

DEFAMATION LAW IN RUSSIA IN THE CONTEXT OF THE COUNCIL OF EUROPE (COE) STANDARDS ON MEDIA FREEDOM

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I. INTRODUCTION

Being a legitimate aim for limiting freedom of expression, the right to protect one's reputation has been sometimes used by national governments to shield politicians and civil servants against criticism.¹ Excessively protective defamation laws have a "chilling effect" on freedom of expression and public discussion.² The development of the internet has instigated considerable new challenges for protecting one's reputation, which often becomes the pretext for adopting harsh legal measures that threaten online freedom of expression and defamation.

In Russia, there is a consistently high count of annual defamation cases. Every year, the Russian courts consider 5,800 civil lawsuits on defamation.³ More than half of these lawsuits are against journalists as well as media editorial offices,⁴ and the defendants are typically not the victors.⁵ Russia is among a few European countries keeping criminal liability for libel and insult of public officials. Furthermore, the Russian parliament outlawed "blatant disrespect" of the Russian state, state bodies, society, the Constitution, and

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¹ See Monica Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (2014), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff48>.

² See TARLACH MCGONAGLE, *FREEDOM OF EXPRESSION AND DEFAMATION* (2016).

³ See Presidium of the Sup. Ct. of the Russian Federation, *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation* (Mar. 16, 2016), http://www.supcourt.ru/Show_pdf.php?Id=10733.

⁴ See Free World Centre, *The Russian Federation: Journalists Under Attack* (2013), [https://www.article19.org/data/files/medialibrary/37399/Russia-Report-EN-\(web\).pdf](https://www.article19.org/data/files/medialibrary/37399/Russia-Report-EN-(web).pdf).

⁵ See ANDREI RICHTER, *PRAVOVYE OSNOVY ZHURNALISTIKI: UCHEBNIK* (2016). (Title translated as "Legal Basis of Journalism: A Textbook").

national symbols in 2019.⁶ This sweeping ban is unique for European law, and it has considerably stifled public debate in Russia. In the year of the ban's adoption, administrative proceedings were brought against fifty-one publications, most of which concerned criticism of the Russian president.⁷ According to the Article 19, an international NPO focusing on free speech issues, defamation in Russia is often invoked as a weapon to silence maladministration and corruption among public officials.⁸

This article investigates the extent to which the Russian legal regulation of defamation is in line with the legal standards on freedom of expression developed by the Council of Europe (CoE),⁹ an intergovernmental organization protecting human rights, democracy, and the rule of law. The CoE has forty-seven members including Russia and other post-Soviet countries.¹⁰

Across Europe, the CoE advances and promotes the legal standards on freedom of expressions of the United Nations (UN), the largest international organization on human rights. Both organizations – the UN and the CoE – view freedom of expression as a universal human right and a precondition for democracy. As a legal successor of the USSR, Russia has been a UN member since the creation of the organization.

In 1996, Russia joined the CoE and thereby agreed to fully comply with its legal standards. However, Russia's relationship with the CoE has deteriorated in recent times. Russia's voting right in the Parliamentary Assembly (PACE) – one of the CoE's main governing institutions – was suspended in 2014 because PACE condemned Crimea's accession to Russia. The following year, Russian statutory law empowered the Russian Constitutional Court – one of the highest courts in the country – to challenge any document of any international institution. This step may have considerable ramifications for human rights protection, both inside and outside Russia. However, so far the Russian government has repeatedly

⁶ See Federal Law On Amendments to the Federal Law on Information, Information Technologies and on Protection of Information, No. 30-FZ (Mar. 18, 2019), http://www.consultant.ru/document/cons_doc_LAW_320400.

⁷ See Maria Starikova, *Za God Neuvazhenie k Vlasti Vrazilos' 51 Raz. (Translated as Disrespect to Authorities Was Expressed 51 Times in a Year)*, *Kommersant*, №57 (Mar. 31, 2020), <https://www.kommersant.ru/doc/4308963>.

⁸ See *The Cost of Reputation: Defamation Law and Practice in Russia*, Article 19 (2007), <https://www.article19.org/data/files/pdfs/publications/russia-defamation-rpt.pdf>.

⁹ The Council of Europe (CoE) was founded in 1949 and currently, it unites forty-seven members. For details, see *Council of Europe*, <http://www.coe.int/en/web/portal/home>.

¹⁰ They are Ukraine, Latvia, Lithuania, Estonia, Georgia, Armenia, and Azerbaijan.

claimed that it does respect international standards on freedom of expression.¹¹

To assess the degree of the consistency of Russian national laws as well as judicial practice with the CoE legal standards, this article applies a qualitative comparative analysis. It focuses on Russian legal perspective on media defamation, while the CoE standards are considered to the extent it is necessary to show common or contrasting visions and trends.

The Russian legal concept of defamation has been explored not only through the analysis of the national legislation, but also through the study of a judicial perspective to shed the light on the role of judiciary in making the Russian legal vision of free speech more consistent with the CoE standards. For the first time in the field, the article compares the visions of defamation of the highest Russian courts, the Constitutional and Supreme Courts. Particularly important for this study are the Supreme Court's non-binding interpretations because they addressed the issue of media defamation several times. They are the 2005 Plenum's¹² decree on defamation,¹³ 2010 Plenum's decree on the statute "On Mass Media"¹⁴ as well as a more recent 2016 review¹⁵ on defamation. Richter in 2015 and 2017¹⁶ has argued that the Supreme Court's clarifications have contributed to freedom of expression in Russia and its compliance with the international standards in this field, and Krug has noted that the Constitutional Court has not made a significant

¹¹ See POSTOJANNOE PREDSTAVITEL'STVO ROSSIJSKOJ FEDERACII PRI OTDELENIJ OON I DRUGIH MEZHDUNARODNYH ORGANIZACIJAH V ZHENEVE, INFORMACIJA ROSSIJSKOJ FEDERACII V SVJAZI S ZAPROSOM SPECIAL'NOGO DOKLADCHIKA SOVETA OON PO PRAVAM CHELOVEKA PO VOPROSU O SVOBODE VYRAZHENIJA MNENIJA, NO. 660 (NOV. 3, 2016) (translated as Information of the Russian Federation in Connection to the Request of the Special Rapporteur of the UN Human Rights Council on the Promotion and Protection of the Right to Freedom of Opinion and Expression Information of the Russian Federation in Connection to the Request of the Special Rapporteur of the UN Human Rights Council on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Permanent Mission of the Russian Federation to the United Nations and Other International Organizations), <http://www.ohchr.org/Documents/Issues/Expression/Telecommunications/Russia.pdf>; see also Anastasia Bazenkova, *Putin Urges Global Authorities to Ensure Freedom of Information*, The Moscow Times (June 7, 2016), <https://themoscowtimes.com/articles/putin-urges-global-authorities-to-ensure-freedom-of-information-53193>.

¹² Plenum of the Supreme Court is a body that assembles all Supreme Court judges and whose aim is to ensure the proper and cohesive application of the law by the various courts in the country. It also issues decrees that explain and interpret the law, sometimes relying on international standards. See Plenum of the Supreme Court of the Russian Federation, *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, No. 3 (Feb. 24, 2005).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Andrei Richter, *Judicial Practice on Media Freedom in Russia: The Role of the Supreme Court*, European Audiovisual Observatory (Strasbourg: IRIS Extra, 2017).

impact on free speech in Russia.¹⁷ This paper will update their conclusions with regards to the issue of defamation and compare the contributions of these two Russian highest courts.

To study the application of the CoE standards in practice, this article examines 120 decisions of the Russian general jurisdiction courts from 2012 to 2016. These courts are the lowest courts in Russia. The article examines 120 decisions over the period from 2012 to 2016 available on the SudebnyeReshenija.rf database,¹⁸ a Russian-language noncommercial system that collects and publishes the Russian courts decisions. The results of our analysis are also compared with the results of the study undertaken by the Article 19 in 2007¹⁹ to examine 102 cases on defamation in Russia over the period from 2002 to 2006.

For the CoE standards on media defamation, this study examines the perspective of the main CoE legally binding treaty on human rights, the 1950 European Convention on Human Rights (ECHR)²⁰, as well as its interpretations made by the European Court of Human Rights (ECtHR). This Court is a special independent CoE's judiciary designed to consider individual or state applications complaining on violations of human rights enshrined in the ECHR by member states. The ECtHR decisions are legally binding on all the CoE participants, and is often acknowledged as one of the most effective instruments to protect human rights in the world. The ECtHR judgments on defamation constitute the largest group of all the decisions on free speech in Russia, and the country lost majority of cases. This paper refers to them *ad hoc* because their study is worthy of a separate investigation. The non-binding legal standards of the CoE, such as the recommendations and declarations of its main institutions, the PACE, and the Committee of Ministers, are considered in the study mainly to avoid misinterpretations of the binding standards.

¹⁷ See Andrei Richter, *Russia's Supreme Court as Media Freedom Protector*, FREE SPEECH AND CENSORSHIP AROUND THE GLOBE 273-98 (Peter Molnar ed., 2015); Peter Krug, *Press Freedom in Russia: Does the Constitution matter?*, 58 LAW IN EASTERN EUROPE 79-103 (2008).

¹⁸ RosPravosudie, <https://rospravosudie.com> (title translated as "Russian Justice").

¹⁹ See Article 19, *supra* note 8.

²⁰ Article 10, Part 1 of the ECHR reads: "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." See Council of Europe, *European Convention on Human Rights* (Nov. 4, 1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

II. KEY RUSSIAN AND COE LEGAL STANDARDS ON FREEDOM OF EXPRESSION

Article 10 Part 1 of the ECHR guarantees everyone the right to freedom of expression. It includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”²¹ This implies obligations of national governments to ensure the implementation of this right and to refrain from undue interference.

Although Article 10 in Part 2²² explicitly mentions “the protection of the reputation or the rights of others” among the legitimate aims for limiting freedom of expression, the governmental interference must strictly comply with the three-tier test enshrined in this part. First, the “interference” must be “prescribed by law.” Secondly, it must “pursue a legitimate aim.” Thirdly, the interference must be “necessary in a democratic society.” A similar test is provided in one of the main UN international treaties, the 1966 International Covenant on Civil and Political Rights (ICCPR).²³

The ECtHR allows a certain “margin of appreciation” for CoE member-states to impose limitations in some areas, such as, for instance, public morality or commercials, but it strongly confines such limitations with regards to political expressions or information of public interest because they

²¹ Article 10 Part 1 of the ECHR reads: “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.” *Id.*

²² Article 10 Part 1 of the ECHR says: “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.” *Id.*

²³ ICCPR in Article 19 Parts 3 states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

United Nations, *International Covenant on Civil and Political Rights* (Dec. 16, 1966), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

are crucial for democracy.²⁴ According to the ECtHR, freedom of expression is applicable not only to inoffensive information and ideas but also to those “that offend, shock or disturb the state or any sector of the population.”²⁵ As the Court clarifies, these are “the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”²⁶

The CoE standards provide nearly no leeway for the protection of public officials from criticism, and its limits of permissible criticism of government or public officials are broader than those of private citizens or politicians.²⁷ Politicians, however, are also less protected from criticism than individuals. A politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large and must consequently display a greater degree of tolerance,” as the ECtHR stated.²⁸

Media freedom (or freedom of the press) is inferred from the conventional commitments.²⁹ The ECtHR views journalism as a watchdog of democracy that informs societies on issues of public interest and holds governments to accountability.³⁰ Although the ECtHR notes that the press must not “overstep the bounds,”³¹ it is “nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest.”³² Therefore, the Court accepts a certain degree of exaggeration in media content.³³

Article 29 of the 1993 Russian Constitution provides a strong and detailed protection to freedom of speech by guaranteeing freedom of thought and speech, freedom of opinion, the right to access information, freedom of

²⁴ See *Sunday Times v. United Kingdom No.2*, App. No. 13166/87 (Eur. Ct. H.R. Nov. 26, 1991).

²⁵ *Handyside v United Kingdom*, App. No. 5493/72 (Eur. Ct. H.R. Dec. 7, 1976).

²⁶ *Id.*

²⁷ The principle of wider criticism of public figures has been implemented in many ECtHR cases. See, e.g., *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R. Apr. 23, 1992); *Janowski v Poland* App. No. 571/04 (Eur. Ct. H.R. Jan. 21, 1999); *Nilsen v. Norway*, App. No. 3118/93 (Eur. Ct. H.R. Nov. 25, 1999); *Jerusalem v. Austria*, App. No. 26958/95 (Eur. Ct. H.R. Feb. 27, 2001); *Karman v. Russia*, App. No. 29372/02 (Eur. Ct. H.R. Dec. 14, 2006); *Lombardo v. Malta*, App. No. 7333/06 (Eur. Ct. H.R. Apr. 24, 2007); *Lepojić v. Serbia*, App. No. 13909/05 (Eur. Ct. H.R. Nov. 6, 2007); *Bodrožić v. Serbia*, App. No. 2550/05 (Eur. Ct. H.R. June 23, 2009); *Renaud v. France*, App. No. 13290/07 (Eur. Ct. H.R. Feb. 25, 2010); *Brosa v. Germany*, App. No. 5709/09 (Eur. Ct. H.R. Apr. 17, 2014); *Stankiewicz and others v. Poland*, App. No. 48723/07 (Eur. Ct. H.R. of Oct. 14, 2014).

²⁸ *Lingens v. Austria*, App. No. 9815/82 (Eur. Ct. H.R. July 8, 1986).

²⁹ See JAN OSTER, *EUROPEAN AND INTERNATIONAL MEDIA LAW* (2017).

³⁰ See, e.g., *Sunday Times v. United Kingdom*, App. No. 6538/74 (Eur. Ct. H.R. Apr. 26, 1979); *Observer and Guardian v. United Kingdom*, App. No. 13585/88 (Eur. Ct. H.R. Nov. 26, 1991); *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R. Apr. 23, 1992).

³¹ *Sunday Times v. United Kingdom No.2*, App. No. 13166/87 (Eur. Ct. H.R. Nov. 26, 1991).

³² *Id.*

³³ See *De Haes and Gijssels v. Belgium*, App. No. 19983/92 (Eur. Ct. H.R. Feb. 24, 1997).

mass communication, and a total ban on censorship.³⁴ The 1991 Statute “On Mass Media”³⁵ defines freedom of mass communication as including not only freedom of the press but also media-like content. It also bans preemptive and punitive censorship.

The Russian constitutional provisions on free speech are almost completely in line with the international standards.³⁶ Like the main international treaties, the Russian Constitution does not view freedom of speech as absolute. The constitutional criteria³⁷ to assess its limitations are similar to the ones of the three-tier test.

The CoE perspective on the concept of public interest was incorporated into Russian law by the Supreme Court. It states that public interest does not refer to just any interest that the audience may have, but includes, “for instance, the need of society to detect and expose threats to the democratic, legal state and civil society, to public safety, and to the environment.”³⁸ This means that the public’s curiosity or demand for juicy stories would not comprise public interest, while information about illegal actions would always fall into the scope of public concern, which reflects the ECtHR’s viewpoint.³⁹

The Russian Supreme Court also states that disseminating information of public interest is a public duty of the media, thus justifying the strong protection of journalistic expressions of public interest. It explains that even

³⁴ Article 29 of the Russian Constitution states:

1. Everyone is guaranteed the freedom of thought and speech.
2. Propaganda or agitation exciting social, racial, national, or religious hatred and strife is not permitted. Propaganda of social, racial, national, religious, or linguistic superiority is banned.
3. No one may be compelled to express his or her opinions and convictions or to renounce them.
4. Everyone has the right to freely seek, receive, pass on, produce, and disseminate information by any lawful means. A list of information comprising state secrets is determined by federal law.
5. The freedom of mass information is guaranteed. Censorship is banned.

Const. of the Russian Federation, adopted at National Voting (Dec. 12, 1993), <http://www.constitution.ru/en/10003000-01.htm>.

³⁵ See Russ. Fed. L. On Mass Media, No. 2124-1 (Dec. 27, 1991), http://www.consultant.ru/document/cons_doc_LAW_1511.

³⁶ Elena Sherstoboeva, *The Evolution of a Russian Concept of Free Speech*, SPEECH AND SOCIETY IN TURBULENT TIMES: FREEDOM OF EXPRESSION IN COMPARATIVE PERSPECTIVE 213-36 (Monroe Price & Nicole Stremlau ed., 2018).

³⁷ The Russian Constitution states in Article 55(3) that the right to freedom of speech could be limited only by federal laws, and “to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, of morality, health, the rights and lawful interests of other people, and for ensuring the defence and the security of the State” *Supra* note 34.

³⁸ *Decree On the Practice of Application of the Statute of the Russian Federation “On Mass Media” by Courts*, *supra* note 12.

³⁹ See Couderc and Hachette Filipacchi Associés v. France, App. No. 40454/07 (Eur. Ct. H.R. Nov. 10, 2015).

the questionable facts on how public officials perform their functions represent public interest may positively affect public debates. The Court also incorporates the CoE concept on wider limits of criticism for public officials or political figures in its 2005 decree.⁴⁰ It directly quotes Articles 3 and 4 of the CoE's Declaration on Freedom of Political Debate in the Media⁴¹ noting that public officials or political figures should tolerate criticism, including criticism in the media, but only with regards to their professional duties, rather than private life.

In line with the ECtHR jurisprudence,⁴² the Supreme Court's decree declared that the Russian courts should balance between the right to protect reputation and freedom of speech.⁴³ The decree reminds Russian courts that they should be guided by Article 10 of the ECHR and pay attention to the legal position of the ECtHR when considering defamation disputes.

However, in most of its judgments on freedom of expression in Russia, the ECtHR found that the national courts had failed to find a proper balance between the protection of freedom of expression and other rights.⁴⁴ In the 2008 case of Dyundin, the ECtHR noted that journalistic claims of police brutality were of public interest and that the applicant was entitled to make them public through the media.⁴⁵ The Court criticized the approach of the national courts that:

⁴⁰ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁴¹ See Eur. Consult. Assemb., *Declaration of the Committee of Ministers on Freedom of Political Debate in the Media* (Feb. 12, 2004), https://avmu.mk/wp-content/uploads/2017/11/Declaration_on_freedom_of_political_debate_in_the_media_angliski.pdf.

⁴² See *Abeberry v. France*, App. No. 58729/00 (Eur. Ct. H.R. Sept. 21, 2004); *Leempoel v. Belgium*, App. No. 64772/01 (Eur. Ct. H.R. Nov. 9, 2006); *Kuliš v. Poland*, App. No. 27209/03 (Eur. Ct. H.R. March 18, 2008); *Bodrožić v. Serbia*, App. No. 38435/05 (Eur. Ct. H.R. June 23, 2009); *Romanenko and Others v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Oct. 8, 2009); *Erla Hlynisdottir v. Iceland*, No. 2, App. No. 54125/10 (Eur. Ct. H.R. Oct. 21, 2014).

⁴³ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁴⁴ See *Dyudin v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. Oct. 14, 2008); *Romanenko and Others v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Oct. 8, 2009); *Porubova v. Russia*, App. No. 8237/03 (Eur. Ct. H.R. Oct. 8 2009); *Aleksandr Krutov v. Russia*, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); *Andrushko v. Russia*, App. No. 4260/04 (Eur. Ct. H.R. Oct. 14, 2010); *Saliyev v. Russia*, App. No. 35016/03 (Eur. Ct. H.R. Oct. 21, 2010); *Novaya Gazeta v. Voronezhe v. Russia*, App. No. 27570/03 (Eur. Ct. H.R. Dec. 21, 2010); *Ivpress and Others v. Russia*, App. No. 56027/10 (Eur. Ct. H.R. Jan. 22, 2013); *Reznik v. Russia*, App. No. 4977/05 (Eur. Ct. H.R., Apr. 4, 2013); *Nadtoka v. Russia*, App. No. 38010/05 (Eur. Ct. H.R. May 31, 2016); *Grebneva and Alisimchik v. Russia*, App. No. 8918/05 (Eur. Ct. H.R. Nov. 22, 2016).

⁴⁵ See *Dyudin v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. Oct. 14, 2008).

[they] confined their analysis to the discussion of the damage to the plaintiff's reputation without giving any consideration to the applicant's journalistic freedom or to the fact that the plaintiff was a civil servant acting in an official capacity and was accordingly subject to wider limits of acceptable criticism than private individuals.⁴⁶

From the ECtHR's perspective and in contrast with international standards, the Russian national authorities tend to provide stronger protection for public officials⁴⁷ and pro-governmental candidates or parties⁴⁸ than for private individuals. The ECtHR also found that even if the Russian national authorities do refer to the CoE's concepts of public interest and broader criticism of public officials or politicians, such references had no effect on making decisions. Nevertheless, this criticism neither prevented Russia from adopting the ban on "blatant disrespect" of the state and state bodies nor from strengthening authorities' legal protection from criticism in general.

III. RUSSIAN AND COE LEGAL STANDARDS ON DEFAMATION

A. *Honor, Dignity, and Business Reputation*

Neither the ECHR nor the ECtHR provide definitions of "defamation" or "reputation." As McGonagle clarifies, the CoE's meaning of "reputation" includes self-esteem as well as the esteem in which a person is held by others.⁴⁹ From his perspective, the act of defamation is viewed under the CoE standards as comprising the expression of a "false or untrue statement about another person that can damage his/her reputation in the eyes of reasonable members of society."⁵⁰

⁴⁶ *Id.*

⁴⁷ See *Grinberg v. Russia*, App. No. 23472/03 (Eur. Ct. H.R. July 21, 2005); *Krasulya v. Russia*, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007); *Dyuldin and Kislov v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. July 31, 2007); *Chemodurov v. Russia*, App. No. 72683/01 (Eur. Ct. H.R. July 31, 2007); *Porubova v. Russia*, App. No. 8237/03 (Eur. Ct. H.R. Oct. 8 2009); *Aleksandr Krutov v. Russia*, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); *Saliyev v. Russia*, App. No. 35016/03 (Eur. Ct. H.R. Oct. 21, 2010); *Novaya Gazeta v. Voronezhe v. Russia*, App. No. 27570/03 (Eur. Ct. H.R. Dec. 21, 2010); *Ivpress and Others v. Russia*, App. No. 56027/10 (Eur. Ct. H.R. Jan. 22, 2013); *Nadtoka v. Russia*, App. No. 38010/05 (Eur. Ct. H.R. May 31, 2016); *Grebneva and Alisimchik v. Russia*, App. No. 8918/05 (Eur. Ct. H.R. Nov. 22, 2016).

⁴⁸ See *Filatenco v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007); *Andrushko v. Russia*, App. No. 4260/04 (Eur. Ct. H.R. Oct. 14, 2010).

⁴⁹ See McGonagle, *supra* note 2.

⁵⁰ *Id.* at 14.

Russian statutory law also does not mention the concept of defamation and uses several different legal notions instead of the one of “reputation,” which may seem confusing. The Russian Constitution acknowledges and shields values such as “human dignity” in Article 21 Part 1,⁵¹ and “human honor” and “good name” in Article 23 Part 1,⁵² but it does not mention reputation at all. Article 152 of the Civil Code of the Russian Federation⁵³

⁵¹ Article 21 Part 1 of the Russian Constitution states: “Human dignity shall be protected by the government. Nothing may serve as a ground for its derogation.” Russ. Fed. L. On Mass Media, Art 21, *supra* note 35.

⁵² Article 23 Part 1 of the Russian Constitution states: “Everyone shall have the right to privacy, personal and family secrets as well as the protection of honor and good name.” Russ. Fed. L. On Mass Media, Art 23, *supra* note 35.

⁵³ Article 152 of the Civil Code of the Russian Federation (“Protection of the Honor, Dignity, and Business Reputation”) states:

1. A citizen shall have the right to claim in court that information discrediting his honor, dignity, or business reputation be rectified unless the person who has disseminated such information proves its consistency with the real state of affairs. Correction shall be made by the same means used for dissemination of the information about the citizen or by other similar means. Upon demand of the interested persons, the protection of a citizen's honor and dignity is allowed after their death.

2. If information discrediting the honor, dignity, or business reputation of a citizen has been disseminated by the mass media, it shall be rectified by the same mass media. A citizen, with respect to whom the mass media has published the said information, has the right to publish his reply in the same mass media, alongside a correction.

3. If information discrediting the honor, dignity, or business reputation of a citizen, is contained in the document, issued by an organization, the given document is subject to an exchange or withdrawal.

4. In cases when information, discrediting the honor, dignity or business reputation of a citizen has become widely known and therefore it is impossible to deliver a correction accessible to a general public, a citizen has the right to seek the removal of the information as well as the prevention and prohibition of further dissemination of the information through seizure and destruction of the copies of tangible carriers containing the information without any compensation, provided that the removal of the information is impossible without destruction of the copies of such tangible carriers.

5. If information discrediting the honor, dignity, or business reputation of a citizen has become available on the Internet, the citizen has the right to request the removal of this information as well as its correction by the means ensuring that the correction would be accessible to the Internet users.

6. In other cases, except from those stipulated in clauses 2–5 of this Article, the procedure of correction of information discrediting the honor, dignity, or business reputation of a citizen shall be established by a court.

7. The application of measures of liability for non-fulfillment of a court decision to an offender shall not exempt him from the duty to execute actions provided by the court decision.

8. If it is impossible to identify the person who disseminated information discrediting the honor, dignity, or business reputation of a citizen, the citizen, about whom the information has been disseminated, has the right to file a lawsuit on recognizing the disseminated information as inconsistent with the real state of affairs.

9. A citizen, with respect to whom information discrediting his honor, dignity, or business reputation has been disseminated, shall have the right, in addition to the correction or a reply to the given information, to claim the compensation of losses and of moral harm caused by its dissemination.

10. The court may also apply the rules of clauses 1–9 of this article, except for provisions on the compensation of moral harm, to cases of dissemination of any untrue information about a citizen

safeguards “the right to protect honor, dignity, and business reputation,” but fails to mention “good name,” like the Statute “On Mass Media” additionally regulating media defamation. The Russian Constitutional Court clarified that a concrete procedure for implementing the constitutional clause on defamation is established in Article 152 of the Civil Code in order to avoid certain ambiguities in these notions.⁵⁴ Therefore, the Russian courts only apply the Civil Code’s notion of “the right to protect honor, dignity, and business reputation.”⁵⁵ The Code qualifies honor, dignity, good name as well as business reputation as intangible, inalienable, and non-transferable values, and guarantees their judicial protection in Russia during lifetime and after death.⁵⁶

In practice, the Civil Code’s notion is considered as comprising the two rights: “to protect honor and dignity” and “to protect business reputation” because they can be separately protected in courts. Russian scholars argue that “dignity” and “honor” are united in one right because the esteem of one’s personal qualities by others influences self-esteem.⁵⁷ The right to business reputation implies only the esteem of “business” qualities of persons in the eyes of members of a society.⁵⁸ Because “dignity” and “honor” are viewed

provided that the citizen proves inconsistency of such information with the real state of affairs. The period of limitation on claims concerning the dissemination of the information in the mass media is one year from the day of publication of such information in the relevant mass media.

11. The rules of the present Article on the protection of the business reputation of the citizen, with the exception of provisions on the compensation of moral harm, shall be correspondingly applied to the protection of the business reputation of a legal entity.

Russ. Fed. L. On Mass Media, Art 152, *supra* note 35.

⁵⁴ See 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. 1 (2006).

⁵⁵ Ukr. Const. Art. 3 Part 1.

⁵⁶ Article 150 Part 1 of the *Civil Code of the Russian Federation* states:

1. The life and health, the personal dignity and personal immunity, the honor and good name, the business reputation, the right to private life, the personal and family secret, the right to a free movement, of the choice of the place of stay and residence, the right to the name, the copyright and the other personal non-property rights and intangible values belonging to citizens by the virtue of the birth or law, shall be inalienable and non-transferable in any other way.

Russ. Fed. L. On Mass Media, Art 150, *supra*, note 35.

⁵⁷ See MIKHAIL TIKHOMIROV, ZASHHITA CHESTI, DOSTOINSTVA I DELOVOJ REPUTACII: NOVYE PRAVILA (2004) (title translated as “Protection of Honour, Dignity, and Business Reputation: New Rules”); *Kommentarij k Ugolovnomu kodeksu Rossijskoj Federacii. Osobennaja tchast’* (Yurii Skuratov & Vladimir Lebedev eds., 2004) (title translated as “Comments to the Criminal Code of the Russian Federation”); NICKOLAI VETROV, UGOLOVNOJE PRAVO. OSOBENNAJA TCHAST’ (2000) (title translated as “Criminal law. Special part”); ALEKSANDR ERDLEVSKIY, MORAL’NYJ VRED I COMPENSACIJA ZA STRADANIJA (1998) (title translated as “Moral Harm and Compensation for Suffering”).

⁵⁸ *Id.*

as moral categories, legal entities in Russia are entitled to protect their business reputation only.

While in general this approach may correlate with the CoE's concept of the right to protect reputation, it is insufficiently clear. Especially problematic had been the issue of court jurisdiction until the Supreme Court, in its 2005 Plenum's decree, clarified that cases on protecting business reputation are subject to consideration in *arbitrazh* courts that hear only economic or commercial disputes, rather than in general jurisdiction courts.⁵⁹ Unlike the former courts, the latter are usually criticized by Russian experts for being less professional and more politically biased. Therefore, the issue of court jurisdiction goes beyond just technical concerns. In the 2016 review, the Supreme Court additionally explained that if cases on business reputation do not concern economic or commercial activities of legal entities or individual proprietors, such cases are subject to consideration in general jurisdiction courts.⁶⁰ This means that Russian cases involving criticism towards public officials are considered by courts that tend to be less tolerant of political dissent.

1. Truth v. Factual Basis

The Supreme Court suggests that the ECtHR's vision of defamation is identical to that established in Article 152 of the Russian Civil Code.⁶¹ However, it is not exactly so. According to Article 152 Part 1, the act of defamation comprises dissemination of "discrediting information" that is "not true."⁶² Consequently, Russian law obliges defendants to prove in courts the truthfulness of the information they have disseminated. In contrast, the ECtHR's perspective on applying the legal concept of "truth" in cases on defamation is much more flexible: although truth provides an absolute defense against claims of defamation, it is often difficult or costly to establish.⁶³

Richter notes that, with regards to journalism, the obligation of proving the veracity of information might be underpinned by the journalistic right and duty to verify information before its dissemination, as established in Article 49 of "On Mass Media."⁶⁴ However, from the ECtHR's perspective, accurate

⁵⁹ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁶⁰ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

⁶¹ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁶² See Russ. Fed. L. On Mass Media, Art 150, *supra* note 35.

⁶³ See DARIO MILO, *DEFAMATION AND FREEDOM OF SPEECH* (2008).

⁶⁴ Richter, *supra* note 5.

reporting on facts, rather than consistency with the truth, is key in cases on defamation.⁶⁵ Additionally, the ECtHR accepts some leeway in accuracy because news is a perishable commodity, and even a short delay in publication or broadcasting may result in the loss of its value as well as social interest.⁶⁶ In contrast, the Russian Constitutional Court strictly claims that placing the responsibility of proving the veracity of defamatory statements on those who have disseminated them is fully consistent with the constitutional right to free speech.⁶⁷

The ECtHR perspective has many important developments that Russian regulations overlook. For instance, the ECtHR acknowledges the so-called “fair comment defense,” which is inapplicable to Russia because of the “truthfulness” requirement. Fair comment defense gives the widest scope possible for free speech in relation to opinions on the issues of public interest.⁶⁸ In *Thorgeirson v. Iceland*, the ECtHR specified that, although the publications were based on rumors, stories, and the statements of others, they raised public interest – in this case, police brutality.⁶⁹ As a result, the ECtHR found a violation of the applicant’s freedom of expression.

The Supreme Court smooths the strictness of the statutory and Constitutional Court’s perspectives to a certain degree. The Supreme Court stated that lower courts should assess a publication in general rather than verifying separate words or phrases.⁷⁰ It also instructed the courts to check whether the disputed information was true at the moment of publication or broadcast, because the plaintiffs could have remedied the breach at the moment of the lawsuit or court consideration. These visions comply with the ECtHR’s case law,⁷¹ but the ECtHR approach is nevertheless more multifaceted and flexible than Russia’s. To illustrate, the ECtHR examines journalistic practices, such as “fact-checking processes” and ensuring “access to sources and documents that can provide evidence in court if an allegation

⁶⁵ See *Bergens Tidende and Others v. Norway*, App. No. 26132/95 (Eur. Ct. H.R. May 2, 2000); see also *Shabanov and Tren v. Russia*, App. No. 5433/02 (Eur. Ct. H.R. Dec. 14, 2006); *Aleksey Ovchinnikov v. Russia*, App. No. 24061/04 (Eur. Ct. H.R. Dec. 16, 2010); *Novaya Gazeta and Borodyanskiy v. Russia*, App. No. 15438/05 (Eur. Ct. H.R. Mar. 28, 2013); *OOO “Vesti” and Ukhov v. Russia*, App. No. 28796/07 (Eur. Ct. H.R. May 30, 2013).

⁶⁶ See *Observer and Guardian*, *supra* note 30.

⁶⁷ See Constitutional Court of the Russian Federation, *Resolution on the Refusal to Consider the Complaint of a Citizen, A.V. Kozyrev* (Sept. 27, 1995).

⁶⁸ See *McGonagle 46*, *supra* note 2.

⁶⁹ See *Thorgeirson v. Iceland*, App. No. 13778/88 (Eur. Ct. H.R. June 25, 1992).

⁷⁰ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

⁷¹ See, e.g., *Grebneva and Alisimchik*, *supra* note 44; *Godlevskiy v. Russia*, App. No. 14888/03 (Eur. Ct. H.R. Oct. 23, 2008); *OOO “Vesti” and Ukhov v. Russia*, App. No. 28796/07 (Eur. Ct. H.R. May 30, 2013); *Filatenko v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007).

of defamation arises.”⁷² In *Dyundin*, the ECtHR criticized the Russian legal perspective on this issue and stated that:

the relevant test is not whether the journalist can prove the veracity of the statements but whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the allegation can be established.⁷³

Because factual basis proves that defendants acted in good faith and respected journalistic ethics when preparing their publications, their expressions should enjoy stronger protection under Article 10 of ECHR. Therefore, factual basis is key from the ECtHR perspective for correct consideration of defamation disputes, as it contributes to reliable journalism as well as freedom of expression and information.

The ECtHR also suggests that it is unfair to require journalists to prove the veracity of statements if they have used reliable sources of information, because it is prescribed by their professional standards.⁷⁴ Among reliable sources are other media outlets,⁷⁵ parliamentary debates,⁷⁶ judicial hearings,⁷⁷ and official reports.⁷⁸ Article 57 of the Russian statute “On Mass Media” also exempts journalists from liability for publishing defamatory information if they had reproduced it verbatim from the speeches or press releases of public officials, or from information agencies, or if it was disseminated at parliamentary sessions or by guests on live broadcast programs.⁷⁹ However, the ECtHR approach is broader and represents the general principle that implies a thorough analysis of each case and assessment of all journalistic efforts to verify the information, rather than use of a narrowly defined formal rule. Its application is also limited because the statute “On Mass Media” is only applicable to professional media outlets that have been registered in this capacity with the state media regulator, Roskomnadzor. The only exception concerns popular Russian news aggregators that may be exempted from liability for defamation if they have reproduced defamatory information verbatim from governmental websites or another media outlet that has also

⁷² See McGonagle, *supra* note 2.

⁷³ *Dyundin*, *supra* note 44.

⁷⁴ See, e.g., *Colombani and Others v. France*, App. No. 51279/99 (Eur. Ct. H.R. June 25, 2002); *Bladet Tromsø and Stensaas v. Norway*, App. No. 21980/93 (Eur. Ct. H.R. May 20, 1999); *Fedchenko v. Russia No. 1*, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010).

⁷⁵ See, e.g., *Thoma v. Luxembourg*, App. No. 38432/97 (Eur. Ct. H.R. Mar. 29, 2001).

⁷⁶ See, e.g., *A. v. the United Kingdom*, App. No. 35373/97 (Eur. Ct. H.R. Dec. 17, 2002); *Jerusalem v. Austria*, App. No. 26958/95 (Eur. Ct. H.R. Feb. 27, 2001).

⁷⁷ See, e.g., *Nikula v. Finland*, App. No. 31611/96 (Eur. Ct. H.R. March 21, 2002).

⁷⁸ See *Bladet Tromsø and Stensaas*, *supra* note 74.

⁷⁹ See Russ. Civ. Code Art. 152, *supra* note 53.

been registered with Roskomnadzor and can be found liable instead of the aggregator.⁸⁰ Needless to say, such regulations can hardly facilitate media freedom.

Russian law cannot protect those contributing to media-like services, including bloggers or other “non-professional” journalists. Even if they acted in good faith when publishing the content, they may still be held liable for defamatory information, which contrasts the CoE perspective. Consequently, Russian laws largely impede the dissemination of news from alternative sources and diminish the potential impact of media-like services to debates on the issues of public interests, which is contrary to the suggestions contained in the CoE Committee of Ministers’ 2011 Recommendation, “On a New Notion of Media.”⁸¹

Nonetheless, the legal notion of truth has become more problematic in Russia since 2019, after it adopted the so-called fake news law.⁸² The law’s vague ban on publishing “false information of public interest, shared under the guise of fake news”, has been used to suppress independent reporting during the COVID-19 pandemic, according to the Independent Press Institute, an international NPO defending press freedom across the globe.⁸³

2. Facts v. Value Judgments

The ECtHR states that it is necessary in cases of defamation to clearly distinguish facts from value judgment because the truth of the former can be demonstrated while the truth of the latter is not susceptible.⁸⁴ The Supreme Court’s 2005 decree incorporates this perspective and confirms that expressions of “subjective opinion and [the] views of a defendant” cannot

⁸⁰ See *Federal Statute of the Russian Federation On Amending the Federal Statute on Information, INFORMATION TECHNOLOGIES, AND THE CODE OF ADMINISTRATIVE OFFENCES* No. 208-FZ (June 23, 2016), <http://cbr.ru/Content/Document/File/33657/208-FZ.pdf>.

⁸¹ See *Recommendation CM/Rec(2011) 7 of the CoE’s Committee of Ministers to Member States On a New Notion of Media* (Sept. 21, 2011), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0.

⁸² See *Federal Law On Amendments to Article 15.3 of the Federal Law On Information, Information Technologies and Information Protection*, No. 31-FZ (March 18, 2019), http://www.consultant.ru/document/cons_doc_LAW_320401/#dst100008.

⁸³ International Press Institute, *New ‘fake news’ law stifles independent reporting in Russia on COVID-19* (May 8, 2020), <https://ipi.media/new-fake-news-law-stifles-independent-reporting-in-russia-on-covid-19>.

⁸⁴ See *Lingens v. Austria*, App. No. 9815/82 (Eur. Ct. H.R. July 8, 1986); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); *Karhuvaara & Iltalehti v. Finland*, App. No. 53678/00 (Eur. Ct. H.R. Nov. 16, 2004); *Keller v. Hungary*, App. No. 33352/02 (Eur. Ct. H.R. Apr. 4, 2006); *Falter Zeitschriften GmbH v. Austria*, App. No. 3084/07 (Eur. Ct. H.R. Feb. 8, 2007); *Ivanova v. Bulgaria*, App. No. 52435/99 (Eur. Ct. H.R. Feb. 14, 2008); *Axel Springer AG v. Germany* No. 2, App. No. 48311/10 (Eur. Ct. H.R. July 10, 2014).

(and should not) be verified.⁸⁵ However, in its case law on media defamation in Russia, the ECtHR suggested that the failure to make a clear distinction between facts and opinions has remained the most common problem of Russian justice concerning defamation.⁸⁶

Furthermore, the ECtHR does require justifying opinions under some circumstances,⁸⁷ for instance, to impede the dissemination of rumors or gossip that appear to be opinion. The ECtHR checks whether there has been a sufficient factual basis for the impugned statements.⁸⁸ Neither Russian laws nor the highest courts have integrated this approach. As a result, gutter journalism is overprotected in Russia, as the ECtHR's judgments on media defamation in Russia have shown.⁸⁹

3. Discrediting Information

Prior to the Supreme Court's 2005 decree, plaintiffs were not required to prove anything in courts, to the detriment of public debates on critical issues. First, the decree obliges plaintiffs to prove that the information has been disseminated.⁹⁰ Furthermore, the Court's 2016 review clarifies that plaintiffs may use any evidence to confirm the fact of dissemination, but the evidence must be "relevant and admissible,"⁹¹ such as news article copies or records of broadcasts. With regard to online defamation, the Supreme Court

⁸⁵ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁸⁶ See *Grinberg v. Russia*, App. No. 23472/03 (Eur. Ct. H.R. July 21, 2005); *Karman v. Russia*, App. No. 29372/02 (Eur. Ct. H.R. Dec. 14, 2006); *Krasulya v. Russia*, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007); *Dyuldin and Kislov v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. July 31, 2007); *Chemodurov v. Russia*, App. No. 72683/01 (Eur. Ct. H.R. July 31, 2007); *Filatenko v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007); *Dyudin v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. Oct. 14, 2008); *Godlevskiy v. Russia*, App. No. 14888/03 (Eur. Ct. H.R. Oct. 23, 2008); *Kudeshkina v. Russia*, App. No. 29492/05 (Eur. Ct. H.R. Feb. 26, 2009); *Romanenko and Others v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Oct. 8, 2009); *Aleksandr Krutov v. Russia*, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); *Kunitsyna v. Russia*, App. No. 9406/05 (Eur. Ct. H.R. Dec. 13, 2016).

⁸⁷ See, e.g., *Novaya Gazeta and Borodyanskiy v. Russia*, App. No. 15438/05 (Eur. Ct. H.R. Mar. 28, 2013); *OOO "Vesti" and Ukhov v. Russia*, App. No. 28796/07 (Eur. Ct. H.R. May 30, 2013).

⁸⁸ See, e.g., *Jerusalem v. Austria*, App. No. 26958/95 (Eur. Ct. H.R. Feb. 27, 2001); *De Haes and Gijssels v. Belgium*, App. No. 19983/92 (Eur. Ct. H.R. Feb. 24, 1997).

⁸⁹ See *Aleksey Ovchinnikov v. Russia*, App. No. 24061/04 (Eur. Ct. H.R. Dec. 16, 2010).

⁹⁰ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁹¹ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

suggests that plaintiffs notarize copies of online publications to confirm that they are in fact genuine.⁹²

Second, the Supreme Court notes that plaintiffs must prove that the impugned information explicitly concerns them, rather than any abstract person or social group.⁹³ This stance is also beneficial for public debates because it makes impossible to bring suit for “general criticism,” reflecting the developments in the ECtHR case law on defamation in Russia.⁹⁴

Third, the Supreme Court requires that plaintiffs prove that the information about them was indeed “discrediting.” The 2005 decree defines “discrediting” information as comprising of information on violating the law, committing dishonest acts, or wrongful or unethical behavior.⁹⁵ It also includes allegations about plaintiffs’ unfair business practices or violation of business ethics.⁹⁶ This explanation should have assisted Russian courts in making fair judgements.⁹⁷

Still, the room for media freedom has been narrowed by the 2013 amendments to the Civil Code. The law now allows punishment for the dissemination of any untrue information even if it does not discredit a plaintiff.⁹⁸ Although this approach contradicts the Supreme Court’s clarifications, the statutory vision must prevail nonetheless because Russian law establishes the supremacy of statutes. That is probably why, despite the contrasting vision, the Supreme Court later agreed with the new provision of the Civil Code.⁹⁹

Regarding the dissemination of untrue information, its veracity is proved by plaintiffs. On the one hand, it somewhat reduces the harm to media freedom in Russia; on the other, such approach is nevertheless disproportionate in light of Article 10 of ECHR. It is of the vision that many untrue statements can be just factual mistakes that cause no harm to plaintiffs’ reputation.

⁹² *See id.*

⁹³ *See Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities, supra* note 12.

⁹⁴ *See Dyuldin and Kislov v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. July 31, 2007); *Filatenko v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007); *Godlevskiy v. Russia*, App. No. 14888/03 (Eur. Ct. H.R. Oct. 23, 2008); *Aleksandr Krutov v. Russia*, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009).

⁹⁵ *See Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities, supra* note 12.

⁹⁶ *Id.*

⁹⁷ *See Richter, supra* note 5.

⁹⁸ *See Russ. Fed. L. On Mass Media*, Art 152, *supra* note 35.

⁹⁹ *See Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation, supra* note 3.

4. Corrections and Replies

According to the Civil Code, citizens or companies may claim corrections of defamatory information in courts,¹⁰⁰ while the statute “On Mass Media” invites them to seek corrections or replies directly with the media editorial office, without initiating a court procedure.¹⁰¹ Such direct communication with the editor would diminish the number of defamation lawsuits against journalists and stimulate media self-regulation and responsible journalism. However, because citizens or companies can choose whether to file a lawsuit or negotiate their corrections with the editorial offices who have defamed or criticized them, the former prefer to sue the latter in practice and apply the Civil Code, which is less favorable for journalists.

The Civil Code provides that the information must be corrected by the same or similar means as those used for its dissemination.¹⁰² Corrections must be published on the same website or outlets that have disseminated false statements. The Civil Code states that the procedure for correction may be established by a court, but the statute lacks criteria for that.¹⁰³

Procedural issues for publishing corrections and replies in the media are established in “On Mass Media.” Seeking to ensure the proper safeguard of the right to protect reputation, it provides that corrections and replies will be published promptly, in the same place and with the same length or duration as the defamatory information.¹⁰⁴ However, Richter fairly notes that these clauses are outdated: it is impossible to apply them to online media, which prevent from the coherent implementation of these rules in practice.¹⁰⁵

Russian statutory law fails to explain when to use the right to reply, so the Supreme Court has tried to fill this gap. It has stated that this right should be provided to correct errors of fact and inaccuracies or to complement incomplete information as well as one-sided value judgment.¹⁰⁶ The Court suggests that replies may justify an opposite perspective.¹⁰⁷ While the Courts’

¹⁰⁰ See Russ. Fed. L. On Mass Media, Art 152, *supra* note 35.

¹⁰¹ According to Article 43 of the statute “On Mass Media,” media outlets must disseminate the text of the correction provided by the citizens or companies concerned by the disseminated defamation “if such text complies with the statute.” Radio or TV stations may give the opportunity to citizens or companies to read aloud the text of the correction and provide it to the stations in the form of a recording. Article 44 of “On Mass Media” sets up the order and requirements for publication of corrections. See Russ. Fed. L. On Mass Media, *supra* note 35.

¹⁰² See Russ. Fed. L. On Mass Media, Art 152, *supra*, note 35.

¹⁰³ *Id.*

¹⁰⁴ See Russ. Fed. L. On Mass Media, *supra*, note 35.

¹⁰⁵ See Richter, *supra* note 16.

¹⁰⁶ *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

¹⁰⁷ *Id.*

suggestions aim at facilitating public debate in the media, as encouraged by the ECtHR, they are insufficiently clear. That is likely why the right to reply is practically useless in Russia. So, is there any need for this right from the international legal perspective?

Unlike the American Convention on Human Rights, the ECHR does not formulate this right at all – however, the ECtHR considers the publication of a reply or a correction as a “normal element of the legal framework governing the exercise of the freedom of expression.”¹⁰⁸ The CoE’s Resolution, “On the Right of Reply—Position of the Individual in Relation to the Press,” states that an individual should “have an effective possibility for the correction, without undue delay, of incorrect facts relating to him.”¹⁰⁹ According to the resolution, if an individual has a justified interest in having corrected this information, this should be done as far as possible in the same scope as the original publication.¹¹⁰

The CoE’s European Convention on Transfrontier Television (ECTT) also addresses the right of reply on television.¹¹¹ The ECTT states that individuals and legal entities must be provided with the opportunity to “exercise the right of reply or to seek other comparable legal or administrative remedies relating to programs transmitted by a broadcaster within its jurisdiction.”¹¹² To that aim, the name of the program service or of its broadcaster “shall be identified in the program service itself, at regular intervals by appropriate means.”¹¹³ Russia signed the ECTT in 2006, but has not ratified it so far, and, most likely, will not ratify it in the near future.

Before the 2013 amendments to the Civil Code, the right to reply had been applied only when the right to correction was inapplicable and the plaintiffs had to seek alternative remedies.¹¹⁴ At that time, replies were mostly used to comment on imprecise or inaccurate information, in line with the CoE standards and the Supreme Court’s perspective. In 2013, however, the Civil Code ambiguously stated that the right to reply may be claimed “in

¹⁰⁸ WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2015).

¹⁰⁹ See Eur. Consult. Assemb., *Resolution (74) 26 of the CoE’s Committee of Ministers to Member States On the Right of Reply—Position of the Individual in Relation to the Press*, adopted by the Committee of Ministers (July 2, 1974), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680645b44>.

¹¹⁰ *Id.*

¹¹¹ Council of Europe, *European Convention on Transfrontier Television* (May 5, 1989) STRASBOURG, <https://www.coe.int/ru/web/conventions/full-list/conventions/rms/090000168007b0d8>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Richter, *supra* note 16.

addition to” the right to correction,¹¹⁵ which should be seen as a disproportionate interference in media freedom from the CoE’s perspective.

5. Monetary Sanctions

The Russian Civil Code provides that citizens who have been defamed may claim compensations for material losses and moral harm, and legal entities may seek only compensation for losses.¹¹⁶ The amount of compensation is determined by courts. It should be “proportionate” to the harm caused by the defamation and should not curtail the freedom of mass information, as the Supreme Court notes,¹¹⁷ reflective the ECtHR case law vision.¹¹⁸ Accordingly, the Supreme Court instructs the Russian courts to pay attention, when determining such amounts, to the specifics of the publications such as their genre and audience reach.¹¹⁹ The Court also states that citizens had the right to claim in the courts damages for moral harm even if the editorial offices have voluntarily agreed to publish a correction but further states that the courts should consider this fact in their decision about awarding compensation.¹²⁰ Referring to the ECtHR case law, the Supreme Court states that the amount of compensation should be reasonable, fair, proportionate and should be sufficiently justified by courts.¹²¹ As the review noted, it is unlawful to compensate for actions that are “punitive, overburden[ed] or precautionary,”¹²² as was in the case of the renowned Russian news article *Kommersant*.

In 2004, *Kommersant* could become bankrupt as a result of its publication alleging the bank’s financial problems during the banking crisis. A Russian court ordered that *Kommersant* would pay an enormous monetary penalty of an equivalent of more than 9 million euro in rubles to Alfa-Bank, the plaintiff. Later, the appellate court reduced the penalty to an equivalent of 1 million U.S. dollars in rubles, which was still a large sum.¹²³ So, the

¹¹⁵ See Russ. Fed. L. On Mass Media, Art 152 Part 9, *supra* note 35.

¹¹⁶ *Id.*

¹¹⁷ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

¹¹⁸ See *Tolstoy Miloslavsky v. the United Kingdom*, App. No. 18139/91 (Eur. Ct. H.R. July 19, 1995); *Timpul Info-Magazin and Anghel v. Moldova*, App. No. 42864/05 (Eur. Ct. H.R. Nov. 27, 2007).

¹¹⁹ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

¹²⁰ *Id.*

¹²¹ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

¹²² *Id.*

¹²³ See *High Court Bans “Ruinous” Libel Suits*, MOSCOW TIMES (Sept. 19, 2010), <https://themoscowtimes.com/news/high-court-bans-ruinous-libel-suits-1583>.

Supreme Court sought to instruct Russian courts in detail on how to calculate compensation to prevent the outlets from bankruptcy and to get the Russian legal vision closer to the CoE standards.

In general, Russian law provides a stronger protection from defamation for individuals than for companies. Since 2013, Article 152 of the Russian Civil Code has unambiguously provided that companies can only seek compensation for losses but not for moral harm, and the Supreme Court confirmed this position in its 2016 review.¹²⁴ The Civil Code defines moral harm as “mental or physical anguishes” of individuals¹²⁵ and provides that courts should pay attention to the degree of fault and other factors related to the defamed person when establishing the amount of the award to compensate moral harm.¹²⁶ Losses, however, should be clearly proved by plaintiffs, for instance, with the documents that would show that the publication was the true reason for such losses.

However, Russian courts continue to award compensation for moral harm to legal entities. By doing so, Russian courts either refer to the ECtHR’s concept of “reputational harm”¹²⁷ or to the ambiguous 2003 ruling of the Constitutional Court, which stated that legal entities may claim “compensation for non-material” losses.¹²⁸ Russian lower courts have often interpreted reputational harm as a reward for moral harm suffered by legal entities.¹²⁹ However, these are misinterpretations. In a 2016 Russian high-profile case, the *Arbitrazh* Court of the City of Moscow partly satisfied a defamation lawsuit filed by the giant state-owned oil company *Rosneft*, ordering the *RBC* media company to pay 390,000 rubles – a substantial amount of money equaling approximately 5,200 U.S. dollars – to compensate the “reputational harm.”¹³⁰ The publication concerned Russia’s attempt to privatize a 19.5% share of *Rosneft* and it stated that the *Rosneft*’s CEO Igor Sechin had asked the Russian government to prevent the British oil giant BP from securing greater control over *Rosneft*. Because the publication was of public interest, the court decision is hardly consistent with the CoE standards

¹²⁴ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

¹²⁵ See Russ. Fed. L. On Mass Media, Art 151, *supra* note 35.

¹²⁶ *Id.*

¹²⁷ See Ekaterina Dobrikova, *Moral'nyj vred i zashhita delovoj reputacii: v kakom sluchae juridicheskie lica mogut trebovat' kompensaciju?* GARANT.RU (Sept. 24, 2015), <http://www.garant.ru/article/652745/#ixzz4WxQWimI7> (title translated as “Moral harm and the protection of business reputation: In which case may legal entities seek compensation?”).

¹²⁸ See Russ. Fed. L. On Mass Media, Art 152, *supra*, note 35.

¹²⁹ See Dobrikova, *supra* note 127.

¹³⁰ *\$6,000 in Damages to Rosneft in Landmark Media Case*, MOSCOW TIMES, (Dec. 12, 2016), <https://themoscowtimes.com/news/court-rules-media-company-must-pay-over-6000-in-damages-to-rosneft-56505>.

on media freedom. Therefore, any reference to the ECtHR's concept of "reputational harm" in similar cases misinterpret the CoE standards on free speech. Furthermore, the ECtHR has never acknowledged that companies may seek compensation for "non-material" losses.

6. Removal of Online Defamatory Content

Seeking to strengthen the protection of reputation, the 2013 amendments to the Russian Civil Code permitted the removal of defamatory information from the internet.¹³¹ If defamatory information becomes "widely known," citizens or companies may request its removal.¹³² They may also seek to ban and prevent its further dissemination, including through such measures as seizure and destruction of the copies containing that information. If a non-identifiable person disseminated discrediting information about citizens, they may request the courts' acknowledgement that this information is untrue as well as its removal.¹³³ Since 2018, the Russian parliament has stepped up a notice-and-takedown system with regards to defamatory information. The Russian statute "On Information, Information Technologies, and Protection of Information" obliges hosting service providers to notify website owners about the decision holding that they must remove defamatory content from their websites within one day. If the owners fail to do so, the hosting service providers must immediately block access to the entire website.¹³⁴ The system is supervised by the state Internet and communication watchdog, *Roskomnadzor*, so it is not an independent body. The law provides the same order for the takedowns of fake news and expressions showing "blatant disrespect" of the state, state bodies, and society.

While it is indeed complicated to fight online defamation, and the scholarly and expert visions of this issue may be polarized, media attorney Galina Arapova argues that the Russian legal framework for online defamation does not meet the ECtHR test.¹³⁵ She suggests that the Russian legislators made no attempt to establish balance online freedom of speech and protection of reputation. For instance, Russian law does not provide an

¹³¹ See Russ. Fed. L. On Mass Media, Art 152, *supra* note 35.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Russ. Fed. L. On Amendments to the Federal Law on Information, Information Technologies and on the Protection of Information, *supra* note 6.

¹³⁵ See Media Rights Defense Centre, *Mediayurist Galina Arapova Oznakomila Sudej, Studentov i Zhurnalystov s Poslednimi Izmenenijami v Zakonodatel'stve, Regulirujushhem Dejatel'nost' SMI*, (Dec.18, 2013), http://www.mmdc.ru/news-div/site-news/mediayurist_galina_arapova_oznakomila_sudej_studentov_i_zhurnalystov_s_poslednimi_iz_meneniyami_v_zakonodatelstve_reguliruyuwem_de (title translated as "Media Lawyer Galina Arapova Introduced to Judges, Students, and Journalists the Latest Amendments in the Legislation Regulating the Mass Media").

explanation of what “widely known” means, thus leaving this concept open to arbitrary interpretations. Mikhail Tikhomirov concludes that the Russian courts would have to elaborate criteria for the proper application of the provisions of the Civil Code on online defamation.¹³⁶ However, according to the criteria of the ECHR’s three-tier test, the law should provide more time for website owners and establish clear and foreseeable rules as well as the system of independent supervision to exclude the state interference.

The CoE standards acknowledge that, on the one hand, online media can exacerbate violations of the right to reputation, but on the other, the internet could be seen as a catalyst for freedom of expression. So, apart from additional limitations, online expressions need additional statutory protections. Digital regulation should pay attention to the specific characteristics of the internet. While the ECtHR allows for the removal of defamatory statements,¹³⁷ the three-tier test must be applied in the online context.¹³⁸ Any decisions on website blockings or online content removal must take into account the potential harm they bring to the public’s right to access the internet that comprises the right to access information online, from the ECtHR perspective.¹³⁹

However, the Russian statutory law does not recognize the right to access the internet, unlike the UN and CoE standards. Moreover, the Russian Constitutional Court justified the constitutionality of injunctions, which are removals of allegedly defamatory information before court consideration, without examining the procedural issues and without any acknowledgements of the value of the internet and online expressions for humanity.¹⁴⁰ Yet, it claimed that the “technological opportunities of the internet to disseminate information for unlimited number of people or to retain anonymity justified the need to specifically restrict online speech.”¹⁴¹ The 2016 Supreme Court’s review confirmed the correctness of the Constitutional Court’s vision on this issue.¹⁴²

In 2017, the Lublinskiy Court of the City of Moscow decided on one of the most high-profile cases on removal of defamatory content from the

¹³⁶ See Tikhomirov, *supra* note 57.

¹³⁷ See *Delfi AS v. Estonia*, App. No. 64569/09 (Eur. Ct. H.R. June 16, 2015).

¹³⁸ See WOLFGANG BENEDEK & DR. MATTHIAS KETTEMANN, *FREEDOM OF EXPRESSION AND THE INTERNET* (2014).

¹³⁹ See *Ahmet Yildirim v. Turkey*, App. No. 3111/10 (Eur. Ct. H.R. Dec. 18, 2012).

¹⁴⁰ See Constitutional Court of the Russian Federation, *Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of Paragraphs 1, 5, and 6 of Article 152 of the Civil Code of the Russian Federation in response to the complaint of citizen Ye. V. Krylov* (July 9, 2013).

¹⁴¹ *Id.*

¹⁴² See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

internet – this decision can hardly correlate with the CoE standards. The case concerns the documentary video of Alexey Navalny, one of the opposition leaders in Russia and the head of his Anti-Corruption Foundation. The video titled “He Is Not Dimon to You” alleged corruption involving the Russian Prime Minister Dmitry Medvedev investigating governmental corruption. The video was disseminated on the internet where it became so popular that it even triggered several anticorruption rallies in big Russian cities. The video claimed that a Russian top businessman, Alisher Usmanov, had bribed Medvedev under the guise of a donation and that Usmanov had executed censorship in the media publishing house he owns. The court fully satisfied the lawsuit. It ordered that the video be removed from several websites and to publish corrections instead. The judgments emphasized that Navalny failed to prove its truthfulness and that he had disseminated the defamatory information “in his personal” aims, although it should have been obvious for the courts that the video concerned the issue of public interests and instigated public discussion on this issue. Therefore, even before the ban on public officials' disrespect, Russian law applied to suppress oppositional and critical voices. Nonetheless, the ban has created additional obstacles for their sounding in Russia.

7. Administrative and Criminal Defamation

While the ECtHR has never challenged the legitimacy of criminal laws on defamation, it has expressed concerns regarding the application of criminal laws in cases of defamation, which may “hamper the press in performing its task as purveyor of information and public watchdog.”¹⁴³ The ECtHR stressed that criminal sanctions in such cases have a disproportionately chilling effect on free speech.¹⁴⁴ Therefore, according to the ECtHR, member states should employ non-criminal sanctions to protect reputation unless the content constitutes hate speech or incitement to violence.¹⁴⁵ This perspective has also been expressed in the 2004 Declaration on Freedom of Political Debate in the Media of the CoE Committee of Ministers.¹⁴⁶

¹⁴³ *Lingens v. Austria*, App. No. 9815/82 (Eur. Ct. H.R. July 8, 1986).

¹⁴⁴ *See Cumpăna and Mazăre v. Romania*, App. No. 33348/96 (Eur. Ct. H.R. Dec. 17, 2004); *Azevedo v. Portugal*, App. No. 11296/84 (Eur. Ct. H.R. Mar. 27, 1991); *Mahmudov and Agazade v. Azerbaijan*, App. No. 35877/04 (Eur. Ct. H.R. Dec. 18, 2008).

¹⁴⁵ *See, e.g., Cumpăna and Mazăre v. Romania*, App. No. 33348/96 (Eur. Ct. H.R. Dec. 17, 2004); *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R. Apr. 23, 1992); *Feret v. Belgium*, App. No. 15615/07 (Eur. Ct. H.R. July 16, 2009).

¹⁴⁶ *See Declaration on Freedom of Political Debate in the Media*, *supra* note 41.

The PACE specifically addressed this issue in its 2007 Resolution “[t]owards decriminalization of defamation.”¹⁴⁷ This Resolution condemns several member states, including Russia, that misuse the prosecution of defamation as a tool “to silence media criticism.”¹⁴⁸ This leads to a “genuine media self-censorship” and causes “progressive shrinkage of democratic debate and of the circulation of general information.”¹⁴⁹

In 2011, before the start of the 2012 presidential campaign, the Russian government abolished criminal liability for defamation but re-criminalized it after the 2012 elections. The authorities also introduced higher criminal sanctions for defamation of judges, prosecutors, investigators, or court bailiffs in a new Article 298.1 of Russian Criminal Code. PACE’s Resolution 1896 (2012) condemned these provisions but they remain unchanged.¹⁵⁰

The Russian Criminal Code criminalizes both libel and slander.¹⁵¹ Unlike in common law countries, such as the UK or the USA, libel and slander in Russia represent the same offense defined as the dissemination of “knowingly false information” discrediting one’s honor and dignity or undermines one’s reputation in a written or oral form.¹⁵² So, if authors of the defamatory information knew it had been untrue but disseminated it nonetheless, such dissemination is criminalized in Russia regardless of the form used to express this information. The punishments vary from monetary penalties of up to five million rubles, or approximately 66,500 U.S. dollars, to compulsory community service of up to 480 hours.¹⁵³ Dissemination of a libel or slander in the media or in public, including online, is an aggravating factor.

The Russian Code of Administrative Offences sets up administrative sanctions for insults. “Insult” is defined as the derogation of a person expressed in an “indecent” form.¹⁵⁴ Although it is generally accepted that an “indecent form”¹⁵⁵ includes obscene language, this article lends itself to much broader interpretations because the law does not define the notion of “indecent form.” The sanctions for insults are monetary penalties. If insults

¹⁴⁷ See Eur. Consult. Assemb., *Resolution 1577 (2007) of the CoE’s Parliamentary Assembly Towards Decriminalization of Defamation* (Oct. 4, 2007), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *Criminal Code of the Russian Federation*, State Duma No 63-FZ (June 13, 1996) Art. 128.1, http://www.consultant.ru/document/cons_doc_LAW_10699.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Code of Administrative Offences of the Russian Federation*, State Duma No 195-FZ (Dec. 30, 2001) Art. 5.61, http://www.consultant.ru/document/cons_doc_LAW_34661.

¹⁵⁵ *Id.*

have been made in public, including in the media or online, they can incur penalties up to an equivalent of sixty U.S. dollars in rubles.¹⁵⁶ Higher sanctions are issued for the failure to stop disseminating insulting statements in public or in the media, which is likely to be a clause against editors.¹⁵⁷ However, insults of public officials “when they are performing their duties” are also criminalized and may lead one year of corrective labor.¹⁵⁸

“Blatant disrespect” of the Russian state or state bodies expressed on the Internet can cause fines up to 100,000 rubles, which is around 1,350 U.S. dollars. Repeat offenders can go to jail for up to fifteen days, according to the 2019 amendments to Article 20.1 of the Russian Code of Administrative Offences.¹⁵⁹

Although administrative sanctions for an insult may not look as severe as those for libel or even less severe, but administrative liability in Russia is applicable to both individuals and companies, unlike criminal liability, which is applied only against individuals. Therefore, the Code of Administrative Offences may be used to punish the entire editorial offices by shutting them down, apart from the individual authors of the impugned expressions. The 2016 Supreme Court’s review confirms that impositions of administrative sanctions does not mean that provisions on civic defamation are inapplicable to the case.¹⁶⁰ Furthermore, unlike criminal sanctions, decisions on administrative liability are in the purview of different bodies – including those overseen by the government – which poses the threat of using this offense as a tool to punish statements criticizing the government.

The cases on libel and insult of public officials in Russia had caused concerns of scholars and human rights activists even before the ban of expressions showing “blatant disrespect” towards them. Defamation regulation in Russia has been often used to punish for criticism against high-ranking public officials, as Arapova suggests.¹⁶¹ These cases exerted a significant chilling effect, and the lawsuits have been often initiated irrespective of sufficient grounds for them.¹⁶²

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *Criminal Code of the Russian Federation* Art. 319, *supra* note 151.

¹⁵⁹ See Russ. Fed. L. On Amendments to the Federal Law on Information, Information Technologies and on the Protection of Information, *supra* note 6.

¹⁶⁰ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

¹⁶¹ See Media Rights Defense Centre, Galina Arapova: “Uzhestochenie Zakonodatel'stva v Sfere SMI—Jeto Katastrofa” (Dec. 11, 2014), http://www.mmdc.ru/news-div/site-news/galina_arapova_uzhestochenie_zakonodatelstva_v_sfere_smi_eto_katastrofa (title translated as “Galina Arapova: Tightening legislation in the mass Media sphere is a disaster”).

¹⁶² *Id.*

In the last few years, several libel and insult cases have resulted in prosecutions for criticism or satire, such as the cases of the information agency SakhalinMedia for the publication of an open letter by Sakhalin residents criticising one senator from Sakhalin; the journalist Mikhail Afanasjev for criticizing the Deputy Interior Minister of the Republic of Khakassia; the journalist Sergei Reznik from Rostov for criticising a judge and a prosecutor; the agency Ura.ru for criticising a prosecutor; and Vadim Rogozhin for his satire of local politicians. However, one of the high-profile criminal lawsuits on online libel was closed in 2017 after the Russian president Vladimir Putin had been asked to “pay attention” to the dispute.¹⁶³ The case concerned a satirical YouTube video parodying Oleg Tinkoff, who is a top Russian businessmen, rather than a public official or politician.

The Russian Supreme Court has tried to reduce an enormous potential for extensive application of the ban on “blatant disrespect” to takedown satirical and other sensitive publications about Russian public officials and political establishment. When overruling the previous decisions that founded “blatant disrespect” towards a local governor in a critical social media publication, the Supreme Court interpreted the ban as inapplicable to protect local authorities’ reputation. According to the Court’s vision, the legal notion of the “Russian state bodies” excludes local entities because they don’t execute power in the entire Russian state.¹⁶⁴ Nonetheless, the Court has abstained from examining the ban from a free speech perspective.

8. Application of Russian and CoE Legal Standards on Defamation by Russian General Jurisdiction Courts

An analysis of the Russian general jurisdiction courts’ jurisprudence concerning defamation shows that cases on defamation are the most widespread type among those involving Article 29 of the Russian Constitution on free speech. From 2012 to 2016, cases on defamation made up nearly 24% of cases involving the constitutional article on free speech (see Figure 1). Among them, one-fifth were cases against the media, as depicted in Figure 2. Of the total number of cases on defamation, those on libel or insult made up less than 1%.

¹⁶³ See *Delo po Isku Tin’koff Banka k Blogeram Nemagia Okonchatel’no Zakryto*, Vedomosti, (Nov. 2, 2017), <https://www.vedomosti.ru/politics/news/2017/11/02/740376-delo-tinkoff-nemagia> (titled translated as “The Case in a Claim of the Tinkoff Bank to the Nemagia’s Bloggers is Finally Closed”).

¹⁶⁴ See *VS Prekratil Delo ob Oskorblenii Jeks-glavy Arhangel’skoj Oblasti*, PRAVO.RU (Aug. 27, 2020), <https://pravo.ru/news/225198/> (titled translated as “The Supreme Court Revoked the Case on Insulting the Ex-head of the Arkhangelsk Region”).

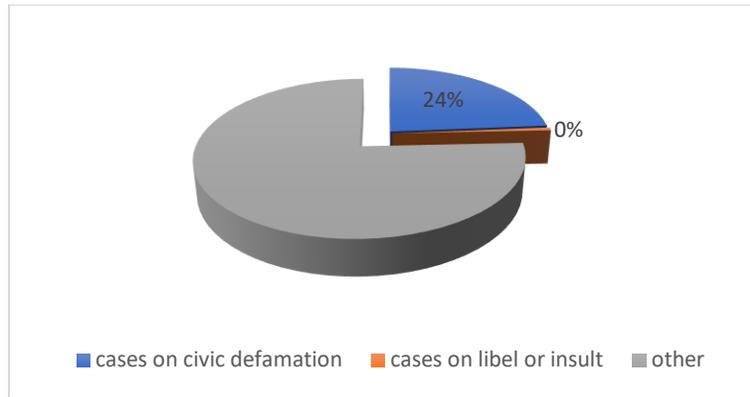


Figure 1. Proportion of cases on civil defamation as well as on libel or insult in the Russian judicial practice involving constitutional Article 29, 2012–2016.

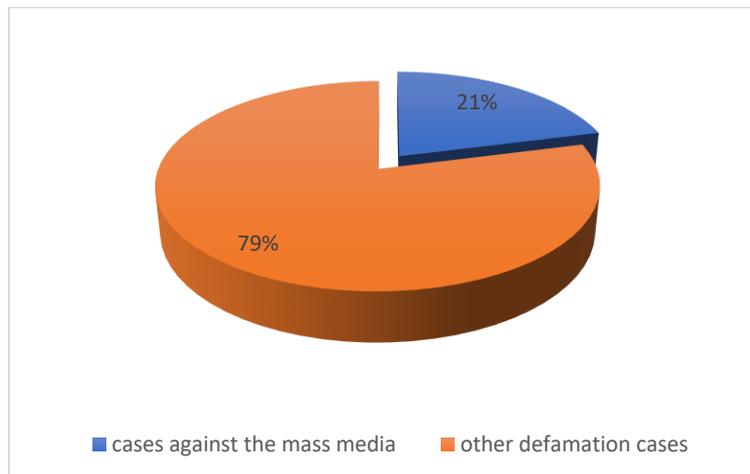


Figure 2. Proportion of cases against the media or journalists and other cases on defamation in Russia, 2012–2016.

Most of the courts' decisions lack sufficient details on the questioned publications to analyze these decisions in light of the CoE standards comprehensively. Therefore, this study focuses on examining whether the argumentative parts of these decisions complied with these standards. It

evaluates the consistency of the concluding parts only if the decision has enough details.

The analysis shows progress in terms of referencing of the CoE standards by the Russian courts in their decisions. The Article 19's report indicates that only 18.6% of cases directly referred to the ECHR in 2002-2006,¹⁶⁵ while my analysis reveals that all cases heard between 2012 and 2016 quoted Article 10 of the ECHR (see Figure 3). From 2002–2006, only six percent of Russian courts' decisions (seven in total) cited specific judgments of the ECtHR, while from 2012–2017, more than half (65) of the decisions directly quoted ECtHR's rulings (see Figure 4). This increase may be explained by the adoption of the Supreme Court's 2005 decree, which is also actively quoted by the Russian courts.

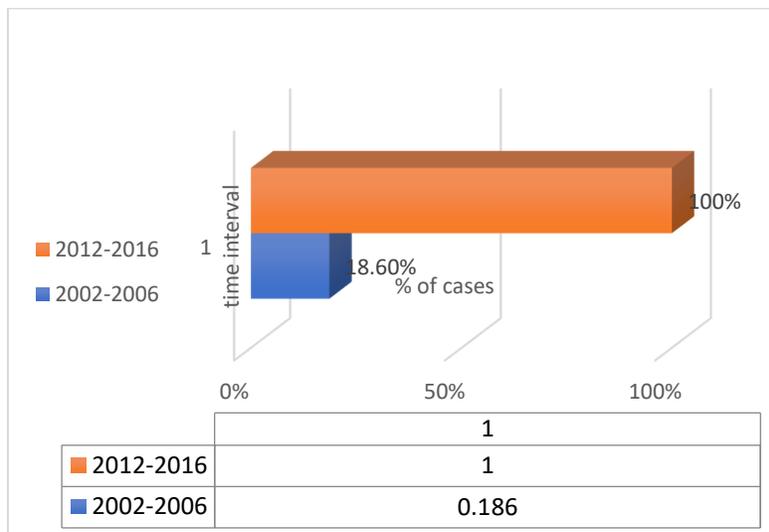


Figure 3. Dynamics in references to ECHR's Article 10 in the Russian judicial practice on defamation.

¹⁶⁵ See Article 19, *supra* note 8.

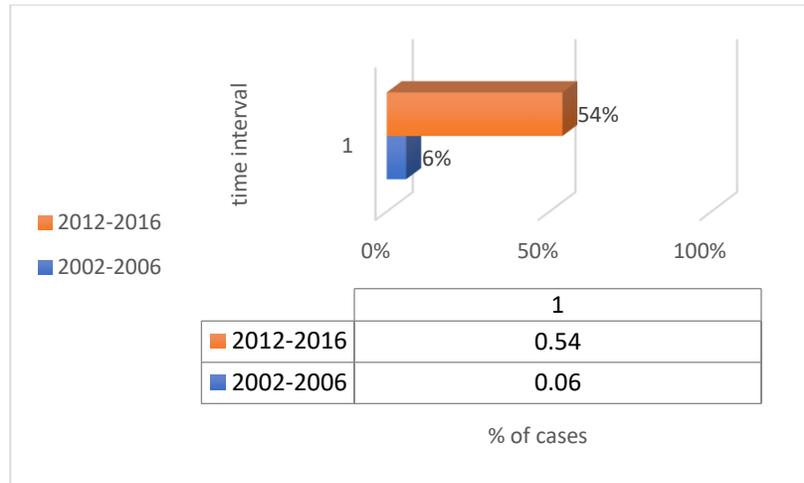


Figure 4. Dynamics in references to ECtHR case law in the Russian judicial practice on defamation.

In almost half of the cases (fifty-five, to be exact) between 2012 and 2016, claimants were public officials or civil servants, while the Article 19's analysis shows that the period from 2002 to 2006 had thirty-nine percent of such cases.¹⁶⁶ Figure 5 illustrates that defamation is still often used by public officials or civil servants to protect themselves from criticism. However, since the Article 19's report, the Russian courts have begun to actively refer to the principle that public officials should tolerate wider criticism. In cases involving public officials, this index has grown from around eighteen percent (eight decisions) to eighty-seven percent (105 decisions) (see Figure 6). Almost all of these decisions referred to the Declaration on Freedom of Political Debate in the Media and to the ECtHR case law.

¹⁶⁶ See Article 19, *supra* note 8.

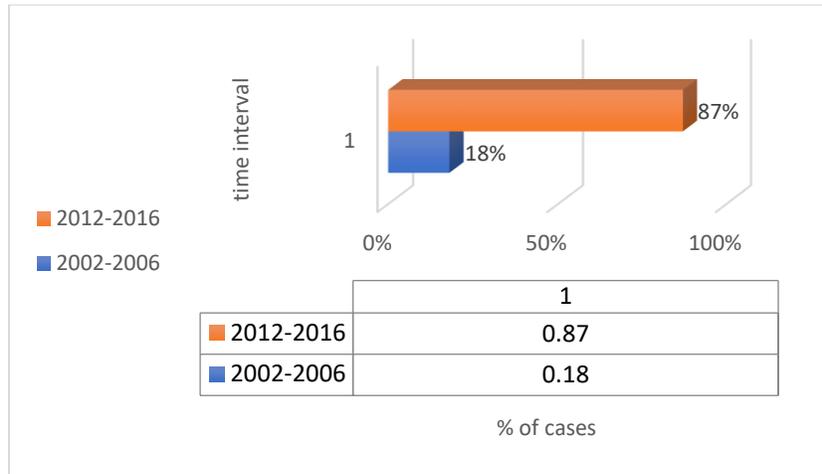


Figure 5. Increase of the number of cases involving public officials and civil servants as claimants in Russian judicial practice on defamation.

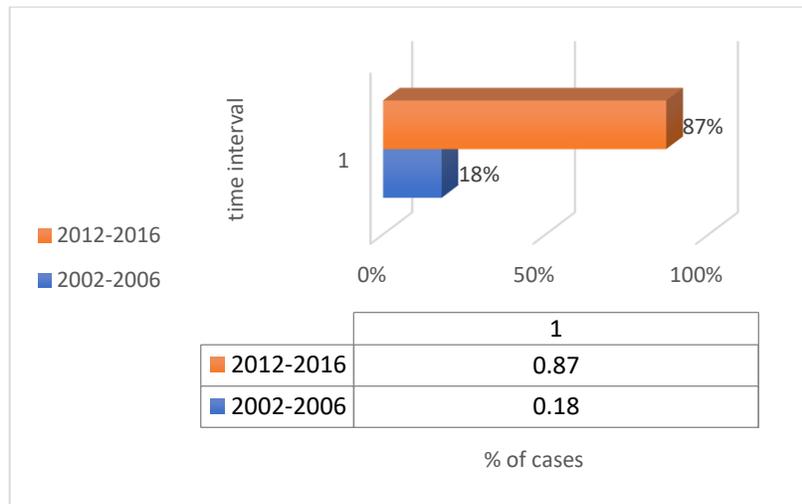


Figure 6. Dynamics in references to the CoE concept of public figures' tolerance of criticism in the Russian judicial practice on defamation.

From 2012–2016, the Russian courts more often and appropriately applied the principle of tolerance to the criticism of public officials or politicians. For instance, in the decision of the Judicial Division for Civil Cases of the Tomsk Regional Court in the action of G. Nemtseva, the head of the deputies' group in the state Legislative Duma of the Tomsk region, against the *Pressa* company, the court did not protect the claimant because she was a politician.¹⁶⁷ The decision stated that as “a public person, she agreed to become an object of public political discussion and criticism in the media.”

However, in most cases quoting the CoE the principle of tolerance to the criticism of public officials or politicians was mainly a formal gesture. There have been numerous examples where the courts did protect public officials, despite referencing the CoE standards. For instance, in the decision in the action of A. Kuzichkin¹⁶⁸, the head of the Department of Culture of Tomsk, on media defamation, the Kirov District Court of the city of Tomsk claimed that:

[P]roviding the mass media with the right to publish critical materials with respect to government public officials, a legislator does not identify this right with permissiveness and balances between the media freedom to publish critical materials and the need that such publication ensures the open and responsible execution of the public officials' duties.

In this decision, the Russian court misinterpreted the ECtHR ideas of balance and “necessity of limitations.” Instead of balancing between the right to free speech and to protection of reputation, the court intended to achieve balance between the freedom of the media to publish critical materials and the right of public officials to be protected from such criticism. As a result, the court protected Kuzichkin and obliged the defendant to publish a correction and to compensate moral harm.

¹⁶⁷ Reshenie Sovetskogo Rajonnogo Suda g. Tomsk po Isku Upravlenija Ministerstva Justicii RF protiv Tomskoj Oblasti Protiv Nekommercheskij Social'nyj Fond Galiny Nemcevoj, App. No. 2-2475/2013. (Sovetskij Rajonnyj Sud g. Tomsk. Aug. 19, 2013) (translated as “Ruling of the Soviet District Court of the City of Tomsk on the Lawsuit of the Department of the Ministry of Justice of the Russian Federation in Tomsk Region against Noncommercial Public Fund of Galina Nemtseva”), <http://xn--90afdabaav0bd1afy6eub5d.xn--p1ai/22605632>.

¹⁶⁸ Reshenie Kirovskogo Rajonnogo Suda Goroda Tomsk po Isku Kuzichkina Andreja Aleksandrovicha protiv OOO “Pressa”- Redakcii Gazety “Tomskaja Nedelja”, Grigor'eva Nikolaja Viktorovicha, App. No. 2-2212/2012 ~ M-2212/2012 19. (Kirovskij Rajonnyj Sud g. Tomsk. Dec. 19, 2012) (translated as “Ruling of the Kirov District Court of the City of Tomsk on the Lawsuit of Kuzichkin Andrej Aleksandrovich against ‘Press’ Ltd, Newspapers ‘Tomsk week’, Grigoriev Nikolay Viktorovich”), https://kirovsky--tms.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=20134305&case_uid=23244fff-043d-466e-8f35-31506561787e&delo_id=1540005.

Another example is the decision of the Krasninsk District Court of the Smolensk region in the suit of A. Shmatkov against the editorial offices of three newsarticles—*Krasninskij Kraj*, *Nasha Zhizn*, and *Za Urozhaj*—for publishing an article about fees for communal public services in which an anonymous person was quoted as calling Shmatkov “an opportunist” and “a liar.”¹⁶⁹ The court paid attention to the fact that the plaintiff Shmatkov was a local deputy when the article was published, and therefore is subject to broader criticism. However, the court then made an opposing statement. It claimed that even the critical opinions towards public officials or politicians should lead to sanctions if it causes harm to their honor, dignity, or business reputation. This perspective might be in line with the ECtHR’s standards if only journalists had overstepped their bounds and it requires thorough consideration of the impugned expressions. The Russian court, however, abstained from such an analysis.

In the decision in the action of local administration against the editorial office of the newsarticle *Tomskaya Nedelja* and others, the Kirov District Court of the city of Tomsk protected a state body. It obliged the news article to correct the allegations that the local administration “is trying to lobby their interests without consideration of the law” and that it re-imposes its duties on the tenants. In many respects, this dispute resembles the ECtHR case of *Krasulya v. Russia*¹⁷⁰ that Russia had lost. However, the Russian local court made no reference to this ECtHR case.

Krasulya was the editor-in-chief of a local news article, and he was charged with libel against Chernogorov, the regional governor and the former applicant’s competitor in the mayoral elections. The news article published an article criticizing the change in the appointment procedure of the mayor. This position could no longer be elected by the town’s residents, but was appointed by the town’s legislative body. The article alleged that that decision was “lobbied” by Chernogorov and referred to him as “loud, ambitious and completely incapable.”

In this case, the ECtHR ruled on a violation of the applicant’s right to free speech. The ECtHR stressed the essential role of the press in a democracy and noted that Chernogorov, as a politician, had to show a greater

¹⁶⁹ Reshenie Krasninskogo Rajonnogo Suda Smolenskoj Oblasti po Isku Shmatkova Andreja Aleksandrovicha protiv Redakcij Gazet “Za urozhaj”, “Krasninskij kraj”, “Nasha zhizn”, “Hislavichskie izvestija”. App. No. 2-9/2014 (2-355/2013;) ~ M-369/2013. (Krasninskij Rajonnyj Sud Smolenskoj Oblasti Dec. 15, 2014) (translated as “Ruling of the Krasny District Court of Smolensk Region on the Lawsuit of Shmatkov Andrej Aleksandrovich against newspapers ‘Za urozhaj’, ‘Krasninskij kraj’, ‘Nasha zhizn’, ‘Hislavichskie izvestija’”), https://krasny-sml.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=61238988&case_uid=10646d75-2616-46ea-b6d6-2e45d637d1f0&delo_id=1540005.

¹⁷⁰ See *Krasulya v. Russia*, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007).

degree of tolerance to criticism. The ECtHR reiterated that Article 10 of the ECHR provided a very little scope for restricting political discussion on the issues of public interest.¹⁷¹ It noted that the publication item raised these issues and contributed to an ongoing debate.¹⁷² The ECtHR observed that it was difficult to determine whether the information concerning the governor's influence was based on fact or judgment – however, they found that the article had a sufficient factual basis to make the impugned allegations.¹⁷³ As seen, Russian courts' interpretations of the notions of “facts,” “factual basis,” and “verification” have been problematic. It will most likely have a direct impact on how Russian courts apply the more recent ban on fake news in Russian law, with negative implications for freedom of expression.

My analysis has shown that the concept of public interest in general is still rarely applied in the Russian court practice on defamation. Article 19 marked the same trend in the 2007 analysis, as Figure 7 depicts. Article 19 noted that although 70% of the seventy-one decisions concerned issues of public interest, only four rulings referred to this legal concept.¹⁷⁴ My analysis arrived at similar results: 74% of cases concerned publications of public interest or political debate, whereas only 17% of the cases incorporated the concept of public interest or political debate.

¹⁷¹ *Id.*

¹⁷² See Anita Soboleva, *Tolkovanie Ponjatija “Ogranichenija, Neobhodimye v Demokraticheskom Obshhestve” v Svete Stat'i 10 Evropejskoj Konvencii o Zashhite Prav Cheloveka i Osnovnyh Svobod* (translated as “Interpretation of the Concept of ‘Restrictions Required in a Democratic Society’ in the Light of Article 10 European Convention for the Protection of Human Rights and Fundamental Freedoms”), *Predely Pravovogo Prostranstva Svobody Pressy*. Moscow: Novaja justicija. (In russ), (2008), at 69, <https://publications.hse.ru/mirror/pubs/share/folder/f21kb7vdsc/direct/59242009.pdf>.

¹⁷³ *Id.*

¹⁷⁴ See Article 19, *supra* note 8.

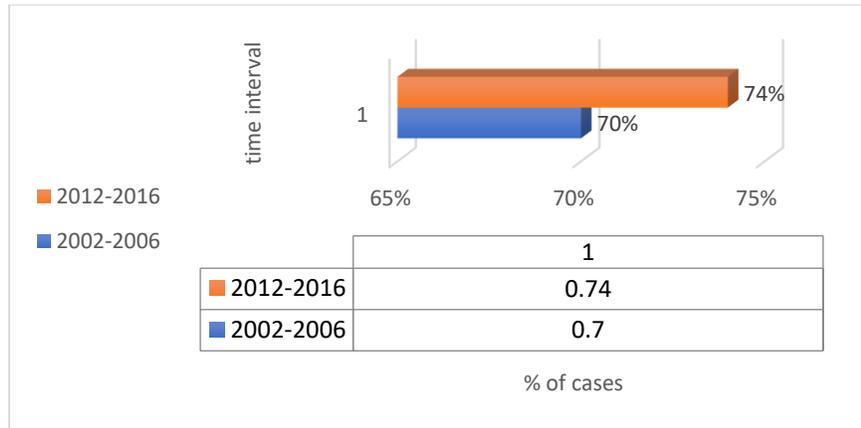


Figure 7. Dynamics in references to the concept of public interest in the Russian judicial practice on defamation.

For example, in the decision by Platonov, a local deputy, against the newsarticle *Delovoy Aleksandrov*, the Alexandrov City Court of the Vladimir region obliged the news article to correct the information that Platonov's family had managed an illegal hotel for migrant workers because the defendant failed to prove the truthfulness of this information.¹⁷⁵ The court failed to examine whether there had been a factual basis to make the allegations or not. Additionally, the court ignored the fact that the case was of public interest.

My analysis shows that the Russian courts almost always try to distinguish statements of facts from opinions, often with the help of linguistic experts. Referring to Article 29 of the Russian Constitution, the courts have stressed that no one can be held liable for his or her opinion, while anyone can be held liable for statements of facts if they are defamatory. In three cases, the courts specifically ruled that the right to an opinion is an inherent right for journalists, according to the statute, "On Mass Media."¹⁷⁶

¹⁷⁵ Reshenie Aleksandrovskogo Gorodskogo Suda Vladimirskoj Oblasti po Isku Platonova Nikolaja Vasil'evicha protiv OOO "Gazeta "Delovoj Aleksandrov", App. No. 2-850/2013 ~ M-617/2013. (Aleksandrovskij Gorodskoj Sud Vladimirskoj Oblasti, Oct 14, 2013) (translated as "Ruling of the Aleksandrov Municipal Court of Vladimir Region on the Lawsuit Platonov Nikolaj Vasil'evich against Newspaper 'Business Aleksandrov' Ltd."), https://aleksandrovsky-wld.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=23003376&case_uid=8e67361a-ea35-4d07-b278-a05d20814fac&delo_id=1540005.

¹⁷⁶ See Russ. Fed. L. On Mass Media, Art. 47 Part 9, *supra* note 35.

Despite this, Russian courts frequently order the correction of opinions, and Article 19 has noted the same problem in their 2007 report.¹⁷⁷ What is more interesting, from 2012–2016, the Russian courts began using the ECtHR case law to justify this approach. However, many decisions misinterpreted the ECtHR's concept of factual basis, and often required the veracity of opinions proven. Otherwise, they claim, such opinions cannot be protected. As observed, this trend has been typical for cases involving public officials, which may evidence that such misinterpretation may be deliberative and politically motivated. In practice, this often results in decisions contradicting to the ECtHR standards on defamation.

This trend can be exemplified by the decision of the Tunkin District Court of the Buryat Republic in the suit of A. Samarinov, the head of local administration to an online media outlet.¹⁷⁸ Its article alleged that Samarinov “works for his own pocket” and “confuses budget money with personal [finances].” It stated that “he does not consider [the] opinions” of the municipal unit directors and that his activities can be described as “an outrage.”¹⁷⁹ These statements were enforced by the statements of several municipal unit directors.

The court ruled in this case that some phrases were statements of facts, but others were opinions. However, referring to the ECtHR case law, the court claimed that the opinions could not be protected because they were based on “untrue facts” that the defendant had failed to prove. The court ordered the defendants to pay damages for moral harm and obliged the online media outlet to publish both a correction and a reply on its main web page, even though the article in question did not initially appear on the main page. Nothing was said about tolerance of wider criticism of public officials in this case. Thus, despite the distinction between statements of facts and opinions, as well as the application of the ECtHR case law, the decision lacks analysis of other elements that were important.

Another illustrative decision was held against A. Ekaev, a prominent human rights activist in the region and a founder and editor-in-chief of the newsarticle *Tverskoy Reporter*. He was found guilty of offending a certain

¹⁷⁷ See Article 19, *supra* note 8.

¹⁷⁸ Reshenie Tunkinskogo Rajonnogo Suda Respubliki Burjatija po Isku Samarinova Andreja Gomboevicha protiv OOO “Izdateľstvo Burmakina”, App. No. 2-97/2013 ~ M-62/2013. (Tunkinskij Rajonnyj Sud Respubliki Burjatija. May 24, 2013) (translated as “Ruling of the Tunkin District Court of the Buryat Republic on the Lawsuit of Samarinov Andrej Gomboevich against ‘Burmakin Publishing House’ Ltd”), https://tunkinsky--bur.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=89211233&case_uid=12d26875-aa8c-4255-9b91-aa20b6b83838&delo_id=1540005.

¹⁷⁹ Arkady Zarubin, *V Tunke ER Pokidajut Glavy Poselenij* (translated as “Heads of Settlements Leave ER in Tunka”), GAZETA RB, (Jan. 25, 2013), <https://gazetarb.ru/news/section-policy/detail-9818>.

Mr. K. In his open letter to Russia's president Putin, he criticized K. calling him a "swindler" and a "liar" and alleging that K. had "succeeded in creating corruption in the judicial bodies of the region." Ekaev also stated that there had been an attempt on his life and that presumably K. has ordered the assassination. The court ruled that Ekaev was guilty of a libel only because he had been educated as a lawyer and "should have known for certain" that K. was never found guilty for swindling, perjury, or abuse of powers. Therefore, Ekaev's allegations had been deliberately false, as the court concluded. The court overlooked public interest in this case, even though the local press kept track of it. Because Ekaev had been previously convicted for assaulting and insulting a figure of authority, the court compounded the two convictions and sentenced Ekaev to two years in prison and one month in a penal colony.¹⁸⁰

Sometimes the Russian courts' requirements that media editorial offices verify information before disseminating have resulted in decisions that have misused both the "On Mass Media" statute, as well as the CoE standards. An example is the decision of the Serov District Court of the Sverdlovsk region in the suit of A. Silenko against the newsarticle *Serovskij Rabochij* and D. Skrjabin, its editor in chief.¹⁸¹ In this case, the defendant merely reproduced information already published several times in other mass media outlets and he should have been exempt from liability, according to Article 57 of "On Mass Media." However, the court stated that even if the information had already been published elsewhere, the editorial office still had the responsibility to check its veracity. Therefore, the defendant was not exempt from liability.

IV. CONCLUSION

Instead of progressing toward compliance with the CoE standards during Russia's membership in the organization, Russian defamation regulation has mostly had a regression, which is becoming increasingly noticeable in the digital era. More consistency has been identified only regarding expressions that avoid politically sensitive issues and criticism of Russian state

¹⁸⁰ See Elena Panova, *Tovarishhi po Partii ne Podelili Tver'* (translated as "Party comrades have not divided Tver"), ROSBALT (Apr. 19, 2008), <https://www.rosbalt.ru/main/2008/04/19/476223.html>.

¹⁸¹ Reshenie Serovskogo Rajonnogo Suda Sverdlovskoj Oblasti po Isku Silenko Aleksandra Vasil'evicha protiv Glavnogo Redaktora Gazety "Serovskij Rabochij" Skrjabina D.Ju., Gazety "Serovskij Rabochij", App. No. 2-2306/2012 ~ M-2031/2012. (Serovskij Rajonnyj Sud Sverdlovskoj Oblasti. Dec. 4, 2012) (translated as "Ruling of the Serov District Court of the Sverdlovsk Region on the Lawsuit of Silenko Aleksandr Vasil'evich against Newspaper 'Serov worker; and the Editor-in-chief Skrjabin D.'"), https://serovsky-svd.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=114539364&case_uid=a25c3d7f-3e53-49f2-b762-d337a75129ea&delo_id=1540005.

authorities. Therefore, such compliance has mainly been superficial because, in such circumstances, the rights to freedom of expression and freedom of mass information in Russia can hardly be exercised for what they have been guaranteed for in both Russian and CoE key legal standards. Russian legal standards have generally lacked balance between the right to freedom of expression and the right to protect reputation, and this tendency mostly looks deliberate, rather than incidental. As the study has found, the statutory regulation of defamation has suffered from fundamental problems. It has many insufficiently clear and precise excessive rules that are mostly implemented extensively. This legal mechanism lacks independent supervision. In other words, Russian statutory law has mostly mismatched all the criteria provided by Article 10 of the ECHR.

At the same time, the Russian judiciary perspective on free speech is more nuanced. As seen from the analysis, the two highest courts have seen to have major disagreements in getting the Russian statutory regulation of defamation closer to the CoE standards on freedom of expression. The Russian Constitutional Court often applies the international standards selectively or even misinterpret them to justify the legitimacy of excessive statutory measures to regulate expressions. On the contrary, the Supreme Court has attempted to balance freedom of expression with other rights and interests in line with the international standards on defamation. One reason to explain why Russian freedom of expression cannot benefit much from the Supreme Court's interpretations is their advisory function. However, the problem seems to be more profound. As the study has found, even if Russian lower courts apply the CoE concepts, such application has mostly been only a tick-box exercise, especially when the cases concern public interest, political expression, or the criticism of public officials and politicians.

The main implication of this is the encouragement of journalistic loyalty and the maintenance of a vision of journalism as a public relations and propaganda tool. By requiring that journalists prove the absolute truthfulness of the information they publish, Russian law limits journalists' opportunities to discuss publicly important issues, in contradiction to the CoE standards. At the same time, by failing to incorporate the ECtHR requirements for journalists to justify unfounded allegations with a certain factual basis, Russian law and its enforcement highly benefits tabloid journalism, rumors and fabricated news. It would be more appropriate for Russian authorities to fight fake news through encouraging journalists to follow their professional standards, rather than through imposing a vague ban on fake news.

Although it is likely that the current trends will further evolve in the same direction, and the gap between Russian and CoE standards on defamation will only continue to increase, monitoring of Russia's judicial perspectives

seems to be a fruitful area for further work. The role and power of the Supreme Court in Russian free speech issues should not be downplayed. It looks vital to promote the court's interpretations in the Russian judiciary and legal practitioners' communities for those concerned about free speech and press in Russia.

As the study has shown, the Russian legislation on defamation requires significant reformation to be consistent with the CoE standards. However, such a reform would be meaningless in Russia now. Until media freedom is properly institutionalized, legal rules will continue to be ignored or interpreted in any possible way, as tends to happen with a few free-press-oriented provisions of the Russian statute such as "On Mass Media" or the CoE standards. Although the will of Russian government is definitely required for the institutionalisation of media freedom, society and the media industry should also play a large role in the process. It is up to them to fully accept and defend the perspective advanced by the CoE and demand broad legislative reforms. It is therefore recommended that the rights of free speech and reputation be studied in-depth in both social and industrial settings.

International organizations need to develop new measures and tools to resist "weaponized" defamation. Exclusions of members for their non-compliance with international standards does not appear adequate. On the contrary, it may only foster media censorship and escalate international tension. Methods of political pressure with regard to human rights may only be effective if they provide some benefits for the member states in economics, technology, culture, and other fields.