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## **Between Belief and Law: Old-New Challenges for Contemporary Art**

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*Recent reports about cultural events, coming from Russia and abroad, lead us to the conviction that we face the conflict between art and its audience with a trend of restrictions of the freedom of artistic expression. This article examines aesthetic and artistic roots and social circumstances of this conflict, and, employing case studies and systematizing legal studies, tests the readiness of Russian legislature and judiciary systems to solve this conflict without harming the freedom of artistic expression. It substantiates the necessity of moratorium on the court and other punitive measures against art and promotes educational programs and scientific support as a solution of the problem.*

*Keywords: contemporary art, freedom of artistic expression, audience, justice, legislation.*

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Recent reports about cultural events coming from all over the world bear a strong resemblance to the summaries of hostilities: “Malta: Ban of theatre play upheld by Constitutional Court,” “Tibet: Banned songs by imprisoned singers translated to English,” “Turkey: Authorities’ persecution of Kurdish artists continues,” “USA: Library covers up controversial artwork,” “Russia: No regrets for Pussy Riot despite bad treatment during court case” (News). The frequency of such information and its content lead us to the state that we face the conflict between art and its audience with a trend of significant restrictions of the freedom of artistic expression. A particularly acute conflict is observed in undemocratic countries and in the countries with young democracies, such as Russia, for example. These countries lack any experience and/or mechanisms for monitoring and solving such kind of conflicts. Being guided

by their totalitarian present or past, they hope to suppress the conflict by forcing repression. To stop the madness of war with cartoons, poems, and songs, they should implement a moratorium on the court and other punitive measures against art and launch new educational public programs, promoting contemporary art and practising free artistic expression. They must build a bridge between artists and their ethnically, religiously, and culturally diverse audience; otherwise we might risk to ruin a delicate balance between the freedom of speech and the freedom of religion, resulting in the phase out of democratic institutions.

The conflict between contemporary art and its audience has aesthetic roots. It is a gap between audience’s expectations and artistic proposals. This gap is an aesthetic norm for any arts that incites the audience’s amazement. From

time to time an aesthetic revolution takes place; artists break the aesthetic norms given and the gap becomes wider. The audience, until they have not had a new assessment scale, employ an old one, which, nevertheless, is already inadequate. At such a time the appearance of a new artistic piece is accompanied by a wave of the audience's indignation. It is exactly what happened to Édouard Manet's *Olympia*, Pablo Picasso's *Avignon Girls*, and the exhibition in Mahesh in 1962. Today old aesthetical criteria do not work as well. The statement that "it is an essential fact about art that we judge current samples to be art on the basis of their relations to our past artistic practice" (Currie, 2010, p. 238) is not true anymore. Artists have stepped out of the traditional bounds of art into an open public space and, betting on different forms of sensitivity, come into direct contact with judiciary and system of law. Colin Perry notes: "The treatment of the law as a pliable medium has long been at the care of political activism" and then adds that "in recent years, legality has also become a medium within contemporary art" (Perry, 2010, p. 6). We have a paradoxical situation when, on the one hand, there is a politically focused artistic activism with aesthetic transgression as an artistic method and an official response as a key facet of a plot's climax; and, on the other hand, there is the audience who, in absence of adequate criteria, considers such art to be hooliganism. Vandalism against artistic pieces, prosecution, and imprisonment of artists indicate, above all, that a gap between the audience's expectations and artistic proposals has become too wide.

The conflict between contemporary art and its audience has artistic roots as well: being special genres of art, satire and parody have a particular ability to make a human's blood boil. The oldest example of a political parody is the uncomplimentary drawing of King Tutankhamen's father, which is dated 1360 B.C. The oldest

religious satires were created by Greek masters of vase drawing, who mocked Gods and thus depicted them "pot-bellied, drop-nosed and ludicrously cavorting" (Keane, 2008, p. 849). Religious satires were also wide spread in Medieval Europe and Russia. Martin Luther employed the power of satire in his struggle against the opponents of his doctrine. William Hogarth, Francisco Goya, Honore Daumier, and other European painters contributed to the development of satire. But the golden age of satire began when first newspapers were issued. Newspapers' editors brought to light the difference between satire of opinion and joke satire: the first one "has been employed frequently and effectively as an aid in building up resistance to the policies of politicians and as a weapon of propaganda, generally in ridicule" (Thomas Kemnitz, qtd. in Keane, 2008, p. 849); the last one has been used for entertainment and "to release tension by means of laughter" (W.M. Coupe qtd. in Keane, 2008, p. 853). At the beginning, satire of opinion was printed separately from newspapers to avoid censorship and libel laws. Later it was incorporated into newspapers and printed on the editorial page. So it gained a much wider audience, but "lost its scurrilous and bawdy character as well as most of its viciousness and much of its bite" (Tomas Kemnitz, qtd. in Keane, 2008, p. 850).

Since theological questions were translated into political issues, and a priest began playing "a role distinctly subordinate to that of the statesman in the moulding of human affairs" (W.M. Coupe qtd. in Keane, 2008, p. 853), satire of opinion has rather dealt with the church's policy, than with its religious opponents. Vasily Perov's *Tea in Mytishchi, near Moscow (Chaepitie v Mytishchakh, bliz Moskvu)*, *Meal (Trapeza)*, *Procession on Easter (Sel'skii krestnyi khod na Paskhe)* are examples of strict anticlerical satire of opinion. The cartoons *Blessing of swords* from *A Woodpecker* magazine (1905) and *The reaction*

*fence* from *The Humorous Almanac* (1906) are examples of satire against the church's policy. The first satire presents a fat priest in a hood and a robe, carrying a candle as a main link in a chain of reaction. The other one depicts a priest, blessing a 'patriotic rally' on a pogrom (Leonov, 2010). All of these satires, as well as many others, were likely to be offensive for religious believers; nevertheless, since the age of the Enlightenment until recent time this fact has never caused vandalism against satirical pictures, prosecution and assassination of artists.

Only in special social and political circumstances the audience's indignation can transform into violence and riots. This conclusion was made by the scientists, who studied the "cartoon crisis" in the Middle East. Several approaches emerged in the process of this study. The first (political) one explains the crisis by political manipulations on the part of authoritarian authorities. It cannot explain why most of the riots happened in the Arabic countries with democratic regimes. The second (religious-&-psychological) one explains the crisis by the participation of image to its prototype, perceived by the believers, when any artistic transgression is perceived as a direct insult of a prophet, saint or God. But this theory cannot explain why the representatives of most non-Islamic religions do not react violently on ridicule and other artistic transgressions of their Gods. The third (moral) one focuses on the moral order, which is ensured by religious taboo, and, therefore, violation of which may be perceived as a threat to life. But a moral approach cannot explain why a riot is hopefully not a norm, but the believers' extraordinary response to the artistic transgressive acts. The conception of Ron E. Hassner, a professor of the University of California, Berkeley, assembles the benefits of all three approaches. He gives an alternative explanation of riots "that emphasizes *moral threat* logic", but, at the same time, takes

political and religious factors into account as well (Hassner, 2011, p. 29). Ron E. Hassner has cogently proved that the audience's indignation can most likely overgrow into a riot "where radical groups enjoyed the freedom to organize and protest the cartoons but lacked state protection of their sacred values" (Hassner, 2011, p. 40).

Hassner's theory sheds light to the event that took place in Russia eight years ago when Oleg Ianushevskii's 'cosmopolitan icons' were vandalized presumably by the Russian nationalists (Article 19, 8). This theory is also valid for the current situation in Russia. Indeed in 2004, the year of the country's political and economical growth and the society's being enthusiastic over a fair democratic future, only mostly marginalized nationalist groups were consistent defenders of the religious orthodoxy and homespun traditionalism. The situation changed when corruption destroyed the mechanisms of legal protection and began to threaten the lives of everyone. In these circumstances a traditional moral order identified with religious values became in demand by all social groups from grass roots to the ruling elite, and any ambiguous artistic performances more and more often began to face incomprehension by the Russian society as a whole. That is what happened in the case of an exhibition called *Forbidden Art-2006* (2007), where art works prohibited for exhibition in Moscow during 2006 were showed. The purpose of the exhibition, as it was defined by its curator Andrei Erofeev, was "to monitor and discuss the nature and trends of institutional censorship in culture" (Epstein, Vasil'ev, 2011). Alex Epstein and Oleg Vasil'ev, analyzing the events around that exhibition, point to the participation of not only a marginal part of the audience but also of the most educated and advanced one in the crusade against it. They cite the words by Oleg Orlov, a leader of the "Memorial" human rights organization, who blamed the exhibition

managers for the display of “blasphemous” art works and lack of any attention to the ‘true art’. He also called their intentions ‘ethically dubious’ and ‘provocative’ (Epstein, Vasil’ev, 2011). So, with the help of the Moscow intelligentsia the artists and their works were crushed by the state penitentiary machine. The exhibition was banned; Andrei Erofeev and painter Iurii Samodurov were prosecuted and fined. This example confirms that if the moral order of society as a whole is in danger, any transgressive artistic act will likely be prosecuted, and this prosecution will be supported by different social classes and groups. However, if an audience as whole sees a moral threat in art works, it does not mean that it is an artists’ guilt or art works are not “true art”; hence a prosecution is a form of sacrifice, that is, an extralegal act.

A legal solution of the conflict contemporary art with its audience is complicated because it entails revision of the system of human freedoms and rights. Until now the foundation for the understanding of human rights was set by the Universal Declaration of Human Rights (UDHR) (1948) and the International Covenant on Civil and Political Rights (ICCPR or the Covenant) (1966). No country has ever voted against the UDHR, and almost all states have ratified the covenant by now. Furthermore, the United Nations Human Rights Committee (the Committee) issued series of General Comments on articles of the Covenant “to assist States Parties to the Covenant in ensuring that their Law and practice complies with their obligations under the Covenant” (Clarke, 2007, p. 103). Nonetheless, after the series of events which followed the provocative works of art, such as the murder of Theo Van Gogh, a Dutch filmmaker, in 2004 and the Muhammad’s cartoons crisis in 2005, the international discussion around Article 20, demanding to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement for discrimination,

hostility or violence” (ICCPR), was stimulated by the Organization of the Islamic Conference (OIC). Since 1999 OIC has been insisting on the enacting of the resolution against defamation of religions. This question split the United Nations in two blocks: the block of Islamic and developing countries and the block of the Western opposition. The last one has opposed this resolution because of “its danger to the human rights structure”: this resolution basically proclaims a new right of “not to be offended” for the group of religious believers only (Graham, 2009, p. 72). That is why, when in 2011, under the pressure of OIC, the UNHRC passed a resolution called *Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief* the Committee issued General Comment 34, concerning the freedoms of opinion and expression, which declared that “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant” (General Comment No. 34, 48). to support a balance of human rights.

The domestic legislators are also under the pressure from both the protectors of free expression and the adaptors of its restriction. Taking into account that the arguments of the latter, concerning vandalism, riots, and murder, are weightier than the arguments of their opponents, it is no surprise that legislators take the side of the adaptors of restrictions. But “what are the limits?” This is the question that Ben Clarke, a Senior Lecturer in Law of the University of Notre Dame in Australia, rightly asks. He emphasizes the following: although the *Racial and Religious Hatred Act*, does not solve but only aggravate the problem. The religious groups, who consider the criticism of religion, ideology, prophet or political

leader, as a threat to the moral order of life and an evidence of religious hatred, take such Act as a legitimation of restriction or even prohibition of any critic and controversial expression towards them. But any limitation of criticism in any area does not correspond with the principals of the free democratic and pluralistic society as well as contravene the Covenant (Clarke, 2007, pp.108-109). Furthermore, even the freedom of religion in the form presumed in the Covenant is absolutely unacceptable for many religious groups. For instance, it's unlikely that the acknowledgement of the Jedi (people who "have embraced Yoda, Luke Skywalker and the other Jedi heroes from the Star Wars films as spiritual role models and listed themselves as a religion on national census form") (Clarke, 2007, p. 107) as a religious group will find understanding among the Orthodox Christians or the Muslims. So, as it follows from the above, enacting the law against religious hatred, the legislators have a great opportunity to fall into the trap, set by the traditional religious groups: when the freedom of speech is restricted, the freedom of religion will be the next in line.

The restriction of freedom of artistic expression does harm to whom it should protect. So, for instance, if a parliament passes a law banning criticism of religious ideas or policy of the church because it offends the believers' feelings, we will have, at least, the following problems: the problem of the systems of belief, including ideological, which advocate moral suppression, sexual abuse, and physical violence (should we criticize them?); the problem of sacred texts (shall we prohibit Qur'an because it denies Christ as God?); a problem of national and world art classic (shall we, for instance, ban Vasily Perov's art works that are critical towards the Russian Orthodox Church and its priesthood?); a problem of the atheistic Soviet inheritance (can we study it?). If a parliament passes a law, which bans artistic remakes of visual or other religious

patterns because they desecrate shrines, it will mean that a state affirms that these patterns participate to a divine essence, or, at least, that the church is a right of the holder. Should, in this case, amateurs and pros buy a franchise from a church to draw icons? As we can see, laws that restrict the freedom of artistic expression, in return, restrict the believers in their basic rights: the right to defend their creeds and expose false beliefs by ridicule and criticism as well as the right to freely express their religious feelings and views. Hence it is wise to agree with Ben Clarke's proposal to view an artistic criticism of religion "as an opportunity to correct misunderstanding" (Clarke, 2007, p. 113) and seek for another way to fix and solve the conflict between art and its audience.

Contemporary art is a challenge for justice as well. Each new prosecution of artists becomes a difficult test for the justice system to protect basic human rights in a contemporary pluralistic society. We will analyze two cases from Russian and American judicial practice to understand how this test works. We also will look for the answers to specific and some general questions. The latter ones are: Was it taken into account that a defendant is prosecuted for an artistic piece or performance? Was semantic structure of an artistic work analyzed or is an artist prosecuted for his style? Were the freedom of religion and the freedom of artistic expression taken into account seriously and equally?

Issue: Religious sensitivity and artistic expression: should an artist be prosecuted if the audience regards his work as an insult to their belief?

Case 1: O'Connor, et al. v. Washburn University, et al. "Washburn University is a public institution located in Topeka, Kansas. Each year the University sponsors an outdoor sculpture contest as a means to beautify the campus and stimulate discussion of art and its

meaning. Once selected, the winning entries are displayed around campus for several months. One of the 5 winning entries for the 2003 contest was a sculpture by artist Jerry Boyle of Longmont, Colorado. Entitled *Holier Than Thou*, the work shows the upper body of a clergyman wearing a miter, the tall hat commonly worn by Catholic bishops, cardinals, and popes. Controversy erupted soon after the sculpture was placed on the Washburn campus. Critics contended that the clergyman was portrayed with a grotesque facial expression and that the ceremonial hat he wore resembled a phallus. The statue so greatly offended a Washburn professor and student that they filed a lawsuit in federal court demanding the removal of the statue. The two plaintiffs alleged that the statue conveyed an impermissible state-sponsored message of disapproval of the Catholic faith and religion. The Tenth Circuit Court of Appeals disagreed. The court concluded that neither the purpose nor the effect of displaying the sculpture was to spread an anti-Catholic sentiment. The court went on to say that, viewed in context with the other sculptures displayed on campus, ‘any reasonable observer... would understand the university had not endorsed that message’” (Boyle).

Case 2: *The Russian Orthodox Church v. Pussy Riot* punk group. On the 21<sup>st</sup> of February, 2012, four young women whose faces were covered with masks came to the fenced part of the Cathedral of Christ the Savior (CCS). They installed the sound-amplifying equipment and performed a punk prayer *Our Lady, chase Putin out*. The action was recorded on video and posted on the blog of the Russian feminist performance art group *Pussy Riot*. The performance continued for about one minute until it was stopped by the temple’s security. Four young women were banished from the cathedral. Soon a court received the complaints from four believers who blamed the women for causing them an unbearable moral

suffering. In March three participants of the punk prayer were detained and placed in jail. They were incriminated, in particular, an insult to the Patriarch and breach of religious taboo. On the 17<sup>th</sup> of August they were convicted of hooliganism, i.e. a gross violation of public order and an obvious disrespect for the society that was motivated by hatred and enmity to believers and committed by the group of persons by prior collusion, and sentenced to two years in prison. They refused to admit the guilt, saying that it was a political act directed against the support of Putin by the Patriarch.

Analysis: The Constitution of Russia, like the Constitution of the USA, guarantees the freedom of religion and the freedom of speech and artistic expression. The First Amendment to the Constitution of the USA, which prohibits the making of any law respecting the establishment of religion, impeding the free exercise of religion as well as abridging the freedom of speech, infringing the freedom of the press, emphasizes inviolability of these rights and freedoms and helps judges to work out reasonable and balanced solutions to controversial cases. The Russian justice system does not have such a support. On the contrary, Article 55 of the Constitution permits the limitation of rights and freedoms by the Federal Law if “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 the defense of the country and security of the State” (The Constitution). This article indicates the willingness of legislative authorities to prohibit everything that causes hot public debates and conflicts. Forcing judges to take the tradition defenders’ side against those who ridicule or question the existing order, this article impedes the restoration of justice in controvertible cases.

The first case shows that the court rejected the offer to remove the statue only because somebody

feels offended. The court took into account that it dealt with a piece of art; hence a form of expression and an artistic message are not the same. Having based the investigation not on the emotions but facts, the court analyzed a semantic aspect of the statue and paid attention to the place of its exhibition. It reasonably concluded that an anti-Catholic message is something that exists only in the heads of the offended and has nothing to do with the purpose of the artist and the University administration. Furthermore, having installed the statue of a Catholic clergyman in the University yard, the University administration showed their respect to this religion rather than hatred. The court also pointed to the exhibition's aesthetic purpose – “to beautify the campus and stimulate the discussion of art” – as a confirmation of the absence of the intension to offend anybody's feelings or discriminate because of religion. So, the first case provides us with the example of the case when both the freedom of religion and the freedom of expression were taken into account and protected by the court seriously and equally, when the complainants got explanation of all controversial aspects of the case, and arguments of the defendants were perceived with comprehension and trust.

In the second case the court didn't care that it dealt with an artistic performance. Basing on the allegations of the witnesses who were disturbed by the breach of the Cathedral rules and religious taboos, the court refused to take the artists' explanation of the character and purpose of their performance into account: it refused to examine the “document”, i.e. a report posted on the blog, which is a significant part of the performance as a genre of art. The court also ignored an artistic political message that the title of the prayer *Our Lady, chase Putin out* implies. The above makes it possible to assert that the artists were prosecuted and sentenced to two years in prison mostly for the style and choice of

a place for their performance that were evaluated as blasphemy. The judgment is an example of an unequal protection of the freedom of religion at the expense of the freedom of speech. Virtually the court employed the believers' feelings to suppress the freedom of speech and remove the problem of interpenetration of the state and the church from a public discussion.

As it follows the above, the Russian judicial practice does not take into account the nature of art and the necessity to maintain the balance of human rights and freedoms. That is why, in the writer's opinion, to fix the conflict between contemporary art and its audience we should establish a moratorium on the prosecution of artists. If, nevertheless, legal authorities consider there is no other way to prevent any kind of hatred only via restriction of freedom of artistic expression, they should take into account a number of challenges. First, defamation laws, which often is employed for solving controversial artistic cases, can properly protect only “an individual's livelihood or reputation” (Graham, 2009, p. 76); their adaptation for protection of religious groups against artistic insulting abridges objectivity of the base evidence and, therefore, validity of a judgment. Second, application of the hooliganism law for such purpose leads to latent prosecution of a dissident opinion under the guise of prosecution of a ‘hate speech’. Third, special blasphemy laws have significant shortcomings, such as: a variable terminology, excess punishment, unequal protection, non-neutral justification. As legal studies show, the main problem of these laws are “their abridgement of free speech” (Levey, Modood, 2009, p. 432); they are used “to settle personal scores..., to suppress reformist dissent..., to establish theocratic regimes” (Graham, 2009, p. 80). Anyway, before adopting any law for solving conflicts of contemporary art with its audience legislators should make a clear

distinction “between three types of expression: expression that constitutes a criminal offence; expression that ... may justify a civil suit or administrative sanctions; expression that ... raises a concern in terms of tolerance, civility and respect for the rights of others” (Rabat, p. 4) and remove artistic expression, at least, from jurisdiction of the criminal law. They also should give robust definitions of the main terms, such as hatred, violence, hostility, etc.; make sure that all restrictions of the freedom of expression are legal, proportional and necessary; examine whether a harm of restriction is less than a harm of ‘hate’ speech. In other words, they should stimulate legal studies, permanently update the domestic law, and take into account recommendations emanating from international papers such as *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* (Rabat). To develop a healthy debate about the role of religions and art in contemporary society, it is reasonable to abandon the blasphemy law.

A solution to the problems caused by an aesthetic conflict between contemporary art and its audience is actually found in cultural, rather than legal areas. Indeed it is a general cultural orientation on maintaining traditions and classical art that turned an aesthetic gap into a cultural void in Russia. As for Europe and the USA, schools and classes of contemporary art are opened everywhere: students can study digital arts, media art, performance, activism at the School of the Art Institute in Chicago (SAIC), the University of the Arts London (UAL), or the Weissensee School of Art in Berlin. In Russia short educational programs in the area of contemporary art are developed only by the State Centre of Contemporary Art in Moscow and its filial branches. Russian humanities also make their own investment into the extension of

the void between audience and contemporary art. Major scientific magazines, such as *Cultural Studies* or *Questions of Art Studies*, keep silent of the current situation with contemporary art in Russia; no doctoral dissertation of 2012 analyzes the conflict between contemporary art with religion, state, and judiciary system (see Ads). The tactic of avoidance of contemporaneity by shifting into history or pure science, which was domesticated by Russian scientists in the Soviet times, causes the inability of most scientists to relevantly evaluate and explain the contemporary forms. That is why to narrow the gap between contemporary art and its audience in Russia cosmetic changes are not enough. There must be a sizable step from the current situation towards the contemporaneity. The most important thing is to change the proportion between historical and contemporary parts of education in favor of the latter on high school and college/university levels. State educational officials should also stimulate creation and promotion of contemporary art curricula throughout the state. It is reasonable to open new graduated programs specializing in legal protection of artists and art. Russian nonprofit organizations, social unions and funds should open free classes for everybody who wants to know more about contemporary art and acquire some basic skill in this area. Russian scientists together with their foreign colleagues should study new trends of contemporary culture, monitor the current situation with contemporary art, support and promote the freedom of artistic expression through different forms of theoretical and social activity.

When Samuel Huntington wrote his famous *The Clash of Civilizations*, he was not able to imagine that a trigger, setting the religious factor in motion (which is the main challenge for the contemporary world, according to his point of view), will be art. Furthermore, he did

not expect that, fighting against art, people will be extremely merciless and ruthless. It is no coincidence the international community gives so much attention to this problem. Unfortunately, Russia still remains out of the work that aims to maintain the freedom of artistic expression. To give the correct assessment of this position it would be appropriate to recall the words of Mr. Ole Reitov, a journalist and cultural advisor: “The issue of artistic freedom is crucial to any nation. It is not ‘just’ about the artists’ rights to

express themselves freely, it is also a question of the rights of citizens to access artistic expressions and take part in cultural life – and thus one of the key issues for democracy” (qtd. in United Nations). These words give a clear answer to the question why Russian authorities should provide for the freedom of artistic expression and support our recommendations for improving the mutual understanding between artists and their audience via changes in Russian legislation and education.

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## **Между верой и законом: старые-новые вызовы современному искусству**

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*Последнее время сообщения о культурных событиях, поступающие со всего мира и из России, приводят нас к выводу, что мы столкнулись лицом к лицу с конфликтом искусства и его аудитории, который угрожает существенным ограничением свободы творчества. В статье анализируются эстетические и художественные корни, политические и социальные обстоятельства конфликта; обобщаются данные исследований юридических аспектов конфликта, анализируются кейсы из сферы судебной практики, подвергается проверке готовность российской системы правосудия решать данный конфликт без ущерба для свободы творчества. В статье обосновывается необходимость объявления моратория на судебные и иные репрессивные меры против искусства. Авторское решение проблемы включает образовательные программы и научную поддержку современного искусства.*

*Ключевые слова: современное искусство, свобода творчества, аудитория, правосудие, законодательство.*

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