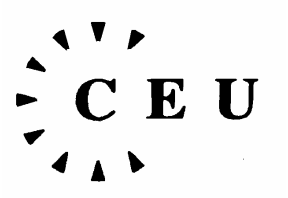

PROTECTION OF SPEECH CRITICIZING THE GOVERNMENT: A COMPARATIVE ANALYSIS OF LEGISLATION AND JURISPRUDENCE OF THE RUSSIAN FEDERATION, THE USA AND THE ECtHR

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ABSTRACT

During the Soviet period it was almost impossible to criticize the government. New era of the Russian defamation law began approximately ten years after the collapse of the Soviet Union with adoption of 'guiding explanation' by the Supreme Court in 2005. The present research shows that Russian defamation law has undergone a significant development during the last three years. *Decree 2005* introduced a very important novella into the interpretation of the Civil Code – distinction between facts and value judgments. This change introduced a standard which has long time been used in the United States and ECtHR.

Other important developments discussed in this paper are: (1) special status of speech concerning public officials, (2) public interest standard as a justification for protection of false statements and (3) burden of proof in cases of defamation of public officials.

This study proposes certain solutions for the issues not so far addressed by the legislation or judicial practice of the Russian courts. A comparative method is being widely employed in search for the best solution. Special attention is given to standing of State Agencies in defamation cases.

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INTRODUCTION

During the Soviet period it was senseless and actually impossible to publicly talk about freedom of speech in the Soviet Union. All media was under rigid governmental control and every piece of information was subject to censorship before being published. After the collapse of the Soviet Union and the formation of the Russian Federation many public enterprises were privatized. Among them were media companies, although some independent media appeared later. Thus, the middle and the end of 90s can be characterized as the most favorable times for the Russian independent media.

During that period there existed several satiric programs which depicted high governmental officials in a very funny and witty way. Some journalists conducted independent investigations, the results of which were very unfavorable for high ranked officials. Nevertheless, those programs remained on air. After the beginning of 2000 the tendency became very unfavorable for independent media in Russia. Actually, many of them ceased to exist. Satirical programs were closed down. Now, one can ascertain that there are no independent Russian channels left and only a few radio programs dare to criticize the government.

This situation may be explained as a long lasting effect of the Soviet Union and as a pendulum effect. However, lack of proper legislative regulation has its role as well. Today we can say that free speech legislation in Russia is still under development. The lack of proper regulation is not favorable for free and independent press. Rather it allows the government to silence the media.

This is only political estimation of the free speech issues in Russia. However, law seems to be improving at the moment. The Constitutional Court, the Supreme Court of the Russian Federation and the ECtHR played an important role in this development.

In my thesis I am going to discuss the importance of speech criticizing the government in a free and democratic society. Russian legislation and judicial practice will be compared to those which are deemed to provide more rigid protection to speech (the USA and the ECtHR). The research will result in the creation of recommendations to amend Russian legislation on free speech.

This research topic has not yet been given proper attention in literature. Russian scholars deal mostly with private defamation issues. Foreign scholars give just a general overview of Russian free speech law without going into details of speech criticizing the government. My work is committed to fill this gap by conducting a coherent research and analysis of case law and by creating recommendations to improve the current state of legislation in Russia.

The research question of my thesis is what should be the scope of protection of speech criticizing the government in the Russian Federation? I am going to divide the research question into sub questions in the following manner:

- What is the current scope of protection of speech criticizing the government in the Russian Federation?
- Which standards are applied in the USA and the ECtHR to this kind of speech?
- What should be changed in the legislation and judicial practice of the Russian Federation in order to satisfy modern criteria of protection of speech criticizing the government?

I am going to argue that the current Russian legislation is undergoing significant reformation at the moment. Several important principles developed in western jurisdictions have recently been introduced into the Russian legal system. Some other principles developed in the US and ECHR jurisprudence should also be introduced into the Russian legal system in the near future.

The employed methodology is an analysis of primary sources, classical legal research: the main focus will be on Russian case law. Jurisprudence of the USA and the ECtHR will be analyzed only to the extent necessary to understand essential principles. As a result of the fact that there is not much literature on my topic the main attention will be given to an analysis of cases. However, an analysis of theoretical concepts will not be set aside. A comparative method will be employed, which amounts to functionalist approach involving comparison of similarities and differences of functionally equivalent concepts and rules leading to conclusions about which ones are better. However, this method shall be employed very carefully because jurisdictions represent different legal systems.

1. BASIC PRINCIPLES UNDERLYING THE VALUE OF FREE SPEECH CRITICIZING THE GOVERNMENT

There are several philosophical justifications for the protection of speech. The first two are instrumental and perceive freedom of expression as a means to other ends such as democracy and truth. Other theories perceive it as a value by itself. Due to the scope of the topic this paper will analyze these justifications in light of speech criticizing the government without going into details of justifications for protection of other types of speech.

1.1. Democracy

The first and the most important justification from the point of view of protection of speech criticizing the government is *democracy* or *political process rationale*. One of the most commonly quoted formulations of this justification was given by Justice Brandeis in his concurring opinion in *Whitney v. California*:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[1]

[1] *Whitney v. California*, 274 U.S. 357 (1927).

Alexander Meiklejohn thought that speech should be protected in order to provide for a proper understanding of political issues by citizens so that they could participate in the political process effectively. In addition he analyzed the issue in the light of individual autonomy in a theory of self-government:[2]

> When men govern themselves, it is they – and no one else – who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as […] American […].
> These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant […]. To be afraid of ideas, any idea, is to be unfit for self-government.[3]

1.2. Discovering the Truth

The second is the search for *truth*, which can be carried out through the *marketplace of ideas*. This approach is particularly associated with John Stuart Mill,[4] but it had also been made two centuries earlier by Milton,[5] and it has played some part in the theorizing of American judges.[6] As CJ Holmes wrote in his famous dissent in *Abrams v. US* "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out".[7]

However, this justification seems to be less applicable to this particular topic in comparison to the democratic rationale, because it is not always necessary to search for truth in the democratic process the purpose of which is to provide for representation of diverse interests of the society. As Justice McLachlin stated in his dissent in *R v. Keegstra*:

> certain opinions are incapable of being proven either true or false. Many ideas and expressions which cannot be verified are valuable. Such considerations convince me that freedom of expression

[2] András Sajó, *Freedom of Expression*, Warsaw: Institute of Public Affairs, 2004, p. 25.
[3] Alexander Meiklejohn, *Political Freedom. The Constitutional Powero f People*, New York: Harper, 1960, p. 27.
[4] John Stuart Mill, *On Liberty*, 1859.
[5] J. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing*, 1644.
[6] Erick Barendt, *Freedom of Speech*, Oxford: University Press, 2005, p. 7.
[7] *Abrams v. United States*, 250 U.S. 616 (1919).

> can be justified at least in part on the basis that it promotes the "marketplace of ideas" and hence a more relevant, vibrant and progressive society".[8]

But of course there is always a scenario when there is a single truth, the disclosure of which would have a tremendously negative effect on the government and probably would lead to its resignation.[9] This situation is usually in between the protection of secrets and speech criticizing the government. In this case the marketplace of ideas theory is one of the justifications for protection of speech criticizing the government.

1.3. Self-autonomy and Self-realization

A decent formulation of this justification was given by Thomas I. Emerson:

> every man-in the development of his own personality-has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.[10]

This approach was in particular employed by the ECtHR in *Ceylan v. Turkey*.[11]

1.4. Suspicion of Government

The theories discussed above claim that there is something special about the speech itself or about the consequences of its protection, i.e. that these theories are positive. The negative approach was developed in works of Frederick Schauer and Erick Barendt. They argue that "there are particularly strong reasons to be suspicious of government in this context; it is a

[8] *R. v. Keegstra*, [1990] 3 S.C.R. 697.

[9] "Mr. St. Clair, what public interest is there in preserving secrecy with respect to a criminal conspiracy?" —Justice Lewis Powell during oral arguments, United States v. Nixon, 418 U.S. 683 (1974). Available at http://www.oyez.org/cases/1970-1979/1974/1974_73_1766/argument/

[10] T. I. Emerson, "Toward a General Theory of the First Amendment" (1963), 72 Yale L.J. 877 p. 879

[11] *Ceylan v. Turkey* (§32), July 8, 1999, Application number 23556/94.

negative argument in that it highlights the evils of regulation, rather than the good of free speech".[12]

Historical development shows that either the government or the Church has been suppressing ideas which were contrary to the official position and which later became widely accepted. Schauer states his claim in the following way:

> Freedom of speech is based on large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of government power in a more general sense.[13]

This justification seems to be a plausible one in terms of protection of speech criticizing the government. One cannot trust the regulation of governmental criticism to the government itself. If we exaggerate the situation a little bit, it can be comparable to giving a prisoner the key to his cell and hoping that he will not escape because his moral foundations prevent him from doing so, and because he thinks that the punishment is just.

Very few of those in power are capable of perceiving criticism constructively and with a still heart. There is a very high probability that they will start to abuse their power to suppress unfavorable speech at a certain moment (especially before the elections). "It is assumed that, if any power to restrict speech is conceded, government will exploit the opportunity and continue to extend speech restrictions".[14] This is why one should not trust the government with the regulation of speech which criticizes it. However, this statement is not absolute and there always should be a limited degree of regulation such as the *NY Times v. Sullivan* standard and regulation with regards to the 'clear and present danger' standard.

[12] Erick Barendt, *Freedom of Speech*, Oxford: University Press, 2005, p. 21.
[13] Frederick Schauer, 'Must Speech be Special?' (1983) 78 North Western Univ Law Rev 1284, pp. 85-6.
[14] András Sajó, *Freedom of Expression*, Warsaw: Institute of Public Affairs, 2004, p. 26.

Nevertheless, Barendt seems to be critical of this approach. He brings about two arguments in contra: *first*, why speech and not other areas such as the regulation of sexual conduct and economic activity should be excluded from governmental control? Should we trust the government more in these areas? And *second*, why it is the government that should be banned from regulation of speech? There are many other actors who have a certain degree of impact on speech. These include churches, commercial companies and media corporations.[15] This argument also presupposes positive obligations of the government to promote the protection of speech. However, within the scope of the present topic such a promotion always appears as a facade; consequently Barendt's second argument could hardly be employed for the protection of speech criticizing the government.

2. COMPARATIVE ANALYSIS OF THE SCOPE OF PROTECTION OF SPEECH CRITICIZING THE GOVERNMENT.

The most robust protection of speech has been developed through the case law of the United States Supreme Court. The First Amendment of the US Constitution states:

> Congress shall make no law … abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

American courts employ a categorical approach to speech, which means that once something is qualified as 'speech' it will be very difficult and almost impossible to restrict it. "The strictest and, most demanding scrutiny applies to any governmental attempt to restrict speech, including sedition".[16] Statements regarding public figures are only restricted by exceptions to the rules of liability; and there is no criminal libel.[17] The First Amendment formulates the

[15] Erick Barendt, *Freedom of Speech*, Oxford: University Press, 2005, pp. 21-22.
[16] András Sajó, *Freedom of Expression*, Warsaw: Institute of Public Affairs, 2004, p. 26.
[17] *Ibid.*

freedom of expression as an absolute right; however it is not so and the subsequent case law establishes certain restrictions.

To the contrary, Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter: *Convention*) contains certain restrictions on the freedom of speech:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Court is continuously balancing free speech interests against other interests listed in the second section of Article 10.

Comparatively, Russian free speech law started its development rather recently. The constitutional definition of the right to freedom of speech may be found in Article 29 of the Russian Constitution:

> 1. Everyone shall be guaranteed freedom of thought and speech.
>
> 2. Propaganda or agitation, which arouses social, racial, national or religious hatred and hostility shall be prohibited. Propaganda of social, racial, national, religious or linguistic supremacy shall also be prohibited.
>
> 3. Nobody shall be forced to express his thoughts and convictions or to deny them.
>
> 4. Everyone shall have the right freely to seek, receive, transmit, produce and disseminate information by any legal means. The list of types of information, which constitute State secrets, shall be determined by federal law.

5. The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.[18]

2.1. Factual Statements Versus Opinions

Although, the United States Supreme Court refused to grant a "wholesale defamation exception for opinion"[19] it nevertheless recognized full constitutional protection of statements of opinions of public concern. Chief Justice Rehnquist refers to *Hepps*[20] in *Milkovich case*: "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection". CJ Rehnquist in a way restricts the scope of statements which may be labeled 'opinions'. Speech is qualified as opinion only if it cannot be proven true or false. "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"[21]

Factual statements which relate to criticism of the government enjoy a higher constitutional protection in comparison to statement of facts on other issues in the United States. Public officials are prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not".[22] To the contrary, in order to claim damages for a private person it is enough to prove only negligence of the publisher of false factual statements.[23]

[18] The translation of the Russian Constitution is quoted from http://kremlin.ru/eng/articles/ConstEng2.shtml

[19] *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990).

[20] *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

[21] *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990).

[22] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[23] *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974).

Article 10 of the *Convention* distinguishes between opinions and facts. Right to freedom of expression includes "freedom to hold opinions and to receive and impart information and ideas"…[24] A clear cut distinction was drawn in *Lingens v. Austria*: "In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof".[25] The rule was restated in *Dichand and Others v. Austria*[26] (§42).

According to the ECtHR "opinions and factual statements are protected equally".[27] Opinions are fully protected unless they are expressed in a form which is itself an offence.[28] Certain untrue statements of facts may also enjoy a certain degree of protection. But, unlike the US (actual malice) standard, the ECtHR verifies whether the expression contributes to the public debate and whether the journalist met a standard of professionalism.[29] The details of tests applied will be discussed later in this paper.

Russian civil legislation does not distinguish between value judgments and statements of facts. At least there is no such distinction within the Civil Code itself. Article 152 §1 of the 1995 Russian Civil Code states that:

> The citizen shall have the right to claim through the court that the information, discrediting his honour, dignity or business reputation be refuted, unless the person who has spread such information proves its correspondence to reality.[30]

This legislation lacuna allowed Deputy Vladimir Zhirinovsky to recover moral damages in the case of *Zhirinovsky v. Gaidar*. This case was decided according to the 1964 Civil Code

[24] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 10.
[25] *Lingens v. Austria,* 8 July 1986. Application number 9815/82. §46.
[26] *Dichand and Others v. Austria,* February 26, 2002, Application number 29217/95.
[27] András Sajó, *Freedom of Expression*, Warsaw: Institute of Public Affairs, 2004, p. 97.
[28] *Ibid*.
[29] See *Bladet Tromsø and Stensaas v. Norway*, May 20, 1999, Application number 21980/93.
[30] English translation of the Russian Civil Code is available at http://www.russian-civil-code.com/, Russian version of the Civil Code is available at http://www.consultant.ru/popular/gkrf1/

which was not significantly different from the 1995 code in terms of distinction between facts and value judgments. The newspaper *Izvestiya* published an article in which the former Prime Minister Egor Gaidar called *Zhirinovsky* "a fascist" and "the most popular fascist in Russia".[31] Zhirinovsky sued both the newspaper and Gaidar for moral damages. A Moscow district court rejected the argument of the defense that the article was a pure value judgment and could not be proven true or false. The second line of the defense was to prove actual fascist views of Zhirinovsky by comparing Adolf Hitler's *Mein Kampf* and Zhirinovsky's book *The Last Dash South.* The Court rejected this argument as well. The appellate court then upheld the decision of the previous court on the same basis that the defendants failed to meet their burden of proof.

This decision was absolutely correct from the point of view of the law and judicial practice which existed at the time. Even the then-in-force Decree of the Plenum of the Russian Federation Supreme Court[32] [hereinafter *Decree 1992*] setting guidelines for interpretation of the Civil Code did not contain any provisions which could be a basis for distinction between opinions and facts. The judges deciding *Zhirinovsky v. Gaidar* probably could have had some understanding of necessity for distinction between facts and value judgments, but the law did not let them decide the case otherwise: the *Convention* was not yet ratified by Russia, the Civil Code was silent on the matter, *Decree 1992* did not give any guidelines, and existing case law also did not allow doing so. The invention of such a distinction would appear as

[31] For more detailed description of the case see Peter Krug, Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution Part One, 13 Cardozo Arts & Ent. L.J. 847, pp.860-863 (1995).

[32] Postanovlenie No. 11 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O nekotorykh voprosakh voznikshikh pri rassmotrenii sudami del o zashchite chesti i dostoinstva grazhdan i organizatsii" [Decree No. 11 of the Plenum of the Russian Federation Supreme Court "Concerning Several Questions Arising in Consideration by the Courts of Cases Concerning Defense of Honor and Dignity of Citizens and Organizations"] (Aug. 18, 1992), in Biull. Verkh. Suda RF, No. 11, 7 (1992). Available at http://medialaw.ru/e_pages/laws/russian/supc-24-2005.htm. Russian version available at http://www.supcourt.ru/vscourt_detale.php?id=889

judicial activism and ordinary courts in Russia are usually reluctant to invent new rules of interpretation. Moreover, Russia has a centralized system of constitutional review, i.e. ordinary courts cannot interpret the Constitution. If there is a doubt as to whether a law contradicts the Constitution, the court shall suspend the proceedings and ask the Constitutional Court for an interpretation. This is the only option the court of the first instance and the appellate court could have used but both failed to do so for some reason.

The Constitutionality of Article 7 of the 1964 Civil Code[33] was nevertheless challenged before the Constitutional Court approximately one year later. The complaint was lodged in connection with the ongoing litigation between the then-Foreign Minister Andrey Kozyrev and notorious Vladimir Zhirinovsky.[34] "Andrei Kozyrev argued that article 29 of the Constitution should shield him from bearing the burden of proving the truthfulness of his statement, made over the air on television that Vladimir Zhirinovskii holds "Fascist-like views".[35]

Despite the fact that in this case the Constitutional Court lacked jurisdiction to decide the case on merits and declined the complaint it nevertheless established certain principles and in a way brought the matter further. In particular the Court said that ordinary courts shall consider not only truthfulness of the statement but also the nature of the information disseminated. Taking this into account courts have to decide whether the dissemination of the information infringes upon constitutional values and "whether it fits within the framework of political discussion". The courts should decide how to distinguish between the dissemination

[33] Article 7 of the 1964 Civil Code is similar to Article 152 of the 1995 Civil Code in a sense that it does not distinguish between facts and value judgments.

[34] For more detailed description of the case see Peter Krug, Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution Part Two, 14 Cardozo Arts & Ent. L.J. 297, pp. 303-306 (1996). Russian version of the case is available at: http://medialaw.ru/projects/1/4/d4.htm

[35] *Ibid* pp. 303-304.

of false information and political value judgments and whether these value judgments may be refuted by judicial means. "Ordinary courts shall ensure equilibrium between the right to one's honor and dignity and freedom of speech". The Constitutional Court recommended to the Supreme Court to issue "guiding explanations" on the matter.

The matter was also addressed by the ECtHR in *Grinberd v. Russia*[36]. The *Gubernia* newspaper published an article written by the applicant where he called the recently-elected Governor of the Ulyanovsk Region a man with "no shame and no scruples". The Governor Mr. Shamanov brought a civil defamation suit against the applicant, the editor and the newspaper's founder. He claimed that the applicant's statement, that he had "no shame and no scruples", was untrue and damaging to his honor and reputation. The court of the first instance and the appellate court supported Governor's arguments and ruled that as far as the respondents did not meet their burden of proof they were liable to compensate moral damages. These courts rejected the applicant's arguments that the statement was a pure value judgment and could not be proven true or false. Moreover, the applicant argued that saying "no shame and no scruples" was a typical Russian idiom used to estimate one's behavior from moral and ethical point of view.

The ECtHR found a violation of Article 10 of the *Convention* because Russian courts failed to draw a distinction between statements of facts and value judgments. However, the Court noted that decisions were taken in accordance with Russian law at the material time and the main problem was a lacuna in legislation. In particular, in §29 the Court notes that:

> the 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

[36] *Grinberg v. Russia*, July 21, 2005, Application number 3472/03.

> 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.

Meanwhile, the Russian Supreme Court was not very rapid to follow the recommendations of the Constitutional Court. The Decree of the Plenum of the Russian Federation Supreme Court from 24 February 2005[37] [hereinafter *Decree 2005*] was enacted almost ten years after the aforementioned decision of the Constitutional Court. In §9 of *Decree 2005* the Court refers directly to Article 10 of the *Convention*:

> According to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 29 of the Constitution of the Russian Federation guaranteeing to everyone the right to freedom of thought and speech and also to freedom of mass information, in accordance with the position of the European Court on Human Rights, the courts deciding cases on protection of honor, dignity and business reputation shall distinguish between factual statements, truthfulness of which may be verified, and value judgments, opinions, beliefs, which cannot be protected under Article 152 of the Civil Code of the Russian Federation because they express a subjective opinion and views of the respondent and cannot be proven true or false.

After the *Decree 2005* was enacted courts started to refer directly to the *Convention* and began to draw a distinction between statements of facts and value judgments.[38]

This interpretation of the article 152 of the Civil Code seems to be more or less in conformity with the *Convention*. But still the Civil Code is silent on whether some untrue factual statements deserve protection. It does not establish a professional journalism standard as the ECtHR has done and certainly it does not go as far as the US Supreme Court in *NY Times v. Sullivan* when CJ Brennan said that "erroneous statement is inevitable in free debate, and it

[37] Postanovlenie No. 3 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O sudebnoi praktike po delam o zashite chesti i dostoinstva grazhdan, a takzhe delovoi reputacii grazhdan i yuridicheskih lits" [Decree No. 3 of the Plenum of the Russian Federation Supreme Court "Concerning Judicial Practice in Cases of Protection of Honor and Dignity of Citizens, and Business Reputation of Citizens and Legal Entities"] (Feb. 24, 2005). Russian version available at http://www.sclj.ru/court_practice/detail.php?ID=1063

[38] See for example decisions of the Federal Commercial Court of Eastern-Siberian District from 26 October 2006 N A33-27775/05-Ф02-5573/06-С2 and from 28 September 2006 N A19-21081/05-17-Ф02-5011/06-С2, available in database Consultant Plus.

must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive". …"[39]

However the Russian law is not as harsh and restrictive as it might seem to be at first sight. Article 57 of the law "On Mass Media"[40] provides for exclusion from responsibility for the dissemination of false information in certain circumstances:

> *Article 57. Exclusion from Responsibility.*
>
> The editorial office, editor-in-chief and journalist shall bear no responsibility for the dissemination of information that does not conform to the reality and denigrates the honor and dignity of private citizens and organizations or infringes on the rights and lawful interests of individuals or represents an abuse of the freedom of mass communication and (or) the rights of the journalist:
>
> 1. if this information is available in binding reports;
>
> 2. if this information was received from news agencies;
>
> 3. if this information is contained in the reply to its inquiry either in the materials of the press-services of state organs, organizations, institutions, enterprises, and organs of public associations;
>
> 4. if this information is the literal reproduction of the fragments from the speeches of People's Deputies at the congresses and sessions of Soviets of People's Deputies, delegates of congress, conferences and plenary meetings of public associations, and also from the official statements by the office-bearers of state organs, organizations and public associations;
>
> 5. if this information is to be found in the author's works that go on air without preliminary recording or in the texts not subject to editing in keeping with the present Law;
>
> 6. if this information is the literal reproduction of reports and materials or of their fragments disseminated by another mass medium, which can be ascertained and called to account for a given breach of the legislation of the Russian Federation on mass media.

Paragraph12 of the *Decree 2005* states that this list of circumstances regulating when the press may be excluded from responsibility is exhaustive and cannot be subject to lateral

[39] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[40] Law of the Russian Federation "On Mass Media", No. 2124-1 of December 27, 1991 [Zakon RF "O Sredstvah Massovoi Informatsii" 27.12.1991 N 2124-1]. English translation available at http://www.medialaw.ru/e_pages/laws/russian/massmedia_eng/massmedia_eng.html. Russian version available at http://www.consultant.ru/popular/smi/ (Russian link contains more recent version of Article 57 which was supplemented by Federal Law from 21.07.2005 N 93-FZ with special provisions on absolution from responsibility during elections and referendum. This part was omitted here as irrelevant for the topic under research).

interpretation. A concluding remark might be that the present state of law of Russia on the matter addressed in the present subchapter seems to be in conformity with the *Convention.*

2.2. Public Officials and State Agencies

Usually, criticism of the government either refers to a particular person whose behavior is under a vigorous critical scrutiny or may be attributed to some public official. In many jurisdictions speech about public officials or figures deserves more protection then speech about private individuals. The standard explaining reasons for different the constitutional protection of speech concerning public and private figures was developed in *NY Times v. Sullivan* and later elaborated in *Gertz v. Robert Welch, Inc.*:

> [We] have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error, and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication, and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties…
> Public officials and public figures had voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.[41]

A more beneficial status of speech concerning public officials *vis-á-vis* speech concerning private individuals was also recognized by the ECtHR in *Castells v. Spain*:

> The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal

[41] *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974).

> 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.[42]

Decree 2005 also gives certain recommendations on how the courts should adjudicate cases of defamation of public officials. Interestingly enough, §9 of the Decree refers not to the *Convention* or position of the ECtHR, but to the Declaration on Freedom of Political Debate in the Mass Media[43] which itself refers to the *Convention.* Probably this was done so because Russian courts are more accustomed to working with normative sources of law than with case law. *Decree 2005* provides:

> Courts should take into account, that according to articles 3 and 4 of the Declaration on Freedom of Political Debate in the Mass Media, adopted on February, 12, 2004 at the 872-nd session of the Committee of Ministers of the Council of Europe, the politicians aspiring to secure public opinion, thus agree to become the subject of public political debate and criticism in mass media. State officials can be subjected to criticism in mass media on how they execute their duties as it is necessary for maintenance of public and responsible performance of their powers.

This provision gives Russian lawyers a template to refer to when persuading judges to use contemporary international standards of free speech protection. It is noteworthy that the wording of §9 refers to public officials when they "exercise their duties". This was found to be problematic by some authors[44] as it may allow the courts to take a narrow interpretation. More specifically the courts may fail to grant protection to speech pertaining to public officials when they are not exercising their official duties.

[42] *Castells v. Spain*, 23 April 1992, Application number 11798/85.

[43] *Declaration on Freedom of Political Debate in the Media*, adopted by the Committee of Ministers of the Council of Europe on 12 February 2004 at the 872nd meeting of the Ministers' Deputies. Available at http://www.ebu.ch/CMSimages/en/leg_ref_coe_decl_political_debate_120204_tcm6-11947.pdf

[44] Peter Krug, Internalizing European Court of Human Rights interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law, Brooklyn Journal of International Law, 32 Brook. J. Int'l L. 1, p. 54 (2006).

What deserves attention is that some courts were deciding cases according to the *Convention* standards even before the *Decree 2005* was enacted. On March 5, 2004 the newspaper "Amurets" published an article written by a candidate for elections to the Soviet of People's Deputies of Ivanovskiy district, *Andrey Prostokishin*, with the title "What district administration is afraid of?"[45] The article criticized the way the district was governed by the head of the administration *Vladislav Bakumenko* which was at the material time also running for elections to the Soviet of People's Deputies. For example, the article contained an allegation that the head of the administration "does not see that the district gradually becomes a lifeless space and nevertheless dares to run for the elections". *Bakumenko* and the administration as an independent legal entity sued *Prostokishin* for damaging their honor, dignity and business reputation. *Bakumenko* claimed that the article ascertains his inability to govern and claims that he does not deserve to be a deputy and thus damages his honor and dignity, misleads the population of the district and inflicts serious injuries to the reputation of the administration itself.

Plaintiffs argued that the statements in the article were untrue and asked the court to order the newspaper to publish a refutation five times so that more people would be able to get acquainted with it. *Bakumenko,* seeking one hundred thousand rubles (approximately $4,000) in moral damages, claimed that he suffered morally and emotionally because he was called responsible for the bad situation in the district.

The court was generally referring to Article 10 of the *Convention.* It made a correct distinction between facts and opinions saying that the article contained pure value judgments

[45] Decision of the Ivanovskii District Court of Amur Region from April 15, 2004. Available at http://www.medialaw.ru/article10/7/2/01.htm

and expressed a general negative attitude towards the head of the administration. But the following argumentation in the case is somehow amazing taking into account the time at which it was decided.

The court addressed the issue of the scope of permissible criticism of public officials. They said that the limits of permissible criticism of such public officials as *Bakumenko* and an organ such as the administration are wider than that of private individuals. Unlike the latter the former shall be more tolerant to the intent and partial scrutiny of their actions by individuals and the population in general. Moreover, the plaintiff used his right to reply and published in the same newspaper an "Open letter to the candidate" *Prostokishin.*

The next paragraph of the decision almost word-for-word "plagiarized" from *Lingens v. Austria* when the ECtHR said that "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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[46]

The court also stated that value judgments on political and economic issues deserve protection even though they are exaggerating and caustic. Such speech has a right for mistake, i.e. some statements may be untrue, but they will still be protected. Despite the fact that the court did not specify in which circumstances false statements deserve protection this is an obvious step forward towards the European standard of free speech. However, a question may arise whether such an allegation is in conformity with Article 57 of the law "On Mass Media" which enumerates circumstances when the press shall be excluded from

[46] *Lingens v. Austria,* 8 July 1986, Application number 9815/82. §41.

responsibility. This list is exhaustive and cannot be subject to lateral interpretation (*Decree 2005,* §12). This law does not exclude responsibility of the authors of defamatory statements. Even if the decision does not absolutely meet the requirements of Article 57 it is nevertheless correct because international law prevails over national law according to the Russian Constitution.

One more issue which was addressed in the decision is standing of State Agencies in defamation cases. Article 152 of the Civil Code tells about business reputation of legal entities (organizations). In a number of cases State Agencies were acknowledged to have standing under Article 152.[47] However, the standing was denied in this case but not on free speech grounds (unfortunately). The Court took the position that according to the general principles of civil law only organizations engaged in commercial activity may have business reputation. The Administration does not exercise commercial functions and is even precluded from doing so by law. Article 152 is only applicable to horizontal, civil relations; civil legislation is not applicable to relations of subordination and exercise of official governmental powers.

This argumentation sounds quite plausible, but the problem is that there are no other examples when courts employed the same approach. The reasoning is based solely on interpretation of the Civil Code which may also be interpreted in a different way. For example the position of the judge of the Supreme Court *Sergei Potapenko* is that state agencies may possess business reputation and his argumentation also seems to be quite

[47] See for example decision of Klepikovskii district court if Ryazan region from 24 February 2004, available at http://www.mmdc.narod.ru/caselaw/process_18.html, decision of Leninskii district court of Ekaterinbug from 1 July 2004, available at http://www.sutyajnik.ru/rus/echr/rus_judgments/distr/beliaev_01_06_2004.htm

reasonable on the grounds of general principles of civil law.[48] *Decree 2005* is silent on the matter.

The issue may be resolved by the ECtHR as soon as the case of *Romanenko and Others v. Russia*[49] is decided. The applicants are contesting among other issues the ability of governmental bodies to file defamation suits. The application was held admissible but the final decision has not yet been delivered.

2.3. Test Applied

The highest standard was so far established by the US Supreme Court in *NY Times v. Sullivan.* Justice Brennan set up an "actual malice" rule for a public official to be able to claim damages:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

This position is technical, i.e. it protects more speech in order to give some "breathing space" for the press. Otherwise – 'chilling effect'.

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments virtually unlimited in amount - leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. 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.[50]

[48] Sergei Potapenko, *Pravovaia pozitsiia verkhovnogo suda RF po diffamatsionnym sporam* [*Legal positions of the Russian Federation Supreme Court concerning defamation disputes*], April 2005, available at http://www.supcourt.ru/news_detale.php?id=2601

[49] *Romanenko and Others v. Russia,* Application number 11751/03.

[50] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

However, this approach was criticized by Eric Barendt. He argues that there is too much attention given to the status of the plaintiff and not to the actual content of the speech.[51] This may lead to a situation when speech of little or no political importance and public interest gains protection, but important speech about individuals who do not generally possess "fame and notoriety" but who might be somehow engaged in political issues does not get protection according the *NY Times v. Sullivan* rule.

Barendt's concern is understandable however it is hard to agree with it. The US Supreme Court was also struggling with it when in the beginning of 1970s when in *Rosenbloom v. Metromedia*[52] the majority of the Court adopted the 'public interest' approach. However, three years later in *Gertz v. Robert Welch, Inc.* the Court ended up with the 'status of the plaintiff' approach.[53] This categorical approach enables for one to draw a clear cut distinction without the need to decide in every particular case whether the communication was in public interest. Very often it is hard to distinguish between matters of public concern and private interests. "Actual malice" standard as it was already mentioned was meant to eliminate "self-censorship" and "chilling effect". Giving public officials a leeway to recover damages in some circumstances without proving "actual malice" would inevitably lead to "self-censorship" and "chilling effect".

The ECtHR when deciding speech cases employs the regular standard, i.e. whether the interference is prescribed by law, pursues "legitimate aim" and necessary in a democratic society, which includes "pressing social need" and "proportionality". Distribution of the burden of proof is left to the margin of appreciation of States. Whether the interference was

[51] Erick Barendt, *Freedom of Speech*, Oxford: University Press, 2005, pp. 209-210.
[52] *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), pp. 45-45.
[53] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

necessary in a democratic society depends upon the content of the speech, measures taken by states and conduct of the journalist.

The ECtHR allows criminal measures to be used if it is necessary to preserve public order.[54] But these measures should also be proportional. To the contrary, there is no criminal libel in the United States after the Sedition Act 1918 was repealed in 1921. The ECtHR seems to have adopted approach which is more consistent with the aforementioned position of Eric Barendt than with the position of the US Supreme Court in *NY Times v. Sullivan*. The position is that the *Convention* offers "little scope […] for restriction on political speech or on debate on matters of public interest".[55] This means that not the addressee of the speech matters but rather the actual content of the speech. The other criterion which matters is whether the conduct of the journalist was professional, whether s/he took necessary measures to verify the information and whether s/he reflected different points of view on the issue.[56]

The Russian Civil Code presumes as a general rule liability of the respondent unless proven otherwise. There are no exceptions for speech criticizing the government in either Article 152 of the Civil Code or the *Decree 2005* (except for 'enigmatic' § 9 which allows criticizing public officials): the burden of proof lies on the respondent (in relation to factual statements of course). The statutory scheme includes three elements which if found result in successful litigation for the plaintiff: (1) "the fact of distribution of the information about the claimant by the respondent, (2) discrediting character of this information and (3) discrepancy of its conformity with the real state of things. At the absence of even one of the specified

[54] *Castells v. Spain* (§46), April 23, 1992, Application number 11798/85.
[55] *Ceylan v. Turkey* (§34), July 8, 1999, Application number 23556/94.
[56] *Bladet Tromsø and Stensaas v. Norway*, May 20, 1999, Application number 21980/93.

circumstances the claim cannot be satisfied by court".[57] The plaintiff has to prove only that the information was distributed by the respondent and that it has discrediting character.[58]

Disclosure of the information relating to the sphere of private life of the person may result in recovery of moral damages. *Decree 2005* provides for one exception when the information concerning private life of the plaintiff relates to public interest (§8). The *Decree 2005* refers to Article 8 of the *Convention* here. Unfortunately, this is the only one case when the *Decree 2005* refers to the public interest justification.

However, some lower courts have employed this approach citing decisions of the ECtHR in a number of cases.[59] But we cannot ascertain that a coherent position on the matter has been formed. In fact, further development may take either of the following directions: courts will either adopt 'status of the plaintiff' approach or 'public interest' approach or combination of the two[60]. This process is highly influenced by the case law of the ECtHR and further incorporation of ECtHR practice into Russian domestic legal system will determine which approach prevails.

Certain types of speech were criminalized by the Russian Criminal Code. In particular, it contains provisions on slander (Article 129) and insult (Article 130). The standard in Article 129 is higher than the civil defamation standard in Article 152 of the Civil Code. Here the burden of proof lies on the prosecution (as always in Russian criminal law) and 'actual malice' shall be proven. Insult relates to the category of fighting words which is a low value

[57] *Decree 2005,* §7.

[58] *Ibid,* §9.

[59] See for example decision of Kalevalskii district court of Karelia Republic from March 12, 2002. Available at http://www.medialaw.ru/article10/7/2/08.htm, decision of Ivanovskii district court of Amur Region from April 15, 2004. Available at http://www.medialaw.ru/article10/7/2/01.htm.

[60] *Supra* note 45, p. 53.

speech in all jurisdictions under comparison. This kind of speech deserves little if any protection and will not be discussed in this paper.

Another law which imposes responsibility for certain types of speech is the law "On Counteraction to Extremist Activity".[61] Definition of extremism includes among other things "a knowingly false public statement that a public official […] during the period of his public service committed acts mentioned in the present article and constituting crime".[62] Article 11 of the aforementioned law contains sanctions for such misconduct: the license of the mass media company may be revoked.

The definition of extremism was given quite recently (the law was adopted in 2002) and undergoes strong criticism. Knowingly false public accusation of commission of a crime already constitutes slander under Article 129 of the Criminal Code. But criminal responsibility may be imposed only upon individuals in Russia. The law "On Counteraction to Extremist Activity" does not provide for criminal sanctions because criminal legislation in Russia may be only in form of the Criminal Code. Revocation of a license of mass media is a very radical measure which may lead to the 'chilling effect'. It is not absolutely clear how the law "On Counteraction to Extremist Activity" correlates to Article 57 of the law "On Mass media". Is mass media excluded from responsibility for publication of information received from certain sources? It looks like false accusations disseminated through mass media will not lead to their responsibility in circumstances listed in Article 57. Definition of extremism includes other elements like incitement to change of constitutional order which if published

[61] Law of the Russian Federation "On Counteraction to Extrimist Activity", No. 114-FZ of July 25, 2002 [Zakon RF "O Protivodeistvii Ekstremistskoi Deyatel'nosti" 25.07.2002 N 114-FZ]. Relevant provision in Russian available at http://www.medialaw.ru/laws/russian_laws/txt/27.htm

[62] *Ibid*, Article 1.

may lead to revocation of the license. However, this leads us to the discussion of the 'clear and present danger' standard which is outside the scope of the present paper.

3. PROPOSALS AND WAYS OF FUTURE DEVELOPMENT OF FREE SPEECH LAW IN RUSSIA

There are three issues which still remain unsolved in the sphere of Russian defamation law. *Decree 2005* does not address them at all or just refers to them without offering a meaningful solution.

The *first* issue is whether some false statements of facts deserve any protection if they refer to matters of public interest. The protection was granted to such statements in a number of cases[63] but a unified position on the matter is still not developed. Establishment of a 'public interest' standard would be one of the solutions. But it is necessary to specify the number of issues when derogation from general rule of responsibility for dissemination of false information is possible. This will require a case by case approach and highly developed legal conscience of judges. The situation is similar to the aforementioned struggling of the US Supreme Court in the early 1970s when finally the Court had chosen a categorical 'actual malice' standard. This happened even though American courts are deemed to have a deeper understanding of law, ordinary courts interpret constitution and operate with general principles of law on day to day basis. Russian ordinary courts do not interpret the constitution and often adopt narrow approaches when deciding legal disputes. A proper understanding of the meaning of law is probably something that is not very well developed so far.[64]

[63] *See supra* note 46.

[64] See for example case of *Dzhavadov v. Russia*, September 27, 2007. Application number 30160/04. In this case the Russian court interpreted a very clear provision of law in a way absolutely contrary to its meaning

Actual malice standard would be much easier to deal with by Russian courts; however it does not seem possible that the legislator will incorporate this approach into the Civil Code in the near future. A possible solution might be a further incorporation of principles established in the ECtHR case law concerning 'public interest' justification by means of 'guiding explanations' and development of legal conscience of the judiciary.

The *second* issue is whether the burden of proof should be redistributed. The situation was improved by *Decree 2005*. Before, all the plaintiff had to do was simply to file a suit and prove that the communication was disseminated by the respondent and relates to the plaintiff. This was quite easy to do and it was used very effectively to silence the media. In each case the media had to start gathering the material proving that the communication does not harm to the reputation of the plaintiff. The harmfulness of the communication was presumed. *Decree 2005* added one more element to be proven by the plaintiff – harmfulness of the communication to honor, dignity or reputation of the plaintiff. In conjunction with the fact/opinion distinction this innovation seriously strengthened the position of the independent media.

However, there are no specific provisions on the burden of proof of public officials in the current Russian legislation. Taking into account the fact that public officials are exposed to a higher public scrutiny and have more access to the media, it seems to be reasonable to shift the burden of proof of the truthfulness of the statement to public officials. This change should be directly incorporated into Article 152 of the Civil Code.

and in violate on Article 10 of the convention. But the ECtHR did not get to the proportionality; it found the interference not prescribed by law.

Finally, the *third* issue to be addressed is the standing of state agencies in defamation cases. State bodies do not possess business reputation because they are not engaged in business activity. However, the Russian translation of the phrase 'business reputation' (delovaya reputatsiya) is not that similar to something connected with business as the English version, consequently some other grounds for elimination of state agency's standing should be found.

Firstly, state agencies have tremendous opportunities to influence the media. Giving them the standing would inevitably lead to the 'chilling effect'. Secondly, state agencies, unlike individuals, do not suffer moral injuries. They are also subject to the heightened scrutiny of the public. Thus, the standing of the public agencies should be eliminated by means of narrow interpretation of a phrase 'legal entities' in Article 152. This can be done through 'guiding explanations' of the Supreme Court.

CONCLUSION

The present research shows that Russian defamation law has undergone a significant development during the last three years. *Decree 2005* introduced a very important novella into the interpretation of the Civil Code – distinction between facts and value judgments. This change introduced a standard which has long time been used in the United States and ECtHR.

Another important development is that *Decree 2005* explicitly authorizes the courts to use Article 10 of the *Convention* and the case law of the ECtHR. This was possible before but not all courts used the *Convention,* the explanations of the Supreme Court pushed the courts to take into account norms of international law within the sphere of defamation law. Special attention deserves provision of *Decree 2005* concerning status of public officials and public interest of speech criticizing them. This might be a powerful impetus for the further development of the Russian defamation law in accord with the ECtHR practice.

The next innovation in the Russian defamation law is a slight change in the burden of proof of the plaintiff, namely the necessity to prove actual damage. This significantly decreases possibilities to put pressure on the press. Russian law does not have anything similar to the American 'actual malice' standard, however it is gradually moving towards more liberal position of the press and probably at a certain moment we will witness more robust protection of speech criticizing the government than offered by the Russian law now.

The issues which are still not resolved by the Russian defamation law were referred to in the last chapter. Necessary changes to be introduced in future include protection of certain untrue statements of public interest, redistribution of burden of proof from respondents to plaintiffs if the plaintiff is a public official and elimination of standing for state agencies in defamation

cases. The first and the third changes may be introuced by means of ‘guiding explanations’, the second should find its place in Article 152 of the Civil Code. Further incorporation of positions of the ECtHR will facilitate the resolution of the issues raised in this paper.

BIBLIOGRAPHY

Books and articles

Alexander Meiklejohn, *Political Freedom. The Constitutional Power of People*, New York: Harper (1960).

András Sajó, *Freedom of Expression*, Warsaw: Institute of Public Affairs (2004).

Erick Barendt, *Freedom of Speech*, Oxford: University Press (2005).

Frederick Schauer, *'Must Speech be Special?'* 78 North Western Univ Law Rev 1284 (1983).

J. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).

John Stuart Mill, *On Liberty* (1859).

Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution Part One*, 13 Cardozo Arts & Ent. L.J. 847 (1995).

Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution Part Two*, 14 Cardozo Arts & Ent. L.J. 297 (1996).

Peter Krug, *Internalizing European Court of Human Rights interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law*, Brooklyn Journal of International Law, 32 Brook. J. Int'l L. 1 (2006).

T. I. Emerson, *"Toward a General Theory of the First Amendment"* 72 Yale L.J. 877 (1963).

Electronic sources

Oral arguments during United States v. Nixon, 418 U.S. 683 (1974). Available at: http://www.oyez.org/cases/1970-1979/1974/1974_73_1766/argument/ Last visited (last visited: March 26, 2008).

Sergei Potapenko, *Pravovaia pozitsiia verkhovnogo suda RF po diffamatsionnym sporam* [*Legal positions of the Russian Federation Supreme Court concerning defamation disputes*], April 2005. Available at http://www.supcourt.ru/news_detale.php?id=2601 (last visited: March 26, 2008).

Statues and acts

Grazhdanskii Kodeks RF (Chast' pervaia) [GK] [Civil Code (Part One)] No. 51-FZ. Adopted November 30, 1994.

Konstitutsiia Rossiiskoi Federatsii 1993 [Constitution of the Russian Federation 1993]. Available at: http://kremlin.ru/eng/articles/ConstMain.shtml (last visited: March 26, 2008).

Postanovlenie No. 11 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O nekotorykh voprosakh voznikshikh pri rassmotrenii sudami del o zashchite chesti i dostoinstva grazhdan i organizatsii" [Decree No. 11 of the Plenum of the Russian Federation Supreme Court "Concerning Several Questions Arising in Consideration by the Courts of Cases Concerning Defense of Honor and Dignity of Citizens and Organizations"] (Aug. 18, 1992), in Biull. Verkh. Suda RF, No. 11, 7 (1992).

Postanovlenie No. 3 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O sudebnoi praktike po delam o zashite chesti i dostoinstva grazhdan, a takzhe delovoi reputacii grazhdan i yuridicheskih lits" [Decree No. 3 of the Plenum of the Russian Federation Supreme Court "Concerning Judicial Practice in Cases of Protection of Honor and Dignity of Citizens, and Business Reputation of Citizens and Legal Entities"] (Feb. 24, 2005).

Zakon RF "O Protivodeistvii Ekstremistskoi Deyatel'nosti" 25.07.2002 N 114-FZ. [Law of the Russian Federation "On Counteraction to Extrimist Activity", No. 114-FZ of July 25, 2002]

Zakon RF "O Sredstvah Massovoi Informatsii" 27.12.1991 N 2124-1[Law of the Russian Federation "On Mass Media", No. 2124-1 of December 27, 1991].

International norms

Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Declaration on Freedom of Political Debate in the Media, adopted by the Committee of Ministers of the Council of Europe on 12 February 2004 at the 872nd meeting of the Ministers' Deputies. Available at: http://www.ebu.ch/CMSimages/en/leg_ref_coe_decl_political_debate_120204_tcm6-11947.pdf (last visited: March 26, 2008)

Table of cases and decisions

The United States of America

Abrams v. United States, 250 U.S. 616 (1919).

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

Whitney v. California, 274 U.S. 357 (1927).

Canada

R. v. Keegstra, [1990] 3 S.C.R. 697.

The European Court of Human Rights

Bladet Tromsø and Stensaas v. Norway, May 20, 1999. Application number 21980/93.

Castells v. Spain, 23 April 1992. Application number 11798/85.

Ceylan v. Turkey (§32), July 8, 1999. Application number 23556/94.

Dichand and Others v. Austria, February 26, 2002. Application number 29217/95.

Dzhavadov v. Russia, September 27, 2007. Application number 30160/04.

Grinberg v. Russia, July 21, 2005. Application number 3472/03.

Lingens v. Austria, 8 July 1986. Application number 9815/82.

Romanenko and Others v. Russia. Application number 11751/03.

The Russian Federation

Decision of Ivanovskii district court of Amur Region from April 15, 2004. Available at: http://www.medialaw.ru/article10/7/2/01.htm (last visited: March 26, 2008).

Decision of Kalevalskii district court of Karelia Republic from March 12, 2002. Available at: http://www.medialaw.ru/article10/7/2/08.htm (last visited: March 26, 2008).

Decision of Klepikovskii district court if Ryazan region from 24 February 2004, available at: http://www.mmdc.narod.ru/caselaw/process_18.html (last visited: March 26, 2008).

Decision of Leninskii district court of Ekaterinbug from 1 July 2004, available at: http://www.sutyajnik.ru/rus/echr/rus_judgments/distr/beliaev_01_06_2004.htm (last visited: March 26, 2008).

Decision of the Federal Commercial Court of Eastern-Siberian District from 26 October 2006 N A33-27775/05-Ф02-5573/06-С2.

Decision of the Federal Commercial Court of Eastern-Siberian District from 28 September 2006 N A19-21081/05-17-Ф02-5011/06-С2.

Decision of the Ivanovskii District Court of Amur Region from April 15, 2004. Available at: http://www.medialaw.ru/article10/7/2/01.htm (last visited: March 26, 2008).

Kozyrev case, available at: http://medialaw.ru/projects/1/4/d4.htm (last visited: March 26, 2008).

Zhirinovsky v. Gaidar case, described in Peter Krug, Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution Part One, 13 Cardozo Arts & Ent. L.J. 847, pp.860-863 (1995).