

**XIX**

**ARTICLE 19**

GLOBAL CAMPAIGN FOR FREE EXPRESSION

# THE COST OF REPUTATION

## Defamation Law and Practice in Russia

NOVEMBER 2007



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## **GLOSSARY**

The Court	European Court of Human Rights
The Bureau	The Bureau of the Representative of the Russian Federation before the European Court of Human Rights
CJES	Centre for Journalism in Extreme Situations
ECHR	European Convention on Human Rights
EU	European Union
GDF	Glasnost Defence Foundation
ICCPR	International Covenant on Civil and Political Rights
MMDC	Mass Media Defence Centre
NGO	Non-governmental organisation
<i>Oblast</i>	Province (with a federally-appointed governor and a locally-elected legislature)
PACE	Parliamentary Assembly of the Council of Europe
The 2005 Resolution	Resolution of the Plenary of the Supreme Court of the Russian Federation <i>On Judicial Practice in Cases on Protection of Honour and Dignity and Business Reputation of Natural and Legal Persons</i> , 24 February 2005, No. 3.
RUJ	Russian Union of Journalists

## INTRODUCTION

In April 2006, the mayor of Lytkarino (in the Moscow *oblast*), Viktor Mikhailov, and businessman Lavrenty Avoyan sued Artyom Danilov, editor-in-chief of the newspaper *Delovoy Press-Tsentr*, for emailing a journalistic enquiry to the regional government. The email referred to perceived favouritism by Avoyan in the privatisation of a State energy utility and questioned the use of administrative resources. Mikhailov and Avoyan sued Danilov for damaging their reputations, and the court ruled in their favour.<sup>1</sup>

This case is just one of many examples of the abuse of defamation law to silence criticism of public officials in the Russian Federation (Russia), even where there are suggestions of possible maladministration and corruption. Defamation has emerged in recent years as one of the most serious constraints on freedom of expression in Russia. However, it is only one of many instruments used to control the free flow of information. Journalism remains a dangerous profession and several journalists have been killed or attacked in the past few years<sup>2</sup>. These incidents are not normally thoroughly or impartially investigated. Some public officials, including those at the highest levels of government, do not see the media as an independent critic and often regard them as a subordinate body that aims to further particular political goals. Government pressure on the media, particularly on the national television channels, serves to restrict information on sensitive matters, for example the situation in Chechnya. In the recent past, we have witnessed the suppression of opposition groups and peaceful demonstrations, the imposition of criminal sentences in freedom of expression cases, and attacks on religious, sexual and ethnic minorities. Russia's democratic credentials, already weak, are being seriously undermined both nationally and on the world stage by these actions.

Russia's main newspapers, radio and television stations are owned either by the government or companies with close ties to the Russian authorities.<sup>3</sup> Under Vladimir Putin's leadership, the lively

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<sup>1</sup> *Journalist Sued for Requesting Information*, Glasnost Defence Foundation, Digest No. 274, 10 April 2006, <http://www.gdf.ru/digest/digest/digest274e.shtml#rus5> and U.S. Department of State, *Country Report on Human Rights Practices: Russia 2006* <http://www.state.gov/g/drl/rls/hrrpt/2006/78835.htm>.

<sup>2</sup> Journalists killed include: *Novaya Gazeta* journalist Anna Politkovskaya (October 2006), *Kommersant* investigative journalist Ivan Safronov (March 2007), *Novoye Televideniye Aleiska* cameraman Vyacheslav Ifanov (April 2007), *Saratovskiy Rasklad* journalist Yevgeny Gerasimenko (26 July 2006), NTV journalist Ilya Zimin (February 2006), Tula journalist Vaghif Kochetkov (January 2006). Also the Grozny correspondent for the independent *Chechenskoye Obshchestvo* newspaper was kidnapped in August 2006.

<sup>3</sup> *Rossiyskaya Gazeta* (circulation 374,000) is State-owned; *Argumenty i Faktiy* (2,825,480 - the highest circulation newspaper) is owned by Russian bank Promsvyazbank; *Izvestiya* (246,000) by State-run Gazprom; *Kommersant* (86,000) by Alisher Usmanov (a steel tycoon who also runs a subsidiary at Gazprom); *Komsomolskaya Pravda* (747,956) by metal tycoon Vladimir Potanin through his Prof-Media; *Trud* (613,000) by Promsvyazbank. A few newspapers escape government control, of which the main ones are *Novaya Gazeta* (138,000), *Moskovskiy Komsomolets* (800,000) and business newspaper *Vedomosti* (42,000). 49% of the shares of *Novaya Gazeta*, famous for its independent reporting, were purchased by United Russia MP Aleksandr Lebedev and former Soviet President Mikhail Gorbachev. Data from the National Circulation Agency, Russia (Nazionalnaya Tirazhnaya Sluzhba) [http://www.pressaudit.ru/j\\_catalog.php?vid=1](http://www.pressaudit.ru/j_catalog.php?vid=1) 2007 (in Russian).



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media that started to flourish in the early 1990s were suppressed, while the State and State-controlled media have increasingly been used to promote the government's views.

Russia has neither public service broadcasting nor a diverse range of broadcast media. Lawsuits against former media tycoons Boris Berezovsky and Vladimir Gusinsky have resulted in the Russian television channels with the largest audiences being brought under the control of the authorities (*NTV*, *First Channel* and *RTR*) or closed (*TV-6*). Radio is also largely controlled by the State and most private stations broadcast music, chat shows, business and cultural news, rarely carrying programmes with serious political content. This media environment is not conducive to the dissemination of a plurality of opinions reflecting Russia's entire political spectrum.

Financial constraints and political corruption make the media dependent on sponsors and turn them into tools in the hands of clans, politicians and oligarchs. Difficult economic conditions are exacerbated by the low purchasing power of the population, which often lacks the funds to buy newspapers. Against this background, the State media has many advantages, including subsidies and cheap deals on rent and printing facilities, which give them an unfair advantage and make competition difficult. The very few distributors available are mostly linked to the government.

The situation regarding defamation is a complex one in Russia. Media outlets' fear of defamation lawsuits severely reduces alternative, particularly critical, voices. Conversely, genuinely defamatory statements are frequently in the media. There are two main reasons for this. First, journalists' low professional standards and limited legal knowledge often results in content that exposes them to the risk of being sued, even in cases when the story might have been presented without this risk. Second, low wages, particularly in the regions, lead many journalists to take fees from private sources for writing articles. In some cases, journalists are effectively paid to defame by powerful individuals with political and commercial interests. The judicial system currently in place tends not to operate speedily or fairly in these cases, or offer effective remedies that take freedom of expression concerns into account. This means defamation can be abused by powerful individuals, both to hurt their enemies and protect themselves from genuine and fair criticism.<sup>4</sup>

This report deals primarily with cases in which journalists' rights to free expression is unduly repressed, with a negative impact on the public's right to know. Punitively high awards for damages in these cases and the threat of imprisonment adversely affect the work of journalists and generate self-censorship. Self-censorship is practised at several levels: by the authors themselves, by editors, and by the owners or founders of media outlets.<sup>5</sup> What little diversity exists involves media outlets publishing only coded or abstract oppositional viewpoints; for example an article might refer to a problem but not name those who are responsible.<sup>6</sup>

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<sup>4</sup> Interview with Alexei Simonov, Glasnost Defence Foundation, July 2007.

<sup>5</sup> Interview with Oleg Panfilov, Centre for Journalism in Extreme Situations, July 2007.

<sup>6</sup> Interview with Alexei Simonov, see note 4.

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The few newspapers that dare to criticise often take significant pre-emptive measures to protect themselves. Some have already registered under a different name, so they can continue operating under an alternative brand if they are closed. For example, *Novaya Gazeta* has registered the name *Novaya Gazeta Plus*.<sup>7</sup>

A rapporteur of the Committee on Legal Affairs and Human Rights (the Parliamentary Assembly of the Council of Europe – PACE) has stated: “Improper use of [defamation] laws – whether in the criminal or the civil sphere – places a real ‘Sword of Damocles’ over all who wish to avail themselves of their freedom of expression, especially the media.”<sup>8</sup> This is the case in Russia despite the fact the country has acceded to a number of international treaties and therefore taken upon itself legal responsibilities for the defence of human rights, including freedom of expression. In addition to the ratification of the *International Covenant on Civil and Political Rights (ICCPR)* and the *European Convention on Human Rights (ECHR)*, Russia has adopted internal measures to fulfil its international obligations. Of particular interest is the adoption of a resolution by the Supreme Court in February 2005 to provide guidance to judges in making decisions in defamation cases that are in line with the case law of the European Court of Human Rights (the Court).<sup>9</sup>

This report assesses the extent to which decisions by Russian courts in defamation cases conform to the standards established by the ECHR. A particular focus is the issue of whether or not the Supreme Court Resolution mentioned above has had a real impact on judicial practice.

The first chapter provides an overview of international standards of freedom of expression, with a special focus on defamation. The second chapter focuses on defamation law and practice in Russia; it lists the main defamation provisions and the major hindrances to a healthy defamation regime in practice, as well as existing trends of court practice. The third chapter looks at the Supreme Court Resolution in detail, with an analysis of its provisions and its actual implementation. This chapter also outlines Russia’s progress in and obstacles to the implementation of international standards generally, as well as summarising the cases against Russia before the Court. The fourth chapter is based on a series of interviews with Russian judges. It discusses their responsibilities vis-à-vis the ECHR, analyses some of the problems they encounter in its implementation and offers suggestions on ways forward. These are further elaborated in the report’s conclusions (Chapter 5) and recommendations (Chapter 6).

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<sup>7</sup> *Ibid.*

<sup>8</sup> Parliamentary Assembly of the Council of Europe, *Towards the Decriminalisation of Defamation*, Doc. 11305, 25 June 2007, report of the Committee on Legal Affairs and Human Rights by rapporteur Jaume Bertumeu Cassany, <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11305.htm>

<sup>9</sup> Resolution of the Plenary of the Supreme Court of the Russian Federation *On Judicial Practice in Cases on Protection of Honour and Dignity and Business Reputation of Natural and Legal Persons*, 24 February 2005, No. 3. The Resolution is analysed in Section 3.1.

## 1. INTERNATIONAL STANDARDS OF FREEDOM OF EXPRESSION AND DEFAMATION

In the 21 years since the European Court of Human Rights delivered its first judgment in a defamation case,<sup>10</sup> it has built up a rich body of case law on this crucial topic. Cases have often been brought by journalists complaining about defamation actions brought by politicians or other public figures attempting to stifle criticism voiced in the press, and have almost always concerned matters of important public interest. In the overwhelming majority of cases, the judgments delivered by the Court have clarified the vital status of freedom of expression, particularly with regard to debate on matters of public interest, and have helped bolster democratic values.

This chapter gives a brief overview of the Court's defamation jurisprudence. First, it describes general standards on freedom of expression, highlighting the overwhelming importance of this key right to democracy, particularly as regards the role of the media and political debate. Then it examines a number of specific issues relating to defamation law, including the scope of defamation rules, defences, sanctions and rules regarding proceedings.

Where relevant, the chapter also refers to the ARTICLE 19's standards in this area, as set out in our leading publication on the issue, *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation*.<sup>11</sup> *Defining Defamation* is an authoritative collection of principles on defamation law endorsed by, among others, the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression.<sup>12</sup>

### 1.1. Guarantee of Freedom of Expression

#### Importance of Freedom of Expression

Freedom of expression is protected in Article 10 of the ECHR,<sup>13</sup> which states:

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.

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<sup>10</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82.

<sup>11</sup> London: ARTICLE 19, 2000. Available at: <http://www.article19.org/pdfs/standards/definingdefamation.pdf>.

<sup>12</sup> Joint Declaration of 30 November 2000. See also UN Doc. E/CN.4/2001/64, 13 February 2001, para. 48.

<sup>13</sup> E.T.S. No. 5, adopted 4 November 1950, in force 3 September 1953.

Freedom of expression is a key human right, and has a fundamental role in underpinning democracy. The European Court of Human Rights has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.<sup>14</sup>

The Court has also made it clear the right to freedom of expression protects offensive and insulting speech. It has become a fundamental tenet of its jurisprudence that the right to freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”<sup>15</sup>

It has similarly emphasised: “Journalistic freedom... covers possible recourse to a degree of exaggeration, or even provocation.”<sup>16</sup> This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.<sup>17</sup> The choice as to the form of expression is up to the media. For example, the Court will not criticise a newspaper for choosing to voice its criticism in the form of a satirical cartoon and – it has urged – neither should domestic courts.<sup>18</sup> The context within which statements are made is relevant as well. For example, in the second *Oberschlick* case, the Court ruled that calling a politician an “idiot” was a legitimate response to earlier, provocative statements by that same politician<sup>19</sup>, while in the *Lingens* case, the Court stressed the circumstances in which the impugned statements had been made “must not be overlooked.”<sup>20</sup>

The Court attaches particular value to political debate and debate on other matters of public importance. Any statements made in such a debate can be restricted only when it is absolutely necessary. As the Court stated in a recent case involving Russia: “It has been the Court’s constant approach to require very strong reasons for justifying restrictions on political speech, for broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.”<sup>21</sup> The Court has rejected any distinction between political debate and other matters of public interest, stating there is “no warrant” for this.<sup>22</sup> It has also said this enhanced protection applies even where the person who is attacked is not a “public figure”; it

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<sup>14</sup> See, for example, *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

<sup>17</sup> See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.

<sup>18</sup> See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 63 and *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.

<sup>19</sup> *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92, para. 34.

<sup>20</sup> *Lingens v. Austria*, note 10, para. 43.

<sup>21</sup> *Krasulya v. Russia*, 22 February 2007, Application No. 12365/03, para. 38.

<sup>22</sup> *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.

is sufficient if the statement is made on a matter of public interest.<sup>23</sup> The importance the Court attaches to the free flow of information on matters of public concern is evident from the facts of a case involving newspaper articles making allegations against seal hunters in Norway. The matter was the subject of intense public debate at the time and the Court held that the journalists should not be liable for defamation even though they did not seek the response of the seal hunters to the allegations made against them.<sup>24</sup>

### **Role of the Media**

The guarantee of freedom of expression applies with particular force to the media. The Court has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law”<sup>25</sup> and stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>26</sup>

In nearly every case before it concerning the media, the Court has stressed the “essential role [of the press] in a democratic society”:

Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.<sup>27</sup>

In the context of defamation cases, the Court has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.<sup>28</sup>

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<sup>23</sup> See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 18.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Thorgeirson v. Iceland*, note 22, para. 63.

<sup>26</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

<sup>27</sup> See, for example, *Dichand and others v. Austria*, note 16, para. 40.

<sup>28</sup> *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.

## Restrictions

While the right to freedom of expression is not absolute, any limitations must remain within strictly defined parameters. It is well-established that defamation cases constitute an interference with freedom of expression, even when no award for damages is made,<sup>29</sup> and must remain within the parameters set by the ECHR. The second paragraph of Article 10 recognises that freedom of expression may, in certain narrowly prescribed circumstances, be limited:

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 or impartiality of the judiciary.

Restrictions must meet a strict three-part test. First, the interference must be provided for by law. The Court has stated this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>30</sup> Second, the interference must pursue a legitimate aim. The list of aims in Article 10(2) of the ECHR is exclusive in the sense no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>31</sup>

This test is mirrored in the International Covenant on Civil and Political Rights,<sup>32</sup> and cases decided in that jurisdiction as well as before the Court have made it clear that it represents a high standard which any interference must overcome:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>33</sup>

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<sup>29</sup> See, for example, *McVicar v. the United Kingdom*, 7 May 2002, Application No. 46311/99.

<sup>30</sup> *The Sunday Times v. United Kingdom*, note 28, para. 49.

<sup>31</sup> *Lingens v. Austria*, note 10, paras. 39-40.

<sup>32</sup> Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976. The ICCPR was ratified by Russia in October 1973.

<sup>33</sup> See, for example, *Thorgeirson v. Iceland*, note 22, para. 63.

## 1.2. Scope of Defamation Laws

The European Court of Human Rights has sought to narrow the scope of applicability of defamation laws in a number of ways. Undoubtedly the most important of these is by carving out special protection against defamation for statements about politicians, public figures or generally on matters of public concern. The Court has also sought to provide greater protection to statements of opinion, while stressing the right of defendants to prove the truth of their statements of fact. The Court has also expressed some concern about the abuse of defamation laws to protect interests other than reputation. Finally, while not ruling it out entirely, the Court has also expressed concerns about the use of criminal defamation laws.

### **The Legitimate Aim of Defamation Laws**

As stated above, Article 10(2) of the ECHR provides an exclusive list of aims in pursuit of which the exercise of the right to freedom of expression may be restricted. In virtually all cases before the Court, the “protection of the reputation or rights of others” has been invoked to justify defamation laws.<sup>34</sup> In the vast majority of cases, the plaintiff was a private individual. In *Castells v. Spain*, however, Castells, then a senator, had been charged with insulting the government in a magazine article about violence in the Basque country. In this case, although the Court did not entirely rule out the idea governments might bring defamation suits, it suggested these might be legitimate only where intended to address situations which threaten public order, the original justification for criminal defamation laws:

[The] dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.<sup>35</sup>

While most defamation laws in the Council of Europe are uncontroversial insofar as they aim to protect honour and dignity, it should be borne in mind that any laws that penalise “insult” or “giving offence” without linking this to the honour and dignity of the offended party will fail the “legitimate aim” test. A particular aspect of this is that the statements must identify the person claiming to be defamed. In a recent case in Russia, various references were made to “the Governor” (who was not

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<sup>34</sup> See, for example, *Thorgeirson, ibid.*, para. 59 and *Schwabe v. Austria*, 28 August 1992, Application No. 13704/88, para. 25.

<sup>35</sup> *Castells v. Spain*, note 26, para. 46.

party to the defamation action), “his team” and “the regional authorities”, but the Court deemed these insufficient to ground a defamation action by members of the regional government, stating:

The Court considers that, for an interference with the right to freedom of expression to be proportionate to the legitimate aim of the protection of the reputation of others, the existence of an objective link between the impugned statement and the person suing in defamation is a requisite element.<sup>36</sup>

### **Criminal Defamation**

In many member States of the Council of Europe, civil defamation laws are now the primary or only means by which reputation is protected. Criminal defamation laws in many countries have either fallen into disuse – in the United Kingdom, for example, there has not been a public prosecution of the media for at least thirty years<sup>37</sup> – or their use has come under heavy criticism, including from the European Court of Human Rights.<sup>38</sup> Some countries – such as Ukraine, Bosnia-Herzegovina and Georgia – have abolished criminal defamation laws altogether.

One of the most serious problems with criminal defamation laws is that a breach may lead to a harsh sanction, such as a heavy fine or suspension of the right to practise journalism. Even where these are not applied, the problem remains, since the severe nature of these sanctions casts a long shadow. It is now well-established that unduly harsh penalties, of themselves, represent a breach of the right to freedom of expression, even if the circumstances justify some sanction for abuse of this right.<sup>39</sup> In the very first defamation case before it, the Court noted:

[The] penalty imposed on the author... amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.<sup>40</sup>

The Court has never directly ruled on the legitimacy of criminal defamation laws; the nature of its jurisdiction means its judgments are usually restricted to the facts of the individual case before it. But it should be noted that it has never upheld a prison sentence or other serious sanction in a criminal

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<sup>36</sup> *Dyuldin and Kislov v. Russia*, 31 July 2007, Application No. 25968/02, para. 44.

<sup>37</sup> The UK Law Commission, as long ago as 1985, recommended the offence be abolished. See Law Commission, *Criminal Law: Report on Criminal Libel* (Law Com. No. 149, Cm. 9618, 1985).

<sup>38</sup> See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99.

<sup>39</sup> For more on this, see below under 1.4.

<sup>40</sup> *Lingens v. Austria*, note 10, para. 44.



defamation case.<sup>41</sup> In *Castells v. Spain*, as noted above, the Court expressed serious concern about the use of the criminal law in defamation cases and suggested this might be legitimate only where the goal was to maintain public order, rather than simply to protect reputations. ARTICLE 19 takes a very clear position on criminal defamation laws: it considers them disproportionate and hence a breach of the right to freedom of expression. ARTICLE 19 stated:

All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.<sup>42</sup>

Our view is that the criminalisation of a particular activity implies a clear State interest in controlling it and imparts a social stigma to it, neither of which we believe to be justified in relation to the protection of individuals' reputations. Instead, we recommend the use of civil proceedings in defamation cases. However, at a minimum, immediate steps should be taken to ensure any criminal defamation laws still in force conform fully to the following conditions:

- i No one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
- ii The offence of criminal defamation shall not be made out unless it has been proven the impugned statements are false, they were made with actual knowledge of falsity or recklessness as to whether or not they were false, and they were made with a specific intention to cause harm to the party claiming to be defamed;
- iii Public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
- iv Prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines, and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.<sup>43</sup>

## **Public Officials**

The Court has been very clear that public officials are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public figures and institutions. Other factors stressed by the Court include the fact that public officials have voluntarily accepted to be subject to

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<sup>41</sup> In the above-mentioned *Lingens* case, the Court found a violation of the right to freedom of expression.

<sup>42</sup> See *Defining Defamation*, note 11, Principle 4(a).

<sup>43</sup> *Ibid.*, Principle 4(b).

criticism and that there will often be alternative means of redress other than bringing defamation cases, namely by publicly countering accusations. In its very first defamation case, the Court emphasised:

The limits of acceptable criticism are... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.<sup>44</sup>

In a case involving Russia, the Court stated:

[The] dominant position which the government occupies makes it necessary for it to display restraint in resorting to libel proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.<sup>45</sup>

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its case law.<sup>46</sup> The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant. For example, the “fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.”<sup>47</sup>

In statements on matters of public interest, the principle applies to public officials and to public servants as well as to politicians.<sup>48</sup> In the case of *Janowski v. Poland*, the Court held public servants must “enjoy public confidence in conditions free of perturbation if they are to be successful in performing their tasks.” However, in this case, the statements in question were not made as part of a public debate – as would normally be the case with the media – and, importantly, did not concern matters of public interest.<sup>49</sup> In *Dalban v. Romania*, the Court resolutely found a violation of freedom of expression where a journalist had been convicted for defaming the chief executive of a State-owned agricultural company.<sup>50</sup> In *Thoma v. Luxembourg*, the Court put the issue beyond doubt:

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<sup>44</sup> *Lingens v. Austria*, note 10, para. 42.

<sup>45</sup> *Dyuldin and Kislov v. Russia*, note 36, para. 45.

<sup>46</sup> See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.

<sup>47</sup> *Dichand and others v. Austria*, note 16, para. 51.

<sup>48</sup> See *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33. See also *Thorgeir Thorgeirson v. Iceland*, note 22.

<sup>49</sup> The statements had been made in a public square to police officers. Although they were witnessed by a group of bystanders, they could not be characterised as forming part of a public debate.

<sup>50</sup> *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.

Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.<sup>51</sup>

As noted above, the Court has extended the principle of enhanced protection to statements on matters of public interest, even where they do not comment on “public figures.”<sup>52</sup> In a series of recent cases, the Court has essentially extended this reasoning to any body or person who has voluntarily entered the public arena. For example, in *Paturel v. France*,<sup>53</sup> the Court pointed out that public associations lay themselves open to scrutiny when they entered the arena of public debate and ought to show a higher degree of tolerance to criticism of their aims by opponents and to the means employed in that debate. Similarly, in *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (No. 3)*,<sup>54</sup> the Court was influenced in its findings by the fact that the plaintiff in a defamation case had already given a number of media interviews and voluntarily entered the public arena.

Finally, the Court has recently also begun to recognise the important role played by large international corporations in society and require that they too display a greater tolerance of criticism than ordinary private individuals.<sup>55</sup>

### **Facts v. Opinions**

The Court has made it clear defamation law must distinguish between statements of fact and value judgments. In practice, the Court allows a considerable degree of leeway to statements of opinion. For example, in the case of *Dichand and others v. Austria*, the applicants had published an article alleging that a national politician who also practiced as a lawyer had proposed legislation in parliament in order to serve the needs of his private clients. The applicants were convicted of defamation by the domestic courts and appealed to the European Court, which first stressed that the statement constituted a value judgment rather than a factual allegation. Furthermore, while acknowledging the absence of hard proof for the allegations and the strong language used, the Court stressed that the discussion was on a matter of important public concern:<sup>56</sup>

It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.<sup>57</sup>

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<sup>51</sup> *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

<sup>52</sup> See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 18.

<sup>53</sup> 22 December 2005, Application No. 54968/00.

<sup>54</sup> 13 December 2005, Application Nos. 66298/01 and 15653/02.

<sup>55</sup> *Steel and Morris v. the United Kingdom*, 15 February 2005, Application No. 68416/01.

<sup>56</sup> *Ibid.*, para. 51.

<sup>57</sup> *Ibid.*, para. 52.

## ARTICLE 19

### GLOBAL CAMPAIGN FOR FREE EXPRESSION

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At the same time, the right to express value judgements is not entirely unfettered under the jurisprudence of the Court, which has noted: “Even where the statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.”<sup>58</sup>

Whether this standard is met depends on all the facts of the case. In *Unabhängige Initiative Informationsvielfalt v. Austria*, the Court expressed concern that domestic courts had required journalists to supply factual proof beyond a reasonable doubt to support value judgements expressed by them, stating: “The degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of any value judgment.”<sup>59</sup> A good example of a case in which the Court accepted an opinion lacked a sufficient factual basis was *Stângu and Scutelnicu v. Romania*.<sup>60</sup> In this instance, the Court found no violation in a case where the applicant had directly accused two local functionaries of corruption without providing any evidence whatsoever.<sup>61</sup>

In another decision, the Court explained that value judgments need not be accompanied by the facts upon which the judgement is based: “The necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances.”<sup>62</sup> For example, where certain facts were widely known among the general public there was no need for a journalist basing an opinion on those facts to refer to them explicitly. Furthermore, value judgements may be based on rumours or stories circulating among the general public; they need not be supported by hard, scientific facts.<sup>63</sup>

Furthermore, the Court has been very liberal in its interpretation of what constitutes a fact and what constitutes a value judgement, normally deciding in favour of the latter when an arguable case can be made to that effect. In a number of cases, the Court held that domestic courts had wrongly treated allegedly defamatory publications as statements of fact. For example, in *Feldek v. Slovakia*, the Court disagreed the use by the applicant of the phrase “fascist past” should be understood as stating the person had participated in activities propagating particular fascist ideals. It explained the term was a wide one, capable of encompassing different notions as to its content and significance. One of them

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<sup>58</sup> *Dichand and others v. Austria*, note 16, para. 43.

<sup>59</sup> 26 February 2002, Application No. 28525/95, para. 46.

<sup>60</sup> 31 January 2006, Application No. 53899/00.

<sup>61</sup> See also *Grinberg v. Russia*, 21 July 2005, Application No. 23472/03 and *Chemodurov v. Russia*, 31 July 2007, Application No. 72683/01. In both of these cases, the Court disagreed with the national courts’ characterisation of the statements as factual.

<sup>62</sup> *Feldek v. Slovakia*, 12 July 2001, Application No. 29032/95, para. 86.

<sup>63</sup> *ThorgeirThorgeirson v. Iceland*, note 22.

could be that a person participated as a member of a fascist organisation; on this basis, the value judgment that that person had a “fascist past” could be fairly made.<sup>64</sup>

The Court has also held that requiring defendants to prove the truth of value judgements is illegitimate. This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof: “The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right to [freedom of expression].”<sup>65</sup> In another case, involving Russia, the defendant had been convicted by domestic courts of defamation for expressing the opinion the plaintiff was without any “shame and scruples.” The Court considered this a “quintessential example of a value judgment”, the truth of which was not susceptible to proof, and held that the conviction constituted a violation of the right to freedom of expression.<sup>66</sup>

Furthermore, where a statement is found to be a statement of fact, a defendant must be allowed to present relevant evidence of its veracity before the domestic courts. This was at issue in the case *Castells v. Spain*, where the domestic courts refused to permit the applicant to try to establish the truth of his claim that the government had intentionally failed to investigate the murders of people accused of belonging to a separatist movement. While the Court recognised the article included statements of opinion as well as of fact, and some of the accusations were serious, it attached decisive importance to the fact that the domestic courts had precluded him from offering any evidence as to the truth of his assertions.<sup>67</sup>

### 1.3. Defences

#### **Burden of Proof**

A number of constitutional courts have developed a general principle that, at least in relation to statements of fact in cases involving matters of public concern, the plaintiff should bear the burden of proving that the statements are false. The heavy onus on the State to justify any restriction on freedom of expression dictates that it should be presumed a statement is true until and unless the contrary is shown. This rule should at least apply to statements on matters of legitimate public interest, given the importance of open debate about them. The US Supreme Court, for example, has made it clear that placing the burden of proof on the defendant will have a significant chilling effect on the right to freedom of expression. In the seminal case of *New York Times v. Sullivan*, it stated:

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<sup>64</sup> *Feldek v. Slovakia*, note 62.

<sup>65</sup> See *Lingens v. Austria*, note 10, para. 46. See also *Dichand and others v. Austria*, note 16, para. 42.

<sup>66</sup> *Grinberg v. Russia*, note 61, para 31.

<sup>67</sup> *Castells v. Spain*, note 26, para. 49.

Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which ‘steer far wider of the unlawful zone’.<sup>68</sup>

The Court has agreed that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it is unfair to require her/him to prove the truth of her/his statements.<sup>69</sup> This is particularly so where the publication concerns a matter of public concern. In the case of *Dalban v. Romania*, the Court stated: “It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth.”<sup>70</sup> However, the Court has required that when they make serious allegations, journalists should make a real effort to verify their truth, in accordance with general professional standards.<sup>71</sup>

Principle 7(b) of ARTICLE 19’s *Defining Defamation* states: “In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.”

### **Reasonable Publication**

It is now widely recognised that, in certain circumstances, even false and defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public’s right to know where matters of public concern are involved, and often cannot wait until they are sure every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. The Court held:

[News] is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.<sup>72</sup>

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<sup>68</sup> *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279.

<sup>69</sup> See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99, para. 65.

<sup>70</sup> *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, para. 49.

<sup>71</sup> *McVicar v. the United Kingdom*, 7 May 2002, 46311/99, paras. 84-86 and *Bladet Tromsø and Stensaas v. Norway*, note 18, para 66.

<sup>72</sup> *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.

A more appropriate balance between the right to freedom of expression and protection of reputation is to defend those who have acted reasonably or honestly in publishing a statement on a matter of public concern, while allowing plaintiffs to sue those who have not: what might be termed the defence of reasonable publication. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. This has been confirmed by the Court, which has stated that the press should be allowed to publish stories that are in the public interest subject to the proviso that “they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”<sup>73</sup>

Applying these principles in *Bladet Tromsø and Stensaas v. Norway*, the Court placed great emphasis on the fact that the statements made in this case concerned a matter of great public interest that the plaintiff newspaper had covered overall in a balanced manner.<sup>74</sup> This follows the line taken by constitutional courts of various countries, which have recognised the principle that, where the press have acted in accordance with professional guidelines, they should benefit from a defence of reasonable publication. The House of Lords in the United Kingdom, for example, has held that a number of factors are relevant in deciding whether a defendant in a defamation case should benefit from a defence of reasonable publication, including the nature of the allegations, the steps taken to verify the information, the urgency of the matter and whether comment was sought from the plaintiff.<sup>75</sup> Similarly, the Supreme Court of Appeal of South Africa has held:

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information.<sup>76</sup>

### Statements of Others

In a related line of cases, the Court has stated that journalists should not automatically be held liable for repeating a potentially libellous allegation published by others. In the case of *Thoma v. Luxembourg*, a radio journalist had quoted from a newspaper article which alleged that only one of the eighty forestry officials in Luxembourg was not corrupt. The journalist was convicted for libel by domestic courts, but the Court held that the conviction constituted a violation of his right to freedom of expression: “[Punishment] of a journalist for assisting in the dissemination of statements made by another person...

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<sup>73</sup> *Bladet Tromsø and Stensaas v. Norway*, note 18, para 65.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609, p. 625.

<sup>76</sup> *National Media Ltd and Others v. Bogoshi*, [1999] LRC 616, p. 631.

would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”<sup>77</sup> The Court also dismissed the contention that the journalist should have formally distanced himself from the allegation, warning the public that he was quoting from a newspaper report:

A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas.<sup>78</sup>

### **Exemptions from Liability**

Certain statements should never attract liability for defamation. This applies, for example, to statements made in legislative assemblies or in the course of judicial proceedings, or reports of official statements or reports quoting from the findings of official reports.

With regard to statements made in legislative assemblies, the Court has recognised the “aim of the immunity accorded to members of the... legislature [is] to allow such members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority.”<sup>79</sup> Thus, because freedom of parliamentary debate is the essence of modern democracies, statements made in parliaments may justifiably attract absolute immunity.<sup>80</sup>

In the case of *Nikula v. Finland*, the Court held that statements made in the course of judicial proceedings should enjoy similar protection.<sup>81</sup> Statements made in court by lawyers should in particular receive protection, as they play an important role as “intermediaries between the public and the courts”<sup>82</sup> and must be free to defend their clients to the best of their abilities. The Court explained:

[The] threat of an ex post facto review of counsel’s criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel’s duty to defend their clients’ interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the

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<sup>77</sup> *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 62.

<sup>78</sup> *Ibid.*, para. 64.

<sup>79</sup> *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, quoting with approval the admissibility decision of the European Commission of Human Rights in *Young v. Ireland*, 17 January 1996, Application No. 25646/94.

<sup>80</sup> See also *Jerusalem v. Austria*, 27 February 2001, Application No. 26958/95, para. 36.

<sup>81</sup> *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55.

<sup>82</sup> *Ibid.*, para. 45.



potential ‘chilling effect’ of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.<sup>83</sup>

The Court has also recognised other occasions where speech should enjoy greater protection because of the importance of open communication. In *Zakharov v. Russia*, for example, the defamation claim was based on a private letter sent by the applicant to the deputy governor, complaining about the conduct of the head of a town council. The Court noted:

The Court considers that, in the circumstances of the present case, the fact that the applicant addressed his complaint by way of private correspondence to the State official competent to examine the matter, is of crucial importance for its assessment of proportionality of the interference. That the citizens should be able to notify competent State officials about the conduct of civil servants which to them appears irregular or unlawful, is one of the precepts of the rule of law.<sup>84</sup>

The media and others should also be free to report, accurately and in good faith, official findings or official statements.<sup>85</sup> This is based on the public interest in ensuring wide dissemination of official findings and the status of such findings. In *Tromsø and Stensaas v. Norway*, the Court said:

[The] press should normally be entitled, when contributing to a debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research.<sup>86</sup>

In the case of *Colombani and others v. France*, the Court extended this principle, holding that the applicants were entitled to rely on the contents of a confidential report leaked to them by sources inside a European Union agency, even though they themselves had not investigated the facts.<sup>87</sup>

## 1.4. Sanctions

It is clear that unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. The Court clearly stated: “the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of

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<sup>83</sup> *Ibid.*, para. 54.

<sup>84</sup> *Zakharov v. Russia*, 5 October 2006, Application No. 14881/03, para. 26.

<sup>85</sup> *Defining Defamation*, note 11, Principle 11.

<sup>86</sup> *Bladet Tromsø and Stensaas v. Norway*, note 18, para. 72.

<sup>87</sup> *Colombani v. France*, note 69.

expression.”<sup>88</sup> As a result, sanctions for defamation must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national defamation laws.<sup>89</sup> Even relatively small awards can raise freedom of expression concerns if they severely affect the defendant. For example, in *Steel and Morris v. the United Kingdom*, the Court noted while the damage awards in this case had been relatively small – tens rather than hundreds of thousands of pounds – they were nevertheless “very substantial when compared to the modest incomes and resources of the two applicants” and therefore contributed to a violation of the right to freedom of expression.<sup>90</sup>

One aspect of this is that less intrusive remedies, and in particular non-pecuniary remedies such as appropriate rules on the right to reply, should be prioritised over pecuniary remedies.<sup>91</sup> Another aspect is that any remedies already provided, for example on a voluntary or self-regulatory basis, should be taken into account in assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a corresponding lessening of any pecuniary damages.<sup>92</sup>

## 1.5. Proceedings

The conduct of defamation proceedings can raise serious questions under Article 6 of the ECHR, which guarantees fairness in both civil and criminal proceedings. This means, among other things, that: journalists need to be given adequate time to prepare their defence; proceedings should be open to the public; and, in criminal cases, a defendant must be presumed innocent until proven guilty.

The Court has in a line of cases laid down strict rules on the maximum acceptable length of time for criminal as well as civil proceedings, on the basis that excessively lengthy procedural delays may lead to a violation of the defendant’s rights, including to freedom of expression. An important consideration in all of these decisions is whether any delay is objectively justifiable.<sup>93</sup>

One particular issue that has arisen before the Court in relation to civil defamation proceedings is the availability – or lack – of legal aid. Another important issue is protection during proceedings of a journalist’s confidential sources. Both of these issues are addressed below.

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<sup>88</sup> *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 35.

<sup>89</sup> *Ibid.*, para. 49.

<sup>90</sup> Note 55, para. 96. This case concerned two campaigners who had handed out leaflets outside McDonalds protesting at the practices and quality of food at that 'restaurant' company.

<sup>91</sup> See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

<sup>92</sup> See *Defining Defamation*, note 11, Principle 15.

<sup>93</sup> See, for example, the Court's recent decision in *Kajjas v. Finland*, 7 March 2006, Application No. 64436/01.

## Legal Aid

In the case of *McVicar v. the UK*,<sup>94</sup> the applicant complained that the limited legal assistance he had received in defending himself in a defamation case had effectively denied him a fair trial. In its assessment of the complaint, the Court held that despite the absence of an explicit guarantee of legal aid in civil cases:

Article 6 § 1 [of the ECHR] may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case.<sup>95</sup>

However:

Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.<sup>96</sup>

In this case, the Court decided that, as the defendant was a well-educated journalist, the issues at trial had not been particularly complex and, up to the start of the actual proceedings, the applicant did have legal representation.<sup>97</sup> Therefore, it did not find a violation of the right to a fair trial.

The *McVicar* case may be contrasted with *Steel and Morris v. the United Kingdom*,<sup>98</sup> in which the Court found the lack of legal aid in a defamation case did violate the rights of the defendants. In this case, the Court noted that extensive legal and procedural issues had to be resolved before the trial judge, and the defendants had been given only sporadic help by volunteer lawyers. In this context, despite the extensive judicial assistance and latitude granted to the applicants as litigants in person, the lack of legal aid violated their right to a fair trial.

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<sup>94</sup> *McVicar v. the United Kingdom*, note 29.

<sup>95</sup> *Ibid.*, para. 47.

<sup>96</sup> *Ibid.*, para. 48.

<sup>97</sup> *Ibid.*, para. 60.

<sup>98</sup> Note 55.

## Confidentiality of Sources

The Court has recognised that, as a matter of fundamental principle, defendants in defamation cases should not suffer any detriment simply for failing to reveal confidential sources of information.<sup>99</sup> In the standard-setting case *Goodwin v. the United Kingdom*, it stated:

Protection of journalistic sources is one of the basic conditions for press freedom as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest.<sup>100</sup>

The importance of this principle in defamation cases has been confirmed in a recent recommendation by the Committee of Ministers of the Council of Europe, which states: “In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities... may not require for that purpose the disclosure of information identifying a source by the journalist.”<sup>101</sup>

Thus, while there may be cases where mandatory disclosure of confidential sources is justified, for example in the defence of a person accused of a criminal offence, this can never be justified in the context of a defamation case.

## 2. DEFAMATION LAW AND PRACTICE IN RUSSIA

### 2.1. Defamation Law in Russia

Russia has a long tradition of criminal defamation, with civil defamation having only been introduced in the early 1990s. Defamation laws are among the principal sources of restrictions of the right to freedom of expression.

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<sup>99</sup> *De Haes and Gijssels v. Belgium*, 24 February 1997, Application No. 19983/92, paras. 55 and 58.

<sup>100</sup> *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39.

<sup>101</sup> Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted on 8 March 2000, Principle 4.

## **Constitutional Guarantees**

Freedom of speech is guaranteed by Article 29 of the Russian Constitution, which states:

Everyone shall have the right to freedom of thought and speech (Paragraph 1).

Freedom of the mass media shall be guaranteed. Censorship shall be prohibited (Paragraph 5).

However, the above rights are restricted by paragraph 4 of the same article, which grants the right to “seek, obtain, transfer, produce and disseminate” information by any “lawful” means. The protection provided by paragraphs 1 and 5 can therefore easily be annulled through the passing of legislation, without any further qualifications.

The Constitution also contains provisions specifically relating to the protection of reputation. Article 21(1) guarantees protection for the dignity of the person; the State is required to put in place legal mechanisms under which anyone who considers her/his honour, dignity or good name denigrated can bring an action to protect these qualities. Article 23(1) emphasises the right of each person to defend their “honour and good name.”

## **Criminal Defamation**

The Russian Criminal Code contains five separate articles dealing with defamation and the protection of reputation. Articles 129 and 130 deal with liability for libel and insult respectively. Libel is defined as the “deliberate dissemination of false information which denigrates somebody’s honour and dignity or harms his reputation”, while insult is defined as the “denigration of somebody’s honour and dignity expressed in an indecent way.” Article 129 states that libel disseminated by a mass medium and libel accusing a person of committing a particularly serious crime constitute more serious crimes than ordinary libel, and can result in imprisonment for up to three years. Article 297 provides for liability for defamatory statements made to participants during court proceedings, referred to as “contempt of court.” Article 298 provides for liability for libellous statements made about a judge, jury, prosecutor, investigator, police officer or court officer (with some of the harshest penalties in defamation – up to four years’ imprisonment), while Article 319 addresses the issue of liability for insulting a government official “who is performing his duties or in connection with the performance of his duties.” As noted elsewhere in the report, it is a well-established principle of international law that public officials should never receive special protection against criticism, regardless of their rank or status.

A prosecution for criminal libel requires proof of malicious intent to denigrate the honour and dignity of the individual in question, as well as knowledge that the information disseminated was false.

## **Civil Defamation**

Defamation and the protection of reputation are covered by various articles of the Russian Civil Code. Article 152 directly address the protection of reputation (referred to as either honour, dignity or business reputation), while Article 150 includes protection for dignity and reputation along with a host of other rights and values referred to as “non-property rights” and “non-material values.” If a private person considers her/himself to have been defamed by the dissemination of false and defamatory statements, s/he is entitled to file a lawsuit for the protection of her/his honour, dignity and business reputation. Article 151 addresses the issue of compensation for moral damages, including for harm to reputation, while Articles 1099, 1100 and 1101 set out the procedural mechanisms relating to compensation, including in cases of harm to reputation.

According to Article 152 of the Civil Code, for an expression to be considered defamatory, it must relate to a particular individual or legal entity clearly identified in the statement. The particular citizen has to be easily and unambiguously identified. Article 152(1) states the burden of proving the falsity of any statement alleged to be defamatory is on the defendants. This is in all cases, even when the statement refers to information in the public interest.

Russian defamation laws consistently prioritise compensation as the primary remedy in cases of defamation. Articles 151, 152(5) of the Civil Code all advocate the application of financial or monetary compensation to redress harms to reputation.

Articles 152(2) and 152(3) of the Civil Code do contain some references to the use of non-pecuniary remedies for addressing defamation, stating:

If information denigrating a citizen’s honour, dignity and business reputation was disseminated by a mass medium, it shall be refuted in the same mass medium. If this information is contained in a document sent out by an organisation, this document should be changed or withdrawn. In other cases, the court shall determine the procedure for refuting this information (Paragraph 2).

And:

A citizen whose rights or other interests protected by law have been denigrated by a mass medium has the right to reply in the same mass medium (Paragraph 3).

The inclusion of these provisions is significant. However, in practice non-pecuniary remedies are often not considered sufficient as a form of redress and are usually added to awards for damages. Russian law also does not provide for a defence of reasonable publication in defamation cases.

## **Extremism Legislation and Defamation**

In July 2007 a federal law<sup>102</sup> was adopted that amended a number of other laws, including the *Law on Combating Extremism Activities*.<sup>103</sup> Its Article 1 now states “extremist activity” includes:

Activity of a public, religious or other association, or of the media and individuals in the planning, organisation, preparation and carrying out of activities directed at... public defamation of a person, holding public office for the Russian Federation or its autonomous regions, during or in connection with carrying out his official duties, combined with charges of the commission of acts listed in this article, under the condition that defamation is determined by the court.

Distribution of “extremist materials” and the “existence of signs of extremism in the activities of the media outlet” (which can also involve defamation) are prohibited. If media outlets do not remedy the situation after receiving a warning, re-offend, or if their actions causes harm to physical or legal persons, their activities can be terminated by court order (Articles 8 and 11).

Although these specific provisions had still not been applied in October 2007, they are highly problematic. International standards permit restrictions on freedom of expression on the grounds of national security only when the statement is intended to incite violence and where there is a direct and immediate link between the act and the likelihood of violence. Extremism and defamation law belong to two very distinct legal spheres and should not be confused. The same is true of incitement to hatred. In addition, the special protection of public officials is also contrary to international standards of freedom of expression.

## **2.2. Legal Basis for the Application of International Standards**

Russia ratified the ECHR on 30 March 1998. On 5 May of the same year, the ECHR became a constituent part of the Russian legal framework, in compliance with Article 15 of the Russian Constitution.

Article 1 of the *Federal Law on The Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*<sup>104</sup> states:

The Russian Federation, in accordance with Article 46 of the Convention, recognises, ipso facto and without special agreement, that the jurisdiction of the European Court of Human Rights is binding for the interpretation and application of the Convention and its Protocols in cases of alleged infringement by the Russian Federation.

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<sup>102</sup> Federal Law No. 121 *On the Amendment of Certain Legal Acts of the Russian Federation with regard to the Realisation of State Control in the Area of Anti-terrorism*, 24 July 2007.

<sup>103</sup> Other amended laws are the *Law On Mass Media*, the Criminal Code and the Administrative Code.

<sup>104</sup> Federal Law No. 54, 30 March 1998.

Moreover, several resolutions of the plenary sessions of the Supreme Court required the application of the European Court of Human Rights' jurisprudence in the formulation of judgements.

Paragraph 10 of Resolution No.5 *On the Application by Courts of Generally Accepted Principles and Norms of International Law and International Treaties of the Russian Federation by Courts of General Jurisdiction* (10 October 2003) states:

The application by courts of the [ECHR] must take place bearing in mind the practice of the European Court of Human Rights, in order to avoid any infringement of the [ECHR].

Resolution No.23 *On a Judicial Decision* (19 December 2003), stipulates that, in their judgements, courts have to take into account "judgements of the European Court of Human Rights, in which an interpretation is provided of the applicable provisions of the [ECHR]."

Of particular relevance to this report is Resolution No.3 *On Judicial Practice in Cases on Protection of Honour and Dignity of Individuals, and Business Reputation of Physical and Legal Persons* (24 February 2005). It contains guidelines to courts ruling on defamation cases; among other things, it directs the courts to apply the judgements of the Court:

When considering defamation cases, the courts should be guided not only by Russian legislation (Article 152 of the Civil Code of the Russian Federation), but... should take into account the legal position of the European Court of Human Rights laid down in its judgements, and related questions of the construction and implementation of this Convention (in particular Article 10).

A decision by the Constitutional Court on the system of *nadzor*<sup>105</sup> from February 2007 includes a section on the European Court of Human Rights, stating:

By ratifying the European Convention on Human Rights and Fundamental Freedoms, the Russian Federation accepted the jurisdiction of the European Court of Human Rights and its Protocols in case of supposed violation by the Russian Federation of the provisions in these acts... This way... the judgements of the European Court of Human Rights... are a fundamental part of the Russian legal system, and as a result *are to be taken into account* by the legislative bodies... and the executive organs [italics added].<sup>106</sup>

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<sup>105</sup> *Nadzor* is a review system for decisions that is already in force. It is used when one of the two parties, the prosecution or the court itself wishes to review the case (this does not include those cases in which new evidence emerges, for which there is a separate procedure).

<sup>106</sup> Resolution of the Constitutional Court of the Russian Federation of 5 February 2007, no.2 on the case of examination of constitutional provisions of articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Code of Civil Procedure of the Russian Federation in relation to the inquiry of the Cabinet of Ministers of the Republic of Tatarstan, and the complaints of the joint stock company Nizhnekameskneftkhim and Khzasenergo and of a number of citizens.



Finally, internal guidelines of the High Arbitration Court<sup>107</sup> establish that the jurisprudence of the Court should be applied in cases considered by the Arbitration Courts.<sup>108</sup>

### 2.3. Filing Defamation Cases

Public officials in Russia have demonstrated a tendency to use the defamation laws to shield themselves from criticism by filing a large number of lawsuits against journalists. Scores of newspapers have been charged with undermining the dignity of State officials.<sup>109</sup>

A relatively high number of cases are being won by newspapers in Central Russia, but this is largely thanks to the Voronezh-based Mass Media Defence Centre (MMDC - [www.mmdc.narod.ru](http://www.mmdc.narod.ru)), which specialises in media law and the legal defence of journalists. In 2006, of the 28 cases taken by MMDC: seven were decided in favour of the media; in five others the media won a partial victory;<sup>110</sup> and in a further six a friendly settlement was reached.<sup>111</sup> However, much less favourable conditions are found in Russia's other regions, where there are few or no specialised organisations.<sup>112</sup>

PACE has expressed alarm at the high number of defamation suits against journalists, stating:

We are concerned by the current defamation legislation and its application by the Russian judiciary and executive powers. Journalists are always prosecuted through libel suits.<sup>113</sup>

In some cases, there have been allegations that judges have been susceptible to pressure from influential individuals.

There are no conclusive data on the number of defamation lawsuits filed every year. In 2006, the Glasnost Defence Foundation (GDF) received communications on 299 lawsuits (defamation and other issues) filed against journalists, and 131 cases reviewed by courts. Yet data from the Russian

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<sup>107</sup> Communication of the High Arbitration Court on the Fundamental Provisions, Applicable by the European Court of Human Rights for the Defence of the Rights of Property and Fair Trial. 20 December 1999 No. S1-7/SMP-1341.

<sup>108</sup> It also gives a brief description of the general rules, such as balancing between private and public interest when ruling on property rights; access to justice and fair trial; independence of judiciary; reasonableness of trial length; etc.

<sup>109</sup> For more on this, see Section 2.4 (Diagram 3).

<sup>110</sup> The court ordered them to refute a part of the information disseminated, and/or moral damages were significantly lowered.

<sup>111</sup> In four cases the proceedings were terminated on procedural grounds by the courts; in two cases the plaintiffs withdrew their applications; four cases were won by the plaintiffs. In 2005 the results were even more positive: of 32 cases, in 13 the plaintiffs' claims were rejected; in 10 the plaintiffs' claims were partially satisfied; in two there were friendly settlements; in one case the plaintiff withdrew the application and in six the cases were terminated on procedural grounds. In no case were all claims upheld.

<sup>112</sup> See Section 2.4 (Diagram 1).

<sup>113</sup> Report to the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, *Honouring of Obligations and Commitments by the Russian Federation*, Doc. 10568, 3 June 2005, Point 389, <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10568.htm>.

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Supreme Court from the early 2000s has referred to nearly 5,000 cases per year, whilst PACE in 2005 referred to as many as 8-10,000 cases a year.<sup>114</sup> Some data are available from the courts of individual administrative units of Russia, which point to the conclusion that the real number runs into the thousands. For example, between 2002 and 2004, 161 defamation cases were heard in Lipetsk *oblast* and 684 in Irkutsk *oblast*; between 2004 and 2006, 158 cases were heard in the Republic of Khakassiya and 137 in Kirov *oblast*; there are 85 such administrative units in Russia). MMDC estimates that 60% of defamation lawsuits filed are against the media.

Freedom of the media has been eroded not only by the frequency of defamation lawsuits, but also by the financial burden imposed by damage awards. For the 131 cases monitored by GDF in 2006, the fines for moral damages imposed on the media amounted to a total of 34,628,000 roubles (EUR 978,226).<sup>115</sup> The plaintiffs had claimed far more. It is positive that courts normally grant lower awards than the extremely high awards generally claimed by plaintiffs, through some consideration for the defendants' financial capacity and proportionality.<sup>116</sup> However, while the awards might seem relatively small to a Western audience, they can have a detrimental impact on the Russian media, which for the most part operate in difficult economic conditions.<sup>117</sup> In addition, there were cases in which particularly high awards were imposed: in 2005, a court sentenced the newspaper *Kommersant* to pay an exceptionally high fine of 320.5 million roubles (EUR 8,900,000), although this was later reduced to a still sizable 40.5 million roubles (EUR 1,150,000).<sup>118</sup>

A significant threat is the filing of repeated claims against newspapers who dare to criticise the authorities. For example, in January 2007, three defamation lawsuits claiming damages totalling 1.7 million roubles (EUR 48,700) were filed against the newspaper *Omskoe Vremya*. The newspaper

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<sup>114</sup> *Ibid.*

<sup>115</sup> Private communication with Alexei Simonov, Glasnost Defence Foundation, August 2007.

<sup>116</sup> According to data of the MMDC, in 2005 plaintiffs in Central Russia claimed a total of 200,000 roubles (EUR 5,600) and were awarded only 0.5% of it. The specialised legal defence provided by MMDC's lawyers contributed to this; however, even in other regions where professional media law organisations do not exist, the astronomical sums claimed by plaintiffs are normally lowered.

<sup>117</sup> The independent media suffers from unfair competition from the State media. The low purchasing power of the population also greatly restricts the media's revenues, resulting in low wages for journalists. To this has to be added Russia's generally difficult economic conditions. The average GDP per capita was approximately EUR 8,500 in 2006, but massive health inequality has to be factored in. According to a 2004 estimate, 17.8% of the Russian population was under the poverty line, while inflation in 2006 was 9.8%. In 2006 unemployment was 6.6%, to which considerable underemployment has to be added. Figures are from the CIA World Factbook, Russia, <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html>. MMDC reported in 2007 that the average awards for damages in Central Russia amounted to 10,000 roubles (EUR 300). Awards of 30,000 to 70,000 roubles are considered high: although these damages will not bankrupt a newspaper, they represent the monthly salary for the newspaper's entire staff. The payment of damages can also cost the newspaper all revenues for an issue, meaning that the outlet will not be able to pay the publisher for the cost of printing. Interview with MMDC, September 2007.

<sup>118</sup> The article, *Banking Crisis Takes to the Street* described Alfa Bank's clients queuing up at cash machines and described the financial difficulties experienced by several banks, including Alfa Bank. The bank accused the newspaper of causing unnecessary fears in their clients that led them to withdraw funds from the bank. Committee to Protect Journalists, *Russia: Court Reduces Financial Penalty against Independent Daily*, <http://www.cpj.org/news/2005/Russia24mar05na.html> and Jack, A, *Russian Newspaper Faces \$10m Bill for Defamation*, *Financial Times*, 20 October 2004, <http://www.ft.com/cms/>. Boris Berezovsky, who then owned *Kommersant*, called the case politically motivated.

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linked this to a desire to interfere with its work in the run-up to the campaign for elections to the Omsk's Legislative Assembly, and noted the same thing happened during the elections of governor in 2003.

These problems are exacerbated by frequent legal irregularities that normally disadvantage defamation defendants. For example, the Omsk regional office of *Novaya Gazeta* lost a defamation case filed by the region's governor and a fine of 60,000 roubles (EUR 1,700) was imposed.<sup>119</sup> In lieu of payment, the District Court authorised the seizure of the newspaper's property, even though confiscation of goods necessary to the debtor's work is prohibited under Russian law. A *Novaya Gazeta* reporter, Georgy Borodyansky, noted the bailiffs seized "everything except books and chairs", for an overall value believed to exceed the original fine.<sup>120</sup> The seizure of property, including computers, resulted in the severe disruption to *Novaya Gazeta*'s work.<sup>121</sup> There were also judicial irregularities: Borodyansky's lawyer was unable to obtain a copy of the case materials, which prevented him from filing an appeal.

Even where awards for damages have not been heavy, the fact the media outlet lost the case sends a signal that it is wrong to criticise government officials. The judges' decisions in these cases often aim at "restoring" a reputation the public official does not deserve or suppressing legitimate criticism, by obliging journalists to refute extracts of their articles.<sup>122</sup> Although the proceedings have been civil rather than criminal and the fines relatively small, they have nevertheless contributed to the erosion of the right to freedom of expression.

Civil defamation lawsuits have even been filed for unpublished materials.<sup>123</sup> One example is the Artyom Danilov case, noted in the introduction, in which an editor was sued for an enquiry sent by email to the local authorities. The enquiry related to possible corruption involving the mayor of Lytkarino and a businessman. It had been forwarded by the local authorities to the regional prosecutor's office and two ministries, yet Danilov was not responsible for the further circulation of the compromising information. Furthermore, the principle that public figures should tolerate more, rather than less, criticism than ordinary people should have been taken into account.<sup>124</sup> The court ruled in favour of the plaintiffs and ordered Danilov to pay 100,000 roubles (EUR 2,800) in moral damages.<sup>125</sup> This case affects the right to submit enquiries to the State authorities enshrined in the Russian Constitution at Article 33.<sup>126</sup> This point, along with the right to report irregularities to a

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<sup>119</sup> 500,000 roubles had been requested by the plaintiff.

<sup>120</sup> CJES, *Journalist Legally Prosecuted, his Working Material Seized, in Defamation Lawsuit by Regional Governor*, reported in IFEX, 22 February 2007, <http://www.ifex.org/en/layout/set/print/content/view/full/81285/>.

<sup>121</sup> *Ibid.*

<sup>122</sup> An example is the case *Chemodurov v. Russia*, note 61. Also see Section 3.2.

<sup>123</sup> See also the *Abrosimov* case below (Imprisonment).

<sup>124</sup> See Section 1.2 (Public Officials).

<sup>125</sup> See note 1.

<sup>126</sup> Article 33 of the Constitution states: "Citizens of the Russian Federation shall have the right to address personally, as well as to submit individual and collective appeals to State organs and local self-government

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competent body, was upheld by the Court, in a similar case, *Zakharov v. Russia*,<sup>127</sup> which also raised the fundamental right to request and obtain information from public bodies.

### Criminal Defamation

As noted earlier, there have also been criminal cases against journalists and media outlets. During 2005-2006, the opposition weekly *Novye Kolyosa* in Kaliningrad was severely harassed through multiple criminal cases against it (16 in 2006 alone) and other measures, apparently to suppress its criticism of powerful individuals.

One of the cases against the newspaper questioned the Kaliningrad Regional Court's acquittal and release of a person who had previously been sentenced to four years' imprisonment by a lower court. The case was taken by three of the Regional Court's judges, who maintained the article had effectively accused them of accepting bribes. The newspaper endured other forms of harassment, including the seizure of its property, police raids and the attempted murder of its founder. Its distribution company also refused to provide it with services in July 2006.<sup>128</sup>

On 16 August 2006, the Regional Court issued an order to close *Noviye Kolyosa*, for "disclosing classified information" relating to a criminal investigation into the murder of a local businessman.<sup>129</sup> *Novye Kolyosa's* staff members were also charged with insulting and beating 22 police officers while the newspaper's print-run was being seized in March 2006, and for assaulting tax officials. The newspaper has carried articles on corruption and organised crime, and generally its coverage has offended local influential individuals.<sup>130</sup> In June 2007, two journalists from *Novye Kolyosa*, Igor Rudnikov and Oleg Berezovsky, were tried in Pskov on criminal charges of committing violence without bodily harm (contrary to Article 318 of the Criminal Code) for the attack on police officers, and for defamatory articles on abuse of office by the Kaliningrad authorities (contrary to Article 319). A demonstration was held in support of the men. On 27 June, in light of their health problems, the court released them on bail of 750,000 roubles (EUR 21,500).<sup>131</sup>

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bodies." This is also developed at Point 10 of the Resolution of the Plenary of the Supreme Court of the Russian Federation of 24 February 2005, No. 3 (See Section 3.1), which states that a person can be charged with defamation for submitting applications "only in the case where the court will establish that the application ... had no basis and was dictated not by the intention to execute the civic duty... but exclusively by an intention to harm the other person." A positive precedent on a similar case was provided by an Arbitration Court. See Section 4 (Arbitration Courts).

<sup>127</sup> See Section 3.2.

<sup>128</sup> Committee to Protect Journalists, *Russia: Opposition Weekly Forced to Close Amid Official Harassment*, 23 August 2006 <http://www.cpj.org/protests/06ltrs/europe/russia23aug06pl.html> and *Attacks on the Press in 2006: Europe and Central Asia*, <http://www.cpj.org/attacks06/europe06/rus06.html>.

<sup>129</sup> The articles in question were based on transcripts of video and audio recordings of testimonies given by the detainees in the case, who confessed that agents from the Kaliningrad branch of the Federal Security Service had organised the murder.

<sup>130</sup> Materials published included articles with information on corruption of judges and a local sauna that allegedly also operated as a brothel, and is owned by a judge's husband.

<sup>131</sup> Glasnost Defence Foundation, *Pskov Opposition Holds Picketing Action in Defence of Kaliningrad Reporters. Igor Rudnikov and Oleg Berezovsky Released on Bail*, Digest No.337, 2 July 2007, <http://www.gdf.ru/digest/digest/digest337e.shtml#mail>.

In another case from October 2006, Vladimir Rakhmankov, editor of (the now defunct) Internet magazine *Kursiv*, was found guilty of criminal insult of the president and sentenced to pay 20,250 roubles (EUR 580). His crime was to have published a satirical article on Putin's plans to raise the country's birth rate entitled *Putin as Russia's Phallic Symbol*. In addition to the insult charges, investigators raided *Kursiv's* offices, seized computers, sealed the premises and searched Rakhmankov's flat. The website was then blocked,<sup>132</sup> while *Kursiv's* Internet Provider discontinued its services, making reference to an unpaid debt that Romakhov for his part denied owing.<sup>133</sup> The treatment of Rakhmankov seemed to reflect a semi-official outlook that sees the president as being above criticism. For example, a Russian lawyer (and one of the authors of Russia's media law), stated: "The head of State is subject of national pride... and requires... respectful relations."<sup>134</sup> This is in direct contradiction of the principle, clearly established by the European Court of Human Rights, that public officials should be tolerant of criticism. In addition, the satire in this case is of a kind routinely found on websites around the world. ARTICLE 19 believes satire, as the expression of an opinion, should not be subject to defamation liability. As noted above, European standards, while not absolutely protecting opinions, do accord them substantial protection. The reaction to the statement was also utterly disproportionate, since it not only led to damages being imposed, but also to the disappearance of the magazine.

Defamation lawsuits have even been filed for works of fiction. For example, prominent lawyer and television presenter Pavel Astakhov was questioned in August 2007 about his novel *Raider*. The local law-enforcement officials said the book defamed them and created "widespread negative resonance" against the police's investigation directorate, despite the fact that, as Astakhov noted, the publication was a work of fiction.<sup>135</sup> The law-enforcement authorities asked the city prosecutor to initiate a criminal investigation against the writer.<sup>136</sup> The novel's main character bribes the local police officers to open criminal cases and raid local companies.<sup>137</sup>

## **Imprisonment**

Russian courts have on a number of occasions imposed disproportionate sentences in defamation cases in the form of imprisonment. In 2005 and 2006, three journalists were imprisoned for defamation.<sup>138</sup>

The case of journalist Eduard Abrosimov is particularly alarming, not only because of the sentence of seven months' imprisonment, but also because of its many irregularities.<sup>139</sup>

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<sup>132</sup> Committee to Protect Journalists, *Attacks on the Press in 2006, Russia*, <http://www.cpj.org/attacks06/europe06/rus06.html>

<sup>133</sup> Committee to Protect Journalists, *Russia: Story Satirising Putin's Birth Goal Prompts Government Retaliation*, 24 May 2006, <http://www.ifex.org/en/content/view/full/74588>.

<sup>134</sup> Whitmore, B, *Russia: Phallic Case Threatens Internet Freedom*, Radio Free Europe / Radio Liberty, 2 June 2006.

<sup>135</sup> Urken, R, *The Moscow Times*, 15 August 2007.

<sup>136</sup> This had still not been officially done in August 2007.

<sup>137</sup> Urken, R, see note 135.

<sup>138</sup> Eduard Abrosimov, Nikolai Goshko and Ilya Azovskiy.

**Eduard Abrosimov**<sup>140</sup>

Two lawsuits were filed against Eduard Abrosimov, a journalist and advisor to the former governor of the Saratov region.

The first case was taken by the vice-speaker of the Russian State Duma, Vyacheslav Volodin. On 2 November 2004, the Moscow weekly newspaper *Sobesednik* published an article entitled *Don't Look Through the Keyhole*, under the pseudonym, Andrey Zabelin, which said Volodin had been seen in a gay club. Volodin initiated criminal proceedings, stating this information had adversely affected his professional reputation. He accused Abrosimov of having organised the article's publication to undermine his possible imminent appointment as governor of Saratov. It was never proven Abrosimov was the author of the publication and *Sobesednik's* editor-in-chief himself, while testifying in court, said he did not know Abrosimov. The court ruled this was irrelevant: what it needed to establish was whether the impugned expression harmed the plaintiff's reputation. The court found it did.

During the investigation into this case, Abrosimov's computer was seized. As police officers searched its files, they found an email by which Abrosimov had sent the draft of a different article to his editor. It said an investigator in the prosecutor's office had received a bribe during the course of an investigation. The article had been published on 11 November 2004 in the Saratov regional newspaper, *Saratov – the Capital of Povoljje*, and it contained some information on corruption in the local public prosecutor's office. The information about the bribe and the name of the investigator had, however, been removed. Despite this, a second criminal case against Abrosimov was opened and then merged with the first. In considering the case, the court examined not the published article but the draft sent by email exclusively to the newspaper's editor.

Abrosimov was first arrested on 20 January 2005 and detained until 3 May. He was then arrested in the courtroom on 22 June 2005, when the judge announced the verdict of seven months' imprisonment. He was finally released the following October. An appeal in October 2005 only succeeded in securing a reduction of the sentence from seven to six months, which Abrosimov had already served by then. A second appeal upheld the

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<sup>139</sup> Another case of imprisonment occurred in October 2006, when a justice of peace in Arkhangelsk sentenced former editor of the newspaper *North-West Pravda* Ilya Azavski to a year in a forced labour camp. This was for the publication of an article saying that a Deputy of the Arkhangelsk's Duma had promised, at the time of the 2004 Ukrainian presidential elections, a large sum of money to presidential candidate Viktor Yushchenko to organise a meeting with Vladimir Putin. CJES, *Rossiya. Lishenie Svobody Zhurnalistaov*, reported on 31 October 2006.

<sup>140</sup> The information on Eduard Abrosimov was provided by his defence lawyer, Galina Arapova, of the Mass Media Defence Centre.

decision of the lower court. Abrosimov's computer was returned but all the documents were deleted, including Abrosimov's PhD dissertation.

The case was submitted to the European Court of Human Rights by the Russian organisation Mass Media Defence Centre in May 2006. However, it was declared inadmissible the following year.

It is concerning that the court did not attempt to establish the identity of the article's author. Volodin's allegation that Abrosimov had orchestrated the publication of the article to undermine his possible appointment as governor (given Abrosimov's position as advisor to Volodin's opponent) was simply accepted by the court.

A disturbing feature of the second case was the fact there was no dissemination of the defamatory information outside the media outlet itself. The case raises the question of whether the media are able to discuss potential materials for publication freely on an internal basis. Furthermore, as noted above,<sup>141</sup> the European Court of Human Rights has never upheld a prison sentence in a criminal defamation case and the very harsh penalty in this case is itself a matter of serious concern.

Another alarming case is that of *Radio Vesna* journalist Nikolai Goshko. In June 2005, Goshko was sentenced to five years' imprisonment by the Magistrate Court in Smolensk for defaming three officials by alleging they had organised the killing of his boss, Sergei Novikov. Novikov had been shot in July 2000 by an unidentified individual, after stating on television he had evidence of corruption by local officials.<sup>142</sup> Goshko accused the same officials of being behind the murder. Defamation involving accusations of the committing of a violent crime is punishable with up to three years' imprisonment. However, given Goshko was still on probation for a previous offence, he received a five year prison sentence – a sentence of unprecedented severity in this type of case.<sup>143</sup> On 19 August 2005, following an appeal, Goshko was released from prison after signing a pledge not to leave the region. He had by then been held for two-and-a-half months.

There were also cases in which civil and criminal cases were filed simultaneously against a journalists for the same offence. According to local media organisations, this is done to increase the punishment.

### **The Use of Extremism Legislation**

Extremism legislation is also being used to suppress criticism of public officials. For example, on 29 August 2007, 71-year-old pensioner Pyotr Gagarin was charged with extremism for criticising city of

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<sup>141</sup> See Section 1.2 (Criminal Defamation).

<sup>142</sup> The officials were later indeed found guilty of corruption.

<sup>143</sup> *Journalist Sentenced to Five Years in Prison, The Moscow Times*, 20 June 2005

Oryol Governor Yegor Stoyev over the rising costs of utilities and residential services during a demonstration the previous January.<sup>144</sup> Gagarin was charged with incitement to extremism and insult.

In another case from 2007, the prosecutor's office of Syktyvkar (Komi Republic) instigated criminal proceedings against Savva Terentiev for incitement to hatred (Article 282(1) of the Criminal Code) for referring to the local police in unflattering terms on his private blog. The offence is punishable with a fine of up to 300,000 roubles (EUR 8,600), deprivation of the right to hold particular posts, forced labour or imprisonment for up to two years. After the case was initiated, the police entered Terentiev's flat and seized his computer. This is the first criminal case in Russia for materials placed on a blog.<sup>145</sup>

Both cases demonstrate a tendency of legal officials to confuse crimes of incitement – whether to extremism or hatred – and defamation law. As noted above,<sup>146</sup> extremism legislation should be applied only when an expression is intended to incite violence and when there is a direct link between the expression and the likelihood of violence. In addition, extremism legislation has been applied in Russia to protect public officials against criticism, contrary to international standards.

The *Terentiev* and *Rakhmankov* cases raise questions about the future of the Internet in Russia, one of the last channels for free expression in the country. Although no legal provisions have been adopted to control the Internet so far, the Russian authorities have been considering such measures for several years.<sup>147</sup>

### **Lawsuits v. Extra-judicial Measures**

Public officials at times seem to file defamation suits not to protect their reputation, but as a matter of pride. Often other measures that are normally sufficient to reverse the damage to somebody's reputation, such as an apology or rectification, are considered unsatisfactory by either the injured parties or judges. An example of this is the *Afanasyev* case. The editor-in-chief of Internet publication *Novy Fokus*, Mikhail Afanasyev, published information that Natalya Sunchugasheva, a former senior aide to the republic's prosecutor, had hit a child while driving. It later emerged the driver had been a relative of Sunchugasheva, who had pretended to be her. In addition to publishing a refutation on the website, Afanasyev apologised to Sunchugasheva, yet Sunchugasheva still filed a defamation case. Afanasyev was found guilty of defamation in June 2007 and given a large fine.<sup>148</sup>

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<sup>144</sup> *Pensioner Called an Extremist, The Moscow Times*, 29 August 2007.

<sup>145</sup> *Filtrui Zhurnal. Prokuratura Grozit Blogeru Dvumya Godami Tyurmy, Kommersant*, No.143, 13 August 2007.

<sup>146</sup> See Section 2.1.

<sup>147</sup> Whitmore, B, see note 134. In Tajikistan, a law was adopted in August 2007 criminalising defamation on the Internet. Also countries such as Belarus and Uzbekistan actively filter the Internet.

<sup>148</sup> *Cnews, Web-journalist \$ 1,927.96 Fine for Defamation*, 20 June 2007, <http://eng.cnews.ru/news/top/indexEn.shtml?2007/06/20/255685> and CJES, *Attacks and Threats against Journalists, Weekly Bulletin*, Issues No. 25(282), 18-24 June 2007 [http://cjes.ru/bulletin/?bulletin\\_id=2523&lang=eng](http://cjes.ru/bulletin/?bulletin_id=2523&lang=eng).



The objective of defamation law should not be to punish journalists, but to restore somebody's reputation: if the media has used means, such as the publication of a refutation, to redress or mitigate the harm caused, this should be taken into consideration by judges. Moreover, Russian law does not envisage a defence of reasonable publication, which should also have applied in the *Afanasyev* case. When information is published in good faith and in accordance with accepted professional norms, even false statements should be protected against defamatory liability. The media have to satisfy the public's right to know in a timely fashion, and therefore cannot always absolutely verify the accuracy of every piece of information prior to publication.<sup>149</sup>

Extrajudicial measures such as media self-regulation bodies are also partially used in defamation cases through the national or local Press Complaints Commissions. Yet this practice is still developing and these bodies enjoy only moderate legitimacy: in most regions they do not contribute to the resolving of conflicts and in only six - Moscow, Nizhniy Novgorod, Ekaterinbourg, Rostov, Petrozavodsk, Voronezh - do they perform a quasi-judicial role.<sup>150</sup>

## 2.4. Trends in Court Practice

### Trends Analysis

102 decisions of courts of general jurisdiction and courts of arbitration from 17 administrative units in Russia were collected and analysed.<sup>151</sup> The cases were delivered between 2002 and 2006.

- 8 claims relating to the defence of honour, dignity and business reputation were fully upheld. This represents 7.8% of the total number of decisions;
- 46 claims were partially upheld (45.1%);
- 48 claims were rejected by the court (47.1%).

This is represented in the diagrams below:

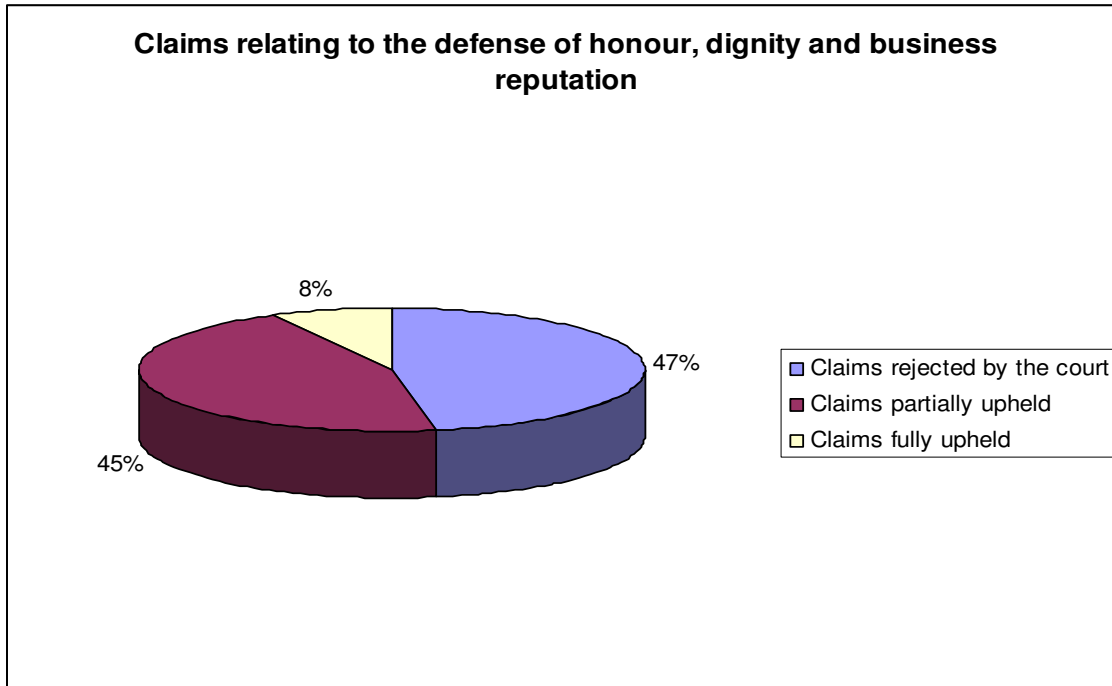
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<sup>149</sup> See Section 1.3.

<sup>150</sup> At the national level there are two self-regulatory bodies: the Grand Jury of the Russian Union of Journalists (RUJ) and the Press Complaints Commission. The latter was established in 2005 and is intended for all Russian journalists, including those who are not RUJ members; it is therefore currently enjoying more popularity than the Grand Jury. See the website of the Commission (Obschestvennaya Kollegia po Zhalobam na Pressu), <http://collegium.ruj.ru/index/html>.

<sup>151</sup> The administrative units are: the *oblasts* of Voronezh, Lipetsk, Belgorod, Kursk, Ryazan, Tambov, Tula, Moscow, Nizhniy Novgorod, Yekaterinburg, Kirov, Ivanovo, Vladimir; the Republics of Komi, Tatarstan and Chuvashiya; and the city of Moscow. The cases were collected by the Mass Media Defence Center and a group of lawyers from Nizhniy Novgorod, Yekaterinburg and Moscow. They represent a sample of cases from the selected regions.

Diagram 1



The group of lawyers who analysed the cases identified as the most pressing issue with defamation the high number of defamation cases filed against the media, which produces a chilling effect on its work - even if only a minority of claims are ultimately fully upheld. They further noted that when claims are fully upheld it is frequently due to journalists not benefitting from an adequate defence in court. In regions where specialised legal defence is not available, the number of claims partially or fully upheld is likely to rise. In the claims that were partially upheld, judges ruled on (partial or full) refutation and moral compensation (reduced, to varying degrees, from the plaintiff's initial claims).

#### Implementation of the European Convention on Human Rights

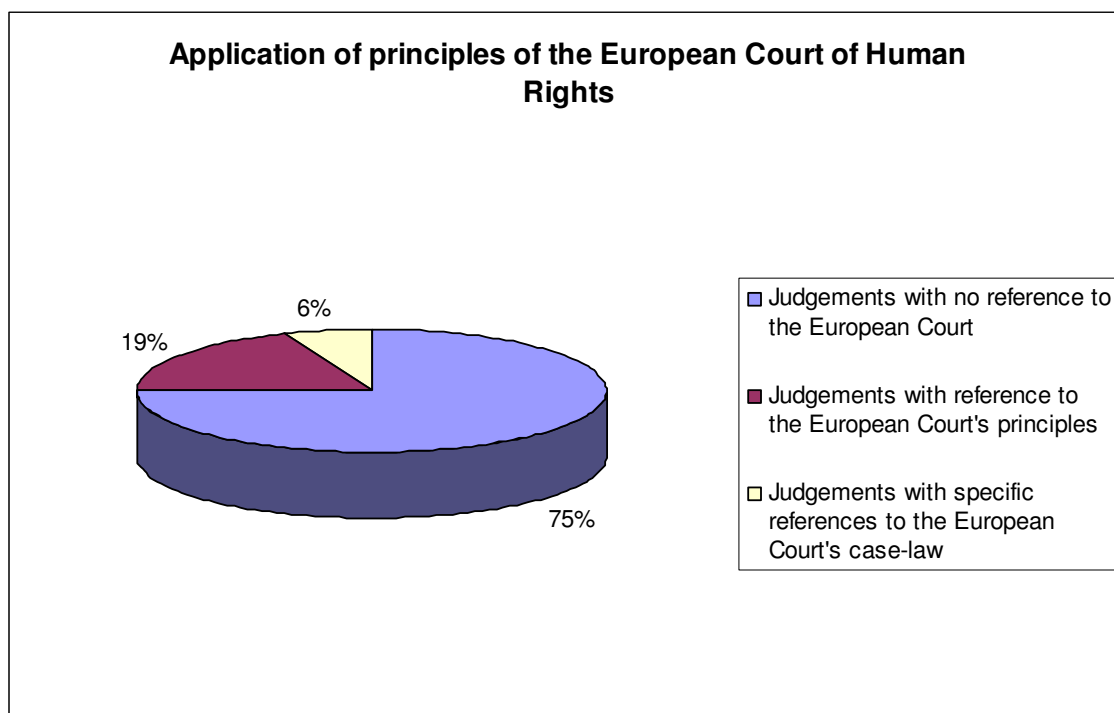
In practice Russian domestic courts still apply the European Court's case law in relatively few cases. Judges referred to the ECHR in 19 out of the 102 decisions analysed, or 18.6% of cases. In the majority of them, the courts correctly applied Article 10 of the ECHR.

Russian courts cited specific judgements of the Court in only seven of the 102 decisions analysed - 6% of the total. The judgement most frequently referred to is *Lingens v. Austria*, which was applied in four of the judgements. This is because it contains two of the Court's principles most commonly applied in Russia: the need to distinguish between an opinion and a statement of fact, and the principle that public figures should tolerate greater criticism than ordinary citizens. In addition, *Lingens v. Austria* was the first judgement made available in Russian. It is also the most popular and well-known judgement among lawyers, who often refer to it while preparing their arguments in a

case. There have also been cases in which judges referred to judgements in *Thoma v. Luxemburg*, *Oberschlick v. Austria* and *The Sunday Times v. the UK*.

Judgements of the Court are increasingly being referred to: in 2003 2% of the cases analysed included quotations from it, but by 2005 this had risen to 5%. One of the reasons for this is likely to be the 2005 Supreme Court Resolution, which indicates the need to apply the principles of differentiation between facts and opinion and of public officials' requirement to be tolerant of criticism.

### Diagram 2



### Public Officials and Tolerance of Criticism<sup>152</sup>

Article 152 of the Russian Civil Code does not place a limit on who is allowed to claim for the protection of honour, dignity and business reputation. However, as this research shows, public figures<sup>153</sup> and State bodies and officials initiate a large number of lawsuits for the protection of honour, dignity and business.

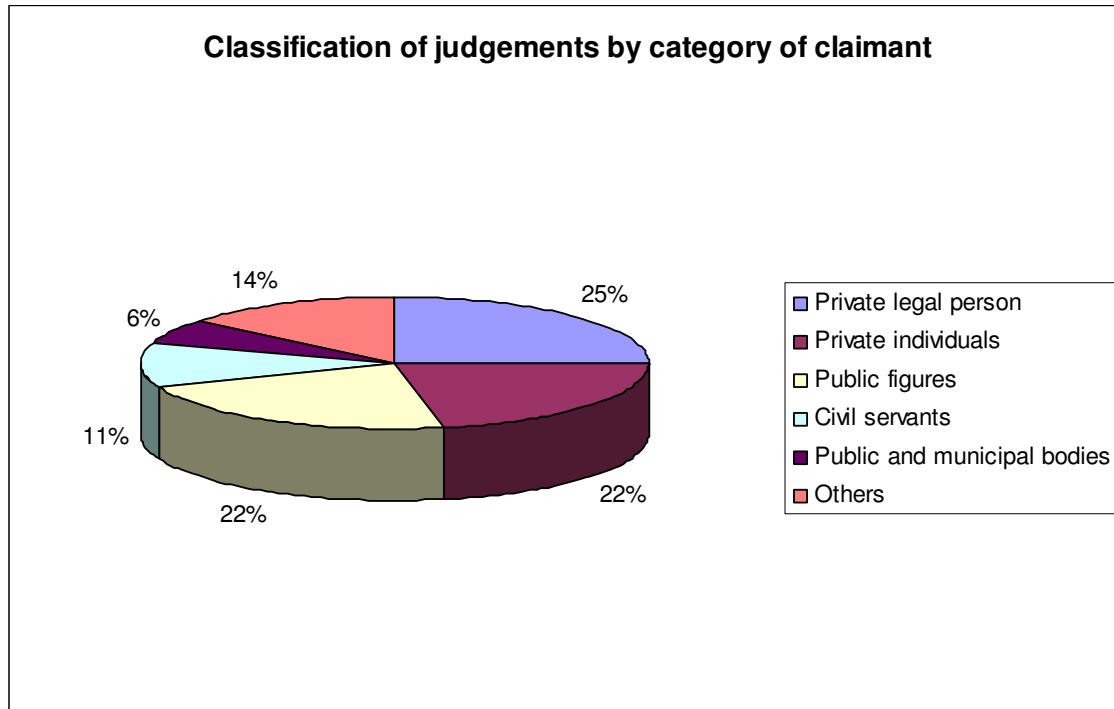
In the diagram below, the judgements have been classified by category of claimant.

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<sup>152</sup> For the relevant European Court principles, see Section 1.2 (Public Officials)

<sup>153</sup> In addition to politicians and elected representatives, for the purposes of this research the term includes oligarchs and powerful businesspeople.

**Diagram 3**



In 39% of cases the claimants were public figures, public bodies or officials. Of these cases, the principle that public figures should tolerate greater criticism than ordinary people was applied in only eight decisions (17.8%).

Russian district courts often consider the status of a public figure, but their approach differs fundamentally from that of the European Court of Human Rights. District courts routinely take the public status of the claimant into consideration to increase compensation for moral harm and as grounds for imposing the refutation of the impugned expression. In eight cases the status of the claimant affected the amount awarded in damages. In seven of these the claimant's status was used as a reason to increase the amount of compensation, directly contradicting the principle that public officials should show greater tolerance.

However, there are some positive examples of the application of this principle. In a decision of the Leninskii district court in Kostroma, the court ruled that the governor of Kostroma was a public figure and should therefore be more tolerant of criticism:

Political figures, by seeking to enlist public support, thereby agree to become an object of public political debate and criticism in the media.<sup>154</sup>

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<sup>154</sup> Judgement of the Leninskii district court in Kostroma in *V. Shershunov v. the Chronometer Ltd., A. Skudayeva*, 15 June 2006.

In another judgement, where the claimant was a deputy of the State Duma, the court stated:

The Court notes that where judgements and opinions are expressed in the press and its sources on the ideas and the position of a political figure, critical and shocking statements are allowed, including for the purpose of preventing the candidate from being elected to public bodies... Despite the fact that the newspaper published an article with a weak factual basis, containing severe criticism using commentaries quoted from the Criminal Code of the Russian Federation, as well as polemical language, Article 10 of the Convention protects statements and ideas which insult, shock and disturb, all the more so here as they have been used in respect of a public figure and directly concern his activity as a deputy.<sup>155</sup>

In 2003-2006, the percentage of cases from the sample where this principle was applied remained largely stable, while in 2002 it was not applied in any of the cases analysed.

### **Public Interest and Good Faith**

As noted, the European Court of Human Rights, in analysing whether there has been a violation of Article 10, takes into consideration the role of the media as a public “watchdog” and disseminator of information in the public interest.<sup>156</sup>

In the Russian legal system, however, the concept of “public interest” is very rarely applied. Its use and interpretation are generally only shown in the judgements of the Russian Constitutional Court. District courts seldom take into account the public interest when handing down judgements and there is only one reference to the term in Russian law.<sup>157</sup>

70% of the analysed judgements concerned publications that were either in the public interest or part of a political debate. However, in only four of these 71 cases did the judge take into account either of the principles in making his/her decision.

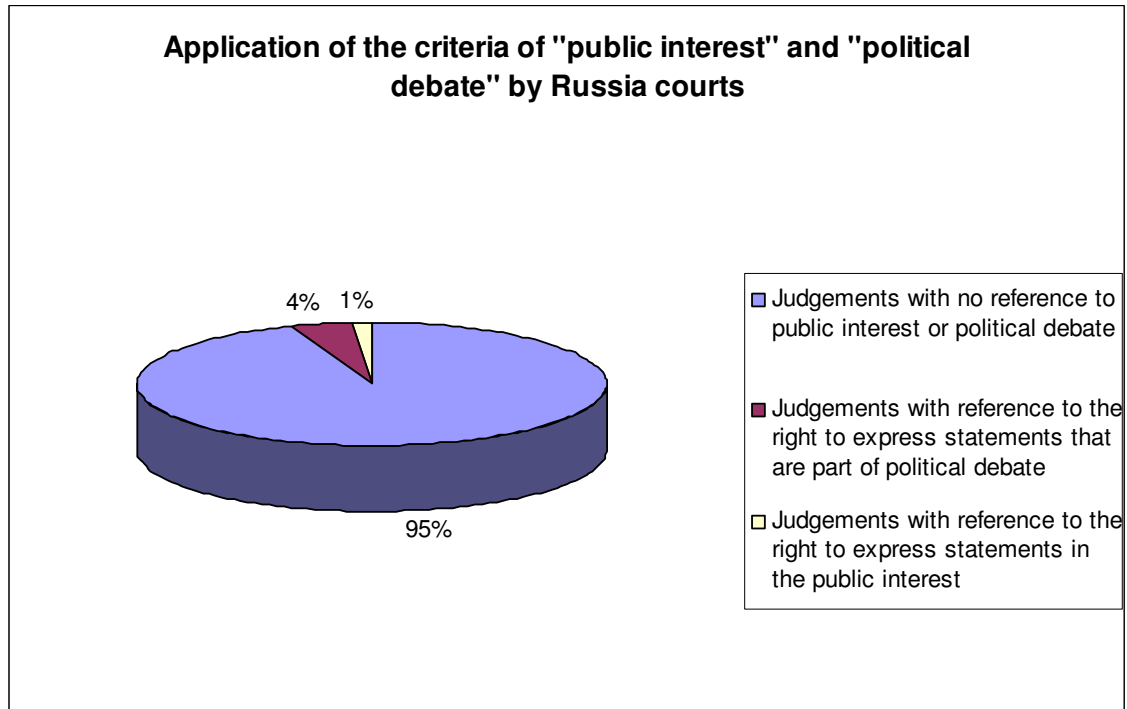
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<sup>155</sup> Judgement of the Leninskii district court in Voronezh in *G. Kudryavtseva v. the Promyshlenni Vestnik editorial board*, 3 November 2005.

<sup>156</sup> See Section 1.

<sup>157</sup> It Article 49(5) of *The Law On Mass Media*, which states: “A journalist is obliged to ask consent of a person to disseminate information about his/her private life, unless he is doing so in order to protect public interest.”

Diagram 4



The chart above represents the 71 cases in the public interest analysed. In only three of these did Russian courts rule that the freedom to express one's opinion was a factor in political debate. In the defamation case *D. Rogozin, deputy of the State Duma of the Russian Federation v. V. Kulakov, Governor of Voronezh region, 'Komsomolskaya Pravda in Voronezh' and other municipal editions*, the Voronezh Central District Court stressed that the public's right to receive information on the candidates' positions during election campaigns outweighed the right of these candidates to defend their honour and dignity:

Political figures, by seeking to enlist public support, thereby agree to become an object of public political debate and criticism in the media... In the opinion of the Court, the public statements of V. Kulakov that are the subject of the dispute are of an evaluative nature and are acceptable in the context of political rivalry between the two parties, as they express a subjective assessment of D. Rogozin's activity as a deputy, made by V. Kulakov... In the opinion of the Court, freedom of political debate is one of the basic fundamentals of a democratic society. The right of the public to know about the candidates' positions outweighs the right of a public figure to defend his honour and dignity.

In only one of the 71 decisions did the court refer to the public interest of the impugned expression as a significant factor in its judgement. In particular, the judgement of the Leninskii District Court (in Voronezh) in the defamation case *Sergey Naumov v. The Voronezhskiy Vesti newspaper* stated:

The Court takes into account the public interest and the right of the public to know and receive timely information concerning public figures, and holds that on the whole the publication was fair.

The infrequent references to the public interest in court decisions reveal a number of problems in Russian legal system. First, Russian legislation does not have an expression comparable to “public interest” in the context of defamation cases. Second, this concept is extremely rarely applied in Russian judicial practice, which obviously makes it difficult to apply.

In defamation cases, the assessment of the public interest in the disputed expression implies a need to take into account the defendant’s intentions when determining whether and to what extent moral damage was caused. However, in the decisions analysed, courts took into account the journalist’s intent as a factor influencing possible awards for damages in only two cases. This is not a surprising result, since Russian legislation includes the provision that compensation for moral damage can be imposed irrespective of the defendant’s intentions (Article 1100 of the Civil Code of the Russian Federation<sup>158</sup>). In addition, there is limited trust in the media in Russia. According to a study of the Russian NGO “Commission for Freedom of Information”, only 17% of Russians trusted the media in December 2005 – presumably due to the generally low standards of journalism and journalists’ frequent lack of respect for ethical principles. This perception can extend to judges, some of whom view the activities of journalists with suspicion.

Moreover, in 45.4% of judgements analysed in which claims were fully or partially satisfied, moral damage was automatically held to exist when the courts ruled defamatory statements had been disseminated. There was no separate process to show the presence - or absence - of moral damage. In one case, a court stated:

Bearing in mind the claim was proved during court proceedings and the fact that the dissemination of statements not corresponding to reality was established, the plaintiff’s claim for compensation for moral damage should be satisfied. This is because point 5 of Article 152 of the Civil Code of the Russian Federation provides that a citizen, in respect of whom defamatory statements were disseminated, has the right to claim, along with the refutation of these statements, compensation for loss and moral damage caused by dissemination of these statements. That is to say that after the fact of the dissemination of defamatory statements is established, it is not necessary to prove other factors. As

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<sup>158</sup> *Basis of Compensation for Moral Harm*. It states: “Compensation for moral harm is independent from the intent of the offender in the cases of... harm caused by dissemination of information, damaging honour, dignity and business reputation.”

a result, with regard to the circumstances of the case, the Court finds in favour of awarding moral damages.<sup>159</sup>

In some decisions this was not explicitly mentioned, but it followed directly from the content and logic of the decision. In these cases, the courts established that statements were defamatory and had been disseminated, and then immediately moved on to examine the amount of moral damages.

The Court emphasises the importance in defamation cases of assessing whether the defendant acted in good faith when preparing the contested article.<sup>160</sup> This must be taken into account in striking a balance between the right to freedom of expression and the right to protect one's reputation.

However, in only five of the 71 judgements on matters of public interest analysed did the court examine the professional conduct of the defendant while preparing the contested publication. In the majority of cases, there was no analysis of the journalist's conduct and simply a conclusion that the defendant had acted in bad faith. Some judges appear to believe the dissemination of defamatory information could occur only when journalists do not comply with their professional duties.

In one decision, a court came to the conclusion that the journalist's actions led to the publication becoming unbalanced and one-sided:

The information published by the author is one-sided and taken out of the context of the information as a whole, since it does not include the opinion of the other party... on the matters concerned.<sup>161</sup>

### **Differentiation between Opinions and Statements of Fact**

The Court holds that a distinction must be made between statements of fact and value judgments, as the latter are not susceptible to proof.<sup>162</sup> This was reiterated in Paragraph 9 of the 2005 Supreme Court Resolution and since its adoption Russian courts have been obliged to apply this principle.

Prior to this, in most cases analysed (68%) the courts did distinguish between value judgements and statements of fact. However, following the 2005 Resolution, the number of decisions in which this principle has been applied has increased significantly, and it is now the most frequently applied principle of the Court in the Russian legal system.

In 57 of 102 cases analysed, the plaintiffs requested the refutation of statements. In 25 cases, the court ordered the refutation of an opinion; in seven of these, the court applied the principle of the

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<sup>159</sup> Decision of the Sovetskii district court in the case *V. Sinitsin, S. Feigin, R. Babayev, N. Podshivalkin v. the Novaya Gazeta in Voronezh Editorial Board*, 30 October 2002. This case was also submitted to the European Court of Human Rights by MMDC.

<sup>160</sup> See Section 1.2 (Reasonable Publication).

<sup>161</sup> Decision of the Oktyabrskii district court of Ryazan, 1 July 2003.

<sup>162</sup> See Section 1.2 (Facts vs. Opinions).



differentiation between fact and opinion in ordering a refutation. However, these principles were applied selectively. For example, while rejecting claims to refute some opinions, some judges ruled on the refutation of others (sometimes within the same article). Hence, the courts still displayed some confusion in the distinction between facts and opinions.

### **The Courts' Application of Other Supreme Court Resolutions**

The Russian legal system includes a number of other Supreme Court resolutions that could be applied in defamation cases.<sup>163</sup> However, of the 102 cases analysed, two resolutions were not applied at all: *On a Judicial Decision* (No.3, 19 December 2003) and *On the Application by Courts of General Jurisdiction of Generally Accepted Principles and Standards of International Law and of the International Agreements of the Russian Federation* (No.5, 10 October 2003). Instead, courts referred frequently to the 2005 Resolution - in 66.6% of cases – on the need to apply the ECHR and the judgements of the European Court of Human Rights. In seven cases, when determining the amount of compensation for moral damage, the courts referred to the 1994 Supreme Court Resolution *Some Questions on the Application of the Legislation on Moral Damage*. This is not surprising, as the 2005 and 1994 Resolutions both provide guidelines for courts in defamation cases and cover compensation for moral damage, whereas the other resolutions are more general in nature.

### **Analysis of Selected Defamation Cases**

Eight decisions by a range of mostly lower-level Russian courts – for example courts of general jurisdiction, including regional and municipal courts, and arbitrage courts – involving claims for defamation were analysed in more detail to determine the extent to which they relied on European standards, either explicitly or otherwise.<sup>164</sup> The defamation claims were dismissed in five of the eight cases and accepted in whole or in part in the other three. Six of the cases were brought by political figures, one by a businessman and one by a private individual.

A number of observations flow from our analysis. First, all three of the cases where defamation claims were upheld are problematical from the perspective of European standards on freedom of expression. In *Kostyorin*, the court held that certain statements were insulting to the claimant. These included:

- An allegation he had disposed of an expensive car just before the elections, on the basis that the term used (“ousted” himself) was insulting;

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<sup>163</sup> See Section 2.2.

<sup>164</sup> The cases were: *Grigoriev and the Administration of the Municipal Education of the Klepikovskiy Region v. Press Club Ltd. and others*; *Kornev and others. v. Barkalov and Zori Newspaper*; *Kostyorin v. Leninskaya Smena Newspaper Ltd. and Kochetkov*; *Naumov v. The Voroneshskie Vesti Newspaper*; *Neva, CJSC v. MAPT-Meida, CJSC, and others*; *Shershunov v. Chronometer, Ltd and Skudaeva*; *Sinitsin and others v. Barkalov and Zolotukhin, Publisher of Novaya Gazeta in Voronezh Newspaper Ltd.*; and *Tabachnikov v. Surkov and Bereg newspaper*. In the *Shershunov* and *Naumov* cases, only an overview of the case was reviewed.

- The allegation he had reached the “sinecure” and had a complex of being “the first chap in the village”, on the basis that this meant he was greedy;
- The claim he had “to follow the rules of conspiracy”, on the basis that it had not been shown that he was part of a criminal gang;
- The title “Kolya” (BMW), presumably an indirect accusation of corruption.

All of these are perfectly legitimate rhetorical devices. A number of other allegations were dismissed as not being defamatory on the basis they were value judgments, did not identify the claimant or did not diminish his honour.

In *Sinitin and others*, the court held that the defendants had failed to prove the truth of their allegations. The court specifically held that not only affirmative statements, but also opinions were subject to proof of their veracity (a “validity check”), despite the fact both the European Court of Human Rights have ruled out requiring defendants to prove the truth of value judgements. It also held that references to rumours, anonymous experts and competent sources did not relieve the defendants from proving the truth of their statements. Significantly, the defendants had relied extensively on an unofficial audit of the City of Novovoronezh. They were unable to obtain an official copy and the court specifically refused to obtain one for them.

The case provides a good demonstration of the complex relationship between the right to obtain information from public authorities and defamation law, since access to the official audit was key to the defendants defence. Regardless, it is clear that European standards allow defendants to rely on leaked official documents, contrary to the ruling of the court.<sup>165</sup> Furthermore, the availability of a reasonableness defence may well have assisted the defendants. As it was, the court failed to note the obvious public interest in the publication of the story, which contained allegations of wrongdoing and political machinations.

Finally, in *Grigoriev*, the court upheld a defamation claim against a newspaper that had published a letter from local residents criticising the authorities, on the basis that the defendant had failed to prove the truth of its contents. The court was dismissive of the evidence presented by the defendant, failing to emphasise the higher standard of tolerance required of political figures, even though one plaintiff was a public figure and the other was actually a public body (which, in many countries, cannot even bring a defamation claim). Some of the statements were clearly value judgements and as such incapable of being proved. Furthermore, the newspaper would have a strong claim to being protected directly against the defamation claims under European standards on the basis that it was publishing the statements of others and in a context that clearly engaged the public interest.

Second, it would appear from the claims dismissed that the courts were of the view that opinions were absolutely protected under Russian law and, in some cases, the court sought to derive

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<sup>165</sup> See *Colombani v. France*, 25 June 2002, Application No. 51279/99.

this conclusion from European rules. The cases contain statements to the effect that to order refutation of an opinion or to require proof of it would breach the right to freedom of expression. The latter is clearly correct, as noted above. The idea that opinions should not be subject to refutation can also be strongly argued on the basis that one should not have to withdraw one's opinions, given one has an absolute right under international law to hold them. However, patently unreasonable or exceedingly harshly-worded opinions might be liable under the ECHR. But the courts did seem to take this position in many of the cases, and in at least one a court specifically ruled out even judicial refutation of "opinions, assumptions and theories."<sup>166</sup>

The attitude of Russian courts to opinions is extremely important in defamation cases, since in every case examined in which the defamation claim was rejected, as well as most of those involving the partial rejection of a claim, the courts relied at least in part on the finding that the statements involved were value judgements. In other words, there is an extremely close relationship between finding that the statements were opinions and the chance of the defamation claim being rejected.

Third, the substantive grounds upon which cases were decided were fairly limited in scope, reflecting the limited range of defences to a claim of defamation. All of the cases upholding the defamation claim were based either explicitly or implicitly on a failure to prove the truth of the impugned statements and, as noted, the fact that the statements were value judgements. In three cases, and one partial rejection case, reliance was placed on the fact the claimants could not be identified by the statements. In *Kornev*, the court rejected the claim of the mother of the person to whom the impugned statements related on the basis that only those against whom statements are directed may claim compensation for harm to reputation. In *Neva*, the court recognised the right of the defendants to repeat statements made by others, in that case a Finnish TV programme. Finally, in *Tabachnikov*, the court relied, among other things, on the failure of the claimant to prove moral suffering, particularly as he was a public official. This would, however, appear to run counter to the 2005 Resolution providing guidance to judges in ruling on defamation cases,<sup>167</sup> which lists the matters the plaintiff needs to prove. Overall, two grounds were relied upon for rejecting most of the claims, with three others playing a minor supporting role.

Fourth, the cases in which the defamation claims were rejected all referred to either European standards or the public interest in rejecting liability for the statements; most referred to both.<sup>168</sup> In stark contrast, none of the cases in which the claims were upheld referred to either European standards or the public interest in publication, although one did refer to international standards (for the proposition that freedom of expression might be subject to limitations).

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<sup>166</sup> See *Kornev*.

<sup>167</sup> See Section 3.1.

<sup>168</sup> Just one of the five cases omitted to mention European standards and just one again failed to refer to the public interest in publication.

The fifth point, closely related to the above, refers to the role the public interest played in the cases. Although, as noted, courts in four of the cases did observe that the statements were in the public interest, often specifically noting the law requires public figures to tolerate a greater degree of criticism, it is not clear from the ruling what role this played. Closer analysis suggests a combination of the rather rigid approach of Russian defamation law and the limited interpretation of European standards by the Supreme Court's 2005 Resolution, leaves little scope for the public interest to play a formal role. In the absence of a reasonableness defence, for example, failure to prove the truth of factual and defamatory statements leads to liability. Courts may recognise political figures are required to tolerate a greater degree of criticism but, once again, failure to prove the truth of factual allegations, even against politicians, will lead to liability. In other words, courts may recognise the importance of protecting public interest statements, but Russian defamation law affords few formal opportunities to give this legal effect.

Finally, we turn to the role played by the Supreme Court resolutions on defamation. Five cases, from among both those that rejected (three) and those that upheld (two) defamation claims referred to the relevant resolutions of the Supreme Court. It is significant that the timing of the cases meant only one referred to the 2005 Resolution; the other four referred to its previous version, from 1992, the judgements having been pronounced before 2005.

### **3. IMPLEMENTATION OF INTERNATIONAL STANDARDS ON DEFAMATION**

#### **3.1. Domestic Implementation: The 2005 Supreme Court Resolution**

##### **Analysis of the Resolution**

In 2005, the Supreme Court of the Russian Federation, in a plenary sitting, issued a resolution providing guidance to judges in defamation cases,<sup>169</sup> with a view to replacing its earlier, outdated, resolution on the same matter.<sup>170</sup> Although progressive in certain aspects, the 2005 Resolution is less forward-looking in others. It is a welcome attempt to bring Russian practice into line with the standards of the ECHR. At the same time, however, it fails to address certain important defamation issues highlighted in the case law of the European Court of Human Rights.

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<sup>169</sup> Resolution of the Plenary of the Supreme Court of the Russian Federation *On Judicial Practice in Cases on Protection of Honour and Dignity and Business Reputation of Natural and Legal Persons*, 24 February 2005, No. 3.

<sup>170</sup> Resolution of the Plenary of the Supreme Court of the Russian Federation of 18 August 1992, No. 11 *On Several Questions Arising in the Consideration by Courts of the Cases regarding Protection of Honour, Dignity Business Reputation of Natural and Legal Persons*, as amended by Resolutions of the Plenary of the Supreme Court of the Russian Federation of 21 December 1993, No. 11, and of 25 April 1995, No. 6.

## ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

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Article 126 of the Russian Constitution entitles the Supreme Court, in plenary, to give “clarification on questions of judicial practice.” This function is inherited from the Soviet legal system and exercised through the adoption of resolutions interpreting existing laws, and these are normally followed by lower courts in their day-to-day practice. A resolution is not the outcome of any concrete case but rather an interpretation of general laws and practice (in the case of the 2005 Resolution, specifically Article 152 of Civil Code, which sets out the rules on defamation).

The 2005 Resolution addresses a number of questions of a technical nature – for example clarifying the delimitation of jurisdiction in defamatory proceedings between courts of general jurisdiction and courts of arbitration – sets out a number of general principles, and provides specific guidance on several issues relevant to the right to freedom of expression.

The preamble to the 2005 Resolution refers to constitutional provisions on freedom of expression (Article 29 of the Constitution) and protection of dignity and good name (Article 23), noting a balance must be maintained between these potentially conflicting rights. This is an important point, since courts might otherwise fail to engage in a balancing exercise when applying defamation law, and instead simply apply the technical defamation rules without regard to the impact on freedom of expression. It also refers to Article 10 of the ECHR, which is directly applicable under Russian law, and the need to take into consideration the case law of the European Court of Human Rights. This proposition is based on Russia’s 1998 ratification of the ECHR, in tandem with the monistic approach taken in the Russian Constitution, whereby international law forms part of the domestic legal system,<sup>171</sup> and it has been recognised in earlier Supreme Court resolutions.<sup>172</sup>

The 2005 Resolution claims the way Russian courts deal with cases falling within their remit is “basically correct”; but in fact the failure of Russian courts to properly apply European standards on freedom of expression remains a significant problem, highlighted by recent decisions of the European Court of Human Rights which found Russia to be in breach of its human rights obligations.<sup>173</sup>

Interestingly, although the 2005 Resolution is primarily an interpretation of international and constitutional standards, it reiterates the position of national laws on a number of occasions. For example, its reliance on the *Law On Mass Media* leads it to conclude certain principles apply only to the media, whereas under international law they are more broadly applicable. The rights of correction and reply are usually recognised as media-specific remedies in Europe,<sup>174</sup> as they are in the 2005

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<sup>171</sup> Article 15(4) of the Constitution of the Russian Federation states: “Generally accepted principles and norms of international law and international treaties of the Russian Federation constitute an integral part of its legal system.”

<sup>172</sup> See Resolution of the Plenary of the Supreme Court of the Russian Federation *On the Application by Courts of General Jurisdiction of Generally Accepted Principles and Standards of International Law and of the International Agreements of the Russian Federation* (No.5, 10 October 2003), para. 10.

<sup>173</sup> See, for example, *Chemodurov v. Russia*, note 61, and *Dyuldin and Kislov v. Russia*, note 36.

<sup>174</sup> Recommendation (2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment, for example, is applicable to “any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.”

Resolution. However, other matters referred to as applicable only to the mass media by the 2005 Resolution – such as the right to distribute information on private life “with a view of protection of public interests” (Para. 8), the right to criticise politicians (Para. 9), or non-liability for certain types of statements (Para. 12) – should be applicable to all forms of communication.

The 2005 Resolution recognises the possibility of criminal defamation as provided for in Article 129 of the Russian Criminal Code. While the European Court of Human Rights has never specifically ruled out criminal defamation, it has expressed reservations about it.<sup>175</sup> ARTICLE 19 is of the view that criminal defamation is unnecessary and thus unjustifiable as a restriction on freedom of expression.<sup>176</sup>

The 2005 Resolution recognises that political figures may be criticised through the media for the way they carry out their functions, insofar as this is necessary to ensure transparency and the responsible exercise of their functions (Para. 9),<sup>177</sup> on the basis they have decided to appeal to the confidence of the public and thus accepted that they may become objects of public political debate. This is an important freedom of expression point and reflects the long-standing position of the European Court of Human Rights,<sup>178</sup> although the 2005 Resolution prefers to cite the Declaration on Freedom of Political Debate in the Media, adopted by the Committee of Ministers of Council of Europe in 2004 (and in particular, paras. III and IV thereof, rather than European Court of Human Rights’ jurisprudence).

The 2005 Resolution is, however, narrower than European standards in several important respects. As noted, pursuant to the jurisprudence of the European Court of Human Rights, the right to criticise politicians is not limited to the mass media.<sup>179</sup> Equally importantly politicians acting in their public capacity may be subject to criticism, and the limits of acceptable criticism in this respect are wider than in relation to a private individual.<sup>180</sup> In these cases, the European Court of Human Rights has stated restrictions on freedom of expression should be interpreted narrowly,<sup>181</sup> and should not exclude “recourse to a degree of exaggeration, or even provocation”<sup>182</sup> as an aspect of the right to freedom of expression. This is particularly significant in the Russian context as defamatory

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<sup>175</sup> See, for example, *Castells v. Spain*, 24 April 1992, Application No. 11798/85.

<sup>176</sup> See *Defining Defamation*, note 11, Principle 4.

<sup>177</sup> Point 9 states:

Courts shall have in view that in accordance with Articles 3 and 4 of the Declaration on Freedom of Political Debate in the Media, adopted on 12 February 2004 at the 872nd session of the Committee of Ministers of the Council of Europe, political figures, by seeking to enlist public support, thereby agree to become an object of public political debate and criticism in the media. Public officials may be subjected to criticism in the media on the way in which they fulfil their duties, inasmuch as this is necessary to ensure that they exercise their powers in an open and responsible manner.

<sup>178</sup> First articulated in *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 42.

<sup>179</sup> See, for example, *Schwabe v. Austria*, 28 August 1992, Application No. 13704/88, *Nikula v. Finland*, 21 March 2002, Application No. 31611/96 and *Nilsen and Johnsen v. Norway*, 25 November 1999, Application No. 23118/93.

<sup>180</sup> See, for example, *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92, para. 29.

<sup>181</sup> See, for example, *Lopes Gomes da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 33.

<sup>182</sup> See *Prager and Oberschlick v. Austria*, 26 April 1995, Application No. 15974/90, para. 38.

proceedings are frequently instituted by powerful public figures due to discussion (and often harsh critique) in the media of their activities.<sup>183</sup> The European Court of Human Rights has also applied this principle to civil servants.<sup>184</sup>

The 2005 Resolution, for the most part, is limited in scope to false statements of fact that cause harm to reputation, as this is the meaning of the term “defamation” in Russian law. However, it does also call on courts to distinguish between statements of facts and value judgments or opinions, since only the former may be verified as true (Para. 9),<sup>185</sup> in line with European Court of Human Rights’ jurisprudence.<sup>186</sup> In this way, it extends some protection to statements of opinion by effectively prohibiting courts from requiring defendants to prove they are true. The importance of this in the Russian context is reflected in a number of court decisions throwing out defamation claims on the basis defendants have expressed opinions that are not capable of being proven to be true or false.

However, the 2005 Resolution does not highlight the fact value judgments are also protected by Article 10 of the ECHR guaranteeing freedom of expression, and even highly critical statements are often protected, in particular if there is “pressing social need”<sup>187</sup> (for example where the statement has been made in the context of debate on a matter of public concern) or “there exists a sufficient factual basis for the impugned statement.”<sup>188</sup>

Paragraph 9 also notes that Article 152 of the Civil Code places the burden of proof of the truthfulness of an impugned statement of fact on the respondent. Although the Court has never disagreed with this approach,<sup>189</sup> ARTICLE 19’s principles in this area call for this onus to be placed on the plaintiff, at least in cases involving matters of public concern.<sup>190</sup>

The 2005 Resolution recalls Article 57 of the *Law On Mass Media*, which exempts media outlets, journalists and editors-in-chief from defamation liability for statements made in certain specific circumstances. These include statements: where the media are under a legal obligation to transmit; originating from news agencies or other media; in response to an official request for information addressed to the public authorities; made at a public meeting of the legislature or public

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<sup>183</sup> A recent Russian case illustrating the willingness of Russian courts to punish journalists who dare to criticise high-profile politicians is *Krasulya v. Russia*, 22 February 2007, Application No. 12365/03. See also the cases referred to in note 173.

<sup>184</sup> See *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97.

<sup>185</sup> It states:

Following Article 10 of the European Convention for the protection of Human Rights and fundamental freedoms and Article 29 of the Constitution of the Russian Federation that guarantee the right of every person to freedom of thought and speech, and freedom of mass information, and following the position of the European Court of Human Rights, *when considering defamation cases the courts should distinguish between statements of fact, which are subjected to proof, and value judgements*, opinions, and views, which are not the subject of legal defence under Article 152 of the Civil Code of the Russian Federation, since, being an expression of the defendant’s subjective opinion and views, they cannot be verified as regards their correspondence to reality [italics added].

<sup>186</sup> See *Lingens v. Austria*, note 178.

<sup>187</sup> See, for example, *Tammer v. Estonia*, 6 February 2001, Application No. 41205/98, para. 60.

<sup>188</sup> See, for example, *Jerusalem v. Austria*, 27 February 2001, Application No. 26958/95, para. 43.

<sup>189</sup> It has held that it is unreasonable to require accuracy in all circumstances. See below where this is discussed in the context of a reasonableness defence.

<sup>190</sup> See *Defining Defamation*, note 11, Principle 7.

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body (including a political party); made by public officials or distributed by official press services; and broadcast on air that cannot be edited in accordance with the law (Para. 12). Para. 11 also protects certain statements made in the course of legal proceedings, although such protection does not extend to statements about individuals who are not parties to the case.

These are important protections for free speech. They recognise in many cases that the media are the messengers, rather than the authors, of the statements, as well as the role that the media play in a democracy in transmitting important messages to the public.

At the same time, the European Court of Human Rights has, in this area, provided wider protection than is recognised by the 2005 Resolution. There is no reason to limit protection in these cases to the media, and there is no indication that the Court would do so. Its case law refers explicitly to the need to protect statements made in the course of legislative proceedings<sup>191</sup> and before the courts,<sup>192</sup> and it has not limited the latter to instances where the statements are directed at the parties involved, as is the case with the 2005 Resolution. It has also extended general protection to statements quoted from official public reports,<sup>193</sup> statements contained in leaked confidential reports,<sup>194</sup> and even, in some cases, statements made by others.<sup>195</sup>

A very serious shortcoming of the 2005 Resolution is that it fails to recognise an important theme in the European case law to the effect that defamation liability should not ensue in certain circumstances - generally referred to as the “reasonableness defence.” The European Court of Human Rights has, for example, stated that stories in the public interest should not attract defamation liability subject to the proviso that the authors “are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”<sup>196</sup> This is the case even where the statements contain inaccuracies.<sup>197</sup>

The 2005 Resolution contains certain other statements that conflict with ARTICLE 19’s principles. It recognises, for example, the right of relatives of a deceased person to bring a defamation case (Para. 2), whereas ARTICLE 19 is of the view a defamation case should expire upon death (although other remedies - for example, for actual pecuniary losses - may well survive).<sup>198</sup> ARTICLE 19 also recognises the need for clear and short limitation periods for defamation actions, given the chilling effect of potential cases left hanging for unduly long periods, whereas the 2005 Resolution provides that, in general, that they are not subject to any limitation of action (Para. 14).

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<sup>191</sup> See *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, quoting with approval the admissibility decision of the European Commission of Human Rights in *Young v. Ireland*, 17 January 1996, Application No. 25646/94.

<sup>192</sup> See *Nikula v. Finland*, 21 March 2002, Application No. 31611/96.

<sup>193</sup> See *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93.

<sup>194</sup> *Colombani v. France*, note 165.

<sup>195</sup> See *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97.

<sup>196</sup> *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para 65.

<sup>197</sup> See, for example, *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.

<sup>198</sup> *Defining Defamation*, Principle 2(b)(iv).



Finally, the 2005 Resolution states that, in setting the level of damages awarded in defamation proceedings, courts should take into consideration the character and content of the publication in question, and that compensation awards should be proportionate and not lead to an infringement of freedom of media (Para. 15). This is in line with European standards, which clearly recognise that unduly large damage awards, on their own, represent a breach of the right to freedom of expression.<sup>199</sup> Indeed, it may be one of the most important statements in the 2005 Resolution, as exorbitant damage awards are largely responsible for the significant chilling effect exerted by defamation law in many countries.

The Russian Supreme Court's 2005 Resolution is undoubtedly an important step forward in terms of providing guidance to Russian courts when interpreting the law in relation to defamation. It recognises the need to take freedom of expression into account when applying defamation laws, and recognised also that judgements should take into account the principles espoused by the European Court of Human Rights (implementation of these standards, of course, is an entirely different matter). At the same time, however, it fails to capture some of the most important protections for freedom of expression established by the Court.

### **Implementation of the Resolution**

The 2005 Resolution was adopted for a number of reasons: routine reviews by the Supreme Court of provisions that are problematic to translate into practice; statistics (defamation cases are among those that are most frequently appealed); and calls for its adoption by several actors, such as the Bureau of the Representation of the Russian Federation before the European Court of Human Rights,<sup>200</sup> Russian NGOs (such as GDF) and the Council of Europe.

There are conflicting opinions as to the real impact of the 2005 Resolution. Several lawyers believe it was a fundamental move towards the harmonisation of Russian law with international standards on freedom of expression. One Russian lawyer described it as “the most significant step towards the strengthening of freedom of expression and mass information in the last few years.”<sup>201</sup> There are a number of factors which support this view. First, judges were reminded very strongly that the ECHR should be applied: despite Russia's monist system, this had not fully translated into practice, and had led to confusion among judges as to their true responsibilities in this area. The 2005 Resolution clarified these responsibilities and linked them specifically to the issue of defamation.

Second, it lists a number of Article 10 principles that ought to be implemented. Of particular significance is the distinction between fact and opinion. Although previously judges could

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<sup>199</sup> See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91.

<sup>200</sup> Until March 2007, the body in the Presidential Administration responsible for the implementation of the ECHR in Russia, and representing Russia in Strasbourg.

<sup>201</sup> Golovanov, D, *Kommentariy. Novaya Redaktsia Postanovleniya Plenuma Verkhovnogo Suda Po Delam o Zashite Chesti, Dostoinstva i Delovoj Reputatsii: Proryvy, Udachi i Nedorabotki*, <http://www.medialaw.ru/publications/zip/127/3.htm>.

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differentiate on the basis of the case law of the European Court of Human Rights, the adoption of the 2005 Resolution has made it an obligation to establish whether the impugned expression is a fact whose truthfulness or falsity can be proven, or whether it is a value judgement. In the latter case, Article 152 of the Civil Code is not applicable.<sup>202</sup> This clarification is particularly important as the Russian word for “statement” (сведение), used in Article 152 of the Civil Code, can be applied both to a fact and the expression of an opinion. Because of this, PACE’s Monitoring Committee had:

... urge[d] the Russian authorities to reform its defamation legislation, *inter alia*... to clearly establish that no one should be liable under defamation law for the expression of an opinion (‘value judgements’).<sup>203</sup>

Other Russian experts believe the 2005 Resolution did not lead to specific improvements, given that there are too many other underlying obstacles to a healthy freedom of expression regime which cannot be solved through a single measure. Although judges might be aware of their responsibility to apply the ECHR, they often continue to ignore it, and change of practice takes time.<sup>204</sup> The use of defamation as a political tool is also deeply entrenched, and the judiciary is subjected to pressure from political and other forces.

Finally, a well-placed public official and lawyer noted that in some respects the situation might have worsened: prior to the 2005 Resolution there was a general acknowledgement of the failure to adequately implement the ECHR’s Article 10; now, however, the authorities are hiding behind a façade of compliance, claiming the problem has been solved.

What is clear is that the 2005 Resolution has provided freedom of expression defenders with additional legal tools for their campaigns, but training and further campaigning is required to enhance its implementation, particularly through concerted efforts by Russian and international civil society.

The implementation of the ECHR was until recently the responsibility of the Bureau of the Representative of the Russian Federation (the Bureau) before the European Court of Human Rights. This body was established in 1998 within the Legal Department of the Presidential Administration but, in March 2007, its functions were transferred to the Ministry of Justice. Of the nearly two dozen people who were employed in the Bureau only three (none of them senior staff) were transferred. The old staff had accumulated a great deal of experience, which the new team is only now starting to develop. A former official interviewed also noted that the Ministry of Justice has little inclination, as well as limited funds and influence, to enhance the ECHR’s implementation. Reportedly, one of the reasons for transferring the body to the Ministry of Justice was to discontinue the activities implemented by

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<sup>202</sup> *Ibid.*

<sup>203</sup> PACE, *Honouring of Obligations and Commitments by the Russian Federation*, see note 113.

<sup>204</sup> Interview with Alexei Simonov, see note 4.

the Bureau, although the official version presented via the media was the need for restructuring to respond to the high number of cases being lost by Russia in Strasbourg.

The Bureau worked intensively on the domestic implementation of ECHR standards, although a representative admits they have had little time to focus specifically on Article 10. Its staff concentrated on – and saw some progress in – certain pressing issues such as Article 3 (freedom from torture), Article 5 (right to liberty) and Article 6 (fair trial). The Bureau also worked on conditions of detention, police brutality and the liberalisation of penal legislation.<sup>205</sup>

## 3.2. Implementation of European Convention on Human Rights Standards

### **Defamation Cases against Russia in the European Court of Human Rights**

The first judgement on Russia was in 2002, and by September 2007 there were over 300. In most cases, the European Court of Human Rights has recognised that the restriction to the right to free expression had been a “legitimate aim” and was “prescribed by law.” However, in several cases it found that the interference was not “necessary in a democratic society.”

The Court’s admissibility procedures stipulate that all domestic remedies must be exhausted before a complaint can be submitted; this has to be done within six months of the last judgement. Strasbourg considers that reaching the Russian Cassation Court (2<sup>nd</sup> instance) meets this requirement. However, there is a misconception among some lawyers that the later *nadzor* review procedure<sup>206</sup> is in fact when remedies have been exhausted, a misapprehension that has led to some would-be applicants miss the six-month deadline for ECHR submissions.<sup>207</sup>

*Grinberg v. Russia*, decided in July 2005,<sup>208</sup> was the first ECHR defamation case on Russia and is often cited in judgments. The applicant published an article in September 2002 in the *Guberniya* newspaper about General Shamanov, governor of the Ulyanovsk Region, stating he was “waging war” against the independent media. Grinberg added that Shamanov showed support for a colonel who had murdered an 18-year-old Chechen woman and that he had “no shame and no scruples.” Following a lawsuit by Shamanov, the Ulyanovsk District Court found the article to be defamatory. In the appeal, Grinberg referred to the difference between value judgments and statements. The Ulyanovsk Regional Court upheld the judgement of the lower court, holding:

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<sup>205</sup> Interview with Yuri Berestnev, former Head of the Bureau of the Representative of the Russian Federation before the European Court of Human Rights (Legal Department of the Presidential Administration), July 2007.

<sup>206</sup> On *nadzor*, see note 105.

<sup>207</sup> Interview with Alexander Lapidus, Russian lawyer, Moscow, July 2007.

<sup>208</sup> See note 61.

The arguments... about the court's confusion of the term 'opinions' and the term 'statements' (*сведения*) cannot be taken into account because [the applicant's] opinion had been printed in a public medium and from the moment of publication it became a statement.<sup>209</sup>

From this the Court commented on an important characteristic of Russian defamation law, which refers uniformly to “statements”:

Russian law on defamation, as it stood at the material time, made no distinction between value judgments and statements of fact, as it referred uniformly to ‘statements’ (*«сведения»*) and proceeded from the assumption that any such statement was amenable to proof in civil proceedings... Irrespective of the actual contents of the ‘statements’, the person who disseminated the ‘statements’ had to satisfy the courts as to their truthfulness... Having regard to these legislative provisions, the domestic courts did not embark on an analysis of whether the applicant's contested statement could have been a value judgment not susceptible of proof.<sup>210</sup>

The Court considered the impugned expression to be a “quintessential example of a value judgment.” Grinberg was asked to prove Shamanov had no “shame and scruples”, which was “a burden of proof... impossible to satisfy.”<sup>211</sup> In addition, it ruled the article referred to a matter of public interest (freedom of the media in the Ulyanovsk region) and public officials should be tolerant of criticism.<sup>212</sup> For these reasons, the Court found a violation of Article 10.

Indeed, the lack of differentiation between fact and opinion in Russian law is widely reflected in court decisions and has been a serious obstacle to the implementation of the principle of European case law that no one should be required to prove the truth of a value judgement. In this context, the 2005 Resolution provided a much-needed clarification, reflected in the excerpt of the judgement of the Ulyanovsk Regional Court quoted above.

The issue of public figures was also examined in *Chemodurov v. Russia*.<sup>213</sup> The original defamation case was brought against journalist Viktor Chemodurov for an article published in the regional newspaper *Kurskiy Vestnik* in 2000, in which the author called the attitude of the Kursk regional governor (and former Russian Vice-President), Mr. Ruskoy, “abnormal.” The author used this expression after the governor reacted to the auditors’ report on irregularities in the regional budget (involving misappropriation of funds), by requesting them to cover up the discrepancy between the amount allocated and the expenses incurred.

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<sup>209</sup> Reported in the Judgement, para 14.

<sup>210</sup> Para. 29.

<sup>211</sup> Para. 31. See also Section 1.2 (Facts v. Opinions).

<sup>212</sup> Para 32.

<sup>213</sup> See Note 61.

Rutskoy lodged a civil suit to the Kursk district court against the author of the article and the newspaper's editors, stating it had damaged his honour, dignity and professional reputation. This claim was upheld by the Russian courts – a decision the Court unanimously found to be a violation of the journalist's right to free expression.

Among other things, the Court noted the expression “abnormal” was used in the context of extremely inappropriate conduct by a public official. Moreover, it was a value judgement the journalist should not have been obliged to prove was true.<sup>214</sup> The domestic courts failed to acknowledge the interference in the applicant's freedom of expression was not “necessary in a democratic society.”

The Court also emphasised that the expenditure of public funds is obviously “a matter of general and public concern” and reiterated the need for compelling reasons to justify restrictions on political speech.

Although the damages awarded by the domestic courts had been small, Chemodurov's victory was important. In cases like this, judges impose the payment of a symbolic sum simply to prove the journalist was wrong to challenge the “integrity” of a public official. These cases have resulted in a negative case law trend on defamation throughout Russia, which ARTICLE 19 believes is undermining respect for freedom of expression.

Meanwhile, *Dyuldin and Kislov v. Russia*<sup>215</sup> upheld the important principle that a statement can only be defamatory if it refers to a specific person. The applicants were among the co-signatories of an open letter sent to the Russian President in 2000 by several editors-in-chief and journalists working in the Penza Region. The letter denounced the corruption of the governor of the region and his entourage, and what they called his “selfish and destructive policy.” It stated that when the media published materials on these issues, the regional authorities had responded with “threats and beatings”, as well as with obstructing publication and distribution.<sup>216</sup> No name, apart from that of the governor, was mentioned. Members of Penza Regional Government (but not the governor) lodged a defamation lawsuit against the signatories to the open letter. The district court ruled in favour of the Regional Government, a decision later upheld by the regional court. The domestic courts ruled the plaintiffs could sue as the expressions “regional authorities” and “team” could cover all public officials employed in the executive branch of the Penza Regional Government. The Court, however, disagreed:

A fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person. If all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an

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<sup>214</sup> In addition, the accuracy of factual data involved (such as identity of the governor's hand-written resolution on the auditors' report) had been confirmed within the course of national judicial proceedings.

<sup>215</sup> See note 36.

<sup>216</sup> Letter printed on the front page of *Novaya Birzhevaya Gazeta*, issue of On 24 August 2000, reported in the judgement, para. 10.

otherwise identifiable manner, journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press.<sup>217</sup>

In *Krasulya v. Russia*,<sup>218</sup> the Court ruled that a one-year suspended prison sentence in a defamation case was disproportionate. The conditions imposed on the editor (that imprisonment would be suspended as long as he did not re-offend in his capacity as editor for six months) represented a serious restriction on his journalistic freedom.<sup>219</sup> The case concerned an article published in the regional (Stavropol) newspaper *Noviy Grazhdanski Mir* criticising the decision of the town's legislative body to abolish mayoral elections. It also suggested that Mr. Chernogorov, then governor of the Stavropol region, had interfered in this process. The Court also disagreed with the domestic court's assessment that the article used offensive language and overstepped the boundaries of legitimate criticism.<sup>220</sup> In particular, it rejected the interpretation of the domestic courts that the article effectively accused Chernogorov of bribery simply by "allud[ing] at the governor's influence on the lawmakers",<sup>221</sup> on the basis that the allegation was too imprecise to carry this meaning.

In the case of *Karman v. Russia*,<sup>222</sup> the applicant - the editor-in-chief of the *Gorodskiye Vesti* newspaper in Volgograd -, published an article in September 1994 that referred to the editor-in-chief of *Kolokol* newspaper, Mr. Terentyev, as a "local neo-fascist." Terentyev lodged a civil defamation action against Karman and the *Gorodskiye Vesti* newspaper, which he won. A judgement was then upheld on appeal.

The domestic courts considered the term "neo-fascist" to be a statement of fact, designating Terentyev as member of a political party and, since Terentyev had not joined any party, the allegation was found to be false. The Court found this interpretation "restrictive"<sup>223</sup> and said the expression was a "wide one" that had to be interpreted according to its context.<sup>224</sup> The domestic court "had never examined the question whether [the expression] could be considered as a value-judgment", it argued, before noting the problem of the failure to differentiate between fact and opinion in Russian law. The Court noted that the "use of the term 'Nazi' – or... a derivative term 'neo-fascist' – does not

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<sup>217</sup> Para. 43-44. The Court further noted the fundamental importance of the press in a democratic society and the fact that "the limits of permissible criticism are wider with regard to a government than... a private citizen.", para. 45. See also Section 1.2 (The Legitimate Aim of Defamation Laws).

<sup>218</sup> 22 February 2007, Application No. 12365/03.

<sup>219</sup> Para 44.

<sup>220</sup> It also, once again, noted the importance of freedom of the press and of political debate in matters of public interest – as was the case with the matter treated in the article.

<sup>221</sup> Para 40.

<sup>222</sup> 14 December 2006, Application No. 29372/02.

<sup>223</sup> Para. 40.

<sup>224</sup> *Ibid.*

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automatically justify a conviction for defamation.<sup>225</sup> Moreover, it found in this case that the value judgement had a factual basis, through documentary evidence provided in the article.

In the case of *Zakharov v. Russia*,<sup>226</sup> meanwhile, the applicant had privately sent a complaint to the deputy governor of the Moscow *oblast* alleging the usurpation by a private person of communal land in the town of Iksha. The applicant stated in the letter that the head of the town council was to blame for allowing this to happen. The head of the town council filed and won a civil defamation case. The Court said the letter was sent privately and found that the applicant's actions were consistent with his right to complain<sup>227</sup> and report irregularities in the conduct of state officials to a competent body.<sup>228</sup>

In *Shabanov and Tren v. Russia* no violation of Article 10 was found.<sup>229</sup> The newspaper *Pravo Znat'* published an article about the high wages paid to town hall employees, with a specific reference to the head of the legal department (Ms P). The article said she "had recently graduated from a teachers' college", despite the fact she had "higher education [a higher legal degree] and three years of relevant experience."<sup>230</sup> The Court shared the domestic courts' view that the statement contained inaccurate information. Although the facts mentioned in the articles were not found to have been untrue, the Court stated:

The aim of legal provisions on defamation is the protection of individuals against falsehoods liable to tarnish their reputation. A falsehood may be communicated by stating untrue facts, but also by leaving out true facts which, had they been stated, could have significantly altered the perception of the matter.<sup>231</sup>

The Court found no violation of Article 10, even though the remuneration of civil servants is an issue of public interest. It ruled: "[The expression] was not a fair comment on a topic of general interest but rather a gratuitous attack on Ms P's reputation."<sup>232</sup>

Still awaiting judgement is *Romanenko and others v. Russia*, which was found admissible in November 2005.<sup>233</sup> In 2002, one of the applicants published an article in the independent newspaper *Arsenyevski Vesti* on the protection of forests, including issues on the felling of trees in the town of Dalnerechensk. It cited a letter endorsed by a group of public officials at a regional conference that commented on irregularities in forest management by the local branch of the police and the local Legal Department of the Supreme Court, which had recently become forest operators. The letter had been

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<sup>225</sup> Para 39. See also *Feldek v. Slovakia*, in Section 1.2 (Facts v. Opinions).

<sup>226</sup> 5 October 2006, Application No. 14881/03.

<sup>227</sup> See also Danilov case for information on Russian law.

<sup>228</sup> The Court also noted again the lack of differentiation between value judgements and statements of fact. On the *Zakharov* case, see also Section 1.3 (Exemptions from Liability).

<sup>229</sup> 14 December 2006, Application No. 5433/02. The Court, however, found a violation of Article 6 (fair trial).

<sup>230</sup> Paras 6 and 7.

<sup>231</sup> Para 39.

<sup>232</sup> Para 41.

<sup>233</sup> *Romanenko and others v. Russia*, Admissibility Decision, 17 November 2005, Application No. 11751/03.

made public at a press conference. A civil suit was brought by the courts' administration department of Primorsky Krai, which said that the publication of extracts of the letter had undermined the authority of the legal system as a whole. The applicant then printed a refutation saying the letter had not referred to a specific courts' administration and the article did not mean to refer to the administration of Primorsky Krai (indeed, the article had not named any officials in the department). Yet the courts ruled in favour of the plaintiff, stating that some of the article's details allowed the reader to clearly identify the defamed entity. The Court, in its admissibility decision, referred to a PACE report calling on Russia to introduce a ban on public bodies suing for reputation, saying:

If public authorities were to be included within the meaning of 'others' whose reputation or rights Article 10(2) was designed to protect, it would subject journalists to a constant risk of harassment through lawsuits and frustrate the media's ability to act as a watchdog of public administration.<sup>234</sup>

It also reiterated that "a plaintiff must be identifiable by name" and that "the test for entertaining a defamation action against the media would be whether the statement at issue was unequivocally 'of and concerning' that official." Finally, it noted that the publication of statements contained in government documents should not attract liability for defamation.<sup>235</sup>

### **Enforcement Measures**

In most cases, the European Court of Human Rights orders the payment of compensation for breach of human rights by States. The simple payment of damages, however, may be insufficient to prevent ongoing violations or to redress their consequences. For this reason, the ECHR's mechanisms include both individual and general measures: individual measures may involve the re-opening of proceedings in domestic courts when these have been unfair; general measures may involve more substantial changes, such as legal and structural reform. General measures are particularly important to prevent similar cases from occurring; for example, when a violation is the direct consequence of a country's legislation, legal reform is needed for compliance with the Court's judgements. The Court has ruled to this effect:

[The] High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties... It follows... that a judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay those concerned the

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<sup>234</sup> The Court added that "mindful of this danger, courts of many established jurisdictions barred public authorities from suing in defamation cases because of the public interest that such authorities must be open to uninhibited public criticism." Examples are the United Kingdom, the United States and South Africa.

<sup>235</sup> The Court referred, for example, to *Colombani and Others v France*, Application No. 51279/99, para 47. In 2004 the Court also found admissible the case *Filatenko v. Russia*, Application No. 73219/01.



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sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.<sup>236</sup>

States have freedom in the selection of the form of individual and general measures. Yet the Committee of Ministers has oversight of the measures' implementation to ensure that they ultimately meet the objectives of the Court's judgements. In exceptional circumstances, the Court can impose specific measures.<sup>237</sup>

With regard to Russia, the Committee of Ministers has noted, in particular, a failure to comply with domestic judicial decisions against public authorities, which has resulted in a large number of cases being taken to Strasbourg for the same reason since 2002.<sup>238</sup> The Russian authorities have acknowledged the existence of structural hindrances to the enforcement of these judgements and the Committee has invited the Russian authorities to identify structural solutions to avoid similar violations in the future.<sup>239</sup>

Of the defamation cases on Russia considered in Strasbourg, the only three that were final in September 2007<sup>240</sup> were *Grinberg*, *Zakharov* and *Krasulya*.<sup>241</sup> These cases were transmitted to the Committee of Ministers for monitoring of the execution of the judgements. In *Grinberg*, the Committee of Ministers noted that "the European Court found that the Russian law on defamation... was not compatible with the ECHR as it required the defendant to prove the truth of any negative statement, whether factual statements or, as in this case, value judgements not susceptible of proof."<sup>242</sup> In *Zakharov*, the domestic courts had also requested that the defendant prove the truth of a value judgement. The Russian Supreme Court adopted the 2005 Resolution, discussed above, prior to the *Grinberg* decision. The compensation awards in both cases were also paid.<sup>243</sup>

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<sup>236</sup> *Scozzari and Giunta v. Italy*, 13 July 2000, Application No. 39221/98 and 41963/98, para 249.

<sup>237</sup> For example, in the case *Ilaşcu and others v. Moldova and Russia* (Application no. 48787/99, 8 July 2004), the Court ruled on the release of the applicants from arbitrary detention.

<sup>238</sup> Point 1. The violations related to the ECHR's Articles 6(1) (fair civil and criminal proceedings), 13 (effective remedy) and Protocol 1's Article 1 (peaceful enjoyment of possessions). These are estimated to constitute 40% of all admissible complaints against Russia. Point 4.

<sup>239</sup> *Non-Enforcement of Domestic Judicial Decisions in Russia: General Measures to Comply with the European Court's Judgments*, Memorandum prepared by the Department for the Execution of the European Court's Judgments (Application of Article 46 of the ECHR), CM/Inf/DH(2006)19 rev3 4 June 2007, <https://wcd.coe.int/ViewDoc.jsp?id=1145341&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

<sup>240</sup> A judgement becomes final three months after it is issued, if none of the parties to the case requests its review from the Grand Chamber (or, when the final judgement is pronounced by the Grand Chamber, if a review is requested).

<sup>241</sup> See Section 3.2.

<sup>242</sup> Annotated Agenda, adopted at the 960<sup>th</sup> Committee of Ministers Human Rights Meeting (March 2006) – public version.

<sup>243</sup> Most general measures taken by Russia have been in relation to Article 6(1) and Protocol 1. For details, see *General Measures Adopted to Prevent New Violations of the European Convention on Human Rights*, H/Exec (2006)1, May 2006 (last updated), [http://www.coe.int/t/e/human\\_rights/execution/02\\_documents/H\\_Conf7.pdf](http://www.coe.int/t/e/human_rights/execution/02_documents/H_Conf7.pdf).

Although not legally binding, PACE has also issued recommendations on the implementation of the ECHR. It has expressed criticism in Resolution 1516 (2006), on *Implementation of Judgments of the European Court of Human Rights*,<sup>244</sup> referring to “major structural problems concerning cases in which unacceptable delays of implementation have arisen” in a number of countries, including Russia.<sup>245</sup> Point 10 refers to the “chronic non-enforcement of domestic judicial decisions delivered against the state... in Russia.” PACE added:

A major reason for difficulties in the execution of the Strasbourg Court’s judgments is the lack of effective domestic mechanisms and procedures to ensure the swift implementation of required measures... The responsible decision-makers in member states often ignore implementation requirements... or lack the appropriate domestic procedures to permit effective co-ordinated action.<sup>246</sup>

In Recommendation 1710 (2005) on *Honouring of Obligations and Commitments by the Russian Federation*, PACE calls on the Committee of Ministers to:<sup>247</sup>

Encourage the Russian authorities to strengthen co-operation with the Council of Europe in order to ensure full compatibility of Russian legislation and practice with the Organisation’s principles and standards, especially with regard to standards guaranteed by the European Convention on Human Rights, as well as full compliance with the decisions of the Strasbourg Court as regards the individual and general measures that may be required.<sup>248</sup>

PACE has also stated that elections in 2003 and 2004 were characterised by “biased media coverage.”<sup>249</sup> As an essential element for free and fair elections, it urged the Russian authorities to create the conditions for a pluralistic media and to:

Immediately end the harassment and intimidation of members of civil society critical of the authorities and in particular in the journalistic, scientific and environmentalist communities, which are subject to abusive application of *defamation and state secret laws* [italics added].<sup>250</sup>

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<sup>244</sup> Text adopted by the Assembly on 2 October 2006 (24th Sitting), <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1516.htm>

<sup>245</sup> Point 5.

<sup>246</sup> Point 18. Point 22 includes recommendations for the set up of domestic mechanisms for the effective implementation of judgements, and “urges the... Russian Federation... to resolve the issues mentioned in the ... resolution and to give this top political priority” (para 5).

<sup>247</sup> *Honouring of Obligations and Commitments by the Russian Federation*, Recommendation 1710 (2002) Text adopted by the Assembly on 22 June 2005 (21st Sitting), <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/erec1710.htm>.

<sup>248</sup> Point 3.ii.

<sup>249</sup> Resolution 1455 (2005), on *Honouring of obligations and commitments by the Russian Federation*, Text adopted by PACE on 22 June 2005 (21st Sitting), <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1455.htm>.

<sup>250</sup> *Ibid*, Point 11.

As previously noted, the 2005 Resolution and other measures adopted by Russia are an important step towards the ECHR's implementation. However, there exist many other obstacles that must be overcome. The continued monitoring of the Committee of Ministers and international organisations is essential in the process of implementation. The Committee of Ministers, despite the closure of the *Grinberg* and *Zakharov* cases, might in the future examine the necessity of additional general measures.

### 3.3. Ukraine: An Example of Good Practice

Ukraine's civil society has campaigned to include in its legislation as many principles as possible arising from the European Court of Human Rights' jurisprudence. For example, amendments in 2003<sup>251</sup> inserted in the *Law on Information* the proviso that nobody should be found guilty for the expression of a value judgement. The fact that the provision is not in a separate resolution, but in the *Law on Information* itself, further facilitates its application by judges. Through the same amendments, Ukrainian legislation now contains provisions stipulating that: there is no liability for defamation when the expression is in the public interest; public bodies cannot sue for defamation;<sup>252</sup> and plaintiffs have to pay a percentage of the amount claimed in damages when they file a lawsuit. Although there is still some abuse of defamation legislation,<sup>253</sup> overall the number of defamation cases against journalists and the sums awarded in damages has substantially decreased since 2003.

Additional guidance is provided by Ukraine's *Law On the Enforcement of Judgements and Application of the Case-law of the European Court of Human Rights*, adopted in February 2006.<sup>254</sup> It was passed with a view to ensuring the enforcement of judgements of the European Court of Human Rights and the implementation of the ECHR, as well as the aim of "eliminating causes of violation of the Convention by Ukraine."<sup>255</sup>

The 2006 Law provides for: the dissemination of information on new judgements through the government's official publications, together with a translation of the judgements' conclusions (Article 4(1)); translations of the full text of judgements into Ukrainian and a requirement for them to be disseminated among the legal community (Article 6); an obligation to "restore, as far as possible [the

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<sup>251</sup> *Law On the Insertion of Changes to Certain Laws of Ukraine which Guarantee Unimpeded Use of the Human Right of Freedom of Speech*, 28 April 2003.

<sup>252</sup> The authorities can now only request the refutation of false information but have no right to claim damages.

<sup>253</sup> Some awards for damages are still disproportionate, or at times defamation law is still used to silence the media.

<sup>254</sup> No.3477-IV, 23 February 2006 (unofficial translation).

<sup>255</sup> Preamble. In Resolution 1516 PACE said that, despite the presence of a number of shortcomings leading to violations of the ECHR, Ukraine "deserve[s] praise" for the adoption of the 2006 Law as an "attempt to solve specific implementation problems by improving domestic mechanisms." See note 244.

status quote ante before the applicant's] Conventional rights were breached" (Article 10(2)), including, when necessary, the reopening of proceedings; an obligation to apply general measures as well as individuals ones, to "eliminate the underlying systematic problems that are at the heart of the violation found by the Court" (Article 13(1)). Possible general measures are outlined in Article 13(2), and listed as:

- (a) Amendments in the current legislation and changes in the practice of its application;
- (b) Changes in administrative practice;
- (c) Legal review of draft legislation;
- (d) Professional training... for prosecutors, lawyers, law-enforcement bodies;
- (e) Other measures... determined under the supervision of the Committee of Ministers of the Council of Europe.

The 2006 Law provides specific solutions for a number of problems that judges are confronted with in countries that have only recently ratified the ECHR (such as provision of translations and training, confusion about the possibility of re-opening proceedings and other general measures). It is more detailed than resolutions in other countries and shows a commitment to eliminate obstacles that result in the systematic violation of the ECHR. It is therefore an important tool for lawyers, judges and human rights activists, and one that may be replicated in other countries, including Russia.

## **4. JUDGES AND DEFAMATION**

### **4.1. Strengths and Weaknesses of the Russian Court System**

Russian judges often experience difficulties in applying ECHR standards in domestic cases. This is not only the case with Article 10 (although this article presents specific challenges, particularly as it involves a balancing of interests).<sup>256</sup> Some of the main challenges are:

- a) The Soviet legacy, with its rigid codification of legal norms, makes it difficult for judges to apply principles that are interspersed in various judgements. Russian judges have no previous experience (and consequently limited understanding) of the meaning of "legal precedent." This problem is exacerbated by the fact that the interpretation of Article 10 by the European Court of Human Rights is not static, but has evolved over the years and continues to do so. For a relatively new Council of Europe member to absorb the significance of Article 10 and the

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<sup>256</sup> Between the right to freedom of expression and the protection of other rights, such as reputation.

entire body of case law since the first defamation case in 1986 is no easy task, and it is no surprise that Russian judges feel more comfortable with the domestic legal system. According to a Russian lawyer interviewed, most judges prefer not to be pioneers but to observe the conduct of others and wait for more precise guidelines to emerge.

- b) Despite the training opportunities that are available, some judges continue to ignore the ECHR. When lawyers refer to the ECHR in court, they are sometimes silenced by the judges or their arguments simply dismissed.<sup>257</sup> Some judges' disinclination to implement the ECHR is partially due to their education, which taught them that Russian (or Soviet) law was supreme. Some judges also refuse to participate in training activities as they do not wish to admit that they are in need of training. This was observed by trainers more often in the higher courts, while, in some cases, first instance judges displayed a greater willingness to undergo training and apply the ECHR. However, this may vary from region to region.
- c) There are no clear and detailed guidelines or instructions from the Supreme Court on *how* the ECHR should be applied. The various resolutions only outline some of the ECHR's general principles, without detailing specific instructions for their implementation.<sup>258</sup>
- d) There is no common understanding of the extent to which the Court's jurisprudence should be applied. Judges' approaches differ, the main views being that they ought to implement:
  - i. The whole body of the Court's case law;
  - ii. The case law developed since Russia became a Council of Europe member; or
  - iii. Only the case law on Russia.Consequently, the ECHR is often only applied in a limited way.<sup>259</sup>
- e) Interference in the work of judges can have a negative impact in their ability to pronounce verdicts that are independent and in line with the European Court's jurisprudence. Pressure on judges was a serious problem during the Soviet Union, when they regularly received telephone calls from public officials, dictating how they should decide cases. According to an insider, "orders" are still passed from high-ranking public officials to high courts, which then pass the information down to lower courts. Business interests also influence public officials at high levels, who in turn exert pressure on the courts. Moreover, judges at times receive requests for "favours" from friends and contacts.
- f) In defamation, like other offences, there is a tendency to hand down (often unnecessarily) severe sentences. As a result, the principle of proportionality, or the idea that the primary purpose of remedies is to repair the damage caused rather than punish the defendant, have not taken root. In many cases judges do not refrain from handing down prison sentences or high awards for damages, even when lighter sentences would have been sufficient.

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<sup>257</sup> Interview with Alexander Lapidus, see note 207.

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

- g) The availability of professional and officially endorsed Russian translations of the Court's case law is limited.

There are, however, conflicting views as to the progress made by courts in recent years. In some cases, the training of judges has resulted in a marked improvement in their performance, with growing references to the ECHR and professionalism in implementing its principles. GDF has noted a clear attempt by courts, since 2004, to be more transparent and co-operate more effectively with journalists. The Supreme Court has established a press office and given instructions to every court to do the same, which has resulted in the appointment of 240 press offices. Several training events have been held on the issue of transparency and a new programme is being prepared by GDF to train press officers.<sup>260</sup> Other commentators, however, remain pessimistic. A former Constitutional Court judge, for example, has maintained that the judiciary's rigid vertical structure means judges are too dependent on their superiors to rule freely.

### **Justices of Peace**

The category of justices of peace (*mirovie sudi*) was re-established in 2000. Their area of work is primarily in family and administrative cases, as well as minor crimes, including defamation.<sup>261</sup> As a relatively new judicial tier that is often under-resourced, they tend to lack training and experience.<sup>262</sup> In addition, they have little experience of working on criminal defamation, a complex area of law. As a result, they have limited knowledge and experience of the main principles of defamation law and relevant international standards, such as the principle of proportionality. For example, in the *Abrosimov* case mentioned above, a disproportionate (prison) sentence was handed down by a justice of peace. In a number of cases, local lawyers have witnessed justices of peace dismissing (and treating with contempt) references made to international standards. There is therefore a need to train justices of peace to enhance their ability to rule fairly in defamation cases.

### **Supreme Court**

The Supreme Court formally favours the implementation of ECHR principles, as the 2005 Resolution demonstrates. In practice, however, it has adopted few tangible measures towards it. It has quoted the ECHR itself on some occasions, but only rarely the case law of the European Court of Human Rights.

The Bureau of the Representative of the Russian Federation has tried to enhance the system of implementation of the ECHR's Article 10 by urging the Supreme Court to set guidelines for all courts. The 2005 Resolution was the most significant and positive result of this process, but there is a need for

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<sup>260</sup> Interview with Alexei Simonov, see note 4.

<sup>261</sup> They include: crimes with sentences of less than two years' imprisonment; family issues (including divorce) except parental rights; pecuniary disputes for up to 500 minimal wages; some labour and administrative issues.

<sup>262</sup> They also have lower standards entry examinations than district judges. Interview with Alexander Lapidus, see note 207.

substantial follow-up activity. A former Bureau official noted it is necessary to continuously remind the Supreme Court of its responsibilities to bring about concrete and lasting change.

### **Arbitration Courts**

Russian legal practitioners have had mixed experiences with arbitration courts. Some have reported positive precedents, which they link to good working conditions, resources and experience. One lawyer interviewed noted a positive example, in the case *ZAO “Arkada-Trust” v. NGO “Gradzaschita” and others* of 5 February 2007.<sup>263</sup> A construction company obtained authorisation from the Moscow authorities to expand an old cultural building. The defendants, having reasons to believe that the company in reality planned to demolish the building, sent several letters, including to the prosecutor’s office and the tax authorities, denouncing the construction activities as illegal. Under Russian law (and the 2005 Resolution) sending letters amounts to dissemination of information that can result in defamation liability. The defence argued that notifying the authorities of irregularities does not attract liability for defamation in the sense of Article 152 of the Civil Code, because of the constitutional right to submit appeals to the authorities.<sup>264</sup> The court supported this view, and noted that the defendants had a right to address the authorities, while the authorities had a corresponding obligation to respond to the complaint. Therefore, the applicant had no right to sue.

Furthermore, the High Arbitration Court, as early as 1999, adopted instructions to its courts about the application of the ECHR, before other courts did so.<sup>265</sup>

However, practising lawyers have also pointed to some arbitration courts’ rejection of international standards. Others have also noted the belief that the arbitration courts are exposed to more corruption than other judicial systems.

## **4.2. Judges Views**

In-depth interviews were conducted with 18 judges from Voronezh, in the Black Soil region (Central Russia).<sup>266</sup>

Less than half of the respondents said they had applied ECHR principles. However, the true percentage might be higher. Indeed MMDC has seen a marked increase in the Voronezh region of references to ECHR principles (in most defamation cases) and references to the European Court of Human Rights’ jurisprudence (in about a third of the cases) since 2004-2005. Some judges might also not be aware of the fact that a number of better-known legal principles are also international law

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<sup>263</sup> Interview with Alexander Lapidus, see note 207.

<sup>264</sup> Article 33 of the Constitution of the Russian Federation. See note 126.

<sup>265</sup> See note 107.

<sup>266</sup> The interviews were conducted and analysed by Nelli Romanovitch, Director of the Institute of Public Opinion for MMDC. The judges interviewed have worked on defamation cases.

standards, and might be applying them without realising it. For example, they might see the differentiation between fact and opinion as being exclusively a principle of domestic law (through the 2005 Resolution) rather than part of international law.

Judges stated that they tended to apply international standards only in specific cases: when there have been inconsistencies between domestic and international law (in this case the latter should be applied according to Russian law); and in the case of a “gap” in Russian law.<sup>267</sup>

Judges accepted the fundamental importance of international standards, in light of the Supreme Court resolutions that stress international law should have priority over domestic law. At the same time, the majority of judges did not feel the need to implement them. Most believed that Russian legal provisions are sufficient for a good and fair judgement, and generally one can avoid applying international standards, for the following reasons:

- International documents are not adapted to the Russian reality.
- International documents are based on principles that are interpreted differently in Russia (references were made, for example, to the principle of fairness).
- International documents are perceived as being general recommendations: the rights are merely stated and there are no details of liability for the infringement of these rights, which are instead provided in Russian law.
- Russian legislation regulates all legal relations, so there is no need for additional provisions.
- There is a long-established practice of using only Russian legislation.
- There is a lack of experience and knowledge of working with international standards.

References to international documents in judgements often have a “decorative” character: some judges might simply cite international cases for formal reasons (or as a means of self-promotion), without these references actually playing a significant role in the formulation of fair and progressive verdicts. Moreover, although the ECHR may be cited during the course of court proceedings, sometimes it is not mentioned in the judgement. This is often the case when the judge has not had prior experience with (or undergone training in) the European Court of Human Rights’ jurisprudence.

Judges believed a university education did not enable them to work with international standards and said they needed additional efforts to improve their qualifications, including more training and greater practical experience. However, they did mention that they had attempted to raise their qualifications by: attending courses at the Russian Academy of Justice in Moscow; participating in international conferences, round-tables, lectures and seminars organised by MMDC, as well as other events; and studying the relevant literature.

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<sup>267</sup> Instances that are not regulated by domestic law.



The judges who had never applied the ECHR were aware that it could be cited either by judges themselves or by the parties to a case. They were also aware that if plaintiffs or defendants referred to the ECHR, the judge in the case was under an obligation to consider these references and justify their application or rejection.

The judges noted that, at times, ordinary people at trials made mistakes when referring to the ECHR, for example incorrectly citing articles or making unfounded claims. However, the very fact people made reference to international law during trials prompted judges to study the subject. At the same time, judges further noted that litigants very seldom referred to the ECHR, which meant its application was often left completely to the judges' initiative.

The respondents did not substantiate the view that judges might refrain from implementing the ECHR because of a fear of making mistakes in the process, stating there were other reasons for its limited use. They confirmed that before considering the ECHR they analysed a case in the context of Russian legislation, exploring the possibility of applying the ECHR only if a "gap" was identified.

The judges were aware of the legal requirement that international law should have priority over domestic law when the two are in conflict. However, except for a single case, judges said they were not confronted with contradictions between Russian and international law. Overall, the majority of judges said they would give priority to international provisions in this situation. However, this was generally the view among judges who had previously implemented the ECHR; those who had refrained from applying it proved to be convinced supporters of the priority of Russian law over international law.

The Voronezh judges who had made reference to the ECHR in their judgements most commonly used Articles 6, 8, 9, 10, 11 and 12. Article 10 was most quoted. This is primarily because MMDC, when representing journalists in court, has itself often referred to international standards of freedom of expression in defamation cases. In addition, several training events on Article 10 were organised in the region.

In the majority of these cases the ECHR was applied following lawsuits lodged against the media. Some judges who did not apply the ECHR in a judgement, nevertheless made reference to Article 10 during the court proceeding. The respondents found Article 10 to be in compliance with Articles 151 and 152 of the Russian Civil Code – for this reason they used Russian provisions in the reasoning of the decisions on defamation.

Some judges said they did not quote the case law of the European Court of Human Rights as there is no use of precedents in Russian judicial practice, Russia being a civil law country. As a result, there is no tradition of citing other cases to formulate a legal position or as a supporting argument in a judgement - some of the judges interviewed did not consider the case law of the Court as "law." These judges regarded the Court as simply giving views on legal issues, rather than providing legal norms. For this reason, they might reject reference to the case law to uphold the right to freedom of expression.

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At the same time, several judges referred to a commitment to acquire greater knowledge of the ECHR. The most commonly cited sources of information on the Court decisions are: copies of its judgments sent by the Supreme Court;<sup>268</sup> information databases *Consultant+* (which is particularly popular) and *Garant*; and the journal *Russian Justice*. Having a collection of Court decisions is, however, rare among judges. Judges also receive relevant information at MMDC seminars, including literature on Court decisions. Judges seldom use Internet resources: although a number of courts have Internet access, individual judges normally do not in their offices.

Most of the judges interviewed said that they did not proactively try to obtain judgements of the Court. Those judges who had worked with Russian information databases said that they had experienced technical difficulties. Some judges have limited computer skills, presenting another problem with regard to legal databases. Databases such as *Consultant+* and *Garant* also only include the translation into Russian of a small number of cases.

Those judges who had applied the ECHR, emphasised the following:

- Some reported disagreeing with a number of Court judgements.
- Some thought there was more than enough relevant legal literature to familiarise themselves with Court jurisprudence. Others felt it was insufficient and blamed the authorities for the paucity of materials and failure to distribute them more effectively.
- Most respondents said they did not see contradictions between Russian law and the case law of the Court. However, a number of the judges who expressed this belief had refrained from applying the Court's jurisprudence, and therefore had no direct experience of it.
- All respondents said lack of time is the primary disadvantage of their profession, preventing them from studying the international legal framework, unless absolutely necessary.

The judges had different (somewhat conflicting) views on the measures that should be adopted to enhance the implementation of the ECHR, voicing four different positions.

First, some believed “citizens’ defence is the citizens’ responsibility”: the basic idea is that the Russian population’s legal awareness should be increased for citizens to be able to lodge claims that refer accurately to international standards. This would substantially reduce the work of judges and contribute to the wider implementation of the ECHR.

Second, some judges believed that a number of measures should be implemented simultaneously: training of judges in the ECHR’s implementation (including sharing experience with

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<sup>268</sup> All regional courts receive information regarding new laws and amendments, as well as Court judgements of relevance. However, the information does not filter down to the district courts, primarily due to limited resources and the high number of courts per territorial unit. For example, there are 39 district courts in Voronezh *oblast*, and 55 in Moscow city and *oblast*.

international experts/judges); provision of relevant literature to judges; and improving courts' technical and information resources, including improved access to the Internet.

Third, some judges believed no measures were needed, based on the belief that "everything will somehow settle by itself", or that whatever was necessary had already been done.

The fourth group also believed no further measures were necessary, but for a different reason: there was no need to apply the ECHR in the first place. These judges said they considered cases in the framework of national legislation, which they believed to be in full compliance with international law.

All judges interviewed were aware of the necessity to distinguish between an opinion and statement of fact. However, the judges noted that difficulties often arose in this process, as the interpretation of words and expressions can be problematic. In these cases, judges use a range of measures, from simply using a dictionary to consulting with their colleagues and philologists, or even requesting a linguistic analysis. At the same time, they emphasised their independence of other experts and colleagues when formulating a final judgement. Yet the judges mentioned several cases in which they did not avail themselves of linguistic expertise, even when there was a request from one of the sides. The survey revealed this to be more typical of male judges. This might be due to a disinclination to admit an inability to resolve a problem independently, which is not in line with the traditional male role in Russian society. By contrast, seeking advice and assistance tends not to be considered a negative trait for a woman. Female judges in the interviews expressed their desire to have more input from experts on various issues.

The majority of the judges interviewed said the Supreme Court's 2005 Resolution, by drawing special attention to the interpretation of the ECHR's Article 10, simplified the implementation of its provisions in practice. On the whole, they approved of the Supreme Court's policy of providing guidelines and information on the application of international standards. However, they also noted that the Resolution provides only general recommendations and a judge must take into account the specificities of each case.

### 4.3. Ways Forward

The *NGO Law*<sup>269</sup> and amendments to the *Law on State Officials*<sup>270</sup> deter judges from participating in the activities of NGOs, including training activities. Amendments to the *Law on Government* and the

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<sup>269</sup> In 2006, amendments to provisions regulating work of NGOs were adopted. It places civil society groups under the authorities' close scrutiny, enabling government officials to audit NGOs at any time by requesting the organisations' internal documents without limitation. Vague concepts open the law to highly subjective and unpredictable interpretations.

<sup>270</sup> A federal law adopted in March 2007, *On the Adoption of Changes in the Area of Legal Acts of the Russian Federation on the Clarification of Requirements for Those who are Acting in State, Municipal Positions*. State officials are limited in carrying out activities financed by foreign States and international organisations.

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*Law on State Services* also restrict their ability to receive funds from international organisations and to participate in their activities.<sup>271</sup>

Training is a crucial aspect of the implementation of the ECHR, equipping judges with the skills they need to apply Article 10 principles. Training has been organised by the Supreme Court, with the participation of the Russian Academy of Justice and local and international NGOs, and some events have been held in cooperation with the Council of Europe. It is important that local experts train alongside international experts, as the former are familiar with both international and domestic law and are able to make the link between the two.

Reference materials are also essential to raise the professional standards of judges in the application of the ECHR. Many judges are not sufficiently fluent in English or French to read judgements in the original language. To respond to this need, in late 2006 and early 2007, the Bureau of the Representative of the Russian Federation distributed to all Russian courts six volumes of Russian translations of the Court's jurisprudence. The volumes contained all judgements on Russia between 2002 and July 2006.<sup>272</sup>

The NGO Moscow Lawyers' Club produces a *Bulletin of the European Court of Human Rights*, with translations of extracts of the Court's judgements and communications. The judges used to receive the *Bulletin* through State funds, but this was discontinued in 2006. The Judicial Department of the Supreme Court has its own publication but, despite being formally independent, is it not quite so in reality. Observers have noted that decisions on Russia that are considered positive (with no or minimal violations) are printed, while others are not included.

Another difficulty is that some expressions create confusion when translated into Russian. "Rule of law", for example, is normally translated into Russian as "Verkhovenstvo Zakona", rather than "Verkhovenstvo Prava", despite the fact "zakon" in Russian is simply the written law. Other problematic expressions are "interference" and "with due respect for the authority of", the translations of which are often excessively vague. Furthermore, the expression "watchdog" in Russian, when associated with the media, gives a negative impression. This means that translations into Russian have to be carried out with the utmost diligence. Another problem is the sheer volume of translations needed, due to the very extensive body of law developed by the Court.

There is also the issue of officially approved translations. Sometimes judges refuse to accept translations carried out by NGOs, on the basis that they are not considered "official." When the Supreme Court subscribed to the *Bulletin*, the publication was then were considered "semi-official." Translations by NGOs have to be certified by notaries as official, which can also cause problems. To avoid possible rejections as "unofficial", when the Bureau printed the above-mentioned six volumes of judgements on Russia it included the inscription: "This book is published by order of the Administration of the President of Russia."

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<sup>271</sup> Interview with Alexander Lapidus, see note 207.

<sup>272</sup> Interview with Yuri Berestnev, see note 205. For information on the Bureau, see Section 3.1.

## 5. CONCLUSIONS

### **Defamation and Judicial Practice**

Defamation law has been used to shield public figures and powerful individuals from forms of criticism that are legitimate and healthy in a democratic society. This report has shown that a high number of defamation cases are initiated by public figures and State bodies or officials. The full acceptance of criticism, or even provocation, of public officials and politicians, requires long-term awareness-raising efforts that challenge current attitudes.

High awards for damages and disproportionate sentences (both monetary compensation and prison sentences) are at times imposed. The *Kommersant v. Alfa Bank* case, by imposing the exorbitant sum of EUR 1,150,000, created an extremely powerful negative precedent. In some cases penalties aim at achieving ends other than protecting someone's reputation, for example to stifle public debate on sensitive issues or protect a reputation that is not deserved. Politically-motivated harassment of outspoken media outlets (such as *Novye Kolyosa*) continually impairs the ability of the media to stimulate public debate on issues in the public interest. Even when high awards are not handed down, sentences that are unfair to the media have a detrimental effect on the free flow of information: first, for small and under-resourced media outlets even relatively low awards can have long-term financial repercussions; second, very low, symbolic awards (or the illegitimate imposition of a retraction) contribute to the already widespread view that the media should refrain from criticising and challenging high-ranking public officials. This has to be seen in the context of a generally deteriorating freedom of expression situation in Russia, where journalism is a dangerous profession. The resulting chilling effect can discourage even the most motivated journalists.

Russia retains and applies criminal defamation, which can lead to imprisonment, as demonstrated by three cases in 2005-2006. This is despite the fact that the European Court of Human Rights has never upheld a prison sentence in a defamation case, viewing this as a disproportionate response.

A particularly concerning development has been the adoption of extremism legislation to provide an additional layer of protection to public officials, a move that runs counter to international standards of freedom of expression. It also mirrors misconceptions of the meaning of incitement to ethnic and religious hatred. In the *Terentiev* case, for example, the mere description in unflattering terms of the police led, amazingly, to a criminal case on incitement to hatred.

Other problems are defamation sentences for reporting irregularities to relevant State bodies (*Danilov*) and for information discussed privately between an editor and journalist (*Abrasimov*). The latter case exemplifies another negative trend: the dismissal by the courts of the need to establish the

identity of the author of an impugned expression. Under Russian law, it is sufficient to prove a person has been defamed for moral damages to be imposed. While a person who has suffered moral damage for the lowering of her/his reputation has a right to compensation, Russian law creates a situation by which an innocent person might well be responsible for remedying something s/he has not caused.

There are a number of other disturbing trends: the use of defamation provisions to silence the media during election periods; the simultaneous filing of civil and criminal lawsuits for the same incident, and multiple criminal cases against the same media outlet, with the sole aim of intimidation; and irregular court proceedings in defamation cases, including the denial of documents necessary to prepare an appeal.

Judges and plaintiffs have at times deemed non-punitive measures, such the right of reply, as insufficient to satisfy the claim. The law also prioritises compensation as the primary remedy in defamation cases. Self-regulatory mechanisms are a novelty, have limited trust from the media community and therefore lack legitimacy, although there are some positive exceptions.

To eradicate the abuse of defamation legislation and ensure its correct application, it is vital to stop it being used to protect people from statements they do not like. Defamation law should be applied only when its genuine purpose and demonstrable effect is to protect someone's reputation. To minimise the impact of defamation legislation on the free flow of information, it is also essential that: in ruling in defamation cases, courts take into consideration the chilling effect the judgement is likely to have on freedom of expression; and extra-judicial measures, such as the right of reply and the setting up of self-regulatory mechanisms, are further explored and increasingly relied upon.

### **The 2005 Resolution, Judges and International Standards**

There are several obstacles to the implementation of international standards in the area of defamation, although some progress has been made.

The reasonable publication defence does not feature in Russian law and practice. The public interest principle is also absent in Russian law, and is only very rarely referred to on the basis of the Court's jurisprudence.

There are various, somewhat conflicting, views as to the exact impact of the Supreme Court's 2005 Resolution. Some believe that it represents significant progress towards the implementation of the ECHR's Article 10; others argue it has had only a modest impact. Among its positive features is that it spells out fundamental principles, such as proportionality and the requirement of a balance between freedom of expression and the protection of reputation. This has been particularly important as Article 152 of the Civil Codes refers to "information" (encompassing both statement of facts and opinions) that denigrate one's reputation. Through the rigid interpretation of this provision, there have been cases in which judges have required defendants to prove the truth of opinions.

From the monitoring of defamation judgements issued between 2003 and 2006, one can observe an increase in the number of cases with reference to international standards since the 2005 Resolution,

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and a significant increase of instances of distinctions between facts and opinions. The majority of judges interviewed said the 2005 Resolution, by drawing special attention to the interpretation of Article 10, simplified its application. The 2005 Resolution was not the only measure for the application of international standards (although it is the first specific to Article 10). Other decisions and resolutions have been issued by higher courts, instructing the lower courts to apply international standards. These legal instruments have had a positive - albeit slow - cumulative effect.

However, some defamation issues remain unresolved. The 2005 Resolution has an exclusive focus on the media, whereas the rights it upholds, for example the right to criticise politicians, should be for everyone. The 2005 Resolution also states that politicians can be subject to criticism, although the Court goes further by saying that the limits of acceptable criticism for public officials are higher than those of ordinary people. In less than one fifth of the cases examined did the courts apply the principle of the higher standard of tolerance required of public officials. In some cases, district courts have taken into account the status of a claimant, but only to raise the awards if a public official was defamed – an approach diametrically opposed to that taken by the European Court of Human Rights.

Overall, despite some positive developments, judges still rarely implement international standards. There are many reasons for this, including: lack of experience, particularly in the application of legal precedents; lack of training opportunities and materials (including endorsed translations); the feeling that Russian law “is enough”; lack of detailed and clear guidelines; the sense that international principles are remote and non-applicable in the Russian context; and the fact that at times international standards are perceived as vague principles rather than as “law.” Most judges interviewed also believe Russian law to be completely in line with international standards, and do not see added value in the application of the latter. In other cases, there is simply a resistance to international law, perhaps due to misperceptions in this area.

Training is of paramount importance in solving many of these issues. Indeed, violations of international standards, such as the imposition of disproportionate sentences, often stem from some judges’ limited knowledge of such standards. Yet training and materials have not reached all judges, and in some cases technical difficulties, particularly lack of Internet access, compound the problem. In addition, NGO legislation has to some extent deterred judges from participating in training activities organised by NGOs.

Most judges access the case law of the European Court of Human Rights through translations, which lead to two problems: the limited availability of translated materials; and inaccuracies in translations, partially due to the fact that a number of expressions common in European jurisprudence have no direct Russian equivalent.

A contributing factor in judges’ efforts to develop their knowledge of international law is the fact that the ECHR may be referred to by the parties in a judicial dispute (although unfortunately this happens rarely). In addition, the cases against Russia in the European Court of Human Rights have

helped to raise the awareness of judges and lawyers, and to some extent the general public, of the need to apply the ECHR in domestic courts.

There is also a need for legal and structural reform in Russia. The Committee of Ministers of the Council of Europe and PACE have also noted several structural hindrances and a “lack of effective domestic mechanisms” to enforce judgements. PACE recommended enhanced cooperation with the Council of Europe to bring Russian legislation and practice into line with the ECHR. Cooperation with international NGOs that provide advice on media and defamation law, such as ARTICLE 19, would also be valuable.

To conclude, there is both a need to reform defamation legislation and to train judges to issue judgements according to the principles of proportionality and fairness. The training of judges carried out by the Russian authorities (through the Russian Academy of Justice), and by local and international organisations, should be intensified.

Russia might also benefit from a similar approach to the implementation of the ECHR to that taken in Ukraine, which has incorporated a number of principles of international law into its domestic legislation. This report has shown that some judges face difficulties in applying general principles arising from the case law of the European Court of Human Rights; clearly codified provisions in the domestic law could be an effective solution to this problem.

In the absence of this, the higher courts should continue to issue resolutions that serve as positive precedents and guidance to lower courts. Finally, general awareness-raising is needed to modify the widespread view that high-ranking public officials should not be criticised and instead receive the utmost respect from the public. Only if these changes happen will the media be able to fulfil its role as disseminator of information in the public interest and make a positive contribution to democratic governance.



## 6. RECOMMENDATIONS

### **Constitution:**

- Article 29(4) of the Constitution, which protects only “lawful” means of seeking, obtaining, transferring, producing and disseminating information, should be amended. The word “lawful” should be replaced by a test for restrictions, consistent with the three-part test under international law and which only allows restrictions that are strictly necessary to protect legitimate aims.

### **Defamation – Criminal Law:**

- The Criminal Code provisions on defamation should be repealed.
- In the interim, they should be amended and/or interpreted to limit their chilling effect on freedom of expression. In particular:
  - Forms of punishment such as prison sentences, arrest, the suspension of rights or mandatory labour terms should not be applied;
  - The higher penalties in defamation cases brought by law enforcement and judicial officials, pursuant to Article 278 of the Criminal Code, should not be imposed.

### **Defamation – Civil Law:**

- Article 152(1) of the Civil Code should be amended so that, in cases involving statements on matters of public concern, the burden of proving the falsity of any allegedly defamatory statement of fact is on the plaintiff.
- A defence of reasonable publication should be added to the Civil Code so that even when a statement of fact on a matter of public concern has been proven to be false, the defendant should not be held liable if s/he acted reasonably under the circumstances. It should be clear that this rule means public officials are expected to tolerate a greater degree of criticism than ordinary citizens.
- Public bodies should not be able to bring civil defamation suits.
- Defamation law should only be applied in cases involving explicit statements of fact that lower somebody’s reputation; statements of opinion should not attract defamation liability.
- The relevant provisions in Articles 19, 151 and 152 pertaining to compensation should be revised to prioritise non-pecuniary remedies over financial compensation.

### **Extremism Legislation:**

- The provisions on defamation of public officials in the *Law on Combating Extremism Activities* should be repealed.

**Defamation Law – Application:**

- Nobody should be found guilty of defamation merely for the content of a complaint or enquiry to a public body.
- Nobody should be found guilty of defamation for re-publishing information contained in government documents.
- Nobody should be found guilty of defamation unless it has been proven that s/he is responsible for contributing to the dissemination of a defamatory statement referring to a specific, identifiable person.
- Damages for defamation should always be proportionate to the harm done, and judges must take into account the importance of freedom of expression and the potentially chilling effect of the award. In assessing harm, the effect on reputation should not be remote or conjectural but, rather, real and tangible.
- Non-pecuniary remedies should be prioritised over pecuniary ones, and any voluntary remedies – such as a refutation or apology – should be taken into account as mitigating factors.
- Everybody should be given the opportunity to lodge an appeal with a higher court in a defamation case.
- Effective mechanisms should be established to ensure swift implementation of defamation judgments.

**The Supreme Court:**

- The Supreme Court should consider adopting a new resolution on defamation or amending its existing resolution to reflect the following principles:
  - Everyone, not just the media, has a right to criticise public officials, who should tolerate more criticism than ordinary citizens;
  - A wide range of statements are protected against defamation liability, including all those made in court and before official bodies;
  - Statements are protected against defamation liability whenever it was reasonable in all of the circumstances to make them;
  - The whole body of ECHR jurisprudence should be taken into account when deciding cases.
- A programme for the full implementation of the 2005 Resolution and, more generally, ECHR standards, should be developed. This should involve, among other things:
  - Training for judges and the amendment of laws – such as the NGO Law and the *Law on State Officials* – that deter them from participating in training initiatives by qualified Russian and international NGOs;

- Dissemination of relevant publications, including officially sanctioned translations of ECHR judgments (consideration should be given, for example, to re-subscribing to the *Bulletin* of the Moscow Lawyers' Club and to assisting qualified NGOs in the effective dissemination and acknowledgement of their translations);
- Consideration should be given to introducing incentives (rather than possible deterrents) for judges who implement ECHR standards.
- The Supreme Court should take the lead in providing positive implementation of ECHR standards.

**Public Officials:**

- Public officials should learn to tolerate criticism and use alternatives measures – such as responding to criticism publicly – rather than looking first to the defamation law when they feel they have been unjustly criticised.

**The Media:**

- The media community should consider further developing mechanisms of self-regulation as a means of addressing the issue of defamation.
- Training on defamation law and practice, professional journalism and ethics should be made available to journalists, with a view to reducing the number of defamation cases.

**Other:**

- The State should create an environment in which an independent, pluralistic media can flourish.
- The media should be able to operate free from harassment or interference from the authorities.
- The incorporation in Russian law of principles arising from the ECHR's jurisprudence (akin to Ukraine's approach) should be considered.
- The Russian authorities should refrain from placing any pressure on the judiciary that may affect its independence; those who are found guilty of this offence should be appropriately punished.





‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of all frontiers.’

Article 19 of the Universal Declaration of Human Rights



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