintained that the applicants’ actions should have been punished by means of an administrative or civil sanction.⁷⁸⁷ It emphasized that the means used by Pussy Riot activists to express their political beliefs could not be justified by the aims and were clearly disproportionate. Though the actions could not be qualified as incitement of religious hatred, they could have been seen as ‘provocative’ and directly involving ‘negative stereotyping’ of Christian Orthodox believers.⁷⁸⁸ The Court posited that this was enough to harm the dignity of Orthodox believers by despising and insulting them as well as treating them as inferiors.⁷⁸⁹ It was explained “though the domestic courts failed to adduce relevant and sufficient reasons to justify the criminal conviction and prison sentence imposed on the applicants, the latter’s

⁷⁸⁶ Alekhina and others v. Russia, Application no. 38004/12, from 17 July 2018.

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid.

⁷⁸⁹ Ibid.

conduct goes beyond the scope of Article 10 [...] because Article 10 does not protect conduct consisting of invading churches and other religious buildings or property for political purposes, nor does it protect conduct comprising intimidation and hostility against Christian Orthodox believers.”⁷⁹⁰

This decision once again proved the respect and impartiality of the European Court to local legal standards. As it was noticed, the Court admitted a failure of legal qualification of the actions in question, yet it did not support the character of those actions as they still were considered to breach the public order. Though the message of Pussy Riot protesters was entirely political, the Court did recognize its blasphemous potential, in spite of the fact that at the time of Pussy Riot’s performance in the cathedral there had been no dedicated blasphemy laws in Russia.

Indeed, the case of Pussy Riot is not only controversial but also set a unique precedent due to the fact that it was hard to qualify it according to the formal law that existed at that time in Russia. As it was noticed by the European Court, the local judicial system should not have sentenced the band to a criminal punishment, but rather enjoined administrative responsibility. Indeed, the actions in question seemed more applicable for Chapter 20 “Administrative Offences Encroaching upon Public Order and Security” of the Russian Code of Administrative Offences. However, it is also questionable if they could entirely satisfy the depositions of Art. 20.1 “Disorderly Conduct”, Art. 20.2 “Violating the Established Procedure for Arranging or Conducting a Meeting, Rally, Demonstration, Procession or Picket” or Art. 20.3.1. “Incitement of hatred or enmity, as well as humiliation of human dignity.”

Though it did not take long for a new amendment to the Criminal Code to be passed, which added a responsibility for insulting feeling of religious believers, the question remains what values were challenged and should have been protected in the first place. The political intention of the group protesting against the re-election of Putin was expressed in the form of a song with ‘prayer-like’ lyrics and provocative dances in the church. The nature of the lyrics could be found potentially insulting by some believers as humiliating the praying ceremony, but as the blasphemy amendment did not exist at the time, feelings of religious believers were not a legally protected value. When it comes to religious hatred, there was no message against religion or the church which in turn meant that the actions lacked the necessary features to be deemed extremist.

⁷⁹⁰ Ibid.

Hence, the only legal value that was potentially breached by Pussy Riot was the public order, which may have been disturbed by a loud performance in an inappropriate public place. There was an obvious blank space in the Russian legislation, as the country lacked a clear definition to classify that sort of action, and the term ‘hooliganism’ was inappropriate for the case.

The final decision of the European Court was published in July 2018, when the blasphemy amendment to the Russian Criminal code was already enforced. And though the new legislation in Russia did not have any retroactive force, the amendment presented “religious feelings” as a new legally protected value, which was presumably considered by the European Court in its final decision.

In October 2012, several months after the trials of Pussy Riot, the European Court of Human Rights reviewed the application brought by Adam Darski who was the lead singer of Polish death/black metal band Behemoth. This group was already mentioned in the previous chapters as one of the top controversial music groups in modern metal scene, and one which has repeatedly become the subject of harsh criticism.

On September, 13, 2007, during a concert in Gdynia (Poland), Darski tore a Bible to pieces in front of the audience, calling it “the book of lies” and the Christian religion “the most criminal sect that existed on Earth.”⁷⁹¹ It was shown on the record that the crowd burned the torn pieces of said Bible and trampled them. The actions of the frontman were deliberately planned and Darski repeated similar announcements during concerts in New York (November 2007) and Paris (February 2008).⁷⁹²

Apart from a few press articles, the event did not provoke any public reaction until on February 4, 2008, Ryszard Nowak, the chairman of the National Committee for Protection against Sects, reported to the Polish Prosecutor General that Darski’s actions were insulting his religious feelings according to Article 196 of the Polish

⁷⁹¹ The video is available at <https://www.youtube.com/watch?v=Nrvv0HRKggg>; the translation is provided by Warzecha, Adam in the article “Shockvertising, scandalization and viral communication in discursive struggle: Nergal in “The Voice of Poland”, 2017, P. 325. Published in *Discourse Studies - Ways and Crossroads. Insights into Cultural, Diachronic and Genre Issues in the Discipline. Studies in Language, Culture and Society*, Vol. 11, Edition: 1, Chapter: 15, Publisher: Peter Lang, Editors: Grzegorz Kowalski, Karolina Broś, PP. 323-345.

⁷⁹² Ibid.

penal code, which provided responsibility for actions that can offend religious feelings or sentiments.⁷⁹³

The Regional Court in Gdansk ruled in favour of Darski in August 2011, pointing out that his actions had had no direct intention to insult religious feelings.⁷⁹⁴ The decision not only pleaded the musician innocent but also ruled that Nowak had to publicly apologize to Darski for calling him “criminal” in the interview, donate a certain amount of money to a local animal shelter, as well as compensate Darski all the court expenses.⁷⁹⁵

However, before considering the appeal, the District Court in Gdansk requested the Supreme Court of Poland to provide guidelines as to whether offence against religious feelings may occur when the perpetrator acts on purpose or also with an eventual intention. The Supreme Court answered by pointing out that according to the Polish legislation insults to religious feelings may be committed intentionally, or unintentionally yet with the perpetrator being aware of possible outcomes of their actions.⁷⁹⁶ In the latter scenario the insult may occur as “a side effect” of other activities by the offender. The Supreme Court also emphasized that there are certain limits of expression that cannot be crossed or justified by artistic value.

Finally, when the case reached the European Court of Human Rights in 2012, it remained loyal to the values of the European Convention in regards to respecting local legal systems. However, it referred to the key decision of *Handyside v. United Kingdom*, saying that Art. 10 “protects not only information or ideas that are received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb.”⁷⁹⁷

⁷⁹³ Ibid.

⁷⁹⁴ "Nergal" niewinny. Darcie Biblii "formą sztuki", available at <https://tvn24.pl/wiadomosci-z-kraju,3/nergal-niewinny-darcie-biblii-forma-sztuki,181508.html?h=1b80> ; Accessed 23 February 2019

⁷⁹⁵ Darski vs. Nowak, Judgment of the District Court in Gdańsk of March 11, 2009, available at <https://www.youtube.com/watch?v=M9ElePh3hXw&list=WL&index=127&t=1s>; Accessed 23 February 2019

⁷⁹⁶ SN w sprawie Nergala: sztuka nie może godzić w uczucia religijne, available at <https://www.polskieradio.pl/5/3/Artykul/714060,SN-w-sprawie-Nergala-sztuka-nie-moze-godzic-w-uczucia-religijne>; Accessed 23 February 2019

⁷⁹⁷ EU to Poland: artists should be free to 'shock', available at <https://euobserver.com/culture/118072>; Accessed 23 February 2019

7.3 Hate Speech

When dealing with cases concerning incitement to hatred and freedom of expression, the European Court of Human Rights uses two approaches which are provided by the European Convention on Human Rights:⁷⁹⁸

- the approach of exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention; and
- the approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).⁷⁹⁹

According to the practice of the European Court, hate speech in all its forms appears as a threat or a direct harm to social well-being and national security. It notably distinguishes between: ethnic hate, negationism and revisionism, racial hate, religious hate, threat to the democratic order, apology of violence and incitement to hostility, condoning terrorism, condoning war crimes, denigrating national identity, extremism, display of a flag with controversial historical connotations, homophobic hate speech, incitement of ethnic, racial hatred or discrimination, religious intolerance, insult of state officials, and hate speech on the internet.

The European Convention protects national integrity, equality, and anti-discrimination policy as its core values. Thus, in *Ivanov v. Russia*⁸⁰⁰ the European Commission clearly stated its attitude against incitement of ethnic hatred. The applicant, owner and editor of a newspaper, was convicted of public incitement to ethnic, racial and religious hatred through the use of mass-media. He wrote and published several articles that portrayed Jews as the source of evil in Russia. He accused an entire ethnic group of conspiring against Russians, comparing them to fascists. The author furthermore denied that Jews had the right for national identity, claiming that they did not form a nation. In the application the author claimed that this conviction for incitement to racial hatred had not been justified.

⁷⁹⁸ Fact sheet – Hate speech, European Court of Human Rights, June 2020, P. 1.

⁷⁹⁹ Ibid.

⁸⁰⁰ *Ivanov v. Russia*, 20 February 2007 (decision on the admissibility)

The European Court found the application inadmissible as it contradicted with the basic principles of democracy and the European Convention, such as tolerance, social peace, and non-discrimination. For that reason, Article 17, which prohibits abuse of rights, overlapped freedom of expression in Art. 10.

The Court also recognized the inadmissibility in *Glimmerveen and Haagenbeek v. the Netherlands*,⁸⁰¹ where the applicants were convicted for possessing leaflets addressed to “White Dutch people”, which intended to say that everyone who was not white had to leave the Netherlands.⁸⁰² Once again, it was decided that Art. 17 overlapped Art. 10, since the message in question clearly demonstrated a racial discrimination.

In *Norwood v. the United Kingdom*,⁸⁰³ the applicant, a member of the British National Party, hung one the party’s posters from a window of his home, which showed the Twin Towers in flames. The image also contained a slogan which read “Islam out of Britain – Protect the British People”.⁸⁰⁴ As a consequence, he was convicted of aggravated hostility towards a religious group by a British Court. The applicant argued that his right to freedom of expression had been breached.⁸⁰⁵ Upon making the decision, the Court recognized the application inadmissible, because this expression constituted an attack against a religious group, linking it to a gruesome act of international terrorism.

Besides ethnic, racial, and religious discrimination, a threat to the democratic order is another crucial criterion of inadmissibility. It can be declared by the Court on grounds of incompatibility with the values of the Convention. Likewise, applications are deemed inadmissible if they are inspired by totalitarian doctrine or express ideas that represent a threat to the democratic order and are liable to lead to the restoration of a totalitarian regime.⁸⁰⁶

For example, in *Nachtmann v. Austria*,⁸⁰⁷ the European Court received the application of an Austrian citizen who was a National Socialist activist. The Austrian

⁸⁰¹ *Glimmerveen and Haagenbeek v. the Netherlands*, 11 October 1979 (decision of the European Commission of Human Rights).

⁸⁰² Fact sheet – Hate speech, European Court of Human Rights, June 2020, P. 4.

⁸⁰³ *Norwood v. the United Kingdom*, 16 November 2004 (decision on the admissibility).

⁸⁰⁴ Fact sheet – Hate speech, European Court of Human Rights, June 2020, P. 4-5.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *Ibid.* P. 5.

⁸⁰⁷ *Nachtmann v. Austria*, Application No. 36773/97, 9 September 1998.

Court found that the applicant, who was head of the editorial department of a local magazine, was responsible for publishing an article which denied the National Socialist genocide and other National Socialist crimes. The Court found that the article suggested that the number of victims of the mass killings had been highly exaggerated and technically impossible.⁸⁰⁸

In consideration of all these circumstances, the European Court agreed with the Graz Regional Criminal Court of Austria, stating the publication in question grossly denied and downplayed the mass murders and other crimes committed under the National Socialist regime.⁸⁰⁹ Besides, the Commission stated that national socialism is a totalitarian doctrine incompatible with democracy and human rights, which is the subject of Art. 17, and receives no protection under Art. 10.⁸¹⁰

It is obvious that directly discriminatory or anti-democratic speech is exempt from the protections afforded by Art. 10 of the European Convention. However, the incitement of illegal actions or potentially harmful views has its own legal interpretation. In some cases, incitement may be considered as threatening to the public order as illegal actions themselves, because incitement may affect unlimited number of individuals.

In February 2020, in *Atamanchuk v. Russia*⁸¹¹, the European Court dismissed the complaint of the Russian citizen, who claimed that his freedom of expression had been violated. The case concerned a businessman's criminal conviction for inciting hatred and enmity following statements about non-Russians in an article published in a local newspaper.⁸¹² The Court held that there was no violation of Article 10, pointing out that the Russian courts had given relevant and sufficient reasons for the applicant's conviction. It agreed with the local court that the applicant's comments and expression did not contribute to any public debate, as they espoused nothing but emotions and prejudices against the local population of non-Russian ethnicity.⁸¹³

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid.

⁸¹⁰ Ibid.

⁸¹¹ *Atamanchuk v. Russia*, Application no. 4493/11, 11 February 2020.

⁸¹² Fact sheet – Hate speech, European Court of Human Rights, June 2020, P. 12.

⁸¹³ Ibid.; *Atamanchuk v. Russia*, Application no. 4493/11, 11 February 2020.

In *Jersild v. Denmark*⁸¹⁴, the European Court made a distinction between the ways in which the same anti-democratic and threatening content might be used for different purposes. The applicant complained about a violation of Art. 10 after his documentary film was prosecuted for including an interview with three members of a group calling themselves the “Greenjackets”. The interviewed young people made abusive and derogatory remarks about immigrants and ethnic groups in Denmark.⁸¹⁵

The Court drew a distinction between the members of the “Greenjackets”, who had made openly racist remarks, and the applicant, who used the interview for journalistic and scientific purposes, touching on a matter of ‘great public concern.’ The film had no intention to spread racist ideas but was rather meant to raise public awareness about the social issue.⁸¹⁶ For that reason, in the particular case the Court recognized a violation of Art. 10.

In *Tagiyev and Huseynov v. Azerbaijan*,⁸¹⁷ a writer, a columnist and an editor were convicted for inciting religious hatred and hostility in a published article concerning remarks on Islam from 2006. The European Court held that there was indeed a violation of freedom of expression due to the fact that the national courts had not taken into account that the article contributed to a public debate. The article in question was deemed to simply have compared Western and Eastern values and discussed the role of religion in society.

On the other hand, in *Ibragimov and others v. Russia*,⁸¹⁸ the European Court reviewed a case about anti-extremism legislation in Russia and a ban on publishing and distributing Islamic books. The applicants complained that Russian courts had banned the distribution of books by Said Nursi, a renowned Turkish Muslim theologian and commentator of the Qur’an, as they were found to be extremist. The applicants had either published some of Nursi’s books or had commissioned them for publication.⁸¹⁹

The Court held that this constituted a violation of Art. 10, since the Russian courts did not have a justifying reason for banning these books. It was found out that the

⁸¹⁴ *Jersild v. Denmark*, 23 September 1994.

⁸¹⁵ Fact sheet – Hate speech, European Court of Human Rights, June 2020, P. 13.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Tagiyev and Huseynov v. Azerbaijan*, 5 December 2019.

⁸¹⁸ *Ibragimov and others v. Russia*, 28 August 2018.

⁸¹⁹ Fact sheet – Hate speech, European Court of Human Rights, June 2020, P. 10.

literature in question was banned based on the opinion of linguists and psychologists, without providing any official examination of the book content. The overall analysis showed that the books in question had already been published for seven years before they were banned and had not demonstrably incited any sort of inter-religious tensions or violence in Russia, nor in any other countries where they were available.

7.4 Summary

This chapter presented the general practice of the European Court of Human Rights on freedom of expression according to Art. 10 of the European Convention.

First of all, it has to be acknowledged that the European Court does not have a duty to cancel or recall the decisions of the member states courts. It is entitled to give relevant recommendations according to the principles of the European Convention and monitor the judicial practice of the member states.

Art. 10 of the European Convention declares freedom of expression as one of the most crucial elements of democracy and free developing society. However, it can be limited in respect of other principles of the Convention, which provide public safety and help maintain public order. As it was revealed in the previous chapters, even states with a long democratic history may struggle to strike a balance between freedom of expression and other constitutional values. For that reason, the duty of the European Court is to provide resolutions in cases where these values have to be weighed against each other.

According to the Convention, the limits on freedom of expression are mainly applied in instances where an expression presents a direct or indirect threat to the moral well-being and/or the public safety of a society.

Most often the Court has to deal with the moral threats such as obscenity and blasphemy. Chapters 4 to 7 showed how several states have struggled to provide legal definitions for these moral terms. Such cases can be complicated due to their moral nature, since morality is not only collective, but also an individual matter, which may vary from one individual to another. For that reason, the practice of the European Court does not interfere by (re)defining moral values for the member states, but instead makes its decisions with respect to local legal traditions. However, a noticeable feature of the European Court's practice is that in regards to obscene and blasphemous expression, the principles of Art. 10 are often overlapped by other legal

values. In respecting the laws of the member states on obscenity and blasphemy, the European Court does not seek to solve their contradictions, but rather makes its decisions based upon individual cases.

In terms of how it deals with issues of obscenity, the European Court intends to protect minors from exposure to improper content which still may be acceptable for the adults. Notably, there is some measure of contention as to how the term 'obscenity' is used by the Court. For example, in *Handyside v. United Kingdom*, the applicant was charged with "exposure of obscene materials to minors" for publishing a graphic book on sex education. Though it was not 'hardcore pornography' with a primarily prurient interest, the Court still operated with the term 'obscene'. The reason why it chose to classify the book in question that way was their respect of the local state legislation since the applicant was charged according to the Obscene Publications Act 1959 of the United Kingdom.

The European practice on blasphemy has similarly ambiguous characteristics. Due to the fact that different states have different approaches in legal regulations of blasphemy, the European practice reflects those circumstances. Once again, Court does not give any legal definitions of sacrilegious actions, but completely relies on the principle of the European Convention, which is to operate with respect to local laws. The case of Pussy Riot illustrated that practice as the Court took into account the new amendment to the Russian Criminal Code, which introduced responsibility for insulting feelings of religious believers. On the other hand, the Court did not find *corpus delicti* when the singer of Behemoth tore up a Bible in front of the audience due to the different circumstances in the case, although Poland also had the law against insulting the feelings of believers.

Hate speech falls into the category of threats against public safety. Unlike moral terms like 'obscenity' and 'blasphemy', definitions of hate speech in the laws of member states tend to be more precise, which significantly facilitates the work of the European Court. However, the Court still faces the ambivalent nature of legal collisions. Additionally, many states also do not use the term 'hate speech', replacing it with other terms. In most of the cases presented in this chapter the European Court restricted the power of Art. 10 in favour of public safety and national well-being, if it was proven that the disputed materials or actions could indeed have posed a threat to these values.

Overall, it has to be noticed that in spite of all the limits of freedom of expression, and in spite of criticism from legal scholars, the European Court tends to support art and artists. The Handyside case remains a key precedent, where the Court commented that freedom of expression protects not only information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also those that offend, shock or disturb. Obviously, unless they infringe upon other rights and values of the European Convention.

Conclusion

The purpose of this dissertation was to observe the dialogue between freedom of speech and artistic expression as a part of contemporary legal cultures and the challenging narratives of heavy metal discourse. It intended to reveal how heavy metal music being a form of creative cultural resistance is treated in modern democratic legal systems that recognize freedom of speech as one of the main constitutional values.

Chapters 1 and 2 introduced heavy metal as alternative music and underground subculture. It identified its specific characteristics such as volume, distortion, and speed as well as the curial narratives of the heavy metal discourse: power, resistance, freedom, challenge, transgression, and obscurity. It was emphasized, though other music-based subcultures such as punk and hip-hop also possess the narratives of freedom, transgression, resistance, etc., each music-based subculture manifests those narratives in its own way guided by the values of the subculture. Hence, the heavy metal discourse operates by its own means and tools, which was taken into consideration as the core of this study.

Chapter 2 also presented heavy metal as a music-based resisting subculture. Though its general discourse is not political, its crucial narratives are constructed in the way in which heavy metal represents opposition to mainstream society, culture, and order. The negative response from that society provoked based on Cohen's theory a moral panic, where heavy metal fits the definition of 'folk devils', an anti-social force that threatens the order and the well-being and the values of the society.

Chapter 3 describes the main issues of heavy metal music and its subculture when it comes to its protection or restriction from freedom of speech. Most of these issues are related to child protection laws, laws defending public peace, and moral values. This chapter also emphasizes that law, on the other hand, is also a cultural product, which absorbs different cultural and social values. Hence, the regulation of freedom of speech and art in each country differs from one to another.

The purpose of the law of freedom of speech and the anti-mainstream target of heavy metal discourse (as a controversial form of art) represent two sides of the coin. According to the formal approach of Western constitutional laws, freedom of speech (art) is designed to encourage free expression without fear of oppression from the state (censorship). According to that principle, freedom of speech and expression is

necessary for the development of society, where different opinions have the right to exist and be freely expressed. Thus, controversial forms of art such as heavy metal music are filling the role of such “social developers”, by representing alternative views that are protected by Western constitutional laws. However, freedom of speech is not absolute, and every state develops its own restrictions in order to protect other constructional values such as public peace, social well-being, human dignity, etc. But as was mentioned before, the law is a cultural product, where restrictions on freedom of speech, besides protecting universal principles, may also be designed to protect local cultural values and represent different approaches towards restricting freedom of speech. For that reason, this dissertation chose three countries that declared themselves as democratic states with freedom of speech as one of the most crucial constitutional values. It intended to identify how heavy metal is seen, protected, restricted, or might be potentially by the local laws of the USA, Germany, and Russia. Chapter 4 revealed that the limits of freedom of speech and artistic expression in the United States are defined by judicial practice, which develops a legal precedent and a number of tests to classify questionable works. Freedom of speech in the United States can be limited for the sake of the protection of public order and safety. The rating systems of films and music in order to protect minors are developed by the film and the music industries on their own and have no legal obligations. In spite of the fact that the first moral panic associated with heavy metal began in the United States, and the agenda of the PMRC intended to restrict heavy metal with its changeling discourse, the overall American legislation of freedom of speech is quite flexible compared to the constitutional restrictions in Germany and Russia. There is no official blasphemy law as well, which in turn makes it more difficult to prosecute works of art that touch sensitive topics of religion and its criticism.

The attitude of the judicial practice towards heavy metal music and its subculture in the United States could be called quite neutral. Good examples to illustrate this are the judges who presided over the cases involving Judas Priest and Ozzy Osbourne in the 1990s. Though the judges seemed aware of the ambivalent narratives of heavy metal, it was clearly pointed out that it was not the duty of the legal system to define which type of music was ‘good’ or ‘bad’, since every individual has their own personal artistic taste and perception.

Chapter 5 described Germany with its own heavy metal scene. The country represents another legal system, one which relies on codification rather than on legal

precedent. Freedom of art in the German constitutional law occupies a distinct paragraph, separated from the general freedom of expression. At the same time, the limits of freedom of art are more strictly defined and controlled by the government.

A special organization called the Federal Review Board for Media Harmful to Minors operates within the law in order to identify and restrict musical, artistic, or literal works if they are considered inappropriate for younger audiences. The Board operates independently, however, the German courts are entitled to review and dismiss its restrictions after examining each particular case, as was presented in the case study of Rammstein.

The Federal Review Board for Media Harmful to Minors is indeed responsible for banning the distribution of many metal albums, including those by the infamous Cannibal Corpse and other controversial metal bands. Freedom of artistic expression in Germany also intersects with the constitutional principle of human dignity, the national policy of public safety, and animal protection acts. Blasphemy falls within the category of public safety, and there is no legal responsibility for insulting religious confessions unless it provokes hatred and extremism.

Chapter 6 revealed that Russia represents arguably the most ambivalent and controversial legal system among the three chosen countries. It is severely impacted by its historical turbulence of changing political regimes, values, and legal standards. The music during the Soviet period was extremely controlled by the ruling political party, and every western genre was considered inappropriate for Soviet listeners. When rock and heavy metal from the West, started to leak into the Soviet Union and it found resonance with local listeners who were experiencing a process of political liberation in the late period of Soviet Russia.

With the collapse of the USSR came a drastic change in local political discourse, which among other things resulted in western music no longer being considered a taboo, and the new Russian Constitution embraced democratic principles including freedom of speech and expression. That time marked the beginning of a new era in Russian popular culture, which included the development of its own rock and metal scenes. Though the subculture in many ways was adapted to the local environment, the distinctive narratives of heavy metal discourse remained the same. It served to manifest alternative views on society, religion, control, and freedom while questioning the traditional order and its values.

Since heavy metal was initially adapted from the West by the Russian youth, it remained mostly obscure for the older generations not only because it was a new cultural phenomenon but also was perceived as a foreign invention.

Although the new law of freedom of speech protected art and artists from censorship, rock and heavy metal faced a substantial amount of hostility from the post-soviet society. Once again it touched on the most sensitive topics of religion and stirred parental fears. At the same time, the legal discourse that this set in motion revealed imperfections of Russia's legal and judicial systems, pointing out its contradictions and ambiguities.

The contemporary limits of artistic freedom in Russia are defined by federal laws and judicial practice, once again in order to maintain public safety and order. Though those values indeed respond to the democratic concept, the new blasphemy amendment to the Russian Criminal Code completely contradicts not only freedom of speech, but also freedom of conscience.

In terms of how this amendment has impacted the heavy metal reception in that legal culture, it appears that it has only (further) empowered religious activists to act against rock, metal, and other "anti-Christian" music, by claiming that it 'offends their religious feelings.

Finally, while the European Court of Human Rights and its recommendation are not entitled to dismiss the decisions from courts of the member states of the European Convention on Human Rights, they are quite significant for the understanding of freedom of speech, expression, and their limits. Though The European Court supports the main values of public safety, moral health, and the protection of minors, it still emphasized that art must be protected, even in its most shocking and disturbing forms. Ultimately, this study revealed that both discourses (heavy metal and freedom of speech) are quite contradictory, versatile, and even interdependent. The inability of legislators to provide clear legal definitions to terms such as 'art', 'shock value, or 'obscenity' has apparently hindered their abilities to accurately assess the complex nature of heavy metal music and its narratives of resistance.

In situations where the law is not capable of providing a clear definition for 'art', 'creative work', or 'creative cultural resistance' there will always be questions without answers. And heavy metal music is and will be one of those music subcultures that will continue to challenge not only society at large but also its legal systems to answer those questions.

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Declaration of originality

I confirm that I am the author of this dissertation. This content was originally written by me and printed for the very first time on the day of submission.

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