



# **Standing Up for the Right to Free Political Expression: the ECtHR Jurisprudence, Lessons for Russia**

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## **Abstract**

In the recent decade the rates of protection of the right to freedom of political expression have significantly decreased throughout the world. Political expression is in jeopardy, particularly in Russia. Silencing political criticism, dissent and opposition takes different forms. Biased media coverage, compelled political expression, persecution of leaders of the opposition, imposition of disciplinary, administrative and even criminal sanctions for the expression of criticism of the work of politicians and other public officials is not the whole list of tools which the Russian government uses to stop those who criticize the governing majority. The paper is devoted to the understanding of the right to free political expression: its notion, legal framework and restrictions. The European Court of Human Rights being a human rights arbiter has developed standards under which the right to freedom of political expression should be treated. This paper analyzes what standards the ECtHR uses with regard to political expression of individuals, what lessons Russian national authorities can learn from them and how the Strasbourg Court's jurisprudence influences domestic policies of states in general.

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## TABLE OF CONTENTS

Introduction .....	1
Chapter I. General overview of the notion of political expression.....	5
Chapter II. ECtHR jurisprudence on freedom of political expression cases .....	10
2.1. Disagreement, disapproval and criticism .....	10
People disagree .....	10
Disapproval of governmental policy.....	11
Criticism of politicians and other public officials .....	11
Abusive criticism.....	14
2.2. “Protest simply is political speech” .....	15
Chapter III. Standing up for freedom of political expression in Russia: domestic problems and lessons from the ECtHR .....	19
3.1. Notion of a political right to free expression within a state that provides constitutional protection.....	19
3.2. Silencing the opposition .....	25
Compelled political expression .....	25
Biased media .....	27
Online censure of expression of controversial political views .....	29
3.3. Changes in the activity of the Russian civil society as one of the factors of rise of political expression .....	30
3.4. Lessons from the ECtHR .....	32
Conclusion.....	36
Bibliography .....	38

## Introduction

The right to freedom of political expression should be exercised in order not to reach the level of abuse of the right. The proper exercise of the right has been a longstanding issue for human rights scientists and experts both on the national and international agenda. In recent decades the number of cases when national authorities applied too restrictive measures to the right to freedom of political expression rose significantly. The wave of political anti-government protests seen in some European states as well as in the Russian Federation (after the last election campaigns 2011-2012) gave start to such practice.<sup>1</sup> The growth of opposition views, political critiques and dissent leads governments to apply more strict measures to muzzle the protesters in the short term and not allow the opposition movement to spread. The lack of time influences the character of the means which are applied. Not only the measures matter, but the legislation which impacts free speech and threatens it.

Although there is no special mention that political expression is protected by law, the importance of the fundamental right to freedom of expression is well recognized at the international, regional and national levels. Article 19 of the International Covenant on Civil and Political Rights [*hereinafter*-ICCPR],<sup>2</sup> Article 10 of the European Convention on Human Rights [*hereinafter*-ECHR]<sup>3</sup> and provisions of the domestic legislation are examples of such regulation. Although the scope of the right to freedom of expression is very broad and legal instruments make no specific mention of political expression, protest speech is nevertheless covered by the above mentioned provisions.

Depending on the jurisdiction, the standards used for the protection of the right to freedom of political expression, the meaning of the right in general and how freedom of expression should be fostered differ. Thus, the European Court of Human Rights [*hereinafter*-

<sup>1</sup> Tom Parfitt, *Anti-Putin Protesters March Through Moscow*, available at: <http://www.guardian.co.uk/world/2012/feb/04/anti-putin-protests-moscow-russia> (last visited on 23 March 2013)

<sup>2</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Treaty Doc. 95-20, 6

<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *op.cit.*

ECtHR] examines the restrictions imposed on the right to freedom of political expression on the basis of the permissible grounds of the regular test prescribed by Article 10 (2) of the ECHR.<sup>4</sup> The United States Supreme Court rules on the basis of the First Amendment right to free speech, under which the vast protection is granted to all kinds of speech.<sup>5</sup>

At the same time, Russia, being a contracting party both to the ICCPR and the ECHR, reflects the internationally established standards of protection of the free speech right in Article 29 of the Constitution of the Russian Federation.<sup>6</sup> But the mere existence of the norm does not by itself guarantee the existence of the legal order with regard to this right, so the provision can simply remain declaratory. In fact, the practice of political dissent is in jeopardy in the Russian Federation. The latest events in Russia – the arrest of protesters after the demonstrations at Prospekt Sakharova<sup>7</sup> and at Bolotnaya Square<sup>8</sup> in Moscow, the arrest of the Punk-Band Pussy Riot,<sup>9</sup> the persecution of the leaders of the opposition for their public speeches and posts on Internet blogs<sup>10</sup> – will be the central cases for the examination in the paper under the tests which were established by the ECtHR. It should be kept in mind that civil society in Russia is still in a period of formation. Moreover, there is no common approach to the interpretation and understanding of civil and political rights. Therefore, such

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<sup>4</sup> *Ibid.*

<sup>5</sup> Constitution of the United States, Bill of Rights, First Amendment, available at [http://www.senate.gov/civics/constitution\\_item/constitution.htm#amdt\\_1\\_\(1791\)](http://www.senate.gov/civics/constitution_item/constitution.htm#amdt_1_(1791)) (last visited on 24 March 2013)

<sup>6</sup> Constitution of the Russian Federation, Art. 29, Dec. 12, 1993, as amended by the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation N 6-FKZ, 30 Dec. 2008 “On the changes of the terms of the President of the Russian Federation and State Duma” (Rossiiskaya Gazeta, 2008, 31 Dec), available at: <http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter1.aspx> (last visited on 24 March 2013)

<sup>7</sup> Howard Amos, *Russia Protests: Tens of Thousands Voice Opposition to Putin's Government*, available at: <http://www.guardian.co.uk/world/2012/jun/12/russia-protests-against-vladimir-putin> (last visited on 24 March 2013)

<sup>8</sup> Phil Black, *Anti-Putin Protesters Clash with Police; More than 250 Arrested*, available at: <http://edition.cnn.com/2012/05/06/world/europe/russia-protest> (last visited on 24 March 2013); Ellen Barry, Michael Schwirtz, *Arrests and Violence at Overflowing Rally in Moscow*, available at: [http://www.nytimes.com/2012/05/07/world/europe/at-moscow-rally-arrests-and-violence.html?\\_r=0](http://www.nytimes.com/2012/05/07/world/europe/at-moscow-rally-arrests-and-violence.html?_r=0) (last visited on 24 March 2013)

<sup>9</sup> *Pussy Riot Found Guilty of Hooliganism*, by Associated Press, [guardian.co.uk](http://www.guardian.co.uk), available at: <http://www.guardian.co.uk/world/2012/aug/17/pussy-riot-found-guilty-hooliganism> (last visited on 24 March 2013)

<sup>10</sup> *Russian Police Search Opposition Leaders' Homes*, by BBC News Europe, available at: <http://www.bbc.co.uk/news/world-europe-18393060> (last visited on 24 March 2013)

constitutional principles as the principle of law-governed state,<sup>11</sup> respect for human rights,<sup>12</sup> human rights as a supreme value<sup>13</sup> should be the leading concerns of the public authorities while applying restrictions to the right to political expression.

Arrests and persecutions in Russia became a matter of wide public discussion. On the one hand, there are people who express a harsh critique of the silencing policy of the government; on the other hand, there are public authorities who try to offer sufficient justifications for the restrictions. The aims which were chosen to justify the restrictions are very controversial and sometimes seem to be artificially tailored. The danger to the expression of political dissent becomes even more acute when public authorities attempt “to act under so vague a concept as the power to protect “domestic security”.”<sup>14</sup> The difficulty of interpretation of the domestic security interest poses “the danger of abuse in acting to protect that interest.”<sup>15</sup>

A number of journal articles have discussed the problems of the imposition of too severe restrictions on the right to political expression in Russia, but none of them has done it comparatively.<sup>16</sup> Moreover, no definite measures or amendments in the legislation have been offered to change the present situation.

This thesis will put forth a logical line of analysis of the selected jurisdictions and will offer preferable ways of adoption of the established standards in the Russian domestic legal system. The thesis is based on the analysis of primary sources such as the ICCPR, the ECHR,

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<sup>11</sup> Constitution of the Russian Federation, *op. cit.*, Art. 1

<sup>12</sup> *Ibid.*, Art.2

<sup>13</sup> *Ibid.*

<sup>14</sup> Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 Geo. Wash. L. Rev. 395, 2005, at p. 395

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

<sup>16</sup> Juliette Terzieff, *Russian Security Legislation Could Impact Free Speech*, WPR Trend Lines; 28 June 2010, p.1, available also at: <http://www.worldpoliticsreview.com/trend-lines/5905/russian-security-legislation-could-impact-free-speech> (last visited on 25 March 2013); *Russia's New Laws Could Have Serious Negative Impacts on Human Rights*, by UN official, available at: <http://www.un.org/apps/news/story.asp?NewsID=42497#.UU8IPxeQVEI> (last visited on 25 March 2013); Tom Flynn, *It's Time to Stand Up for Free Expression*, available at: [http://www.secularhumanism.org/index.php?section=fi&page=flynn\\_33\\_1](http://www.secularhumanism.org/index.php?section=fi&page=flynn_33_1) (last visited on 25 March 2013)

the US Constitution, the Constitution of the Russian Federation as well as official reports,<sup>17</sup> reviews and recent scientific findings which constitute a theoretical basis for the research.

The first chapter of the thesis is devoted to the general overview of the right to freedom of political expression, its scope and permissible restrictions. To find out how different forms of violence against political activists and protesters can be justified a comparative method of research over the jurisdictions will be used. The second chapter is devoted to the examination of the ECtHR case law in this sphere. What were the outcomes in the political speech cases examined by the ECtHR, what standards were applied and what justification for the restrictions to political expression were found by the Court? The answers to these questions are supposed to be lessons for the Russian public authorities. These issues will be covered in the third chapter of the thesis.

Ultimately this thesis aims to provide practical guidance for the Russian authorities how to treat the right to freedom of political expression in accordance with the rule of law. The findings will help to form the unique practice in the right's implementation in all states which deal with the problem of illegal restrictions to political speech and particularly will identify which amendments have to be made to revoke the recent restrictive legislation and bring it in accordance with legal international human rights standards, which will stop the arbitrariness towards political opposition/dissenters in my Russia. Until core reforms are introduced, people in Russia need to stand up for their right to free political expression and fight against the severe governmental policy.

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<sup>17</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Addendum, Summary of cases transmitted to Governments and replies received, A/HRC/17/27/Add.1, pg. 274, May 27, 2011; "2010 Human Rights Report: Russia," Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, Apr. 8, 2011, available at [www.state.gov/j/drl/rls/hrrpt/2010/eur/154447.htm](http://www.state.gov/j/drl/rls/hrrpt/2010/eur/154447.htm) (last visited on 24 March 2013); Human Rights Foundation Report, Russia's Violation of the Right to Freedom of Expression: The Case of the Punk Rock Band Pussy Riot (Legal Report) New York August 16, 2012 (updated August 17, 2012)



## Chapter I. General overview of the notion of political expression

It is well established on the agenda of international human rights and constitutional law scholars that freedom of expression is a fundamental right which should be guaranteed to everyone.<sup>18</sup> Scholars define the right to freedom of expression in a broad way, including into the scope of the right different types of expressions. “The marketplace of ideas” concept allows to provide protection to various types of speech.<sup>19</sup> However, the approaches to the regulation of the right to freedom of expression and, accordingly, to the level of protection provided to different types of expression, differ depending on jurisdiction.

Scholars present different views on what exactly deserves high level of protection under the freedom of expression provisions. Glen Newey in his article correctly made the distinction upon which the levels of the free expression protection should be provided. He emphasized that the “*opportunity*” to import the message and the “*content*” of the message should deserve different protection. In these regards, he clarified that “*opportunity*” is a possibility “to contribute to public discussion”, thus this approach concerns that “no group should be silenced”.<sup>20</sup> On the other hand, a “*content*” approach is based on the presumption that protection should be given to what is put into the public sphere, thus there is “particular content which is proscribed, rather than banning specific groups from uttering it, or a particular mode of expressing it”.<sup>21</sup> In fact, a range of factors matter. Thus, free speech requires:

certain groups of people or individuals who wish to speak, or certain kinds of content, or certain modes of expressing content, or certain contexts in which it is

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<sup>18</sup> See International Covenant on Civil and Political Rights, Art. 19, *op. cit.*, Universal Declaration of Human Rights, Art. 19, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)

<sup>19</sup> Initially the concept appeared in the dissenting judgment of Justice Holmes in *Abrams v. US* (250 US 616, 630-631, (1919)), see also Eric Barendt, *Freedom of Speech*, Oxford University Press, 2nd ed, 2005, at pp.11-12

<sup>20</sup> Glen Newey, *Denial Denied: Freedom of Expression*, Amsterdam Law Forum 2: 2, pp. 63-70 at p.64; available at <http://ojs.ubvu.vu.nl/alf/article/view/109> (last visited on 24 March 2013)

<sup>21</sup> *Ibid.*

expressed. These possibilities call for rather different kinds of justification, and correspondingly different free speech regimes result from them.<sup>22</sup>

In specific cases the focus may be on a speaker's entitlement to be heard or on an audience's entitlement to hear.<sup>23</sup> The existence of a forum in general to exercise the right to freedom of expression is crucial.<sup>24</sup> Therefore, in order to provide protection to free speech all factors mentioned above should be kept in mind.

Political expression is only one form of expression which is given protection under international, regional and national legal instruments. Neither Article 19 of the ICCPR, nor Article 10 of the ECHR provide grounds as to why the right to freedom of political expression should be less respected than any other form of expression. Free political speech as an essential right of individuals in every democratic society deserves a high level of protection. However, it is important to have a clear understanding what political speech is.

In general it should be noted that "political speech" or "political expression" is seldom defined clearly. There has been a long-standing tradition both in legal thinking and in popular mind as well that "political speech" is a speech "relating to 'public affairs', 'criticism of governmental officials and policies', 'debate on public issues [including] attacks' on the behavior of the policymakers, judiciary and other officials, etc."<sup>25</sup> John Rawls, a political philosopher, defined political speech as being the central tool for the exercise of the "idea of basic political liberties".<sup>26</sup> It seems that the term introduced by Katharine Gelber in her book follows the definitions provided above and can also be used. She used the term to mean different "kinds of expressions that speakers intend to make as a contribution to public debate,

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<sup>22</sup> Glen Newey, *op. cit.*, at p.64

<sup>23</sup> Glen Newey, *op. cit.*, at p.67; for further details see Jerome Neu, *More Speech, Better Speech as the Best Defense, On Loving Our Enemies: Essays in Moral Psychology*, Oxford University Press, 2012

<sup>24</sup> Terrence S. Morrow, *A Free Speech Siberia: Drawing Property Lines to Limit Dissent*, 42 Free Speech Yearbook; 2005, pp. 41-59

<sup>25</sup> Katharine Gelber, *Speech Matters: Getting Free Speech Right*, St. Lucia: University of Queensland Press, 2011, p. 215 at pp.11-12

<sup>26</sup> Katharine Gelber, *op. cit.*, at p.11; for further details see John Rawls, *The Basic Liberties and Their Priority*, in Sterling M. McMurrin, ed., *The Tanner Lectures on Human Values, III*, Salt Lake City: University of Utah Press; Cambridge: Cambridge University Press, 1982.

and which at least some of the hearers receive as such a contribution”.<sup>27</sup> Numerous attempts of different scholars to define political speech more narrowly have failed.<sup>28</sup> However, political speech scholar, Edwin Baker, insisted that the category of political speech is “indefinable as it is dependent on the eye of the beholder”.<sup>29</sup>

Numerous protests, demonstrations and other social movements take place when people disagree or want to express dissent. Restrictions on their right to freedom of political expression do not let them import the message they want to be heard by public officials. Therefore, more and more people nowadays have to stand up for their right to free political expression. Nancy Chang pointed out that public activism is “the hallmark of a democratic society”.<sup>30</sup> The expression of opposing viewpoints both makes the problem which the government faces clearer, challenges the creativity to find a quick and proper solution to the problem and, sometimes, even includes possible ways of balancing different views. However, governments suffer excessive sensitiveness to criticism and are not ready to accept or at least to hear the critique. They do not agree with the statement that productive dialogue on public matters requires healthy dissent.<sup>31</sup> Thus, the overbroad use of powers by governments prevails over the freedoms and rights of the people, which were proclaimed to be realistic but in fact remained declaratory and abandoned.

To make the right to free political expression real individuals have to invoke legal instruments which recognize this right. The allegations of human rights violations can be brought before the European Court of Human Rights, which acts as a human rights arbiter examining the cases on the basis of the European Convention on Human Rights. On the regional level, under the European Convention on Human Rights, freedom of political

<sup>27</sup> Katharine Gelber, *op. cit.*, at p.14

<sup>28</sup> Katharine Gelber, *op. cit.*, at p.14

<sup>29</sup> C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters*, New York and Cambridge: Cambridge University Press, 2006, 256 p., at p.57

<sup>30</sup> Nancy Chang, *Silencing Political Dissent*, Seven Stories Press, NY, 2002, 110 p. at p.92

<sup>31</sup> For further details see Terrence S. Morrow, *A Free Speech Siberia: Drawing Property Lines to Limit Dissent*, 42 Free Speech Yearbook; 2005, p. 41-59

expression allows individuals to contribute to public debate and raise the discussion of public issues as long as the expression concerns public matters.

If we compare the European approach to the right to free political expression with the one which prevails in the United States, it should be noted that the understanding of the American tradition enshrined in the First Amendment can be taken as an ideal example of what should be protected under the constitutional provision which guarantee the right to free speech: “independence of thought, diversity of opinion, and the right to uninhibited expression of one’s views, no matter how unpopular”.<sup>32</sup> The United States Supreme Court is bound by one provision, “by iron law: “no law.”<sup>33</sup> The function of free speech under the American Constitution “is to invite dispute”.<sup>34</sup> The concept of the marketplace of ideas prevails in all spheres including the sphere of political expression. It is accepted in American constitutional theory that free speech “may indeed best serve its high purposes when it induces a condition of unrest, creates the dissatisfaction with conditions as they are, or even stirs people to anger”.<sup>35</sup> The possibility to impose restrictions on speech which expresses protest or dissent is really limited. The interference in the First Amendment rights of protesters can be based only on the implementation of reasonable time, place, and manner restrictions.<sup>36</sup>

In contrast, none of the Parties to the European Convention on Human Rights has in their domestic legal systems such a high level of protection of speech. The level of protection, established in the Convention, can be regarded as sufficient and the one which answers all the needs of the individuals in cases when they seek the protection for their expressions. More balanced approach of the Strasbourg Court to the grant of the protection of political speech

<sup>32</sup> Nancy Chang, *op. cit.*, at p.93

<sup>33</sup> Elisabeth Zoller, *Freedom of Expression: "Precious Right" in Europe, «Sacred Right" in the United States?*, Foreword at a Symposium: An Ocean Apart? Freedom of Expression in Europe and the United States, 84 Indiana Law Journal, 2009, at.p. 807

<sup>34</sup> *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)

<sup>35</sup> *Ibid.*

<sup>36</sup> Nick Suplina, *Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 Geo. Wash. L. Rev. 395, 2005, pp.395-428 at p.404

can be connected with the European past when political and hate speeches led to undesired consequences.<sup>37</sup> The imposition of restriction on the right to freedom of political expression should strictly follow the test introduced in Article 10 (2): the interference should be prescribed by law, pursue the legitimate aim and the interference in the individual's right has to be necessary in the democratic society.<sup>38</sup> Only the existence of the whole list of factors would justify the state's infringement in the right to free political expression.

Although the category of "political expression" has not been defined clearly, the protection to the right to freedom of political expression should be guaranteed. One of the possible ways to understand the notion of "political expression" is to look at the practice of the European Court of Human Rights. The Strasbourg Court has already examined cases where it needed to define both the scope of the right, its breadth and possible grounds for the imposition of restrictions on it.

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<sup>37</sup> *Vajnai v. Hungary*, ECtHR, Application no. 33629/06, Judgment of 8 July 2008

<sup>38</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *op. cit.*, Article 10 (2)

## **Chapter II. ECtHR jurisprudence on freedom of political expression cases**

The European Court of Human Rights as the main arbiter in human rights protection within the Council of Europe exercises its functions on the basis of the European convention on Human Rights. The ECHR recognizes the right to freedom of expression as well as the right to freedom of assembly under two different provisions of the Convention, Article 10 and Article 11 respectively. Both articles protect speech which aims to express criticism, dissent or protest towards public officials or governmental policy.

The current chapter aims to examine the jurisprudence of the European Court of Human Rights on Article 10 and Article 11 cases when they concerned political expression. As the category of expression under Article 10 of the Convention is broad and political speech is included into the notion of the former, the close link between these two groups of cases is seen. The principles which the Court laid down as a basis for justification of the restriction are supposed to form examples of how the right to free political expression should be treated by the state authorities on the national level.

### ***2.1. Disagreement, disapproval and criticism***

#### *People disagree*

When this disagreement prompts people to reject a significant aspect of the policy or “agenda of a governing political order” the emphasis should be made on what means are used to express this rejection.<sup>39</sup> In fact, whether the expression of critique of public officials is justified “continues to be dependent on such factors as the nature and form” of the expression.<sup>40</sup> There is a European consensus that, when the criticism of national authorities

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<sup>39</sup> Derek Malone-France, *Political Dissent : A Global Reader. Vol. 1, Ancient to early-modern sources*, Lanham, MD. : Lexington Books, 2012, 308 p. at p.10

<sup>40</sup> Michael K.Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards*, Aldershot: Dartmouth Publishing Company Ltd., 2000, 276 p. at p.16

takes the form of disagreement, such form of expression is tolerated.<sup>41</sup> The critique of governmental policy and the expression of dissent are likely to provoke a response from public officials which, therefore, contributes to the public debate and makes the discussion of the issue possible. Placing restrictions on political speech limits the individual's possibility to participate in a discussion of public matters and, accordingly, influence the policy.

#### *Disapproval of governmental policy*

Disapproval is another allowed form of critical political expression which is essential for the majority of modern democracies. Journalists usually express disapproval of the work of politicians and other public authorities in their works. Nevertheless, this form of political expression is also tolerated in the majority of democracies as these works mainly enhance democratic ideals rather than undermine them.<sup>42</sup>

#### *Criticism of politicians and other public officials*

The case law of the Court on political expression cases developed over time. Consideration of open-ended notions, balancing competing interests, defining the role of the press in the democratic society, margin of appreciation of national authorities are not the complete list of issues the Court needed to solve.

It is very difficult to produce one mechanism which can be applicable to freedom of political expression cases as the circumstances may differ and it significantly influences the outcome of the Court. Therefore, the ECtHR still has not produced any straightforward and consistent policy. However, with regards to criticism of politicians and public officials in general, the Court paid special attention to the facts and value judgments. In this regard the Court stated that “[t]he existence of facts can be demonstrated, whereas the truth of value

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<sup>41</sup> Michael K.Addo, *op. cit.*, at p.16

<sup>42</sup> Michael K.Addo, *op. cit.*, at p.18

judgments is not susceptible of proof”.<sup>43</sup> Therefore, the imposition of the obligation on people to prove what they say would be an overburden and can have chilling effect on the right to freedom of political expression.

It is well recognized in the case law of the ECtHR that the discussion of public matters is inherent in democratic society. Article 10 cases against Austria, Iceland, United Kingdom and Spain prove that people are granted protection when criticism concerns anybody who engages in political activities.<sup>44</sup>

In fact the ECtHR has emphasized that “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest”.<sup>45</sup> The Court in a number of cases has stressed that strong and open criticism of politicians gets a higher level of protection than criticism as regards private individuals.<sup>46</sup> This principle can be applied, *mutatis mutandis*, to the criticism of all public officials in general. Wider criticism of public officials is allowed because they perform public office and their actions are always of interest to the public. The ECtHR pointed out which factors it takes into account when examining the restrictions imposed on journalists who criticize public officials:

The Court will take the following elements into account: the position of the applicant, the position of the person against whom his criticism was directed, the subject matter of the publication, characterisation of the contested statement by the domestic courts, the wording used by the applicant, and the penalty imposed on him.<sup>47</sup>

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<sup>43</sup> *Savitchi v. Moldova*, ECtHR, Application no. 11039/02, Judgment of 11 Oct. 2005, at para. 49; see also: *Grinberg v. Russia*, ECtHR, Application no. 23472/03, Judgment of 21 July 2005, at para. 30, *Lingens v. Austria*, ECtHR, Application no. 9815/82, Judgment of 8 July 1986, at para. 46

<sup>44</sup> Jochen Abr. Frowein, *Incitement Against Democracy as a Limitation of Freedom of Speech*, in D. Kretzmer and F. Kershman Hazan (eds.), *Freedom of Speech and Incitement Against Democracy*, Dordrecht, Netherlands: Kluwer Law International, 2000 at p.33; for further details see: *Castells v. Spain*, ECtHR, Application no. 11798/85, Judgment of 23 April 1992, *Lingens v. Austria*, *op. cit.*, *Thorgeir Thorgeirson v. Iceland*, ECtHR, Application no. 13778/88, Judgment of 25 June 1992, *Steel and Others v. UK*, ECtHR, Application no. 67/1997/851/1058, Judgment of 23 September 1998

<sup>45</sup> *Feldek v. Slovakia*, ECtHR, Application no. 29032/95, Judgment of 12 Oct. 2001, at para. 74, *Sürek v. Turkey (no. 1)*, ECtHR, Application no. 26682/95, Judgment of 8 July 1999, at para. 61

<sup>46</sup> *Castells v. Spain*, *op. cit.*, at para. 46, *Lingens v. Austria*, *op. cit.*, at para. 42; *Oberschlick v. Austria*, ECtHR, Application no. 11662/85, Judgment of 23 May 1991, at para. 59

<sup>47</sup> *Krasulya v. Russia*, ECtHR, Application no. 12365/03, Judgment of 22 May 2007, at para. 35



Moreover, the Court referred to one of its “fundamental principles which emerge from its [the Court’s] judgments relating to Article 10”.<sup>48</sup> In *Thorgeir Thorgeirson v. Iceland* the Court referred to the principle that not only information favorable to the government may be transmitted to the public, but also ones which can offend, shock or disturb.<sup>49</sup> The Court emphasized there was no warrant for distinguishing between the criticism of public prosecutor and criticism of other public matters. As the criticism took the form of value judgment in the current case, the limits of the criticism of police brutality were wider and, therefore, the Court found the violation of the conventional right.<sup>50</sup> The imposition on the applicant of the task to provide evidence for the allegations amounted to an unreasonable burden. The Court reached the same outcome 13 years later in *Grinberg v. Russia* where the criticism of the regional governor was justified by the ECtHR.

The Strasbourg Court, while examining cases where strong criticism of public officials was used, has stressed that with respect to pluralism, broadmindedness and tolerance, without which there is no democratic society, rejection to justify restrictions posed on the speakers by national authorities is the only possible way of behavior of the Strasbourg Court.<sup>51</sup> This is the way in which European democracies are developing on the basis of ECtHR jurisprudence.<sup>52</sup>

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<sup>48</sup> *Janowski v. Poland*, ECtHR, Application no. 25716/94, Judgment of 21 Jan. 1999, at para. 30.

<sup>49</sup> *Thorgeir Thorgeirson v. Iceland*, *op. cit.*, at para.63; see also: *Savitchi v. Moldova*, *op. cit.*, at para. 45 (The case concerned the critique of traffic police officers. Although the newspaper published an article in a sarcastic ton, the issues raised in the article were of public interest and contributed to the discussion of public matters (at paras. 47, 52, 54). The Government argued that public servants deserved higher level of protection from “undue criticism and scrutiny” (at para. 51), *Feldek v. Slovakia*, *op. cit.*, at para. 72, *Handyside v. The United Kingdom*, ECtHR Application no. 5493/72, Judgment of 07 Dec.1976; see for further details: Elisabeth Zoller, *op. cit.*, at.p. 806 (“[T]he European Court proclaimed, addressing all the European states, that a democratic society is one that can withstand all expression without exception and welcome all information and all ideas”).)

<sup>50</sup> *Grinberg v. Russia*, *op. cit.*, at para. 23

<sup>51</sup> *Tatar and Faber v. Hungary*, ECtHR, Application nos. 26005/08 and 26160/08, Judgment of 12 June 2012, at para.35, *Oberschlick v. Austria*, ECtHR, Application no. 11662/85, Judgment of 23 May 1991, *op. cit.*, at para. 57

<sup>52</sup> Michael K.Addo, *op. cit.*, at p.19

## *Abusive criticism*

The notion of abusive criticism has not been clearly established yet as “[t]here is no simple way of indentifying criticism as abusive”.<sup>53</sup> The mere use of strong language does not make the criticism abusive. The evaluation of the form of expression as well as the context and circumstances all together can help to understand whether the use of strong criticism and dissent contributed to the discussion of public matters or enhanced the democratic process.

However, in a number of cases the Strasbourg Court has found that criticism of public officials was excessive and reached the level of abuse. In *Ivanciuc v. Romania* where the journalist of the weekly satirical review published an article criticizing the behavior of the provincial leader of a political party, the Court stressed that, although there was a value judgment as regards the politician, it needed to be proven by factual basis.<sup>54</sup> Thus, the provision of evidence with regards to what has been published was decisive for the Court. Without any factual basis the Court could not reject justification of domestic courts. In *Janowski v. Poland* the Court stressed that:

[C]ivil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty... [T]he reasons prompting the applicant’s conviction were relevant ones in terms of the legitimate aim pursued. It is true that the applicant resorted to abusive language out of genuine concern for the well-being of fellow citizens in the course of a heated discussion... The actions of the guards ... did not warrant resort to offensive and abusive verbal attacks.<sup>55</sup>

Although the jurisprudence on abusive criticism is not so vast, it is nevertheless evident that journalistic freedom in criticizing public officials is not absolute. Where abusive strong language was used by the press towards politicians or other servants of public office, the Strasbourg Court agreed with domestic courts and confirmed the restrictions imposed on the speakers.

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<sup>53</sup> Michael K. Addo, *op. cit.*, at p.18

<sup>54</sup> *Ivanciuc v. Romania*, ECtHR, Application no. 18624/03, Judgment of 08 Sept. 2005, *Feldek v. Slovakia*, *op. cit.*, at para.76

<sup>55</sup> *Janowski v. Poland*, *op. cit.*, at para. 33-34, see also *Lešnik v. Slovakia*, ECtHR, Application no. 35640/97, Judgment of 11 March 2003, at para. 53

## 2.2. “Protest simply is political speech”<sup>56</sup>

Once disagreement with the actions of the government becomes real conflict between dissidents and politicians, the expression of this disagreement may take the form of protest. In this thesis “protest” is understood as a political expression “showing criticism of, or support for, particular policies, governments, public officials or social issues, and occurring in a public place”.<sup>57</sup> Protest includes both verbal and nonverbal expression (posters, graphics, slogans, etc.); therefore, both kinds of expressions deserve protection from the abuse of governmental powers to suppress it.

National authorities fight with protesters by using all legal and sometimes even illegal mechanisms as they suppose that the threat the former pose for the stability of the state is big and needs to be eliminated in the short term. In fact each state aims to stop individuals from participating in protest movements (as it disturbs public order, poses a threat to security or raises public distrust of the government in general) and from joining the protests for the first time.

The expression of protest and dissent is usually followed by the imposition of restrictions, administrative, disciplinary or even criminal sanctions. European states in this regard have different regulations and, therefore, the practice of the imposition of sanctions differs from state to state. But, the European Court of Human Rights has already adopted its own line of tests and principles under which Article 10 and Article 11 cases are examined by the Court. The very point of having recognition of both freedoms and the development of the case law allows to ensure a whole variety of possibilities for individuals to express their disagreement and protest in the most comfortable way for them.

The close link between these two articles is understandable as “free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other

<sup>56</sup> Katharine Gelber, *op. cit.*, at p. 104

<sup>57</sup> *Ibid.*, at p.105

public places” is definitely what the demonstrators aim to transmit to the public.<sup>58</sup> Moreover, the Court directly noted in its *Ezelin* judgment that Article 11 must be considered alongside with Article 10.<sup>59</sup> To express the views more effectively and to ensure open debate and the unrestrained exchange of views people gather on the streets.<sup>60</sup> As the practice shows, the restrictions on the right to association are narrowly connected with the controversial protest expression being held during the demonstrations. One such example is *Stankov* judgment.<sup>61</sup> The ECtHR has stressed that the close link between the freedoms under articles 10 and 11 of the Convention formed the basis for the imposition of restrictions on protesters.<sup>62</sup>

Several times the ECtHR was challenged to establish which of the articles is *lex specialis* if any. This happened because sometimes the applicants alleged the violation of the two articles together (as they were not sure under which provision the protection is more favorable to be granted), sometimes applicants alleged violation of only one article which they considered to be violated directly. In fact, there is no case in the jurisprudence of the Strasbourg Court when the ECtHR has ruled under both Article 10 and Article 11, there is also no inadmissible decision under one article when the violation could be found under the other.<sup>63</sup> However, in the recent decision in *Tatar and Faber v. Hungary*, the Court confirmed the position of the Applicants who argued that their right under Article 10, but not Article 11, was violated because in this case “ ‘political performance’ in question was intended to send a message through the media rather than the direct gathering of people”.<sup>64</sup> Therefore, the Court

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<sup>58</sup> *Osmani v. FYR Macedonia*, ECtHR, Application no. 50841/00, Inadmissibility decision of 11 Oct. 2001

<sup>59</sup> *Ezelin v. France*, ECtHR, Application no. 11800/85, Judgment of 26 April 1991, at para. 37; see also *Rai and Evans v. the United Kingdom*, ECtHR, Application nos. 26258/07 and 26255/07, Judgment of 17 November 2009, *Tatar and Faber v. Hungary*, ECtHR, *op. cit.*

<sup>60</sup> *Molnar v. Hungary*, ECtHR, Application no. 10346/05, Judgment of 7 Oct. 2008; for further details see also Michael K. Addo, *op. cit.*, at p.215

<sup>61</sup> *Stankov v. Bulgaria*, ECtHR, Application no. 29221/95 and 29225/95, Judgment of 2 Oct. 2001

<sup>62</sup> *Ibid.*

<sup>63</sup> David Mead, *The New Law Of Peaceful Protest: Rights and Regulation in the Human Rights Act Era*, Oxford, Hart Publishing, 2010, 499 p., at p.64

<sup>64</sup> *Tatar and Faber v. Hungary*, *op. cit.*, at para. 39; see also *Açık and Others v. Turkey*, ECtHR, Application no. 31451/03, Judgment of 13 January 2009, at para. 40

tried somehow to distinguish the application of the Articles, depending on the consequences they intended afterwards.

In all these cases the primary job of the Strasbourg court is to define whether there was interference in the right which the applicant claims to be violated. The regular test introduced in Article 10 (2) and Article 11 (2) has to be followed to find out whether the violation of the right by the national authorities took place. “For any interference to stand a chance of being considered permissible, governments may be called upon to demonstrate the benefits to the wider community as a whole of such an interference of freedom of expression”.<sup>65</sup> This is needed to ensure that the interference is proportionate to the aim pursued and there are sufficient reasons for the imposition of restrictions on the individual’s right.

National legislation, which nowadays regulates the expression of political opinion, “strike at what is perhaps the most fundamental set of expression interests in modern democracies”.<sup>66</sup> Sometimes the intention which was behind the imposition of restrictions on the right to free political expression is praiseworthy, however, in the majority of cases discussed above public authorities imposed too strict sanctions on the speakers, and, thus, harshly curtailed them in the enjoyment of political freedoms of expression and assembly.<sup>67</sup>

The legitimate aims mentioned in the laws for the imposition of restrictions on freedoms, protected under Article 10 and Article 11, differ. In general, it can be noted that the aims under Article 10 are formulated in more detail and include more grounds than Article 11. The legitimate aim under which the restriction is imposed on the right to freedom of political expression also influences the width of the tolerance which the national authorities may provide. Although the relationship between the security and freedoms of expression, association and assembly are tenuous, in the time of peace, when security concerns are

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<sup>65</sup> Michael K. Addo, *op. cit.*, at p.217

<sup>66</sup> Ian Cram, *Contested Words: Legal Restrictions on Freedom of Speech In Liberal Democracies*. Aldershot, Hampshire, England: Ashgate, 2006, p.233 at p.65

<sup>67</sup> *Ibid.*, at p.71

minimal, the freedoms are given greater enjoyment and, therefore, the state provides greater tolerance towards the controversial protest views.<sup>68</sup> The Strasbourg Court has adopted “a tiered view” of freedom of political expression and has granted this form of expression prime importance and the highest level of protection from state interference.<sup>69</sup>

To sum up, it is worthy to note that the forms of expressions discussed in this chapter lie at the very heart of the most protected form of expression within modern democracies – political expression.<sup>70</sup> “[A]cting under the rule of law and *within their respective constitutional traditions and frameworks*” national authorities exceeded the allowed margin of appreciation and interfered in the individual’s conventional rights.<sup>71</sup>

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<sup>68</sup> Mandeep S. Tiwana, Brett J. Kyle, *The Law, Security and Civil Society Freedoms*, in Regina A. List and Wolfgang Dörner (ed.), *Conflict, Violence, and Civil Society*. London: Bloomsbury Academics (2012), 192 p. at p.105

<sup>69</sup> Ian Cram, *op. cit.*, at p.109

<sup>70</sup> See for further details Katharine Gelber, *op. cit.*, at p.5: “In the context of protecting speech political speech in particular ought to be protected to the highest degree possible” as it is said “to be central to the free speech idea.” The importance of this type of speech is based on the idea of the self-governance and the preservation of democracy.

<sup>71</sup> Ian Cram, *op. cit.*, at p.71

### **Chapter III. Standing up for freedom of political expression in Russia: domestic problems and lessons from the ECtHR**

*Almost always, the creative dedicated minority has made the world better.*

-Martin Luther King Jr.

The chapter is devoted to the notion and importance of the political right to free expression, its regulation on the domestic level of the Russian Federation and restrictions the right faces. To examine protest as a kind of political speech it seems necessary to outline several points: such as legislative framework which exists in Russia, public attitudes towards political protest and tensions involved.

The mere recognition of the right in the Constitution does not guarantee its proper exercise and protection. Therefore, the analysis of specific circumstances which have happened within the state is needed. The chapter aims to provide the analysis of the legal framework of the right to free political expression which exists in the Russian Federation and the way public authorities pose restrictions to the right. The chapter also refers to the jurisprudence of the ECtHR. The case law of the European Court of Human Rights is supposed to provide practice which national authorities should follow when they deal with issues which are under the protection of Article 10 of the European Convention on Human Rights.

#### ***3.1. Notion of a political right to free expression within a state that provides constitutional protection***

Central to the very idea of a constitutionally protected right is the fact that when such a right is recognized and systematically enforced, especially strong protections are afforded individuals that go beyond the possession of an ordinary legal right ...When a

right has been made basic within a political scheme, e.g., by being afforded constitutional protection, certain guarantees are placed outside” of the normal operation of the system.<sup>72</sup>

The Russian Federation recognizes in Article 17 of the Constitution that “human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law”.<sup>73</sup> This means that the international standard should be applied on the domestic level. The Constitution of the Russian Federation recognizes and guarantees to everyone freedom of thought and speech.<sup>74</sup> Constitutional protection of such a fundamental right as freedom of expression means that the right is of such paramount importance that, in order to protect it and guarantee its proper exercise, it should be given special safeguards and deserves a special place within the legal system.<sup>75</sup>

The commentators of Article 29 before giving the interpretation of the right usually refer to the history of development of the right to free speech. Constitutional scholars mention a link between the US Bill of Rights (where the right firstly was mentioned) and European constitutions. They say that the right began to develop within the European constitutional texts at the beginning of the XX century and, accordingly, appeared in the constitutional text of the Russian Empire.<sup>76</sup> Although the authors do not directly refer to the notion of political speech in the context of Article 29, they use a broad approach with regards to the interpretation of speeches which are under the protection, and stress that the constitutional recognition aims to protect expressions which can be understood as controversial and even dangerous by the ruling classes.<sup>77</sup>

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<sup>72</sup> Fred R. Berger, *Freedom, rights and pornography: a collection of papers*, Dordrecht: Kluwer Academic Publishers, 1991, p.220 at p.14-15

<sup>73</sup> Constitution of the Russian Federation, *op. cit.*, Article 17

<sup>74</sup> Constitution of the Russian Federation, *op. cit.*, Article 29

<sup>75</sup> Fred R. Berger, *op. cit.*, at p.51

<sup>76</sup> V.D. Zorkin, L.V. Lazarev, *Commentary to the Constitution of the Russian Federation*, Article 29, (*Kommentariy k Konstitutsii Rossiskoi Federatsii*), available at: <http://kommentarii.org/konstitutc/page34.html> (last visited on 24 March 2013)

<sup>77</sup> *Ibid.*



It is evident from the Commentary to the Constitution of the Russian Federation that Russian constitutional scholars while interpreting the text of the Constitution base their ideas on internationally accepted theories about the importance of the right to freedom of expression, such as the necessity of the development of the individual's autonomy and self development, the argument from democracy and the argument of the "marketplace of ideas".<sup>78</sup> The main concern which is expressed regarding the recognition of the right in the constitutional text is the necessity of the provision of free flow of opinions without any fear to be prosecuted or restricted in any other way mainly by the actions of the state or actions of other individuals.<sup>79</sup>

The key argument for the protection of freedom of expression in the argument from democracy is that "the informed public is able to monitor and contribute to the activities of governing ... Public is engaged in 'critical reasoning', which means thinking critically about the system of governance in which they take part, and engaging in debates and discussion about its justification and validity".<sup>80</sup> It is evident that the understanding of the question why the discussion of the actions of public actors is so important within the democratic state is clear. The unresolved question remains how the freedom of expression in such situations should be facilitated.<sup>81</sup>

As was mentioned in the previous chapter, the right to political expression as well as the right to freedom of assembly is recognized by the European Court of Human Rights as a cornerstone of democratic society.<sup>82</sup> The rights are very close in their nature. Several cases from the ECtHR jurisprudence where dissenting views and critique were expressed during

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<sup>78</sup> V.D. Zorkin, L.V. Lazarev, *op. cit.*, Article 29

<sup>79</sup> *Ibid.*

<sup>80</sup> Katharine Gelber, *op. cit.*, at p.15

<sup>81</sup> *Ibid.*

<sup>82</sup> See *Case of Palomo Sanchez and Others v. Spain*, ECtHR, Applications nos. 28955/06, 28957/06, 28959/06 and 28964/06, Judgment of 12 September 2011, at para. 26

demonstrations and which the Court ruled under Article 10 of the Convention are examples of the close link between these two rights.

In contrast to the Constitution of the United States where free speech and freedom of assembly are in fact incorporated under one provision - the First Amendment to the Constitution,<sup>83</sup> the Constitution of the Russian Federation guarantees these rights in separate constitutional provisions, Article 29 and Article 30 respectively.

What is interesting is the fact that on the domestic level, Russia has a detailed legislative framework for the imposition of restrictions on the freedom of assembly (the Federal Law on assemblies, meetings, demonstrations, marches and pickets of the Russian Federation<sup>84</sup>) but lacks provisions which are necessary to regulate freedom of expression. In fact, the constitutional provision of Article 29 does not find any significant support in laws (*Federalnie Konstitutsionnie Zakoni i Federalnie Zakoni*) or other regulations (*Podzakonnie Akti*). Only few pieces of legislation mention the right to freedom of expression or somehow touch upon it but not directly or in detail as they are devoted to other issues: the Federal law on mass media (*Federalnii Zakon "O sredstvakh massovoi informatsii"*),<sup>85</sup> the Federal Law on the order of informing people about the work of public authorities in state-owned mass media (*Federalnii Zakon "O poryadke osvesheniya deyatel'nosti organov gosudarstvennoi vlasti v gosudarstvennykh sredstvakh massovoi kommunikatsii"*),<sup>86</sup> the Federal Law on the information,

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<sup>83</sup> Nancy Chang, *op. cit.* ("Constitution of the United States, First Amendment ...guarantees our freedoms of speech, political association, and religion, our rights to assemble peaceably, and to petition the government ...and the freedom of the press. These guarantees encourage democratic participation in government by promoting debate on public issues that is 'uninhibited, robust, and wide-open'".)

<sup>84</sup> The Federal Law of the Russian Federation No.54-FZ (19 June 2004) "On assemblies, meetings, demonstrations, marches and pickets" (*Federalnyi Zakon Rossiiskoi Federatsii "O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh"*) as amended by the Federal Law N 65-FZ of 08 June 2012), available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=130964> (last visited on 24 March 2013)

<sup>85</sup> The Federal law of the Russian Federation N 2124-1(27 Dec. 1991) on mass media (*Federalnii Zakon "O sredstvakh massovoi informatsii"*) as amended by the Federal Law N 133-FZ of 28 July 2012, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=127218> (last visited on 24 March 2013)

<sup>86</sup> The Federal Law of the Russian Federation N 7-FZ (13 Jan. 1995) on the order of informing people about the work of public authorities in state-owned mass media (*Federalnii Zakon "O poryadke osvesheniya deyatel'nosti organov gosudarstvennoi vlasti v gosudarstvennykh sredstvakh massovoi kommunikatsii"*) as amended by the

information technologies and data protection (*Federalnii Zakon “Ob informatsii, informatsionnnih technologiayah i zashite informatsii”*),<sup>87</sup> the Federal Law on Providing Access to Information on the Activities of Government Bodies and Bodies of Local Self-Government (*Federalnii Zakon “Ob obespechenii dostupa k informatsii o deyatelnosti organov gosudarstvennoi vlasti I organov mestnogo samoupravleniya”*)<sup>88</sup> and the Federal Law “On Advertising” (*Federalnii Zakon “O reklame”*).<sup>89</sup>

Should the right to free political expression be absolute or there are certain restrictions which are permissible? The protection given to one right can significantly influence on the exercise of other right. Glen Newey asked “Why insist on an absolute entitlement to free speech or expression, regardless of the costs?”<sup>90</sup> And the question seems to be logical. According to Article 2 of the Constitution the Russian Federation declares human rights as a “supreme value”.<sup>91</sup> The point of freeing speech is “to permit communication by removing specific obstacles to it”.<sup>92</sup> Nevertheless, the mechanism to fight against the abuse of rights is introduced in Article 55 (1), (3) of the Constitution<sup>93</sup> as “[t]he provision of constitutionally protected right carries with it a commitment to risking certain costs or harms to the general welfare in order to fully protect certain rights”.<sup>94</sup>

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Federal law N 95-FZ of 12 May 2009, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=87696> (last visited on 24 March 2013)

<sup>87</sup> The Federal Law of the Russian Federation N 149-FZ on the information, information technologies and data protection (27 July 2006), (*Federalnii Zakon “Ob informatsii, informatsionnnih technologiayah i zashite informatsii”*) as amended by the Federal law N 139-FZ of 28 July 2012, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=133341> (last visited on 24 March 2013)

<sup>88</sup> The Federal Law of the Russian Federation No. 8-FZ (9 February 2009) “On Providing Access to Information on the Activities of Government Bodies and Bodies of Local Self-Government” (*Federalnii Zakon “Ob obespechenii dostupa k informatsii o deyatelnosti organov gosudarstvennoi vlasti I organov mestnogo samoupravleniya”*) as amended by the Federal law N 200-FZ of 11 July 2011, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=116691> (last visited on 24 March 2013)

<sup>89</sup> The Federal Law of the Russian Federation N 38-FZ (13 March 2006) “On Advertising” (*Federalnii Zakon “O reklame”*) as amended by the Federal Law N 133-FZ of 28 July 2012, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=132296> (last visited on 24 March 2013)

<sup>90</sup> Glen Newey, *op. cit.*, at p.63

<sup>91</sup> Constitution of the Russian Federation, *op. cit.*, Article 2

<sup>92</sup> Glen Newey, *op. cit.*, at p.67

<sup>93</sup> Constitution of the Russian Federation, *op. cit.*, Article 55 (1), (3)

<sup>94</sup> Fred R. Berger, *op. cit.*, at p.15

At the same time, if the speech aims to raise “[p]ropaganda or agitation, which arouses social, racial, national or religious hatred and hostility” or poses a threat to the national security of the state, the number of criminal laws imposes sanctions on such political speech.

<sup>95</sup> “Propaganda of social, racial, national, religious or linguistic supremacy” is also prohibited.<sup>96</sup> The system of both criminal and administrative laws recognizes offences for which different levels of sanctions are prescribed.

Some people can say that “[t]his might seem contradictory-to argue for better protection of free speech and for the legitimacy of some speech regulation at one and the same time”.<sup>97</sup> However, where speech is destructive –the regulation, even strict, can be justified. Where speech is constructive, even if people can accept it as being offensive, challenging or uncomfortable, certain safeguards have to be provided to make the right to free political expression enforceable.

“Protesting is in many ways the epitome of collective, popular political speech in a democracy, and it is precisely the kind of political speech that ought to be protected”.<sup>98</sup> When people openly criticize governance, the people engage in practicing “democracy itself”, freedom of speech enables people “to develop their capacities to engage in processes of democratic legitimacy”.<sup>99</sup>

In the Russian Federation the situation became critical, when it became evident that freedom of expression, especially the political one, significantly lacks protection and proper regulation. Lack of popular trust in the government and, accordingly, an increasing amount of protests and critique rose after Article 81 constitutional amendment<sup>100</sup>, election campaigns<sup>101</sup>

<sup>95</sup> Constitution of the Russian Federation, *op. cit.*, Article 29 (2)

<sup>96</sup> *Ibid.*

<sup>97</sup> Katharine Gelber, *op. cit.*, at p.23

<sup>98</sup> *Ibid.*, at p.104

<sup>99</sup> *Ibid.*

<sup>100</sup> The Law of the Russian Federation on the amendment of the Constitution of the Russian Federation N6-FKZ of 30 Dec. 2008 “On the changes of the terms of the President of the Russian Federation and State Duma” (*Zakon Rossiskoi Federatsii “Ob izmenenii sroka polnomochii Prezidenta Rossiskoi Federatsii I*

and several corruption scandals. It did not take much time to wait for the reaction of the public.

### **3.2. Silencing the opposition**

#### *Compelled political expression*

- *The right to remain silent*

The right to freedom of political expression includes both positive and negative rights. If the individual chooses to exercise his right to speak, the situation is more or less clear in that the individual knew what he wanted to import to the public and, at the same time, he knew that he will be responsible for all that is said. The right not to speak should be regarded as another side of “the freedom of expression coin”.<sup>102</sup> Therefore, both the right to speak and the right not to speak deserve equal respect and protection as “silence is itself expressive”.<sup>103</sup> The constitutional provision of Article 29 (3) corresponds to the right to be free from governmental compulsion to engage in political expression which the individual does not share. Scholars connect the right to remain silent with the significant, for each individual, right to express himself. What one chooses to say or not to say helps to define his public identity.<sup>104</sup> When the government compels an individual to express a particular political preference, support, or, on the other hand, dissatisfaction, it deprives the individual of the opportunity to remain silent, and thereby lacks respect to his autonomy, dignity and self-worth.<sup>105</sup>

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*Gosudarstvennoi Dumi*”), Rossiiskaya Gazeta, , 31 Dec.2008, also available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=83180> (last visited on 24 March 2013)

<sup>101</sup> 2011 election campaign to the State Duma and 2012 President elections

<sup>102</sup> Richard Moon, *The Constitutional protection of freedom of expression*, Toronto: University of Toronto Press, Scholarly Publishing Division; (2nd Revised ed.), 2000, 320 p., at p.182

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, at p.31

<sup>105</sup> David Mead, *op. cit.*, at p.7

- State compulsion to engage in political expression

The situation becomes more complicated in cases when the individual decides to abstain from expressing his views, for example - his political preferences, but the state compels an individual to express his views against his will.<sup>106</sup>

Article 29 (3) of the Constitution of the Russian Federation provides: “[n]obody shall be forced to express his thoughts and convictions or to deny them.”<sup>107</sup> Compulsion from the state to speak makes it “a serious affront” for individual to import the ideas which he, by himself, does not share and support.<sup>108</sup> Allegations and suspicions of “buying” the public to express support for public authorities and policy of the government, in parallel to major protests which took place in 2011-2012 in Russia are of serious concern to protesters.

At the time when the “March of Millions” took place on Bolotnaya Square and at Prospekt Sakharova in Moscow, the crowds of counterdemonstrators were gathering on Vorobievi Gori. People expressed support and affiliation or the governing party and policy of the president. These were students, teachers, doctors from state- owned institutions and other people who, as numerous allegations called, participated in counterdemonstrations being compelled by the public authorities. The majority of the students were paid to participate. Their engagement was needed to make a crowd and show artificial public support. Others were threatened with disciplinary punishment at workplaces which would follow a refusal to participate.

In fact, there is no difference whether the individual agrees with the views he is compelled to express, and whether or not the public understands his coerced expression as his own. The fact that there had been interference in the individual’s right to remain silent in his political expression makes it clear that the individual had been deprived of his freedom to decide how he will be engaged in the discussion of public matters. In any given case the

<sup>106</sup>Richard Moon, *op. cit.*, at p.182

<sup>107</sup> Constitution of the Russian Federation, *op. cit.*, Article 29 (3)

<sup>108</sup> Richard Moon, *op. cit.*, at p.182

question must be whether one of the individual's interests has been infringed and, if so, to what extent. The intrusion of the state in the flow of political expressions and their content significantly infringes the right of controversial views to find equal representation on the agenda of public discussion.

### *Biased media*

Media acts as “a check upon the state to ensure that the rules governing all forms of life including the behavior of the public authorities are followed”.<sup>109</sup> The fact that the media “has historically played an important role in our democratic process does not mean that it has always played it well”.<sup>110</sup> The “sad truth” is that the mainline media usually remained an uncritical supporter of the government and had “a built-in bias in favor” of all the policies which were held.<sup>111</sup> Thus, only information favorable from government perspective was allowed and afterwards was transmitted to the public through state-owned TV channels and publishing houses.

Media discourse is not only vital in terms of framing political issues and problems for the general public, “but it's also a place where the activists and state actors can struggle over ideology and ideas”.<sup>112</sup> In fact, media frames dissident messages of the people, and, accordingly, if media is biased, protesters will fail to transmit their message to the public in the way they wanted. Objectivity is an important journalistic principle which should guide mass-media coverage.<sup>113</sup> Negative coverage results also from “state's direct manipulation of friendly media sources”.<sup>114</sup>

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<sup>109</sup> Georgy Bovt, *The Russian Press and Civil Society: Freedom of Speech versus Freedom of Market*, in Christopher Marsch and Nikolas K.Gvosdev (eds.), *Civil Society and the Search for Justice in Russia*, Lanham, MD: Lexington Books, 2002, p.200 at p.97

<sup>110</sup> John Denvir, *Freeing speech : the constitutional war over national security*, New York, N.Y. : New York University Press, 2010, p.189 at p. 80

<sup>111</sup> *Ibid.*

<sup>112</sup> Jules Boykoff, *Beyond bullets : the suppression of dissent in the United States*, Oakland, CA ; Edinburgh : AK Press, 2007, p.400 at p. 176

<sup>113</sup> *Ibid.*, at p. 177

<sup>114</sup> *Ibid.*, at p. 178

The difference between state-owned and commercial TV channels' coverage of public critique of government during the recent election campaigns of the president and members of the Duma reflect the real controversies which happen when facts were presented from contradictory points of view. For example, the number of participants in the demonstrations was indicated differently and, accordingly, numbers were several times less when they were discussed by the state-owned TV programs. The fear that regions of the Russian Federation might join mass public protests made both regional and federal governments apply strict regulation towards street protesters, silencing political expression which from the government perspective was dangerous for the stability of democracy in the state.

Once the situation went out of the control of the media staff, when during the online transmission of the results of the elections by one of the main Russian TV channels the total percentage for all the parties which participated in the 2011 elections exceeded 100%, and news observers could see the absurd number of 146%. The scandal was artificially silenced. The head of the Federal Election Commission refused to make any comments. Public attention was centered on the issue but neither the government, nor media could provide a sufficient explanation of the situation. Public authorities were not successful in hiding fabricated, false schemes, which were used during the elections in order to make everything possible for the governing party to win the elections and seats in the Duma, and, therefore the disclosure of these actions occurred during the online transmission. In the current absurd incident standing up for democratic elections was one of the means which was at hand. The expression of public critique was harshly silenced. None of the state-owned channels spent enough time on the coverage of public demands. The demonstrations were presented from another angle-as demonstrations expressing support for the governing party and the president. Only some commercial channels were able to transmit the real events which took place.



Stigmatization tendencies and categorization of the people who express governmental critique and dissent as “enemies of the state” and “political opponents” by state authorities and state-owned media contributes to the conclusion that these people become “targets for abuse by state and other non-state actors”.<sup>115</sup>

When media focuses on some issues and disregards others, it influences on the means people use to reach public authorities and transmit to them their message. The disregard from mass media exerts “a subtle form of suppression that affects the ability of dissidents ... to get taken seriously by potentially sympathetic bystander publics”.<sup>116</sup>

*Online censure of expression of controversial political views*

Nongovernmental groups attempting to affect policy in Russia could be described as “free speech activists”, groups of people who hold political views critical of government policy.<sup>117</sup> “These groups are more likely to attract the unwanted attention of government investigatory agencies and are less likely to be able to muster the political muscle to fight back without” freedom of expression support.<sup>118</sup> Public authorities in critical situations of public critique are “willing to use all legal tools of their office (and sometimes even illegal ones) to neutralize such opposition”.<sup>119</sup>

“The borderless nature of the Internet makes it more difficult for despots and dictators” to influence the access of individuals to information.<sup>120</sup> Online blogs and posts are the most popular tool for the activists to make comments, express critique and the political opposition dissent. Having no access to media coverage because of the silencing strategy of the government and constant persecution of opposition activists, internet facilities remain

<sup>115</sup> Mandeep S. Tiwana, Brett J. Kyle, *The Law, Security and Civil Society Freedoms*, in Regina A. List and Wolfgang Dörner (ed.), *Conflict, Violence, and Civil Society*. London: Bloomsbury Academics 2012, 192 p. at p.107

<sup>116</sup> Jules Boykoff, *op. cit.*, at p. 252

<sup>117</sup> John Denvir, *op. cit.*, at p.119

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, *Annals of the American Academy of Political and Social Science*, Vol. 603, Law, Society, and Democracy: Comparative Perspectives, 2006, pp. 202-216 at p.203

efficient. However, even in this sphere, where earlier critics felt themselves more or less free, by the time it became difficult to express their views. Attacks on blogs, spamming, internet trolling complicate and suppress the free flow of political expression. “Online censure allows the viral spread of indignation against media columnists and other public figures who have voiced controversial views.”<sup>121</sup>

### ***3.3. Changes in the activity of the Russian civil society as one of the factors of rise of political expression***

Russian civil society actively participated in protest initiatives and tried to call the authorities to turn back to the democratization path and correspond respectively to the demands of the public.

The dispute about the existence of Russian civil society and its power remains actual till present times. “Recently increasing international awareness of Russia’s deviance from the path of democratization and the government’s imposition of restrictive regulations on civil society have spurred renewed attention to the issue”.<sup>122</sup> Foreign scholars as well as international and non-governmental organizations devote their works to the research of the changes in the country, the adopted legislation and all that influence the rights of the civil society and human rights of individuals in particular.

In general scholars come to the conclusion that Russian civil society remains “weak, internally fragmented, undeveloped, co-opted, repressed, or even non-existent”.<sup>123</sup> Historical and cultural approaches explain previous weakness and fragmentation of the Russian civil society.<sup>124</sup> However, there are scholars who believe that not only the Russian civil society exists, but that it has been based on a longstanding tradition and has even raised its power

<sup>121</sup> Glen Newey, *op. cit.*, at p. 63

<sup>122</sup> Diana Schmidt-Pfister, *What kind of civil society in Russia?*, in White, Stephen, *Media, culture and society in Putin's Russia*, Basingstoke ; New York : Palgrave Macmillan, 2008, p.264 at p.37

<sup>123</sup> *Ibid.*, at p.38

<sup>124</sup> *Ibid.*, at p.43

over the time.<sup>125</sup> Although the understanding of Russian civil society is partial at the present moment, the one thing that both groups of scholars have in common with regards to the understanding of this diverse notion is that Russian civil society has different features from that which are established under the western standards for civil society.<sup>126</sup> Thus, most of the western studies on the Russian civil society take *a priori* premises that western standards will be not applicable to the understanding of Russian civil society.<sup>127</sup>

Western donors believe in the necessity to foster in Russian civil society and the involvement of NGO's in democratization programs, however, these actions make the attitude of the governing authorities towards the actions of the civil society more sharp, which is also reflected in the restrictive legislation adopted in recent years.<sup>128</sup>

“Criticism regarding a troublesome situation” of Russian civil society flows from different directions, such as legalized state control of the activities of civil society, restrictions on the association rights and freedom of expression, control over the activists and severe persecution of the latter.<sup>129</sup> The debates over the legacy of the Putin era acknowledged the authoritarian trend and therefore weakness of civil society initiatives and systematic suppression.<sup>130</sup> Civil society weakened under the strengthening state.<sup>131</sup> The role of civil society as active and real influential opposition was not clearly realized until the real distrust to the public authorities raised civil society to defend their rights from the abuse of the government's powers and constant intrusion in human rights.

Lack of popular trust in the government in fact is the issue from which all democratization concerns of civil society arise. The tools which the activists use to stand up for democratic development of the state and broader human rights protection do not always

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<sup>125</sup> *Ibid.*, at p.38

<sup>126</sup> Diana Schmidt-Pfister, *op. cit.*, at p.39

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*, at p.39

<sup>129</sup> *Ibid.*, at p.40

<sup>130</sup> *Ibid.*, at p.43

<sup>131</sup> *Ibid.*, at p.46

correspond to the restrictive legislation framework. Political critique and dissent more and more often turn into arrests and persecution of the leaders of opposition movements. In the last two years activists have achieved success. Thus, nowadays one can say there is “a ‘real-bottom-up’ civil society formation in Russia”.<sup>132</sup> The waves of increasing activism of street demonstrators and mass mobilization mainly in response to Duma and presidential elections (2011-2012) shook up the well-being of those who sit in governmental cabinets. The regional level protest support increased the scale of the crisis which the government faced.

On the one hand, there is an approach according to which contemporary Russian civil society transformed into deviant forms of uncivil society, and therefore, all the restrictions applied to its actions are necessary and proportionate. On the other hand, depending on what people understand under “democracy”, there is a concern that Russian civil society is forming within the state which is still in transition towards democratic consolidation

To sum up it should be noted that it is no longer possible to say that Russian civil society is weak or absent. The other question scholars should deal with is how far the government can go to suppress the activism of civil dissent.

### ***3.4. Lessons from the ECtHR***

The case law of the European Court of Human Rights on freedom of political expression and freedom of assembly cases is significant. This reflects the systematic problem which exists in the state. As has been mentioned above in the current chapter, there is a lack of legislative framework for the protection of the right to free expression although this right is recognized in the Constitution of the Russian Federation. The lack of certainty and foreseeability of the law makes the exercise of the right unclear. This has been confirmed by the Strasbourg Court in several decisions against Russia.

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<sup>132</sup> Diana Schmidt-Pfister, *op. cit.*, at p.41

The European Court has taken a divergent approach in considering the relationship between the rights to freedom of expression and freedom of association. This fact is explainable as although the provisions in the Convention looks similar, the differences in the formulation and the number of the allowed grounds for restrictions make it possible to justify cases in different manner. However, recent judgments, including those against the Russian Federation, reflect the formation of the unified approach towards the examination of cases regarding political expression when both Article 10 and Article 11 were invoked by the applicants.

The problem with assessment of the alleged violation begins with the examination of the legislation which regulates the right to freedom of political expression in the domestic legal system. In contrast to the stable ECtHR jurisprudence based on the distinction between facts and value judgments, defamation provisions in Russia, being one of the most invoked by public officials, when the criticism against them is expressed,

as it stood at the material time, made no distinction between value judgments and statements of fact, as it referred uniformly to "statements" and proceeded from the assumption that any such statements were amenable to proof in civil proceedings. Irrespective of the actual contents of the "statements", the person who disseminated them had to satisfy the courts as to their truthfulness. Having regard to those 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>133</sup>

Domestic courts often require respondents in the cases before the Court to prove the truth of statements they made when expressing criticism of the politician. As the ECtHR frequently emphasized the imposition of this obligation poses an impossible burden on the speaker, which accordingly infringes the right to express his political views protected under Article 10 of the Convention in general. The unrestricted marketplace of ideas is not a concept

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<sup>133</sup> *Grinberg v. Russia*, ECtHR, *op. cit.*, at para. 29; for further details see Civil Code of the Russian Federation of 30 Nov. 1994 N 51-FZ, *Sobranie Zakonodatel'stva RF*, 05 Dec. 1994, N 32, art. 3301, Article 152 (Protection of honor, dignity and reputation), available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=140475> (last visited on 24 March 2013), Criminal Code of the Russian Federation of 13 June 1996 N 63-FZ, *Sobranie Zakonodatel'stva RF*, 17 June 1996, N 25, art. 2954, Article 128.1, (Defamation) available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=142949> (last visited on 24 March 2013)

which Russians “have wholeheartedly adopted”.<sup>134</sup> Therefore, participation in the public debate is not always regarded as a contribution significant for the development of the democratic society and self-fulfillment of the individuals. It seems logical to establish an unwritten rule for the domestic courts that if the press or media do not overstep the bounds, act in a good faith and express criticism that concerns public matters and contributes to the public debate, then all forms of such expression should be protected and granted a higher level of protection when such criticism is against a politician or other public official than as regards the individual.<sup>135</sup> More demanding public scrutiny should be tolerated.<sup>136</sup> Following this rule, national authorities would follow the jurisprudence of the Strasbourg Court and accordingly a lower number of applications would be filed to this European human rights institute.

Now it is time to turn to political expression which is expressed during protest and mass demonstrations. The language used during these events is much stronger and criticism can be regarded even as offensive. Nevertheless, rampant misuse of powers does not allow to enrich public debate.<sup>137</sup> “In Russia’s managed democracy, the state effectively controls independent civic engagement”.<sup>138</sup> The people protesting on the streets are under special attention and control of governmental forces because of the important role they play in the process of political change.

As far as can be seen from the claims of the Government when it argued before the Strasbourg Court, the preference is given to the right to freedom of assembly, as public officials are sure the detailed legislative framework allows them to impose restrictions.

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<sup>134</sup> Nikolas K.Gvosdev, “*Managed Pluralism*” and *Civil religion in Post Soviet Russia*, in Christopher Marsch and Nikolas K.Gvosdev (eds.), *Civil Society and the Search for Justice in Russia*, Lanham, MD: Lexington Books, 2002, p.200 at p.112

<sup>135</sup> *Zakharov v. Russia*, ECtHR, Application no. 14881/03, Judgment of 05 Oct. 2006, at para. 27 “[T]he Court finds that its contents did not go beyond the limits of acceptable criticism, especially since these limits are wider in respect of civil servants than in relation to private individuals”.

<sup>136</sup> *Ibid.*, at para. 25

<sup>137</sup> John Denvir, *op. cit.*, at p.119

<sup>138</sup> Sabine Fischer, Heiko Pleines (Eds.), *Civil Society in Central and Eastern Europe*, Stuttgart: ibidem-Verlag, 2010, 192 p. at p.99

Moreover, the right to freedom of assembly can be limited on the basis of many procedural aspects which the protesters often do not follow. Thus, the lack of the regulation of the right to freedom of expression makes it inconvenient both for the applicants and the Government to prove what they claim. In these regards, public authorities invoke the provisions of other laws which protect public order, security of the state or the right of others to calm down the protest movements. However, vast investigatory activities and the use of police powers should not be commenced “against a citizen or group unless there is an indication of past or future” commission of a crime.<sup>139</sup>

The number of cases pending before the Court, for example *Lashmankin against Russia and 14 other applications*,<sup>140</sup> can be the next step towards the confirmation of democratic principles under which all state authorities should act and the provision of broader protection to the right to free political expression in whatever form it takes.

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<sup>139</sup> John Denvir, *op. cit.*, at p.127

<sup>140</sup> *Lashmankin against Russia*, ECtHR, Application no. 57818/09 and 14 other applications, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116762>

## Conclusion

Freedom of political expression has recently suffered significant pressure. Being an inherent part of democratic society it should not be threatened by laws. The impositions of restrictions on the right to free political expression should be narrowly tailored with the interests of the state to diminish the right and should not be connected with the undesirability of the information transmitted. The expression of ideas without “fear for life, liberty, or possessions, but with peace of mind and a firm certainty of freedom from government harassment” should be enjoyed.<sup>141</sup>

As long as political criticism and dissent “is marginalized as ‘disruptive’, ‘uncivil’ or ‘harmful’” by the national authorities no positive steps towards the expression of tolerance to such views will be provided.<sup>142</sup> The power of political expression can be defeated by the thinly elaborated interest of the government.

Freedom of expression in the Russian Federation is in jeopardy. The contemporary lack of freedom of political expression in Russia does not allow people to respond to the abuse of power by the governing majority. Radical changes in law and policy have to be adopted. Using the examples of the treatment of the right to freedom of political expression established under the Strasbourg Court jurisprudence, it becomes evident that the interests of the individual and the interests of the state may be balanced. The criticism of public officials should be tolerated as it concerns public matters and individuals have an inherent right to participate in a public debate. The imposition of sanctions of different types including disciplinary, administrative and even criminal inevitably leads to the abolition of the rights of the individual.

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<sup>141</sup> Elisabeth Zoller, *op. cit.*, at.p. 803

<sup>142</sup> Terrence S. Morrow, *op. cit.*



The thesis has detected the problem of the lack of proper legal regulation of the right to freedom of political expression in the Russian Federation. The gap in legislation makes it possible for the national authorities to abuse power and apply severe restrictions to the freedoms of individuals when they want.

While the Russian Federation does not follow the jurisprudence of the European Court of Human Rights, it is predictable that new cases from the Russian Federation will be laid before the bench. As a further development of the right to freedom of political expression within Russia the adoption of a conventional approach to the imposition of restrictions is recommended.

To sum up the discussion, several suggestions for change of the Russian legal framework with regards to freedom of expression can be introduced. Firstly, the thesis indicated that the category of “statements” is used as regards all kinds of critical expression towards politicians and other public officials. Therefore, the legislative distinction should be made between facts and value judgments in the Russian Civil Code. Secondly, the amendments in the Russian Code on Civil Procedure with regards to proof of the statements containing criticism against politicians and other public officials and servants should be adopted in order to decrease the burden of proof on individuals. Thirdly, the domestic courts should comply with the Strasbourg Court jurisprudence and apply and enforce the decisions on the national level.

Hopefully the authorities will come to the conclusion that the abrogation of civil liberties was unnecessary and will take steps for further improvement of the principle of “human rights as a supreme value”.<sup>143</sup>

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<sup>143</sup> Constitution of the Russian Federation, *op. cit.*, Art. 2

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