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Defamation and Political Comment in Post-Soviet Russia

Elsbeth Reid

Abstract

The law of defamation in Russia has a long history. Its roots are in the European tradition, but the discontinuity of its historical development has meant that there have been particular difficulties in reconfiguring the law for the new human rights era following Russia's accession to the Council of Europe in 1996 and ratification of the European Convention on Human Rights in 1998. Defamation law must now be tested against the fundamental standards enshrined in the ECHR, to ensure that appropriate levels of protection are provided not only for reputation but, also, for freedom of expression. It has been left largely to the judiciary and judge-made law to manage this difficult transition. This article analyses the elements that make up the law of defamation in Russia and assesses the challenges that remain in adapting it to the twenty-first century.

Keywords

defamation, freedom of expression, human rights, protection of reputation

1. Introduction

Protection for personality rights in general, and for honor and reputation in particular, has a long history in Russia, as in other European jurisdictions, which can be traced back through the pre-revolutionary period to the earliest legal texts. Civil remedies for defamation, however, lay dormant in the earlier part of the Soviet era, to be partially revived in the 1960s and then extended in the 1990s. But this is an area which has encountered particular challenges in its reconfiguration for the post-Soviet era. The law of defamation is a “curious compound”,¹ the composition of which has come under intense scrutiny in many systems during the closing decades of the twentieth century. Its elements have been adjusted in varying ways in order to combine protection for reputation

* The author is grateful to the two anonymous referees for their helpful comments on a draft of this article. The texts of recent Russian cases have been obtained from the websites of the relevant courts, accessible through the general portal <<http://www.sudrf.ru/>> and, also, searchable at <<http://actoscope.com/>>. Unless otherwise stated, all translations in the present article from Russian are by the author. Texts of all cases from the European Court of Human Rights, including those not reported in *European Human Rights Reports (EHRR)*, are available at the Court's website, <<http://www.echr.coe.int/echr/>>.

¹ William Page Keeton *et al.* (eds.), *Prosser and Keaton on Torts* (West Group, St Paul, MN, 1985, 5th ed.), 771.

with the minimum possible level of interference with freedom of expression.² The Russian Federation (RF) too has found itself drawn into this process by its accession to the Council of Europe in 1996 and ratification of the European Convention on Human Rights (ECHR) in 1998. The law as contained in the 1994 RF Civil Code, its basic form still drawn from the Roman law *actio iniuriarum*, has required to become “constitutionalized”, to the extent that the rules on civil liability have been tested against the fundamental standards enshrined in the ECHR. It has been left largely to the judiciary and judge-made law to manage this transition, but with no clear strategy for reconciling traditional sympathy for the victim of calumny with modern expectations of freedom of expression, and with little consensus as to the relative priority of the interests involved. This article analyses the elements that make up the law of defamation in Russia and assesses the challenges that remain in adapting it to an age of human rights in the twenty-first century.

1.1. The Terminology of “Defamation”

The term “defamation” is itself problematic. While defamation in the Anglo-American Common Law was once taken to mean any malicious verbal injury, false or true, that affected the reputation of the victim, in modern usage it has come to be restricted to false imputations only.³ In Russian, the term “defamation” (“*diffamatsiia*”) is encountered as the generic term for verbal injury against honor and dignity, and remains capable of extending to material for which there is a factual basis, as well as to falsehood.⁴ This term is not, however, to be found in legislative texts. More specifically, the modern Russian law breaks this general category down into: (i) civil remedies for “protection of honor, dignity and business reputation” (“*zashchita chesti, dostoinstva i delovoi reputatsii*”), actionable only if the offending imputation does not “correspond with reality”;⁵ and (ii) the criminal offense of defamation, in which not only must the offending imputation be false but, also, the defendant is required to have made the comment knowing it to be so.⁶ The Russian term used for this second category is “*kleveta*” (*i.e.*, not

² Bonnie Docherty, “Defamation Law: Positive Jurisprudence”, 13 *Harvard Human Rights Journal* (2000), 263-287.

³ Richard H. Helmholz, *Select Cases on the Law of Defamation to 1600* (Selden Society Vol. 101, London, 1985), xxx-xxxii; and V.V. Veeder, “A History and Theory of the Law of Defamation” (Part 1), 3 *Columbia Law Review* (1903), 546, at 551.

⁴ G. Arapova (ed.), *Sbornik praktiki Rossiiskikh sudov po delam o diffamatsii* (Tsentr zashchity prav SMI, St. Petersburg, 2006), 7-8; and A.M. Erdelevskii, *Kompensatsiia moral'nogo vreda* (Wolters Kluwer, Moscow, 2007, 3rd ed.), 143.

⁵ 1994 RF Civil Code (30 November 1994, with subsequent amendments) No.51-FZ, *SZRF* (1994) No.32 item 3301, Art.152(1), discussed at length below in section 4.2.

⁶ 1996 RF Criminal Code (13 June 1996) No.63-FZ, *SZRF* (1996) No.25 item 2954, Art.128-1. The previous provisions in the Criminal Code, Art.129, were repealed by 2011 RF Federal Law “O vnesenii izmenenii v ugolovnyi kodeks RF” (7 December 2011) No.420-FZ, *SZRF* (2011) No.50 item 7362, while Art.128-1 was restored by 2012 RF Federal Law “O vnesenii izmenenii v ugolovnyi kodeks RF” (28 July 2012) No.141-FZ, *SZRF* (2012) No.31 item 4330, as discussed further below in section 4.1.

“*diffamatsiia*”);⁷ but, in keeping with English usage, the term “defamation” is used for this criminal wrong as well as for the general concept. Closely related is the civil wrong of insult (“*oskorblenie*”), which compensate affronts to dignity even if they are not demonstrably based upon falsehood;⁸ and there is also an administrative offense of insult (likewise “*oskorblenie*”) which similarly does not require remarks to have been factually incorrect but stipulates that they should have involved an element of “indecentcy” (“*vyrazhennoe v neprilichnoy forme*”).⁹ The formal division between libel and slander, by which English law distinguishes remedies for spoken and written defamation, is not found in Russian law. Issues relating to the protection of private information¹⁰ and image rights¹¹ in the modern law are beyond the scope of this article and will not be discussed below.

2. The Pre-Revolutionary Era

The concept of verbal injury as an actionable infringement of honor and status, attracting sanctions in the same way as physical blows, is scattered through the earliest Russian texts.¹² While the role of criminal procedure in addressing such wrongs may have been the primary concern of the early texts, the rise of civil litigation can be traced to the sixteenth century.¹³ The *Sudebnik* of 1550 reveals that in cases of infringement of honor (“*bezchest'e*”) a complex scale of civil compensation had evolved, according to the rank and gender of the victim.¹⁴ Such formal distinctions according to status survived the eighteenth-century reception of Roman law in Russia¹⁵ but receded after emancipation of the serfs in

⁷ See definition in A.K. Simonov and M.B. Gorbanevskii (eds.), *Poniatiia chesti, dostoinstva i delovoi reputatsii* (Medeia Publishers, Moscow, 2004), 14-15.

⁸ 1994 RF Civil Code, *op.cit.* note 5, Art.150.

⁹ 2001 RF Code on Administrative Offenses (30 December 2001) No.195-FZ, *SZRf* (2002) No.1 item 1, Art.5.61(1)-(2), discussed further below at section 4.1. See a definition in Simonov and Gorbanevskii *op.cit.* note 7, 15. This structure parallels that found in other continental European jurisdictions: *e.g.*, see the German *Strafgesetzbuch*, *BGBI.* I S.3322 (13 November 1998) §§185-200, distinguishing the criminal offenses of insult and defamation (“*Beleidigung*” and “*Üble Nachrede*”).

¹⁰ 1994 RF Civil Code, *op.cit.* note 5, Art.150.

¹¹ *Ibid.*, Art.152-1.

¹² See a general account in Nancy Shields Kollmann, *By Honor Bound: State and Society in Early Modern Russia* (Cornell University Press, Ithaca, NY, 1999), 42-44. The late 14th-century Charter of the Dvina, *e.g.*, provided in Art.2 for remedies against those who used insulting language against boyars (for an English translation see George Vernadsky, *Mediaeval Russian Laws* (Columbia University Press, New York, NY, 1947), 58).

¹³ See Horace W. Dewey, “Old Muscovite Concepts of Injured Honor (Beschestie)”, 27(4) *Slavic Review* (1968), 594-603.

¹⁴ See, also, the *Sudebnik of Feodor Ioannovich*, available in F.F. Mazurin (ed.), *Sudebnik Tsaria Feodora Ioannovicha 1589 g.* (Tipografiia G. Lissnera i A. Geshelia, Moscow, 1900), Arts.41-71.

¹⁵ See Darrell P. Hammer, “Russia and the Roman Law”, 16 *American Slavic and East European Review* (1957), 1-13; and John Quigley, “The Romanist Character of Soviet Law”, in Ferdinand J.M. Feldbrugge (ed.), *The Emancipation of Soviet Law*, in F.J.M. Feldbrugge (ed.), *Law in Eastern Europe* No.44 (Dordrecht, Martinus Nijhoff Publishers, 1992), 27-50.

1861. In keeping with other European legal systems, insult and defamation were treated primarily as criminal wrongs, but a parallel right to civil compensation also arose.¹⁶ Tiutriumov's compilation of the Civil Laws in the latter days of the Russian empire allowed for small sums to be claimed by way of civil compensation, alongside or as an alternative to criminal sanctions, when the claimant had suffered "personal disgrace and insult".¹⁷ Pobedonotsev's authoritative *Course on Civil Law*, published in 1896, drew parallels with the contemporary French and German law in casting wrongs against the person as primarily a matter for the criminal law, and to that extent the primacy of the detailed civil remedies offered by English law was regarded as "distinctive".¹⁸ At the same time, he also traced the legacy of the Roman law *actio iniuriarum*—in Russia as in other European legal systems—in providing injured persons, or their relatives, with civil remedies in cases of murder, assault, the use of violence, deprivation of freedom as well as personal disgrace and insult.¹⁹

However, the highly restrictive system of press censorship which had been in place since the enactment of "temporary" press laws in 1865²⁰ gave the law of defamation a very different context from that which obtained in some other European jurisdictions at that time. Admittedly, there appeared to be little sign of the widespread use of defamation lawsuits as the tool of political censorship, which is said to have been prevalent in late nineteenth-century Germany;²¹ but the scope to defame those in public life, in effect, was cut off at source. There was no phenomenon in Russia comparable to the "epidemic" of libel litigation observed in Germany in the 1880s involving tens of thousands of cases annually.²² And there was certainly no Russian equivalent of the French *Loi sur la liberté de la presse* enacted in 1881,²³ or of the developments that in England had led to

¹⁶ See, e.g., A. Gozhev and I. Tsvetkov, *Sbornik grazhdanskikh zakonov* (Gosudarstvennaia tipografiia, St. Petersburg, 1886) Vol.2, paras. 8853-8861.

¹⁷ "Lichnye obidy i oskorbleniia". See I.M. Tiutriumov, *Zakony grazhdanskie s raz'iasneniiami Pravitel'stvuiushchego Senata i kommentariiami Russkikh iuristov*, Book Two (Zakonovedenie, St Petersburg, 1913, 4th ed.), Arts.667-669.

¹⁸ K.P. Pobedonotsev, *Kurs grazhdanskogo prava (Tret'ia chast': Dogovory i obiazatel'stva)* (Sinodal'naia tipografiia, St. Peterburg, 1896), 594. For detailed discussion of the influence of French and German codification upon Russian legal development in the nineteenth century, see Tatiana Borisova, "Russian National Legal Tradition: *Svod versus Ulozhenie* in Nineteenth-century Russia", 33(3) *Review of Central and East European Law* (2008), 295-341, 295.

¹⁹ Pobedonotsev, *op.cit.* note 18, 593.

²⁰ And remained in force being progressively augmented until 1905. For further background, see Daniel Balmuth, "Origins of the Russian Press Reform of 1865", 47 *The Slavonic and East European Review* (1969), 369-388.

²¹ Ann Goldberg, *Honor, Politics, and the Law in Imperial Germany, 1871-1914* (CUP, Cambridge, 2010), 81-82.

²² *Ibid.*, 4.

²³ On the significance of the 1881 legislation in liberalizing the French law of defamation, see Raymond Kuhn, *The Media in France* (Routledge, London, 1995), 50-52.

the establishment of a fair-comment defense as the newspaper industry expanded in the latter part of the nineteenth century.²⁴ In the latter part of the imperial period, while the Russian law of defamation lay recognizably within the European tradition,²⁵ it remained largely isolated from the changes in press culture that in certain European jurisdictions were causing the proper boundaries of freedom of speech to be rethought in the closing years of the nineteenth century.²⁶

3. Defamation and Insult in the Soviet Era

After the Revolution, the crimes of insult²⁷ and defamation²⁸ survived in the 1926 RSFSR Criminal Code as offenses against public order. Both were directed at honor and dignity, with the exacerbating feature in relation to insult that some sort of indecency had been imputed. Moreover, while defamation is based on false information, an insult might be justiciable even if it was not based upon a false statement of fact. However, no specific provision was made in the 1922 RSFSR Civil Code for civil liability for defamation or insult, or indeed in any other legislation of the early Soviet era. As Grzybowski has suggested,²⁹ further development of private remedies for slights against reputation was hardly consistent with the post-revolutionary order, certainly insofar as the allegedly defamatory remarks appeared in the media. The role of the Soviet press was not only to inform on matters of objective truth but, also, to educate its readership and to exhort it to greater endeavor. Accordingly, it was “the duty of the Soviet man to embrace and emulate the criticism by the press and to assist in the elimination of mistakes and shortcomings”.³⁰ Even if the media were on occasion over-zealous in exposing personal and organizational failures, individual interests were not be asserted in such a way as to undermine the forces of progress.

²⁴ On English law, see *e.g.*, Ian Loveland, *Political Libels: A Comparative Study* (Hart Publishing, Oxford, 2000) 19-50; and Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, Oxford, 2004), 151-163.

²⁵ Indeed, the draft civil code presented to the *Duma* on the eve of the First World War followed the European style of containing a general clause on delictual liability, in Art. 1173, without specific provision for defamation or insult. The fifth section of the Code, on the Law of Obligations, was introduced to the *Duma* in 1913. For the official publication approved by the Minister of Justice, see V.E. Gertsenberg and I.S. Pereterskii (eds.), *Obiazatel'stvennoe pravo. Kniga v Grazhdanskogo Ulozheniia* (Pravo, St Petersburg, 1914), the draft introduced on 14 October 1913 to the State *Duma*. The draft had drawn heavily on continental European scholarship; see C.P. Gal'perin, “Zamechaniia na glavu pervuiu proekta v knigi grazhdanskogo ulozheniia (ob obiazatel'stvakh)”, *Vestnik prava* (1903) No.1, 61-104; and Hammer, *op.cit.* note 15, 7-9.

²⁶ Such as resulted *e.g.*, in France in the enactment of the *Loi sur la liberté de la presse du 29 juillet 1881*, noted *supra*. For England see Loveland, *op.cit.* note 24, ch. 2.

²⁷ 1926 RSFSR Criminal Code, *SU RSFSR* (1926) No.80 item 600, Arts.159 and 160.

²⁸ *Ibid.*, Art.161.

²⁹ Kazimierz Grzybowski, *Soviet Legal Institutions* (University of Michigan Press, Ann Arbor, MI, 1962), 141, referring to the 1922 RSFSR Criminal Code, *SU RSFSR* (1922) No.15 item 153.

³⁰ Grzybowski, *op.cit.* note 29.

The civil law of defamation, therefore, did not figure in Soviet textbooks for several decades; but an important turning point, as in so many other respects, was the Twentieth Party Congress of the Communist Party in 1956 and Khrushchev's famous "secret" speech. The ensuing public campaign to rediscover "Leninist" principles of social democracy and to restructure socialist legality was ultimately to replace the "dualism of law and terror" with a new "dualism of law and social pressure".³¹ Nonetheless, one of its lasting consequences was a reappraisal—at least at a theoretical level—of protection for the honor and dignity of the individual. The 1961 *Program of the Communist Party of the Soviet Union*³² envisaged a transition to communism in which "moral principles become increasingly important",³³ bringing society closer to a stage in which "the personal dignity of each citizen is protected by society".³⁴

This new focus upon the importance of personal dignity became apparent almost immediately in the more punitive approach adopted by the 1960 RSFSR Criminal Code to crimes against the person. In the 1926 Criminal Code, political crimes had been punished with significantly greater severity than non-political offenses, so that infliction of bodily injury, rape, theft, defamation and insult met with relatively lenient penalties as compared with crimes against the state.³⁵ With the 1960 Code, this approach changed in relation to a range of offenses against the person. In particular, Articles 130 and 131 of the 1960 Criminal Code doubled the possible terms of imprisonment that could be imposed in relation to defamation and insult.³⁶

Developments in the civil law were also significant. The 1961 USSR Fundamental Principles of Civil Legislation aspired to establish the legal relationships for the new era³⁷ by providing not only for the material and technical foundation for communism but, also, "the greater satisfaction of the material

³¹ Harold J. Berman, *Justice in the USSR* (Harvard UP, Cambridge, MA, 1963, rev. ed.), 88.

³² Foreign Languages Publishing House, Moscow, 1961.

³³ *Ibid.*, 108.

³⁴ *Ibid.*, 109-110 (emphasis added). The 1977 USSR Constitution later provided, in Art.57, that citizens had "the right to judicial protection against infringements of their honor and dignity, life and health, and personal freedom and property", although this "right" was qualified by the stipulation, in Art.39, that "the exercise of rights and citizens by citizens must not harm the interest of society and the state or the rights of other citizens". *Ved. SSSR* (1977) No.41 item 617. English translations of the 1936 and 1977 USSR Constitutions are in Ferdinand Feldbrugge (ed.), *The Constitutions of the USSR and the Union Republics: Analysis, Texts, Reports* (Sijthoff & Noordhoff Publishers, Alphen aan den Rijn, The Netherlands, Germantown, MD, 1979).

³⁵ See Harold J. Berman and James W. Spindler, *Soviet Criminal Law and Procedure: The RSFSR Codes* (Harvard University Press, Cambridge, MA, 1972, 2nd ed.), 27.

³⁶ *Ved. RSFSR* (1960) No.40 item 591. The sentence for defamation was raised to between one and three years, as compared with six months to one year under the 1926 Code (Art.130). Similarly, insult attracted imprisonment of between six months and one year (Art.131), more than double the terms stipulated previously. 1926 RSFSR Criminal Code, *op.cit.* note 27.

³⁷ *Ved.SSSR* (1961) No.50 item 525, Art.1.

and spiritual needs of the citizen”.³⁸ In particular, a civil remedy was restored to the law of defamation. Article 7 offered individuals and also organizations the right to demand the refutation of statements that impugned their “honor and dignity”.³⁹ If the author of the statement failed to prove its truth, the sanction for failure to refute was a fine payable to the state. The principal distinguishing feature between civil defamation and criminal defamation was that while the criminal offense required malicious intent, the civil wrong was actionable even where the defendant had no intention to harm. In the absence of provable intent, therefore, the criminal prosecution would fail, but a civil claim might remain. Article 7 was thus an important landmark, in effect restoring to the Soviet citizen a remedy for *iniuria*. Admittedly, it did not provide for the moral injury suffered to be compensated by the award of damages but, instead, attempted to restore reputation, on pain of criminal punishment of the defendant. Article 7 of the 1961 Fundamentals was duly implemented by Article 7 of the 1964 Civil Code of the Russian Soviet Federative Socialist Republic, in which its text was repeated verbatim.⁴⁰ It was left unclear whether Article 88 of the Fundamentals—the “general clause” on delictual liability—allowed for damages to be payable for patrimonial loss or moral prejudice. Soviet scholars argued that the former should be exigible on proof of fault, but were divided on the latter.⁴¹

The criteria by which defamatory statements were to be judged under Article 7 are of particular note.⁴² Other European jurisdictions purport to appraise defamatory remarks objectively by hypothesizing the likely impact on the general community. Defamation in German law, for example, is perpetrated by remarks which “malign [the plaintiff] or disparage him in public opinion”,⁴³ and an English court asks: “would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”⁴⁴ Inevitably, therefore, the attribution of opinions to “right-thinking” members of society becomes normative, not purely descriptive, by reference to what—in the court’s view—persons in the street *ought*

³⁸ *Ibid.*, Art. 1. For parallel developments in the 1964 Czechoslovak Civil Code, see Theodor Vondracek, “Defamation in Czechoslovak Law as a New Legal Concept”, 1 *Review of Socialist Law* (1975), 281-307.

³⁹ 1961 USSR Fundamentals, *op.cit.* note 37. The first paragraph of Art. 7 reads: “*Grazhdanin ili organizatsiia uprave trebovat' po sudu oproverzheniia porochashchikh ikh chest' i dostoinstvo svedeniĭ, esli rasprostranivshii takie svedeniia ne dokazhet, chto oni sootvetstvuiut deistvitel'nosti.*”

⁴⁰ 1964 RSFSR Civil Code, *Ved. RSFSR* (1964) No. 24 item 406. This provision was similarly incorporated into the Civil Codes of the other fourteen Soviet republics during the course of 1963-1964. See Serge L. Levitsky, *Copyright, Defamation, and Privacy in Soviet Civil Law*, in Ferdinand J.M. Feldbrugge (ed.), *Law in Eastern Europe* No. 20 (Alphen aan den Rijn, The Netherlands, Sijthoff & Noordhoff Publishers, 1979), 145.

⁴¹ Levitsky, *op.cit.* note 40, 18-19.

⁴² *Ibid.*, 32-38. For an American perspective, see Peter B. Maggs and Karl F. Winkler, “Libel in the Soviet Press: The New Civil Remedy in Theory and Practice”, 41 *Tulane Law Review* (1966), 55.

⁴³ *StGB*, *op.cit.* note 9, §187.

⁴⁴ (1936) 52 *TLR* 669; and (1936) 2 *All ER*, 1237 at 1240.

to think rather than what they *do* think. The normative nature of the equivalent test in Soviet law was explicit from the outset. Not every negative comment would attract liability in terms of Article 7. As with other civil rights, the right to honor and dignity merited protection only in so far as consistent with “the rules of the socialist community, and the moral principles of a society building communism”.⁴⁵ In a 1964 review of judicial practice, the USSR Supreme Court declared that honor and dignity was undermined where the imputation lowered the subject in public estimation “from the point of view of the laws and rules of socialist communal life and of the moral principles of our society”.⁴⁶ Of course, many of the types of imputation deemed actionable by this standard would also have been regarded as defamatory by Western European standards—such as allegations of dishonesty or criminal or disorderly conduct. But, in addition, they included other categories more particularly reflecting Soviet mores, for example: assertions regarding non-fulfillment of labor obligations, violation of civic or filial duties or of the rules of communal living, display of characteristics disapproved of by communist morality, or membership in a religious sect.⁴⁷

The initial reception of Article 7 was “troubled”, with leading newspapers such as *Izvestiia* and *Pravda* campaigning forcefully against recourse to the new provisions being offered as a means of vindication for “intriguers” (“*kliauzniki*”) and “parasites” (“*parazity*”).⁴⁸ Nonetheless, Article 7 remained, and while it could hardly be said to have opened the floodgates to defamation litigation generally—whether generally or in relation to political comment—its impact was not trivial. By 1972, the Plenum of the Supreme Court noted that around 400 cases per year were being brought across the Soviet Union, 75% against newspapers and 25% against individuals, and the claims were upheld in just under 50%.⁴⁹ However, a worrying feature of these developments—perhaps reflecting the courts’ lack of familiarity with the framework entrusted to them—were the “mistakes” and misconceptions that bedeviled legal practice in this area, with significant “errors” found in a number of decisions.⁵⁰

Protection for reputation was thus significantly enhanced in the 1960s; and, indeed, the right to protection of honor and dignity was included in the 1977 Soviet Constitution.⁵¹ But while it was said that Article 7 had enhanced

⁴⁵ 1961 USSR Fundamentals, *op.cit.* note 37, Art.5.

⁴⁶ *Sotsialisticheskaia zakonnost'* (1964) No.12, 17 at 18.

⁴⁷ Levitsky, *op.cit.* note 40, 38-42.

⁴⁸ For discussion, see Fred H. Cate, “Civil Defamation Law in the Soviet Union”, 23 *Stanford Journal of International Law* (1987), 304-308.

⁴⁹ *Biulleten' Verkhovnogo Suda SSSR* (1972) No.1, 3 at 4. See, also, Levitsky, *op.cit.* note 40, 5.

⁵⁰ *Biulleten' Verkhovnogo Suda SSSR* (1972) No.1, 3 at 4.

⁵¹ 1977 USSR Constitution, *op.cit.* note 34, Art.57.

the status of the press in making it more accountable,⁵² there was no equivalent re-evaluation of the extent to which freedom of expression should be taken into account when defamation was alleged. Article 125 of the 1936 Soviet Constitution had guaranteed freedom of expression “in accordance with the interests of the workers and the goals of strengthening the socialist order”, but this sat awkwardly with some of the other features of the new 1960 RSFSR Criminal Code, most notably the retention and strengthening of earlier provisions on counter-revolutionary crimes, already defined in exceedingly broad terms in the 1926 Code.⁵³ Article 70 of the 1960 Criminal Code—found in the section entitled “Especially Dangerous Crimes against the State”—criminalized anti-Soviet agitation and propaganda,⁵⁴ penalizing:

“Agitation or propaganda carried on for the purpose of subverting or weakening Soviet regime or of committing particular, especially dangerous crimes against the state, or the circulation for the same purpose of defamatory fabrications which defame the Soviet state and social system, or the circulation or preparation or keeping, for the same purpose, of literature of such content [...]”⁵⁵

Indeed, it was under these provisions that the writers Siniavskii and Daniel were prosecuted and imprisoned in 1966, despite the allegedly defamatory propaganda having taken the form of works of fiction.⁵⁶ Notwithstanding international condemnation of the trial proceedings, Article 190-1 was inserted into the Criminal Code immediately thereafter.⁵⁷ This broadened the scope of the anti-Soviet propaganda offense by extending it to “fabrications” known to be false which “defamed” the Soviet state and social system, *even if* they were not circulated for the purpose of subverting or weakening Soviet authority. There was no requirement that anti-Soviet intent be proven.

The scope for political discussion was thus limited by not only by press censorship but, also, by broadly-framed provisions criminalizing any comment on public affairs that could be construed as defamation of the state. Accordingly,

⁵² A.V. Beliauskii and N.A. Pridvorov, *Okhrana chesti i dostoinstva lichnosti v SSSR* (Iuridicheskaia Literatura, Moscow, 1971) 27.

⁵³ See, in particular, Art.59 of the 1926 RSFSR Criminal Code, *op.cit.* note 27. For an English translation of the 1936 USSR Constitution see Feldbrugge, *op.cit.* note 34.

⁵⁴ For examples of prosecutions under the 1960 RSFSR Criminal Code (Arts.70 and 190-1), see Amnesty International, *Prisoners of Conscience in the USSR* (AI Publications, London, 1980), 9-19, available at <<http://www.amnesty.org/en/library/info/EUR46/004/1980/en>>.

⁵⁵ 1960 RSFSR Criminal Code, *op.cit.* note 36; translation from Berman and Spindler, *op.cit.* note 35, 153.

⁵⁶ For a full account see Max Hayward (ed.), *On Trial: The Soviet State versus “Abram Tertz” and “Nikolai Arzbak”* (Harper and Row, New York, NY, 1966).

⁵⁷ Decree of the Presidium of the RSFSR Supreme Soviet (16 September 1966), *Ved. RSFSR* (1966) No.38 item 1038. Arts.190-2 and 190-3—inserted at the same time—dealt with desecration of a state emblem and violation of state order by a group (various demonstrations had taken place at the time of the trial).

there was little call to bring journalists to account in the civil courts for publishing politically controversial material, since such text was unlikely to find its way into the media in the first place. A well-publicized but relatively rare example, involving foreign journalists, was the 1978 case of *Gosteleradio v. Whitney and Piper*. Whitney and Piper were correspondents for *The New York Times* and *Baltimore Sun*, respectively, who published articles alleging that the televised confession of a prominent Georgian dissident had been fabricated. After highly-charged proceedings, at which the dissident in question was brought out of jail to testify, the civil action brought against them by the *Gosteleradio*, the state broadcasting organization, was successful, although western commentators regarded the proceedings as flawed even by the letter of Soviet law.⁵⁸ The defendants declined to attend the proceedings and, in any event, had no standing to compel their newspapers to refute their statements; in the event, however, they did pay the fine exacted by the Soviet court.

The *perestroika* era saw further development of civil remedies for defamation, however. In the closing months of the Soviet Union, the 1961 Fundamental Principles of Civil Legislation were recast into the 1991 Fundamental Principles of Civil Legislation which significantly expanded the provisions relevant to defamation. Article 7 of the 1961 Fundamentals had dealt with infringements of honor and dignity by compelling refutation of the offending statement. Article 7 of the 1991 Fundamentals protected not only honor and dignity but, also, the business reputation of citizens and juridical persons.⁵⁹ A further highly significant change was that the 1991 Fundamentals provided for monetary compensation for damage and moral harm,⁶⁰ over and above the right to demand refutation of the defamatory imputation. Nonetheless, in this era of *glasnost*, a notable omission from the 1991 text of Article 7 was any reference to freedom of expression, to counterbalance the extended reach of defamation.

By the end of the Soviet era, therefore, the civil law of defamation had been revitalized but in isolation from the processes which in other European jurisdictions had created a complex balance between protection for reputation on the one hand and press independence and freedom of expression on the other. In the 1990s, the lifting of control of the media brought a flowering of political commentary and a new generation of journalists. Privatized and independent

⁵⁸ See Glenn Kolleeny, "Comment: The Soviet Law of Defamation and the Case of *Gosteleradio v. Whitney and Piper*", 20 *Columbia Journal of Transnational Law* (1981), 295-318. Levitsky provides more a "unusual" example of a case brought under Art.7 (*op.cit.* note 40, 54-57) in which defamation proceedings had been instituted (unsuccessfully) by a district prosecutor, G. Filimonov, against a commentator, O. Chaikovskaia. The allegedly defamatory allegation was contained in her article published in *Izvestiia* describing his views as "naïve" and "dangerous" after he had written to *Literaturnaia Gazeta* arguing for a presumption of guilt in criminal proceedings.

⁵⁹ 1961 Fundamental Principles of Civil Legislation of the USSR and the Union Republics, *op.cit.* note 37, Art.7(1).

⁶⁰ *Ibid.*, Art.7(6).

media organizations competed in Russia to produce original discussion and satire that was often highly critical of public and political figures. With the turn of the new century, however, independent media organizations have struggled to continue and political satire has shifted from the traditional media to the internet.⁶¹ Of course, many factors have combined to change the environment for political speech in the twenty-first century Russia—most of which are beyond the scope of this article, not least of which are the “voluntary” cooperation between journalists and the state⁶² and tighter control over access to information.⁶³ The role of the law of defamation in “chilling” debate in the traditional media should not be ignored, however.

4. Defamation in the Post-Soviet Era

The 1993 Constitution of the Russian Federation makes provision both for the importance of reputation to the individual and for freedom of expression. Article 23 enshrines the right to protect honor and good name, but is balanced by Article 29(1), guaranteeing “freedom of thought and expression” and “freedom of the mass media”, and adding that “censorship is forbidden”.⁶⁴ Article 46 confers a general right to judicial protection for constitutional rights and freedoms.

4.1. Decriminalization and Recriminalization of Defamation

Although in 2010, the United Nations described criminal defamation laws generally as “problematical”,⁶⁵ laws criminalizing defamation and insult continue to be common, notably in continental European jurisdictions—even if rarely applied.⁶⁶

⁶¹ See Konstantin Ivanov, “Protection of Speech Criticizing the Government: A Comparative Analysis of Legislation and Jurisprudence of the Russian Federation, the USA and the ECtHR”, LLM thesis, Central European University, 2008 (available at <http://www.etd.ceu.hu/2008/ivanov_konstantin.pdf>).

⁶² See Dorothea Schönfeld, “Tilting at Windmills? The European Response to Violations of Media Freedom in Russia”, 37(2-3) *Review of Central and East European Law* (2012), 233-290, at 279.

⁶³ On the restrictions on access to information and the “broad denominator of confidential information” that has replaced “references to political and ideological control”, see Hedwig de Smaele, “Mass Media and the Information Climate in Russia”, 59 *Europe-Asia Studies* (2007), 1299-1313, at 1310.

⁶⁴ 1993 RF Constitution, *Rossiiskaia gazeta* (25 December 1993), Art.29(5).

⁶⁵ UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression, Addendum, Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, AHRC/14/23/Add.2, (2010) Annex para. 2.

⁶⁶ E.g., in France “*diffamation publique*” attracts sanctions in terms of Art.29 of the *Loi sur la liberté de la presse du 29 juillet 1881* and Art.R621-1 of the *Code penal*, whereas “*diffamation non publique*” is dealt with by Art.R621-2 of the *Code Pénal* (both texts available in full at French Government website <<http://www.legifrance.gouv.fr/>>). In Germany, the crimes of defamation and insult are set out in §§185-200 of the *Strafgesetzbuch* (*op.cit.* note 9). In England, on the other hand, the common law offenses of sedition and seditious libel, defamatory libel and obscene libel were abolished by the Coroners and Justice Act 2009, s.73 (Her Majesty’s Stationery Office, London, 2009 chapter 25, and also available at <<http://www.legislation.gov.uk/>>).

In post-Soviet Russia too, defamation and insult remained crimes until 2011, attracting fines or imprisonment, with more severe penalties imposed in cases where the offending statement was published in the media or where it contained a false allegation of criminal conduct;⁶⁷ in practice, accusations that a person has committed a crime were most often the basis for prosecutions. Since a successful prosecution required malicious intent to be established as well as knowledge that the allegation was indeed false, convictions were relatively rare;⁶⁸ but a number of high profile cases had generated controversy as to the appropriateness of criminal sanctions in such matters. One of the most notorious involved the investigative journalist Mikhail Beketov, who had published articles critical of the mayor of the Khimki district outside Moscow, Vladimir Strelchenko. When Beketov's car was burnt out in 2007, he alleged that Strelchenko was responsible for the incident. Criminal proceedings were brought under Article 129 but interrupted by a near-fatal attack on Beketov by unidentified assailants. They resumed in 2010 with the defendant in a wheelchair and having lost the power of speech. A guilty verdict and fine of 5000 rubles at first instance, triggering significant public sympathy, was eventually overturned on appeal, on the basis that the necessary criminal intent had not been established by the prosecution.⁶⁹

Following these developments, Articles 129 and 130, setting out the crimes of defamation (“*kleveta*”) and insult (“*oskorblenie*”), were deleted from the Criminal Code in November 2011.⁷⁰ However, they did not disappear altogether; in effect, they were reincarnated as the administrative offenses of defamation and insult in Articles 5.60 and 5.61 of the 2001 RF Code of Administrative Offenses,⁷¹ and indeed even higher fines were imposed than under the repealed criminal provisions. The re-categorization of these offenses perhaps carried some symbolic significance therefore;⁷² but it was of marginal impact in liberalizing the law in practice.

⁶⁷ 1996 RF Criminal Code, *op.cit.* note 6, Arts.129 and 130.

⁶⁸ See overview by N. Alexandrovna *et al.* in “Russian Federation”, in C. Glasser Jr. (ed.), *International Libel and Privacy Handbook* (Bloomberg Press, New York, NY, 2nd ed. 2009), 354-376, at 356-357.

⁶⁹ Khimki Town Court (10 November 2010) Case No.263. See, also, the prosecution (noted at note 190 below) of Oleg Orlov, Chair of the Memorial Human Rights Society, who had accused President Kadyrov of Chechnia of complicity in the murder of a journalist. Orlov was acquitted by Khamovniki District Court, Moscow City (14 June 2011). A criminal prosecution brought against the blogger Alexander Sorkin, accusing him of defaming the governor of the Khemerovo region in a posting that compared Russian regional governors to Latin American dictators, drew international attention and was dropped when the 2011 changes to the Criminal Code were enacted.

⁷⁰ 2011 RF Federal Law No.420-FZ, *op.cit.* note 6.

⁷¹ As inserted by 2011 RF Federal Law No.420-FZ, *ibid.*

⁷² Not least because the stated scope of administrative offenses is to regulate conduct compromising public order, public safety and the environment: 2001 RF Code on Administrative Offenses, *op.cit.* note 9, Art.1.2.

In any event, any intended concession towards a more liberal regime was abruptly withdrawn after only a few months by reform in July 2012, reinstating defamation to the Criminal Code.⁷³ Article 128.1—as now inserted into the Code⁷⁴—has not restored prison sentences but has introduced penalties for defamation that significantly exceed those exacted under Article 129 or under the short-lived Article 5.60 of the Administrative Code. In the ordinary case, defamation is punished with a maximum fine of 500,000 rubles or the equivalent of the defendant's income for a six-month period, or 160 hours of compulsory labor;⁷⁵ where the offending imputation is contained in a public statement, publicly performed work, or in the media, the maximum fine increases to 1,000,000 rubles.⁷⁶ This tariff rises to 2,000,000 rubles where the defamation has been pronounced by the defendant in an official capacity,⁷⁷ 3,000,000 rubles where its substance was that the victim was suffering from a noxious disease or had committed sexual offense⁷⁸ and 5,000,000 rubles where it alleged the victim to have committed a serious crime.⁷⁹ There is also separate provision imposing a fine of up to 2,000,000 rubles in relation to defamation of those involved in legal process, judges, jurors, prosecutors, and others involved in judicial procedure.⁸⁰

Article 128(1) defines defamation (“*kleveta*”) as “the dissemination of information known to be false impugning the honor and dignity of another person or damaging his reputation”.⁸¹ The important distinction from the civil wrong, therefore, is that while civil liability does not turn upon malicious intent (as discussed further below), the criminal offense requires that the defendant should have known the imputation to be unfounded (the adverb used in the Russian text is “*zavedomo*”). No further indication is given as to the precise state of knowledge required to found liability, nor the circumstances in which knowledge might be inferred; but, as with Article 129 previously, establishing proof of such knowledge may turn out to be a significant barrier to successful prosecutions.⁸²

73 2012 Federal Law No.141-FZ, *op.cit.* note 6.

74 The Russian-language text of the new Art.128.1 is available at <<http://www.pravo.gov.ru/>>, or at the commercial databases, “Garant” (<<http://www.garant.ru/>>), “KonsultantPlius” (<<http://www.consultant.ru/>>), or “Kodeks” (<<http://www.kodeks.ru/>>).

75 2011 Federal Law No.420-FZ, *op.cit.* note 6, Art.128.1.1.

76 *Ibid.*, Art.128.1.2.

77 *Ibid.*, Art.128.1.3.

78 *Ibid.*, Art.128.1.4.

79 *Ibid.*, Art.128.1.5.

80 This offense is now contained in Art.298(1) of the Criminal Code, *op.cit.* note 6.

81 2011 Federal Law No.420-FZ, *op.cit.* note 6, Art.128.1.1.

82 On the statistics for the years 2009-2011, see Aleksei Nikol'skii, “Verkhovnyi sud'ia: za klevetu prigovarivaiut redko”, in *Vedomosti* (19 July 2012), available at <http://www.vedomosti.ru/politics/news/2299026/verhovnyj_sudya_za_klevetu_prigovarivayut_redko>.

The “administrative” offense of insult, introduced in 2011, remains and is constituted by “debas[ing] the honor and dignity of another person, expressed in an indecent form”.⁸³ There is little sign, as yet, of widespread prosecutions on such charges; but an indication of the potential scope of criminal liability in relation to remarks that are demonstrably true is found in the civil proceedings forming the basis for the 2007 case of *Chemodurov v. Russia*.⁸⁴ In that case, a journalist had published an expose describing the misappropriation of funds from a regional Governor’s budget and the Governor’s instructions to officials to cover this up. He had reflected that “a Governor who gives such advice is abnormal”.⁸⁵ A claim brought by the Governor for defamation under Civil Code Article 152 was unsuccessful on the basis that the journalist could prove the factual basis for the story. However, the court awarded damages for the insult suffered, in terms of Article 150, because of the use of the term “abnormal” (“*nenormal’nyi*”) was an affront to dignity that, in colloquial usage, could carry connotations of mental incapacity. On the journalist’s application to Strasbourg, the ECtHR found the comment not to have exceeded the acceptable limits of criticism. Nonetheless, the case serves as a warning that, even where journalists have verified their sources, comment thereon using figurative or ambiguous terminology may be vulnerable to interpretation as “indecent” and, thus, actionable by civil or criminal suit.

There is a further administrative offense of omitting to take measures to prevent insult in a public forum or the media, even if the instigators were third parties,⁸⁶ although there is no indication of the circumstances in which such failure to take action attracts liability, nor those by which such failure might be exculpated. Moreover, Article 319 of the Criminal Code remains: insult specifically directed against public officials is an offense punishable by a fine and/or by a period of compulsory labor.

The re-criminalization of defamation so soon into a new Presidency⁸⁷ is no doubt intended to be taken as warning of a more punitive approach towards unguarded public discourse. It remains to be seen whether, in practice, it heralds a fresh wave of successful criminal prosecutions. Nonetheless, this renewed threat of prosecution and of significant financial and other penalties has the potential to exert a persuasive form of negative censorship. Its effects are likely to be felt

⁸³ 2001 RF Code on Administrative Offenses, *op.cit.* note 9, Art.5.61(1),(2) (“*unizhenie chesti i dostoinstva drugogo lisa, vyrazhennoe v neprilichnoi forme*”).

⁸⁴ *Chemodurov v. Russia* (31 July 2007) No.72683/01, (2008) 47 EHRR9. The full documentation for this case, including the decisions of the lower courts, is available at <http://www.mmdc.narod.ru/caselaw/process_19.html>.

⁸⁵ The offending sentences read in full: “I do not know what others think, but my view is as follows: a Governor who gives such advice is abnormal. Let me clarify, lest I face judicial proceedings: I am talking about the conduct of a [state] official, not Mr. Ruskoy’s personality, which is none of my business.” (English translation in version presented to ECtHR, *op.cit.* note 84.)

⁸⁶ 2001 RF Code on Administrative Offenses, *op.cit.* note 9, Art.5.61(3).

⁸⁷ President Putin took his oath of office on 7 May 2012.

not so much within the conventional media but, to a greater extent, by small-scale media organizations and individuals voicing public comment by informal means—a blogger who gets the facts wrong in alleging criminal wrongdoing by a public official, for instance, risks not only prosecution but, also, bankruptcy.

4.2. Civil Liability

Whatever the future impact of recent reforms on the number of criminal and administrative prosecutions, the volume of civil litigation continues to be substantial. Article 150 of the RF Civil Code⁸⁸ now sets out the general framework of protection for “nonmaterial assets” (“*nematerial’nye blaga*”), including life and health, honor, good name, and reputation, privacy, confidentiality, freedom of movement, and the rights of authors. More specifically, Article 152 deals with “honor, dignity and business reputation”,⁸⁹ reworking the provisions formerly located in Article 7 of the 1991 Fundamental Principles of Civil Legislation. A party who believes himself, herself, or itself to have been defamed:

“[...] has the right to apply through the court for refutation of information, impugning his honor, dignity or business reputation, unless the person who has spread such information proves its correspondence with reality.”⁹⁰

Essentially, therefore, Article 152 offers a remedy where: (i) the plaintiff can establish that the offending statement or publication have a damaging effect on honor, dignity or business reputation; and (ii) the defendant is unable to demonstrate the accuracy of its underlying factual basis.

On pain of a fine, a “refutation” (“*oproverzhenie*”) must appear in the same medium in which the defamatory material was published, and any documents containing the offending words are subject to exchange or recall.⁹¹ In cases where the offending information has become “widely known and it is not possible to bring a refutation to the attention of all”, the plaintiff instead can demand the confiscation and destruction of all material in which it is contained. Moreover, if the offending imputation has appeared on the Internet, the person responsible must publish the refutation by a means which will ensure that it reaches Internet

⁸⁸ The RF Civil Code (*op.cit.* note 5) has been enacted in four parts, between 1995 and 2008. Arts.150-152 were contained in the first part, which entered into force on 1 January 1995. It has been translated in several publications; one is Alexei N. Zhiltsov and Peter B. Maggs (transl.), *Civil Code of the Russian Federation* (English and Russian editions) (Infotropic Media, Moscow, 2010, 2nd rev. ed.).

⁸⁹ The Russian-language text of Art.152 is available in electronic form in the sources detailed at note 74 *supra*.

⁹⁰ 1994 RF Civil Code, *op.cit.* note 5, Art.152(1). These provisions are available not only to natural persons. They extend to protection of the reputation of the dead, Art.152 (1), and also legal persons in relation to their business reputations, Art.152(7). The 2002 RF Arbitrazh Procedural Code (24 July 2002) No.96-FZ, *SZRF* (2002) No.30 item 3012, Art.33(5), confers jurisdiction on the Arbitrazh (Commercial) courts to hear cases brought by business entities concerning injuries to business reputation.

⁹¹ 1994 RF Civil Code, *op.cit.* note 5, Art.152(2).

users.⁹² The plaintiff also is entitled to respond by publishing a response in the same medium.⁹³ A fine is payable in the event that the defendant does not comply with the obligations noted above; in addition, the plaintiff may claim financial compensation for any losses and moral harm suffered.⁹⁴ Compensation for moral harm may be awarded “regardless of fault”,⁹⁵ although in fixing the quantum the court is directed to consider not only the injury suffered by the plaintiff and the plaintiff’s individual characteristics but, also, the degree of “fault” (“*vina*”) exhibited by the defendants,⁹⁶ subject always to “the requirements of reasonableness and justice” (“*trebovaniia razumnosti i spravedlivosti*”).⁹⁷

These provisions are available not only to natural persons. As in other European Civil Law jurisdictions,⁹⁸ they extend to protecting the reputation of the dead.⁹⁹ They are also declared expressly in Article 152(8) to apply also to legal persons seeking to vindicate their business reputations, whether by demanding a refutation, confiscation of material, or by the award of damages.¹⁰⁰ Indeed, they have been successfully invoked not only by business entities but, also, by public organizations such as political parties.¹⁰¹

Liability is “strict” in the sense that the civil wrong has become uncoupled from the concept of intent that is required for the criminal offense and that was an element of the *actio iniuriarum*.¹⁰² There is no requirement for the plaintiff to prove intention to harm or knowledge of falsity on the defendant’s part. By the same token, there is no defense if malice is demonstrably absent, even in the circumstances that command “privilege” in Anglo-American jurisdictions. The motivation of the defendant is irrelevant except to the extent that perceived degree

92 These provisions were added to Art.152(2) by amendment in 2012: see note 88 *supra*.

93 1994 RF Civil Code, *op.cit.* note 5, Art.152(3).

94 *Ibid.*, Art.152(5).

95 *Ibid.*, Art.1100.

96 *Ibid.*, Art.151(2). See note 103 *infra*.

97 *Ibid.*, Art.1101(2).

98 For a comparative discussion see Christian von Bar, *The Common European Law of Torts*, Vol.2 (Oxford University Press, Oxford, 2000), para. 116.

99 1994 RF Civil Code, *op.cit.* note 5, Art.152(1).

100 The 2002 RF Arbitrazh Procedural Code, *op.cit.* note 90, Art.33(5), confers jurisdiction on Russian arbitrazh (commercial) courts to hear cases brought by business entities concerning injuries to business reputation. On the anomalies of awarding moral damages to legal persons, see Erdelevskii, *op.cit.* note 4, 119-124.

101 *E.g., Sutorin v. Pranitiskii*, Chernovskii District Court, (Zabaikal Region) Chita (13 April 2012) Case No.2-613/2012 (plaintiff was a branch of the Communist Party).

102 See Reinhard Zimmermann, *The Law of Obligations* (Juta, Cape Town, 1990), 1067ff.

of fault is one of the circumstances that may affect the amount of compensation awarded.¹⁰³

Truth is, in effect, a defense in that Article 152(1) allows claims to succeed, only if the defendant cannot establish that the defamatory imputation “corresponded with reality”. However, the Civil Code makes no express provision conferring privileged status on the media in relation to their coverage of matters of public interest. The wording of Article 152 makes no mention of a “public interest” defense or its equivalent, and it is not sufficiently open-textured to accommodate such a defense by implication (by use of concepts such as “fault” or “negligence”). An opportunity to adjust the wording of Article 152 was presented in 2012, following a major revision project which lasted four years and culminated in amendments to 500 of the Civil Code’s Articles.¹⁰⁴ However, the focus of this exercise primarily has been on commercial, land and intellectual property law. Although minor amendments were made to Article 152—with regard, for example, to Internet publication¹⁰⁵—no public interest defense appears to have been contemplated, at least at this time.

Admittedly, the 1991 RF Law on the Mass Information Media¹⁰⁶ sets out a number of rights guaranteed to the journalist carrying out professional activities, including the right to “seek out, inquire, receive and spread information”¹⁰⁷ and to protect her or his own “honor, dignity, health, life and property as a person discharging his civil duty”.¹⁰⁸ Otherwise, however, the Law on the Mass Information Media reinforces the obligation imposed in the Civil Code to refrain from publishing defamatory material. It does not provide any specific defenses available in the event of a defamation suit to journalists seeking to exercise these rights, except to the extent that journalists are absolved of civil liability where they have merely disseminated information obtained from official reports or news agencies or from official publications of state organs, public associations etc.¹⁰⁹

¹⁰³ The text of Art.151 directs that: “In fixing compensation for moral harm, the court takes into account the level of culpability of the defendant and any other circumstances worthy of attention. The court must also consider any degree of physical and moral suffering that is linked to the victim’s individual characteristics.” (“*Pri opredelenii razmerov kompensatsii moral’nogo vreda sud prinimaet vo vnimanie stepeni viny narushitelia i inye zasluživaiushchie vnimaniia obstoiatel’sva. Sud dolzhen takzhe uchityvat’ stepeni’ fizicheskikh i nraivtvennykh stradanii sviazannykh s individual’nymi osobennostiami litsa, kotoromu prichinen vred.*”)

¹⁰⁴ See note 88 *supra*.

¹⁰⁵ 1994 RF Civil Code, *op.cit.* note 5, Art.152(2).

¹⁰⁶ 1991 RF Law “O sredstvakh massovoi informatsii” (27 December 1991) No.2124-1, *Ved.RSFSR*(1992) No.7 item 300.

¹⁰⁷ *Ibid.*, Art.47.

¹⁰⁸ *Ibid.*, Art.49.

¹⁰⁹ *Ibid.*, Art.57.

4.2.1. The European Convention on Human Rights: Practice Prior to 2005
 In the 1990s, one commentator at least had urged that a necessary “first step” towards achieving appropriate levels of protection for both reputation and freedom of expression would be to recognize that “the relevant texts do not categorically exclude recognition of constitutional and international norms as sources of defamation law”.¹¹⁰ Some orientation in this direction was suggested by a 1996 RF Supreme Court decree reminding the judiciary of the central significance of Article 18 of the RF 1993 Constitution and highlighting that human rights and freedoms were “directly” enforceable and “determinative of the meaning, content and application of laws”, although admittedly that document made no specific reference to defamation.¹¹¹ However, those important first steps appeared to have been taken when Russia acceded to the Council of Europe a few months later in 1996¹¹² and then, in 1998, ratified the European Convention on Human Rights, acknowledging the competence of the European Commission for Human Rights to receive applications from Russian citizens and accepting the jurisdiction of the European Court.¹¹³

At the same time, serious concern was expressed about Russia’s preparedness to join the Council of Europe.¹¹⁴ Optimism that reform processes might nonetheless be hastened thereby was not borne out when, in 2005, the Council of Europe’s Parliamentary Assembly presented its wide-ranging report on *Honouring*

¹¹⁰ Peter Krug, “Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution” (Part One), 13 *Cardozo Arts & Ent. L.J.* (1994-1995), 847-880, at 860-863.

¹¹¹ Decree of the Plenum of the RF Supreme Court (31 October 1995) No.8, full text available at Supreme Court Website <http://www.supcourt.ru/vscourt_detale.php?id=938>, “O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia”, para. 1. The document further referred in para. 5 to Art.15(4) of the Constitution, which incorporated the “generally recognized principles and norms of international law” (“*obshchepriznannye printsipy i normy mezhdunarodnogo prava*”) as an integral part of the Russian system of justice, and specifically mentioned the Universal Declaration of Human Rights (providing not only for protection of honor and reputation at Art.12 but, also, for the right to freedom of opinion and expression at Art.19).

¹¹² As approved by the Parliamentary Assembly of the Council of Europe (see “Invitation to the Russian Federation to become a member of the Council of Europe”, Resolution (96)2, Doc. 7490 (14 February 1996), Adopted by the Committee of Ministers on 8 February 1996 at the 557th meeting of the Ministers’ Deputies, and available at <<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=7424&Language=EN>>).

¹¹³ 1998 RF Federal Law “O ratifikatsii Konventsii o zashchite prav chelovek i osnovnykh svobod i Protokol k nei” (30 March 1998) No.54, SZRF (1998) No.14 item 1514, acknowledged:
 “the jurisdiction of the European Court for Human Rights as binding in regard to questions of interpretation and application of the Convention and Protocols thereto in cases of alleged violation by the Russian Federation. [...]”

Although certain derogations were set out with regard to pre-trial and extra-judicial detention, none related to freedom of speech or protection of reputation.

¹¹⁴ See Mark Janis, “Russia and the ‘Legality’ of Strasbourg Law”, 8 *European Journal of International Law* (1997), 93-99, at 98; and Bill Bowring, “Russia’s Accession to the Council of Europe and Human Rights: Compliance or Cross-purposes?”, 6 *European Human Rights Law Review* (1997), 628-643.

of *Obligations and Commitments by the Russian Federation*.¹¹⁵ The law of defamation was identified as one of the areas which fell short of the necessary European human rights standards. The rapporteurs noted their concern at “the current defamation legislation and its application by the Russian judiciary and executive powers. Journalists are often prosecuted through libel suits (approximately 8,000 to 10,000 lawsuits a year)”.¹¹⁶ By this time also, the growing numbers of applications brought by journalists to the European Court of Human Rights (ECtHR)¹¹⁷ indicated worrying gaps between Russian jurisprudence and European standards, and that as far as Russia was concerned the inconsistencies in judicial practice first observed by the USSR Supreme Court in the 1970s¹¹⁸ plainly had not been alleviated by the requirement to factor in consideration of European jurisprudence. The mismatch between the expectations of the CoE’s Parliamentary Assembly and Russian defamation law in practice was not perhaps surprising; in any event, Russia is hardly alone in having struggled to map the open-textured norms of the Convention on to the framework of private law.¹¹⁹ Although the Constitution had hitherto addressed protection for both reputation¹²⁰ and freedom of expression,¹²¹ there had been little sustained attempt to correlate these constitutional norms with civil law remedies.

It is nonetheless possible to draw from Strasbourg jurisprudence certain irreducible principles which underlie the balancing of freedom of expression, as protected by Article 10 ECHR, against protection for reputation, as part of the individual’s “personal identity and psychological integrity”¹²² and thus within the scope of “private life” under Article 8 ECHR.¹²³ At the risk of over-simplification,

¹¹⁵ Doc. No.10568 (3 June 2005) available at <<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc05/EDOC10568.htm>>.

¹¹⁶ *Ibid.*, para. 389. This figure related to the number of civil suits, although disquiet was also noted in relation to the growing number of criminal prosecutions.

¹¹⁷ Including *Chemodurov v. Russia*, *op.cit.* note 84; *Grinberg v. Russia* (21 July 2005) No.23472/03, 43 *EHRR* 45; and *Dyundin v. Russia* (14 October 2008) No.37406/03, 52 *EHRR* 31.

¹¹⁸ See the text at note 50 *supra*.

¹¹⁹ *E.g.*, English law has found it necessary to recast its rules on “qualified privilege” to provide an ECHR-compliant public interest defense for responsible journalism (*Reynolds v. Times Newspapers* (2001) 2 *AC* 127), and on the difficulties in translating protection of private life, as entailed in Art.8, into a domestic law which did not recognize the tort of breach of privacy. See *Wainwright v. UK* (26 September 2006) No.12350/04, 44 *EHRR* 40.

¹²⁰ 1993 RF Constitution, *op.cit.* note 64, Art.23.

¹²¹ *Ibid.*, Art.29.

¹²² *Pfeifer v. Austria* (15 November 2007) No.12556/03, 48 *EHRR* 8, para. 35.

¹²³ For a discussion of whether protection for reputation is an independent right within the scope of Art.8 or whether this is more properly to be regarded as a factor to be considered in determining whether restrictions upon freedom of expression are lawful in terms of Art.10(2), see *Karakó v. Hungary* (28 April 2009) No.39311/05, 52 *EHRR* 36. On both views, however, the right to reputation must be balanced against the right to freedom of expression. On the interaction of Arts.8 and 10, see further Lord Lester of Herne Hill *et al.* (eds.), *Human Rights Law and Practice* (LexisNexis, London, 2009), 3rd

they can be summarized as follows. *First of all*, where there is a conflict between two rights under Articles 8 and 10, both must be considered and “neither of them can neutralize the other through the adoption of any absolute approach”.¹²⁴ In other words, a test of proportionality is required.¹²⁵ Nonetheless, the wording of Article 10(2)¹²⁶ requires initially that freedom of speech should be restricted only insofar as “prescribed by law”, “necessary in a democratic society” and required to meet a legitimate aim.¹²⁷ *Secondly*, the press plays a crucial role in imparting information and ideas on matters of public interest and the public has a right to receive such material. A degree of “exaggeration or even provocation” is permitted¹²⁸ but carries with it the obligation of reporting “in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”.¹²⁹ *Thirdly*, although in the first place it is for the national courts to make the distinction,¹³⁰ statements of fact and value judgments must be distinguished: “the requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental

ed.) paras. 4.10.37-4.10.38; and see, e.g., the opening analysis in the recent English Supreme Court case on defamation by the media, *Flood v. Times* (2012) 2 WLR 760 per Lord Phillips at para. 44:

“The [...] importance [of freedom of speech] has been repeatedly emphasised by the ECtHR when considering Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. There is, however, a conflict between Article 10 and Article 8, and the Strasbourg court has recently recognized that reputation falls within the ambit of the protection afforded by Article 8: see *Cumpănă and Mazăre v. Romania* (2004) 41 EHRR 200 (GC) at para 91 and *Pfeifer v. Austria* (2007) 48 EHRR 175, paras 33, 35 [...] It is indeed [a balancing operation]. The importance of the public interest in receiving the relevant information has to be weighed against the public interest in preventing the dissemination of defamatory allegations, with the injury that this causes to the reputation of the person defamed.”

¹²⁴ *Lindon v. France* (22 October 2007) No.21279/02 and No.36448/02, 46 EHRR 35, Concurring Opinion of Judge Loucaides, para. O-19.

¹²⁵ *Sorguç v. Turkey* (unreported) (23 June 2009) No.17089/03, para. 28.

¹²⁶ “Art.10.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Art.10.2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

(The text of the authentic English version of the ECHR is available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf>.)

¹²⁷ See *Observer v. UK* (26 November 1991) No.13585/88, 14 EHRR 153, para. 59: “Freedom of expression, as enshrined in Art.10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”

¹²⁸ *Prager and Oberschlick v. Austria* (26 April 1995) No.A/313, 21 EHRR 1, para 38.

¹²⁹ *Cumpănă v. Romania* (17 December 2004) No.33348/96, 41 EHRR 14, para. 102.

¹³⁰ *Petrencu v. Moldova* (30 March 2010) No.20928/05, [2011] EMLR 5, para. 56.

part of the right secured by Article 10”.¹³¹ *Finally*, the extent to which the disputed material relates to a matter of public interest is highly significant. The limits of acceptable criticism are wider in relation to persons acting in a public capacity than in relation to private individuals. Therefore “politicians must display a greater degree of tolerance”.¹³²

By 2005, it was evident from the case-law brought to Strasbourg by Russian applicants that the judicial interpretation of Article 152 of the RF Civil Code was not yet compatible with these core principles. An underlying problem may certainly have been a degree of mismatch between the European and Russian understandings of the legitimate limits of freedom of expression. As analyzed elsewhere, there has traditionally been greater emphasis in the Russian context on the responsibilities of the press with regard to national unity.¹³³ The countervailing interests specified in Article 10(2) of the ECHR—national security, public safety, the protection of public morals etc.—arguably have carried a different weighting within a Russian judicial culture attuned to the importance of collectivism. However, that is not to say that those countervailing interests should *always* prevail over freedom of expression.¹³⁴ Inevitably, inconsistencies in application of general principle have also raised pressing questions regarding possible political intervention in the deliberations of the courts and the partiality of the judiciary.¹³⁵

But a yet more fundamental obstacle posed by the wording of Article 152 was that, even on an expansive reading, it was not clear how the assessment

¹³¹ *Pedersen v. Denmark* (17 December 2004) No.49017/99, 42 *EHRR* 24, para. 76.

¹³² *Jerusalem v. Austria* (27 February 2001) No.26958/95, 37 *EHRR* 25, para. 38

¹³³ For discussion, see Schönfeld, *op.cit.* note 62, 275-278.

¹³⁴ *Ibid.*

¹³⁵ On the extra-judicial pressures to which the judiciary has allegedly been subjected in some cases see *Obukhova v. Russia* (8 January 2009) No.34736/03; and *Kudeshkina v. Russia* (26 February 2009) No.29492/05, 52 *EHRR* 37. On concerns as to the impartiality of the judiciary in relation to media matters, see Schönfeld, *op.cit.* note 62, 280-281. For an example raising such concerns, contrast two cases: both heard in Moscow courts in February 2011 and involving the question whether the individual plaintiff had been sufficiently identified as a member of a defamed “class”. In *Milov v. Putin*, Savelovskii District Court, Moscow City (14 February 2011), Case No.2-1779/11, Putin had responded to a question on a television phone-in program, “What do Nemstov, Ryzhkov, Milov and so on really want?” with the following:

“Money and power, what else do they want? In their time they caused chaos, in the 90s—along with Berezovskii and others who are now in prison. [...] they made off with quite a few billion. They’ve been dragged away from the hand that fed them, they’ve gone bust, and they want to come back and fill their pockets. But I think that if we allow them to do that they won’t stop at a few billion—they will sell up the whole of Russia.”

Milov’s claim failed because the remarks were not taken as generalizations that did not apply to Nemstov, Ryzhkov, Milov specifically as individuals. The outcome of that case is difficult to reconcile with that of *Timchenko v. Milov and Nemstov*, Zamoskvoretskii District Court, Moscow City (22 February 2011) Case No.2-649/2011. Timchenko, a billionaire industrialist, took issue with a pamphlet written by Nemstov and Milov, plaintiffs in the first case, stating that: “Putin’s old friends, who were nobodies before he came to power [including Timchenko] have turned themselves into dollar millionaires.” In contrast with the previous case, this assertion was regarded not simply as an unexceptionable generalization but, instead, an attack on the individual worth of Timchenko, and his claim was accordingly successful.

of the interests of freedom of expression was to be factored into the civil law remedy. Article 152 was directed expressly at injury to honor and dignity, without countervailing provisions—proportionate or otherwise—to address freedom of expression or to privilege commentary on matters of public interest. Against that background it was perhaps unsurprising that the Russian courts have not found it easy to incorporate reference to the ECHR—or to its interpretation in ECtHR jurisprudence—into their reasoning. Quite simply, this European material could not readily be mapped across into the basic framework as presented by Article 152. A survey by the NGO, the Article 19 Global Campaign for Free Expression, scrutinized a sample of 102 defamation cases heard in Russian courts between 2002 and 2006.¹³⁶ It found that reference to European authority was infrequent and superficial, particularly in the earlier part of the period under review. Only in nineteen of the 102 cases was there reference to the ECHR, and even fewer—seven—cited ECtHR case law. Even then, when European authority was cited, this was almost always the leading case of *Lingens v. Austria*¹³⁷ (perhaps because this 1985 decision had been one of the first to become available in Russian translation). Unsurprisingly, therefore, there were several key areas in which European authority had not been consulted or applied and the practice of the Russian courts did not meet with European human rights standards.¹³⁸ The conclusions of Article 19 (admittedly not entirely disinterested) were borne out by the observations of the ECtHR in relation to Russian applications of this nature brought to Strasbourg. It noted in some instances that the reasoning of the domestic courts had been flawed to the extent that they made little attempt at balancing the competing demands of Articles 8 and 10 in an even-handed and informed fashion; indeed, in some cases they ignored the ECHR altogether. In the 2009 decision *Krutov v. Russia*, for example, Russian courts were found to have confined their analysis to the plaintiff's interest “without giving any consideration to the Convention standard which requires very strong reasons for justifying restrictions on debates on questions of public interest initiated by members of the press”.¹³⁹ In *Romanenko v. Russia* (also 2009), the ECtHR concluded that Russian courts had failed even to recognize that the case presented a conflict between protection of reputation and the right to freedom of expression.¹⁴⁰

¹³⁶ Art.19, *The Cost of Reputation: Defamation Law and Practice in Russia* (2007) <available at <http://www.article19.org/data/files/pdfs/publications/russia-defamation-rpt.pdf>>. Of these claims, approximately one-half have been rejected while the other half have been upheld (see detailed figures at 35).

¹³⁷ (1985) No.9815/82, 7 EHRR CD446.

¹³⁸ Art.19, *op.cit.* note 136, 39-42.

¹³⁹ (3 December 2009) No.15469/04, para. 28. (Newspaper article concerning the interplay of political groups in the Saratov Region and, in particular, the role of the Prosecutor's office.)

¹⁴⁰ (8 October 2009) No.11751/03, see para. 42. (Article calling into question the management by public bodies of forestry resources.)

A particular challenge in translating European standards into practice under Article 152 was that the text of the Code did not articulate any distinction between fact and comment or opinion.¹⁴¹ Accordingly, the Russian courts tended to treat both in the same way, referring uniformly to information/statements (“*svedeniia*”), and operating on “the assumption that any such statement was amenable to proof in civil proceedings”.¹⁴² Irrespective of whether the contested statement was straightforward fact or a value judgment, the defendant avoided liability under in Article 152 of the Civil Code only by demonstrating that it “corresponded with reality” (“*chto oni sootvetstvuiut deistvitel’nosti*”). But this formulation presented particular problems in relation to political speech by media defendants. While “correspondence with reality” might readily be judged one way or another in relation to straightforward factual assertions, this was much harder for the kind of statements of opinion or comments typically found in political journalism, especially if couched in metaphorical language. Cases brought to the Russian courts in the 1990s showed that it has hardly been possible to prove the literal truth of comments such as that the plaintiff’s fortune was “made from the woes and tears of simple people”, and that “whatever he undertakes is damned”,¹⁴³ that a regional governor had implemented policies that were “selfish and destructive”,¹⁴⁴ or that teachers were frightened to express concern about the management style of an education authority.¹⁴⁵ The case of *Fedchenko v. Russia*¹⁴⁶ offers a fairly typical illustration of such problems.¹⁴⁷ Fedchenko was the editor of a newspaper that had published an article that was critical of various management failures in the

¹⁴¹ Art.19, *op.cit.* note 136, 42; also commentary in *Novaya Gazeta v. Voronezhe v. Russia* (21 December 2010) No.27570/03, (regarding material published in 2002), reproduced at <<http://www.echr.coe.int/echr/>>.

¹⁴² *Grinberg v. Russia* (21 July 2005) No.23472/03, (2006) 43 EHRR 45, para. 29.

¹⁴³ *Andrushko v. Russia* (14 October 2010) No.4260/04, reproduced at <<http://www.echr.coe.int/echr/>>.

¹⁴⁴ *Dyuldin and Kislov v. Russia* (31 July 2007) No.25968/02, (2009)48 EHRR 6.

¹⁴⁵ *Fedchenko v. Russia* (11 February 2010) No.48195/06, reproduced at <<http://www.echr.coe.int/echr/>>.

¹⁴⁶ Judgment (11 February 2010) No.48195/06.

¹⁴⁷ A striking earlier illustration of such problems was found in the case brought by Vladimir Zhirinovskii, citing the equivalent provision in Art.7 of the 1991 *Fundamentals* and seeking moral damages from *Izvestiia* newspaper and from former Deputy Prime Minister, Egor Gaidar (discussed in Krug, *op.cit.* note 110, 327). The newspaper had alleged Zhirinovskii to be a “fascist”. Its argument that it had been presenting an analytical appraisal of the plaintiff’s political character was ineffective as an answer to liability under Art.7. In an attempt to dress up as verifiable fact what was essentially unverifiable as the expression of a point of view, the defendants attempted to assert specific parallels between the plaintiff’s writing and that of Hitler, and between 1920s Germany and 1990s Russia. Unsurprisingly, the newspaper was held not to have discharged the burden of proof required in order to establish this defense. But cf. now *Karman v. Russia* (14 December 2006) No.29372/02, (2009) 48 EHRR 21, in which a politician successfully sued a journalist and the newspaper in which he had been described as a “neofascist”. The national courts held that the defendants had failed to discharge the burden of demonstrating that the politician was in fact a neofascist. However, in this instance, the defendants applied to the ECtHR which ruled that such language did not exceed the acceptable limits of political criticism and that their right to freedom of expression under Art.10 of the Convention had been violated.

educational system in the Briansk Region and, in particular, the conduct of the head of the regional Department of Education. The departmental head brought a successful claim under Article 152 in the Sovietskii District Court, which was substantially upheld in the Briansk Regional Court. On Fedchenko's application to Strasbourg, however, the European Court found that in various aspects the rulings of the Russian courts had violated Article 10. In particular, classification of these assertions as factual statements interfered in an unwarranted way with the author's rights to express "subjective opinion". In criticizing management failings, Fedchenko had "done no more than fulfill the essential role of the press, that is, to impart information and solicit debate".¹⁴⁸ Most importantly:

"[...] the defendant in a defamation case concerning criticism of a public official's performance of his duties may not be required to prove the truth of all his factual assertions. This would but stifle public debate on matters of genuine public concern."¹⁴⁹

In some cases where media defendants were required to "prove" the truth of their stories, their difficulties were further exacerbated by the imposition of an extremely high standard of proof—suitable perhaps for establishing the guilt in a criminal matter but not for judging the conduct of the parties in a civil case.¹⁵⁰ The imposition of such a standard in relation to value judgments of this nature was, in many cases, therefore a disproportionate interference with the right to freedom of opinion, particularly where the defendant was a journalist and the alleged injury was the expression of an opinion on a matter of public concern.

A related problem in these early cases was that Article 152 did not distinguish political speech from remarks directed at conduct in other contexts. Consequently, there was little acceptance that, in the interests of public debate, those who performed public functions—politicians in particular but, also, public servants generally¹⁵¹—should expect to be "subject to wider limits of acceptable criticism than private individuals" in the conduct of those functions.¹⁵² Indeed, the judiciary "routinely" made allowance for the plaintiff's public status by awarding increased damages¹⁵³ (reflecting an understanding, as in earlier times, that if these purpose of these provision was to address loss of honor and dignity, such persons had more to lose). This was another feature of judicial reasoning in *Fedchenko* which

¹⁴⁸ *Fedchenko* (2010), *op.cit.* note 145, para. 43.

¹⁴⁹ *Ibid.*, para. 56.

¹⁵⁰ See, e.g., *Karman v. Russia* (2006), *op.cit.* note 147, para. 42; and *Novaya Gazeta v. Voronezh v. Russia* (2010), *op.cit.* note 141.

¹⁵¹ *Novaya Gazeta, ibid.*

¹⁵² *Dyundin v. Russia* (2011), *op.cit.* note 117, para. 33.

¹⁵³ See discussion in Art.19, *op.cit.* note 136, 38. On a related matter, the European court noted the "sound policy reasons" why—in the interests of open debate—public authorities should not be attributed with standing to sue for defamation, but it did not make a formal ruling on whether the Russian practice permitting them to do so *per se* represented a breach of Art.10. *Romanenko v. Russia* (8 October 2009) No.11751/03, para 39, reproduced at <<http://www.echr.coe.int/echr/>>.

was criticized by the European Court—the domestic courts had not properly considered the fundamental principle that civil servants, like the plaintiff, were subject to wider limits of criticism than private individuals and were obliged to tolerate a certain level of public discussion.¹⁵⁴ “Effective criticism” required reference to “specific figures and persons”,¹⁵⁵ and “journalistic freedom” could extend to “a degree of exaggeration, or even provocation”.¹⁵⁶

4.2.2. RF Supreme Court Decree (24 February 2005) No.3

In short, the commitment to import the standards contained in the ECHR had left numerous unresolved problems for judicial practice, and it was acknowledged that these required a vigorous response.¹⁵⁷ In 2003, the RF Supreme Court issued a Decree emphasizing the weight to be attributed to human rights considerations in judicial reasoning.¹⁵⁸ It declared that the practice of the Russian courts was to be aligned with the principles and norms of international law including the ECHR, as well as the jurisprudence of the ECtHR.¹⁵⁹ A further Decree in February 2005 was specifically directed at cases relating to injuries to reputation.¹⁶⁰ The coordinates by which judicial practice was to be set were noted in the Preamble to the Decree: Article 23 of the Russian Constitution protecting honor, dignity and business reputation but, also, Article 29 protecting freedom of thought and expression as well as freedom of the media; Article 15 of the Constitution which gave the norms of international law direct effect; and ECHR Article 10, with special reference to Article 10(2) (on the extent to which freedom of speech may legitimately be restricted). In particular, Article 10 was to be interpreted according to the “legal position”¹⁶¹ of the ECtHR, as expressed in its judgments.

The 2005 Decree summarized the essential requirements of Article 152—that the defendant had published information which impugned the character of

¹⁵⁴ *Ibid.*, para. 45.

¹⁵⁵ *Ibid.*, para. 59.

¹⁵⁶ *Ibid.*, para. 34.

¹⁵⁷ Decree of the Plenum of the RF Supreme Court (24 February 2005) No.3, “O sudebnoi praktike po delam o zashchite i dostoinstva grazhdan, a takzhe delovoi reputatsii grazhdan i iuridicheskikh lits”, preamble (full text published on Supreme Court website at <<http://www.supcourt.ru/second.php>>).

¹⁵⁸ The RF Supreme Court is empowered *inter alia* to issue explanations of judicial practice in order to ensure uniformity across the courts of the Russian Federation, as well as to decide questions arising out of the international obligations of the Russian Federation. 2011 Federal Constitutional Law “O sudakh obshchei iurisdiktsii RF” (7 February 2011) No.1-FKZ, SZRF (2011) No.7 item 898, Art.9. On the status of such Decrees as sources of law, see A.L. Burkov, “Status Postanovlenii Plenuma Verkhovnogo Suda RF v Zakonodatel'stve i sudebnoi praktike”, *Pravovedenie* (2011) No.5, 172-186; and William Pomeranz and Max Gutbrod, “The Push for Precedent in Russia’s Judicial System”, 37(1) *Review of Central and East European Law* (2012), 1-30.

¹⁵⁹ Decree of the Plenum of the RF Supreme Court (10 October 2003), No.5, and see 1993 RF Constitution, *op.cit.* note 64, Art.15.

¹⁶⁰ Decree of the Plenum of the RF Supreme Court (24 February 2005) No.3, *op.cit.* note 157.

¹⁶¹ *Ibid.*, Preamble, para. 3 (“pravovaia pozitsiia”).

the plaintiff in such a way as to infringe Article 23.¹⁶² There were also pointers to the sort of material to be regarded as damaging to reputation—allegations that the plaintiff had broken the law or had engaged in dishonorable conduct; improper, unethical behavior in the private social or political sphere. And in place of the references to “socialist communal life” of the 1960s, the courts were directed to have regard to accusations of unscrupulousness in the industrial or commercial context or of violation of business ethics or business practices.¹⁶³ Most significantly, the Decree also gave direction in relation to cases involving public figures. Political figures and state officials should anticipate robust public scrutiny and criticism of their activities insofar as this related to their official duties and “insofar as this is necessary to ensure the transparent and responsible exercise of their powers”.¹⁶⁴ The Decree referred the Russian courts to the 2004 Council of Europe *Declaration on Freedom of Political Debate in the Media*,¹⁶⁵ to the effect that a higher threshold of tolerance of criticism was to be imposed upon political figures and public officials and that any remedies awarded were to be proportionate. The Decree also addressed the burden placed upon the defendant whereby liability was avoided only by proof that the information did not “correspond with reality”.¹⁶⁶ In order to ensure compliance with constitutional requirements,¹⁶⁷ the assertion of facts and the expression of subjective opinions were to be distinguished.¹⁶⁸ The Decree acknowledged that while the correspondence of the former could readily be verified in terms of Article 152, the latter could not be checked one way or another against such a standard. It reasoned

¹⁶² *Ibid.*, para. 7.

¹⁶³ *Ibid.*, para. 7.

¹⁶⁴ *Ibid.*, para. 9. The text suggested the influence of European jurisprudence. See, e.g., *Lingens v. Austria*, *op.cit.* note 137, para. 52:

“The limits of acceptable criticism are [...] wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others—that is to say, of all individuals—to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”

¹⁶⁵ Adopted by the Committee of Ministers (12 February 2004), reproduced on the Council of Europe website at <<https://wcd.coe.int/ViewDoc.jsp?id=118995&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>>; see paras. 3 and 4.

¹⁶⁶ Decree of the Plenum of the RF Supreme Court (24 February 2005) No.3, *op.cit.* note 157, para. 9.

¹⁶⁷ Arts.23 and 29 of the 1993 RF Russian Constitution, *op.cit.* note 64, and ECHR Art.10. However, the 2005 Decree provided a reminder that even where comment or expression of opinion escaped liability under Art.152, this did not exonerate for the purposes of criminal liability under Art.130 of the Criminal Code if the content was sufficiently insulting (para. 9).

¹⁶⁸ Decree of the Plenum of the RF Supreme Court (24 February 2005) No.3, *op.cit.* note 157, para. 9.

that expression of opinion should not, therefore, be considered as within the scope of Article 152.

The 2005 Decree was thus a notable milestone, indicating at the very least that Article 152 no longer presented an “exclusive, self-contained, comprehensive system of rules” within Russian domestic law.¹⁶⁹ Indeed, in its Commentary on the Decree published in the same year, the Glasnost’ Defense Foundation¹⁷⁰ drew attention to the document’s far-reaching implications in opening up European legal principles to journalists and in enabling them to argue their cases by making direct reference to European jurisprudence.¹⁷¹ This acknowledgement of the authority of European jurisprudence was in itself of major importance. At the same time, little analysis was to follow—at Supreme Court level or elsewhere—to explain and disseminate the content of those European authorities, and no further was there detailed guidance provided for determining the proper limits of political speech.¹⁷²

Some limited assistance in filling this gap could be found, however, in a later (2010) Decree of the Supreme Court (No.16), “On the Practical Application by the Courts of the Law on the Mass Media”. This differentiated between, on the one hand, “information on facts [...] capable of exerting a positive influence on public discussion of matters concerning, for example, the fulfillment of their functions by public officials and public figures”, and, on the other, “detailed information about the private life of a person not engaged in any public activity”. The media have a duty to inform citizens of the former, but they have no such role in relation to the latter.¹⁷³ This section of the Decree was directed primarily

¹⁶⁹ See commentary in Peter Krug, “Internalizing European Court of Human Rights Interpretations: Russia’s Courts of General Jurisdiction and New Directions in Civil Defamation Law”, 32 *Brook. J. Int’l L.* (2006-2007), 1-66 at 16.

¹⁷⁰ A Russian NGO whose objectives are to promote freedom of speech and protect the independence of journalists. Its website provides information on developments seen as threatening these areas as well as commentary on legal matters. See <<http://www.gdf.ru/>>.

¹⁷¹ *Kommentarii k Postanovleniiu Plenuma Verkhovnogo Suda RF No 3 ot 24 fevralia 2005 g.*, available at <<http://gdf.ru/article/item/1171>>.

¹⁷² See, e.g., Review by the Supreme Court in 2007 of judicial practice in defamation and breach of privacy: “Obzor praktiki rassmotreniia sudami Rossiiskoi Federatsii del o zashchite chesti, dostoinstva i delovoi reputatsii”, *Biulleten’ Verkhovnogo Suda RF* (2007) No.12 available at <http://www.supcourt.ru/print_page.php?id=5137>. The Review singled out and endorsed a decision of 22 March 2005 from the Sovietskii District Court in Tula ruling that a newspaper’s “ironic” coverage of the conduct of a public official was not defamatory since it addressed matters of public interest, namely questions of administrative reform. However, while, it cited the leading European cases of *Lingens v. Austria* (1986) *op.cit.* note 137; *Prager and Oberschlick v. Austria* (1995), *op.cit.* note 128; and *De Haes and Gijssels v. Belgium* (24 February 1997) No.19983/92, (1998) 25 *EHRR* 1, it offered no further guidance as to the applicability of these authorities in the Russian context or how they related to the framework of Art.152.

¹⁷³ Decree of the Plenum of the RF Supreme Court (15 June 2010) No.16, “O praktike primeneniia sudami Zakona RF ‘O sredstvakh massovoi informatsii’”, para. 25; translation as provided by the Supreme Court website at <http://www.supcourt.ru/vscourt_detale.php?id=6786>. (Russian text at <<http://www.supcourt.ru/second.php>>.)

at breach of privacy, rather than defamation. Nevertheless, it offered some assistance in demarcating those spheres of activity by public officials upon which the press was entitled to comment and those upon which it was not.

A later paragraph in the same document also appeared to advocate a nuanced approach to the public information function of the media, directing the courts in general terms to make concessions for the complex and shifting environment in which the media operated. In judging whether there had been an abuse of freedom of expression by the media, the courts were to have regarded to the context and to:

“[...] consider not only the use in the article, TV or radio program of a word or expression (the wording) but also the context in which they were put (particularly the aim, genre and the style of the article, program or their specific part, if it is possible to view them as an opinion in the sphere of political discussion or a drawing of attention to the discussion of socially important matters, and what the attitude of the interviewer and/or the representatives of the editorial staff of the mass media towards the expressed opinions, judgments, statements is) as well as the social and political situation in the country as such or in its specific part (depending on the area of distribution of the mass media).”¹⁷⁴

In a further move to discourage excessive awards of damages, the Supreme Court issued another Decree (No. 21) on in late 2010¹⁷⁵ adding a further two paragraphs to its June (No.16) Decree. The September 2010 Decree directed that where moral damages were awarded to compensate for injury suffered as a result of a media publication, the amount should be consistent with the purpose for which it was intended. In other words, it should provide compensation for the plaintiff's physical or moral suffering but should not be used as a weapon to limit freedom of expression. As stipulated in Article 1101(2) of the Civil Code, the sum awarded should be “reasonable and just”, without “destroying” freedom of mass information (*i ne vesti k narusheniiu svobody massovoi informatsii*), and this appeal to moderation was equally relevant whether the plaintiff was a private individual or a public figure. In other words, the practice of awarding relatively higher figures by way of compensation to those in the public sphere was to be discontinued.¹⁷⁶

The combined effect of these 2005 and 2010 Supreme Court Decrees, therefore, was to give a strong steer on the importance of European standards in assessing whether the defendant in defamation cases could invoke the right freely to express political opinions. They did not establish Strasbourg jurisprudence

¹⁷⁴ *Ibid.*, para. 28.

¹⁷⁵ Decree of the Plenum of the RF Supreme Court (16 September 2010), “O vnesenii izmenenii v postanovlenie Plenuma Verkhovhogo Suda RF ot 15 June 2010 No 16 ‘O praktike primeneniia sudami Zakona RF ‘O sredstvakh massovoi informatsii’”, adding paras. 37 and 38 to the earlier Decree. Text available at Supreme court website at <<http://www.supcourt.ru/second.php>>.

¹⁷⁶ See note by N. Kozlova, “Prigovor v rubliakh”, *Rossiiskaia gazeta* (20 September 2010), reporting that private individuals might expect moral damages of 3-5 thousand rubles, whereas public figures regularly obtained 7-figure sums.

as binding precedent in the Russian domestic court but did point to use of European decisions as a vital resource in interpreting the ECHR and in guarding against future findings of violation by the ECtHR.¹⁷⁷ At the same time, many practical problems were left unresolved. It was not clear how exactly the lower courts—relatively unschooled in handling case law, particularly when this included European authorities¹⁷⁸—were to assimilate such material into a coherent body of principle suitable for practical application. More fundamentally, it had not been explained in any detail how precisely those standards were to be translated into the existing strict liability framework of Article 152.

4.2.3 The Impact of the 2005 Decree

The 2005 Decree did not transform the practice of the Russian courts overnight. For example, the 2010 case of *Fedchenko v. Russia*, discussed above,¹⁷⁹ arose out of defamation proceedings brought against the applicant in the Russian courts in 2006, just a few months after the publication of the 2005 Decree. The findings of the European Court in that case point—in no uncertain terms—to a failure to meet European standards with regard to the very issues specifically addressed in the 2005 Decree. Gradually, however, the 2005 Decree has begun to make an impact. The 2007 Article 19 Survey, noted above,¹⁸⁰ analyzed cases between the years 2002-2006. An important finding was that while prior to 2005 only a very small proportion of cases had referred to European authority, after 2005 two-thirds of the cases studied mentioned the Decree and the need to apply the ECHR and European jurisprudence. Admittedly, there were significant regional variations: European authorities were much more frequently used and journalists were more likely to invoke them successfully in their defense in areas where they had access to the resources of organizations such as the Voronezh-based Mass Media Defense Centre or the Moscow-based Agora Human Rights Association.¹⁸¹ But, of course, a major change in the post-2005 period has been the emergence not only of a cadre of Russian lawyers receptive to ECtHR jurisprudence but, also, of a considerable body of ECtHR case law brought by Russian applicants, as exemplified in *Fedchenko*. While the Russian courts may have been slow in

¹⁷⁷ For discussion see Krug, *op.cit.* note 169, 43ff.

¹⁷⁸ See Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law* (Ibidem-Verlag, Stuttgart, 2007), 72-77; and Galina Arapova, “Russian Case-Law in the Framework of Article 10 of the European Convention”, presentation delivered at a seminar at the ECtHR organized by Robert Schuman University (Strasbourg), Ghent University and the Open Society Justice Initiative (10 October 2008), available at <http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Report_Galina_Arapova_Session_III.pdf>.

¹⁷⁹ *Op.cit.* note 146.

¹⁸⁰ *Op.cit.* note 136.

¹⁸¹ Mass-Media Defense Centre (<www.mmdc.narod.ru>) is a not-for-profit organization whose primary purposes are stated as promoting freedom of expressing and supporting journalists in asserting their constitutional rights. Agora (<www.openinform.ru/about/show/71/>) is an inter-regional defense which also assists journalists as well as bloggers and NGOs in resisting unlawful government interference.

assimilating the case law involving other respondent states (apart from obvious leading cases such as *Lingens*), cases involving Russia were easier to obtain in translation—and harder to ignore. If the 2005 Decree directed the Russian courts to apply European jurisprudence, these cases have provided more specific, and linguistically-accessible,¹⁸² reference points on how this might be done. Examination of domestic cases six years after the 2005 Decree indicates that, while the citation of jurisprudence originating from other states may remain infrequent and lacking in detail in the lower courts, the recent cases involving Russian applicants to the ECtHR are noted and discussed.¹⁸³

A measure of the impact of European authority is a sign of a growing recognition that expression of opinion or comment should be treated differently from assertions of fact. While the distinction still causes some degree of confusion and the principles continue to be applied “selectively”,¹⁸⁴ it is no longer widely disregarded, as it had been prior to 2005. Significant numbers of allegedly defamatory remarks are now classed as the former, thus permitting media defendants to escape liability under Article 152 (although there is acceptance that even the expression of comment may be actionable if it is completely lacking in factual foundation).¹⁸⁵ A telling comparison, indicating increasing tolerance in the approach to comment, can be found in the following two cases, two years apart, again both from District Courts in Moscow.

The 2009 case of *Kadyrov v. Orlov*¹⁸⁶ arose out of the circumstances surrounding the murder in Chechnya of Natalia Estemirova, a human rights activist. The defendant had stated on the website of a human rights campaign group:

“I know, I am sure who is guilty of the murder of Natalia Estemirova. We all know that man. His name is Ramzan Kadyrov, president of the Chechen Republic. Ramzan had already threatened Natalia, insulted her, and considered her his personal enemy. We do not know whether he himself gave the order or whether it was given by his close comrades-in-arms to please the boss. [...]”¹⁸⁷

The court in this case applied a literal reading of the wording used, referring to standard Russian language dictionaries to find, unsurprisingly, that use of the

¹⁸² For a first-hand account of the difficulties of citing ECtHR jurisprudence in Russian courts, where it cannot be assumed that judges or counsel have the linguistic skills to read judgments in the original languages, see Arapova, *op.cit.* note 178.

¹⁸³ See, e.g., *Prytsakov v. Shelimova*, Volgodonskoi District Court, Rostov Region (8 February 2011) Case No.2-42/11; and *Korolevskii v. Avilov*, Volgodonskoi District Court, Rostov Region (3 May 2011) Case No.2-1660/11.

¹⁸⁴ Art.19, *op.cit.* note 136, 42-43.

¹⁸⁵ *Novaya Gazeta v. Voronezhe v. Russia* (2010), *op.cit.* note 141, para. 53; and on this point see *Prager and Oberschlick v. Austria* (1995), *op.cit.* note 128, para. 33.

¹⁸⁶ Tver District Court, Moscow City (6 October 2009).

¹⁸⁷ “*Ia znaiu, ia uveren v tom, kto vinoven v ubiistve.*”

word “killer”¹⁸⁸ was indeed defamatory, but showing little regard to the Supreme Court’s instruction that the context of publication must also be considered.¹⁸⁹ The 2005 Decree was noted, but the court regarded Orlov as having stated a fact, rather than having expressed an opinion, by use of the wording: “I know, I am sure of who is guilty of the killing.” Article 152 was therefore engaged,¹⁹⁰ and the defendant was unable to prove that the statements corresponded with reality.

By contrast, the later (2011) case of *Iakemenko v. Morozov and Kashin*¹⁹¹ applied the opposite interpretation to a very similar formulation. In that case, the Chair of the Federal Committee for Youth Affairs argued that the defendants, well-known journalists, had defamed him by insinuating that he had masterminded a physical assault on one of them, Kashin. As in the Estemirova case, no criminal prosecution had been brought. The court cited the 2005 Decree, and the need to take into account the jurisprudence of the ECtHR, although it did not refer to any specific European case. As in the *Kadyrov* case, it applied a very close literal reading of the allegedly defamatory imputation. Morozov had made various vague assertions in a blog about the criminal investigations into the assault. However, Morozov’s blog also asked how it would be “possible now to divulge the results of the investigation if it uncovers a direct link between the attackers and the Iakemenko organization?” The court held that since this was a question it could not be regarded as a statement of Iakemenko’s guilt. Kashin himself wrote that “in fact I myself do not doubt the ‘Iakemenko’ version, and I don’t have any alternative versions”.¹⁹² Perhaps more surprisingly, the court regarded this wording as the expression of Kashin’s opinion, not a factual assertion of Iakemenko’s participation in crime. In other words, for *Kadyrov* court “I know, I am sure that” presented fact, whereas for the *Iakemenko* court two years later “I myself do not doubt” prefaced the expression of opinion.

At the same time, while the increased receptivity to this distinction is certainly a welcome development, if labeling imputations as comment remains the main device for absolving those whom the courts regard as having been justified in putting information into the public domain, there may even be a tendency to stretch, and thereby distort, the boundaries of comment, as arguably occurred in the *Iakemenko* case. The distinction between fact and opinion cannot be drawn with precision; it must be approached in a consistent and reasoned way if an even-handed balance between competing interests is to be achieved.

188 “Ubiitsa”.

189 See text *op.cit.* note 174.

190 It should be noted, however, that in criminal proceedings for defamation Orlov was ultimately acquitted. The court held that an individual should not be held criminally liable for statements he or she believed to be true, and that no evidence of a criminal intent on behalf of the defendant had been disclosed. Khamovniki District Court, Moscow City (14 June 2011).

191 Khamovniki District Court, Moscow City (27 June 2011) Case No.2-1267/11.

192 “Na samom dele ia i sam ne somnevaius’ v ‘iakemenkovskoi’ versii, i drugikh versii u menia net.”

In any event, distinguishing fact from comment cannot serve as a sufficient shield for freedom of expression in all circumstances. The distinction is embedded in the wording of ECHR Article 10(1) and, of course, is not unique to Russian law. Presentation of false facts necessarily merits harsher treatment than expression of comment or opinion. But effective reporting must contain some factual data if debate on matters of public concern is not to be converted “into a purely fictitious concept”.¹⁹³ An illustration of the difficulties left unresolved by increased leniency towards comment can be found in a later case involving the applicant in *Fedchenko v. Russia* discussed above.¹⁹⁴ Some time after Fedchenko’s application to the ECtHR, his newspaper published an article alleging nepotism and profiteering in the award to the director of a local steel plant of a citizenship prize worth 1.8 million rubles. The information was presented in such a way that could not plausibly be characterized as representing opinion only; since the literal truth of the allegations could not be proved, the claim was upheld.¹⁹⁵ It is arguable that in cases of this nature, involving information of public interest, the interests of freedom of expression require some concessions to be extended to the journalist who has researched a story responsibly but has simply got some of the facts wrong—or, at least, cannot prove that they are completely true. The obligation to verify facts is an onerous one, but the jurisprudence of the ECtHR indicates that it is not absolute. It should not extend to establishing truth where this is “an unreasonable, if not impossible, task”,¹⁹⁶ particularly where a story engages “the right of the public to be informed quickly about matters of legitimate general concern”.¹⁹⁷ However, such concessions cannot readily be accommodated within the strict liability framework of Article 152, absolving the media defendant only when the literal truth of the story is proved.

As discussed above,¹⁹⁸ the RF Supreme Court ruled in its 2010 Decree that the Russian courts should not permit Article 152—under the guise of protection of honor and dignity—to be used as a weapon to limit freedom of expression. However, the continuing impact of the Decree will necessarily be limited by the absence of specific frameworks by which due consideration for freedom of expression might be integrated into the reasoning of the Russian courts. No amendment to the strict liability regime of Article 152 has been proposed in order to accommodate expression on matters of public interest. And while Article 49(2)

¹⁹³ *Fedchenko v. Russia* (2010), *op.cit.* note 146, para. 59; see, also, *Prager and Oberschlick v. Austria*, *op.cit.* note 128.

¹⁹⁴ Note 146 *supra*.

¹⁹⁵ *Voronin v. Fedchenko*, Briansk Regional Court (18 July 2011) Case No.2-27/2011.

¹⁹⁶ *Tromsø and Stensaas v. Norway* (20 May 1999) No.21980/93, (2000) 29 *EHRR* 125, para. 87 of the Commission’s Opinion.

¹⁹⁷ *Observer v. UK* (1991), *op.cit.* note 127, para. 11.

¹⁹⁸ See text at notes 175 and 176 *supra*.

of the 1991 Law on the Mass Information Media requires journalists to “verify the authenticity of the information communicated to them”, no concession is made within the civil law to those journalists who were ultimately mistaken but who can demonstrate that they have fulfilled this responsibility to a reasonable standard “in accordance with the ethics of journalism”.¹⁹⁹ Admittedly, the 2005 Decree enjoined the Russian courts to apply human rights standards in domestic law by reference to the jurisprudence of the ECtHR. But it asks much that the Russian courts should in effect reform the law in such a fundamental way, if there is no amendment to the Civil Code, and their main tool is the case law derived from a court that not only employs a very different style of judicial reasoning but, also, does not generally publish its judgments in Russian.

In order to provide appropriate support to the media in their role as “purveyor of information and public watchdog”,²⁰⁰ Russia might usefully look beyond the fact/comment distinction to the mechanisms applied in domestic law elsewhere in Europe that mitigate the rigor of strict liability.²⁰¹ In German law, for example, mere expression of opinion does not normally attract liability;²⁰² and, in addition, there is a general defense available where publication is deemed to have been in the legitimate public interest.²⁰³ English law regards liability for defamation as strict; and in addition to a defense of “fair” or “honest” comment,²⁰⁴ it offers media defendants a “qualified privilege” defense, recently re-conceptualized in the light of European jurisprudence. Privilege attaches to “responsible” journalism on matters of public interest, even if the offending imputation has been presented as fact, in effect replacing strict liability with a negligence-based standard in this context.²⁰⁵

¹⁹⁹ Compliance with this standard should mean that freedom of expression is protected, at least in the view of the ECtHR in *Dyundin v. Russia* (2008), *op.cit.* note 117, para. 28.

²⁰⁰ *Barthold v. Germany* (25 March 1985) No.8734/79, (1985) 7 EHRR 383, para. 58.

²⁰¹ See, generally, Maryann McMahon, “Defamation Claims in Europe: A Survey of the Legal Armory”, 19(4) *Communications Lawyer* (2002), 24, including discussion of the “good faith” defense available in France and in The Netherlands, *i.e.*, where the journalist had reasonable belief in the factual basis for the story reported.

²⁰² Expression of opinion is actionable if deemed to be a malicious insult (*Schmäbkeritik*), with the consequence that in marginal cases there is a tendency to label imputations as opinion rather than fact. For discussion see, *e.g.*, Alexander Burns, “Access to Media Sources in Defamation Litigation in the United States and Germany”, 10 *Duke J. Comp. & Int’l. L.* (1999-2000), 283-306.

²⁰³ For a comparative overview of protection for expression of opinion in several European jurisdictions, see McMahon, *op.cit.* note 201, 24-37.

²⁰⁴ *Joseph v. Spiller* (2011) 1 AC 852; and see now a Defamation Bill, before Parliament at the time of writing, in which s.3 provides for the expression of “honest opinion” available at <<http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0005/13005.pdf>>.

²⁰⁵ *Reynolds v. Times Newspapers* (2001) 2 AC 127; *Jameel v. Wall Street Journal sprl* (2007) 1 AC 359; and see now the Defamation Bill, before Parliament at the time of writing, that contains (in s.4) a defense for “Responsible publication on matter of public interest” to the effect that the journalist was *not* negligent. *Op.cit.* note 204.

5. Conclusion: Future Challenges

Protection for reputation is deeply embedded within the Russian legal tradition, and to that extent the post-Soviet Russian law of defamation was not written on a *tabula rasa*. Nevertheless, the restricted environment within which the press and media have developed is set apart from that found in many other members of the Council of Europe. It cannot therefore be said in Russia, as, for example, a member of the English judiciary once remarked, that the values to which the European Convention on Human Rights gives effect are “much the same”²⁰⁶ values that Russian domestic law has already long accepted. Accordingly the incorporation of Convention rights into domestic law is no straightforward task. It has been left largely to the judiciary to accomplish this by building on the very basic framework of Article 152, the text of which has barely changed since Soviet times. Quite understandably there remains a lack of clarity not only about substantive mechanisms but, also, about the values to which the modern law should give effect.

Traditionally, in Russia and elsewhere, reputation has been seen as a social construct and defamation as a social tort with the dual functions of “protecting individual dignity [as] a matter of defending purely private interests” as well as “enforcing rules of civility [as] a matter of safeguarding the public good inherent in the maintenance of community identity”.²⁰⁷ The Soviet law of defamation clearly could be seen as operating in the social context, preserving relationships within the socialist order, and changing notions of public good in the new Russia allowed the law to be extended to the protection of business and even corporate reputations. Inside and outside of Russia, however, much of the modern case law now ranges beyond the social or commercial sphere to allegations concerning the responsibilities of the publicly accountable or the public lives of the famous. In these contexts, its focus is not so much social or commercial reputation in a narrow sense but, rather, on determining the extent to which public identity should be shielded from unfair attack. For example, a defendant seen recently in defamation litigation is, for example, the “superblogger” Alexei Naval’nyi.²⁰⁸

²⁰⁶ Lord Woolf, “European Court of Human Rights on the Occasion of the Opening of the Judicial Year”, *European Human Rights Law Review* (2003) No.3, 257-262, at 258.

²⁰⁷ Robert C. Post, “The Sociology of Libel”, 74 *Cal. L. Rev.* (1986), 691-742, at 713.

²⁰⁸ Navalnyi’s website is at <<http://navalny.ru/>>. For a recent example of litigation involving Naval’nyi that perhaps raises questions over the impartiality of the judiciary see the 2012 case of *Sviridov v. Naval’nyi*. A claim had been brought against Naval’nyi by Sviridov, a member of the United Russia Party, on the basis that he personally was defamed by the colorful epithet coined by Naval’nyi in his blog and also recorded in an article in *Esquire* magazine (see <<http://esquire.ru/wil/alexey-navalny>>) that United Russia is a party of “swindlers and thieves” (“*zhulikov i vorov*”). Notwithstanding that the United Russia Party has many millions of members, the court found in Sviridov’s favor, and awarded damages of 30,000 rubles, ordering Naval’nyi also to publish a refutation on his internet site. There is little question that the epithet “swindler and thief” is defamatory as applied to an individual, but applying the logic of the 2011 *Milov v. Putin* case (*op.cit.* note 135), it is not clear that this generalization made of such a large class reasonably can be understood as impugning the probity of an individual party member. The

The main substance of his blogs relates to institutional corruption, in particular in relation to procurement for government contracts. Their effects are unlikely to be much felt within the social or even business relationships of those named by him, and his true target lies elsewhere. In such cases, notions of public good are served not only by permitting the plaintiff some measure of control over the means by which his or her public reputation is mediated but, also, by allowing the defendant's voice to be heard within the proper limits of public debate.

This extension of the law of defamation into the public and political spheres entails a re-conceptualization of its traditional structures. As in the Soviet era,²⁰⁹ this may require a reconsideration of how defamatoriness is to be measured, and the delineation of the defamatory will be particularly problematic in relation to new media where the conventions accepted by audiences are fluid. Recourse to decontextualized dictionary definitions, as applied in 2009 in *Kadyrov v. Orlov*,²¹⁰ is almost always an inadequate technique for determining whether reputation has been damaged; but it is particularly unhelpful, for example, in gauging the impact of an internet blog upon communities accustomed to the jargon and conventions of the blogosphere. A more nuanced approach is required that has regard to the estimation of the extended communities to which the remarks have been directed, and the beginnings of this are seen in the direction contained in the Supreme Court Decree of June 2010.²¹¹

But an even greater challenge is the need for proper engagement with the principle that freedom of expression—even potentially defamatory expression—has a value for the author as well as for its audience, a concept accepted on paper by the Russian Federation's ratification of the ECHR but not properly integrated into judicial practice. The value attributed to freedom of expression, in competition with reputation, is not absolute but, rather, varies according to context, as Article 10 indicates: the freedom to express personal insult, for example, may be accorded little priority as compared with political speech on a matter of public importance. ECtHR jurisprudence—now acknowledged by the Russian courts—provides guidance on the relative weight of competing interests, but it is for domestic law to supply the mechanisms by which these are adjudicated. As the mass media have grown in circulation in Russia and beyond, other European jurisdictions have developed more finely-balanced frameworks for this

judgment, dating from the Liublinskii District Court in Moscow on 4 June 2012, does not seem to have been made publicly available, and was under appeal at the time of writing. For an account of the subsequent campaign to mobilize other Party members to sue Naval'nyi, thereby bankrupting him, see <<http://навальногорответы.рф/>> and Naval'nyi's response at <<http://navalny.livejournal.com/712841.html>>.

209 See the text at note 46 *supra*.

210 *Op.cit.* note 186. See the text at note 188 *supra*; also the literal interpretation of “abnormal” as in *Chemodurov v. Russia* (2007), *op.cit.* note 84.

211 As discussed in the text at note 174 *supra*.

purpose.²¹² This has been achieved largely through case law—in codified as well as in common-law systems. However, it is significant that, even in the English common law, there is now a proposal for legislation to secure the foundation for a “responsible-journalism” defense.²¹³ It is unreasonable to expect the Russian judiciary readily to construct and delimit such a defense unaided by domestic legislation and by reference to the jurisprudence of a court thousands of miles distant and not generally available in the Russian language. Reform of the Civil Code provisions, augmenting the framework of Article 152, would do much to support the judges in determining the proper limits of political speech for the twenty-first century.

²¹² See the text to notes 202-205 *supra*.

²¹³ See *op.cit.* note 205 in relation to the “responsible-journalism” defense which is contained in the draft legislation codifying the English law of defamation and which was before Parliament at the time of writing.