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FREEDOM OF EXPRESSION IN RUSSIA AS IT RELATES TO CRITICISM OF THE GOVERNMENT

Our lives begin to end the day we become silent about things that matter.

—Martin Luther King Jr.

INTRODUCTION

Freedom of expression in Russia appears to be slowly eroding, Russian Government promising to protect human rights, including the right to freedom of expression.

The collapse of the Soviet Union in 1991 and the transition from “Old” Russia to “New” Russia were associated with many new hopes and promises.¹ One such promise was the establishment of new human rights standards, including the fundamental right to freedom of expression. This promise was made by the ratification of the European Convention on Human Rights (Convention) in May of 1998.²

Previously under the oppressive governments of Stalin and his successors, Soviet Russia enjoyed no freedom of expression.³ Under Mikhail Gorbachev, Russia began a new movement commonly known as “Perestroika,” a Russian word that literally translates to “restructuring.”⁴ Perestroika ushered in a new era of hope and freedom and was heralded both domestically and internationally as an opportunity to change the oppressive policies of the past and establish new respects for the rights of the individual.⁵ The collapse of the

¹ Mikhail S. Gorbachev, Essay, *The Laws of Life and Political Responsibility*, 6 EMORY INT’L L. REV. 321 (1992).

² The Convention for the Protection of Human Rights and Fundamental Freedoms, popularly known as the “European Convention on Human Rights,” was opened for signature in Rome on November 4, 1950. See Council of Eur., *Chart of Signatures and Ratifications: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL EUR., <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=07/01/2013&CL=ENG> (last visited Oct. 31, 2013), for a list of all “High Contracting Parties.” It entered into force on September 3, 1953. *Id.* Russia deposited its instrument of ratification on May 5, 1998. *Id.*

³ See Lynne Viola, *Stalinism and the 1930s*, in A COMPANION TO RUSSIAN HISTORY 368, 368–73 (Abbott Gleason ed., 2009).

⁴ *Id.* at 317; *Russia: The Gorbachev Era: Perestroika and Glasnost*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/513251/Russia/38564/The-Gorbachev-era-perestroika-and-glasnost> (last visited Aug. 31, 2013).

⁵ See Archie Brown, *The Gorbachev Era*, in THE CAMBRIDGE HISTORY OF RUSSIA: THE TWENTIETH CENTURY 316, 323–25 (Ronald Grigor Suny ed., 2006), for a background discussion of Perestroika.

Soviet Union was accompanied by the people's desire to get rid of the old policies that disregarded the value of individual human rights, such as the freedoms of religion and freedom of expression.⁶

In any political system, there is always a natural tension between the interests of the state and the interests of the individual. In the old Soviet Russia, the interests of the state prevailed over any other rights.⁷ The early transition period was associated with the transition to a New Russia, which was to be a symbol of the new rights, freedoms, and policies, with the rights of the individual prevailing.⁸ The ratification of the Convention was a big step in this transition. It was a significant promise on the part of the new government, the promise of a commitment to the values of human rights and individual freedoms, including freedom of expression.

The Convention expressly protects many fundamental human rights, such as the right to life;⁹ prohibition of torture;¹⁰ the right to a fair trial;¹¹ respect for private and family life;¹² freedoms of thought, conscience, and religion;¹³ freedom of assembly;¹⁴ and the right to freedom of expression,¹⁵ which is the focus of this Comment.

Freedom of expression is a fundamental part of every democracy. To be a truly democratic society, the government has to establish its serious commitment to the values that are at the foundation of every democratic system. Ratification of the Convention was the first big step to such a commitment.

This Comment analyzes whether the new Russian government adhered to its commitment and whether it performed upon its promise made fifteen years ago. It was a promise of democracy that the new government of Russia gave to its people in 1991, when thousands came out on the streets demanding a new

⁶ See generally *id.* at 323–31.

⁷ See generally David R. Shearer, *Stalinism, 1928–1940*, in *THE CAMBRIDGE HISTORY OF RUSSIA*, *supra* note 5, at 192, 193.

⁸ See Brown, *supra* note 5, at 323–25.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, E.T.S. No. 5 [hereinafter *Convention*].

¹⁰ *Id.* art. 3.

¹¹ *Id.* art. 6.

¹² *Id.* art. 8.

¹³ *Id.* art. 9.

¹⁴ *Id.* art. 11.

¹⁵ *Id.* art. 10.

system of fundamental freedoms, the system where everyone would be free to express their opinion as to the work of the government and its officials without fear of prosecution.

Additionally, this Comment analyzes the current status of political speech in Russia and proposes certain practical solutions for further development of the rule of law, given the importance and sensitive nature of the subject matter. Political speech—“speech that participates in the processes of representative democracy”¹⁶ and serves the function of “discovery and spread of political truth”¹⁷—is an essential component of every democratic society. The ability to freely express political criticism is an important component of freedom of expression. Freedom of expression, an essential human right and an important component of any developing democratic system, is protected under Article 10 of the European Convention.¹⁸ This Comment analyzes the protections afforded to freedom of expression under Article 10 of the Convention and whether Russia provides such protections in its domestic legal system.

It has been fifteen years since Russia ratified the Convention and began the adjustment and reformation of its legal system, bringing it into compliance with the Convention provisions. Nevertheless, after many years of legal reforms, Russian citizens bring one of the highest amount of claims to the European Court of Human Rights (ECHR).¹⁹

This Comment argues that today’s threat to political speech is a result of the indirect actions taken by the government to suppress freedom of expression when it involves criticism of the government. This threat is also a direct result of the dependent judiciary inherited from the Soviet era and influenced by Putin’s government. Tracing the history of political speech in Russia and analyzing the current problems faced by the Russian legal system help form an understanding of freedom of speech in Russia. This Comment also examines

¹⁶ Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300 (1978).

¹⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

¹⁸ Convention, *supra* note 9, art. 10.

¹⁹ EUR. CT. OF HUMAN RIGHTS, STATISTICAL INFORMATION: VIOLATIONS BY ARTICLE AND BY RESPONDENT STATE (1959–2012), http://echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf; Aslan Khuseinovich Abashidze & Ekaterina Sergeevna Alisievich, *10 Let Uchastia Rossii v Konventsii Soveta Evropy po Pravam Cheloveka: Znachenie dlia Rossiiskogo Zakonodatel'stva i Pravoprimitel'noi Praktiki [10 Years of Russia's Participation in the Council of Europe Convention on Human Rights: Implications for the Russian Legislation and Legal Practice]*, 12 ZAKONY ROSSII: OPYT, ANALIZ, PRAKTIKA 6, 7 (2008), <http://elibrary.ru/item.asp?id=12879692>.

the actual and potential reasons for the declining freedom to criticize the government and the often-inadequate measures taken by the Russian legal system, which frequently serve to escalate the problem.

Because understanding the prior history and mentality of the Russian people is an important part of the development of freedom of expression in Russia, Part I of this Comment traces the history of the freedom of expression in Russia from the Soviet times to its transition under the new Russian Government. Subpart A analyzes the historical development of freedom of expression in Russia as it relates to criticism of the government, its status during the Soviet Era, and the rapid changes during the early post-Soviet period. Subpart B examines the promise of a commitment to democracy made during this transition by the ratification of the Convention.

Part II examines protection of freedom of expression under Article 10 of the Convention. It also analyses the implementation of the Convention in Russia since its ratification, the changes made to the existing laws, as well as the existing problems and violations of the Russian Constitution, Russian federal law, and the European Convention. This analysis is performed based on the examination of cases brought before the European Court of Human Rights against Russia.

Part III analyzes the most recent and current matters brought before the Russian domestic courts, the most recent administrative legal “innovations” of Putin’s Government, and the limitations imposed on freedom of expression based on the cases recently decided by the domestic courts.

Part IV.A analyzes the reasons for limitation on political speech. Part IV.B analyzes the practical solutions and suggestions as to the improvement of freedom of expression in Russia. In conclusion, this Comment finds that the Russian government poorly performed on its promise of democracy and the freedom to criticize the government, which is under threat in the Russian Federation today.

I. BACKGROUND ON FREEDOM OF EXPRESSION IN RUSSIA PRIOR TO THE RATIFICATION OF THE EUROPEAN CONVENTION

A. *A Brief History of the Restrictions on Political Speech in Russia*

Political speech and criticism of the government were restricted during the entire Soviet Era. Stalin and his Prokuratura undertook particularly gruesome

measures of restricting and prosecuting political speech.²⁰ In the early 1930s, political speech and criticism of the government were controlled, first, through artificial famine and starvation created by the Soviet government,²¹ then by placing its citizens in labor camps²² and by deporting citizens into remote and undeveloped areas of the country.²³ After this, the period of mass repressions began with hundreds of thousands of people executed without trial.²⁴ Any government criticism was reported to the Prokuratura and was immediately prosecuted by the government without a hearing.²⁵ These mass prosecutions, in complete absence of any human rights, erased any thoughts of freedom of expression and changed the mentality of the people for years to come. It took decades before individuals would attempt to criticize the government again.²⁶

The late 1980s were accompanied by the period of Perestroika, when the Soviet government decided to change its approach to the socio-political development of the country. While still under Soviet influence, Russia experienced some change in freedom of expression during this period when the first limited criticism of the government was published.²⁷ In 1991, the situation in the country culminated with the collapse of the Soviet Union. This began the first stormy years of transition to the new political system with previously unknown freedoms.

²⁰ Prokuratura (Office of the Prosecutor) is a “unified federal centralized system of agencies effectuating in the name of the Russian Federation supervision over compliance with the Constitution and the execution of laws operating on the territory of the Russian Federation.” Federal’nyi Zakon RF “O Prokuratorie Rossiiskoi Federatsii” art. I(1) [Federal Law of the Russian Federation “On the Procuracy of the Russian Federation”], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 47, Item 4472, available at <http://www.consultant.ru/popular/prosec/>; see also Jonathan D. Greenberg, *The Kremlin’s Eye: The 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 STAN. J. INT’L L. 1, 5–7 (2009).

²¹ See generally TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN 388 (2010).

²² Angus Roxburgh, *How Russia Faced Its Dark Past*, BBC NEWS (Mar. 5, 2003, 9:51 AM), <http://news.bbc.co.uk/2/hi/europe/2821281.stm>.

²³ NORMAN M. NAIMARK, STALIN’S GENOCIDES: HUMAN RIGHTS AND CRIMES AGAINST HUMANITY 84 (2010).

²⁴ See Viola, *supra* note 3, at 373.

²⁵ See generally Greenberg, *supra* note 20, at 1–2; SNYDER, *supra* note 21, at 388.

²⁶ See Brown, *supra* note 5, at 324.

²⁷ Brown, *supra* note 5, at 324–25.

B. Early Changes to the Rule of Law in the Post-Soviet Era, up to the 1998 Ratification of the Convention

Between the collapse and the first election of Putin,²⁸ Russia experienced the first true years of democracy and the development of human rights. This transition from “Old” Russia to “New” Russia was accompanied by changes in the law, the legal structure, and most importantly, by changes in the policies that were at the foundation of its legal system. A part of this transition was to establish the legal protections to human rights and fundamental freedoms.

Following the Soviet collapse, Russia began implementing substantial changes to the law, including on freedom of expression. These significant reformations took place during the early 1990s, such as an amendment to the Constitution, and the adoptions of a new criminal code and international law provisions in its federal legal system.²⁹

In 1993, Russia declared the establishment of freedom of expression and made several amendments to its Constitution.³⁰ For example, Article 29 of the Constitution of the Russian Federation was adopted to guarantee the freedom of ideas and expression, as well as freedom of the mass media.³¹ After enacting the new rights in its Constitution, Russia also amended its Criminal Code to

²⁸ Vladimir Putin was elected as President in 2000. Tom Parfitt, *Vladimir Putin Inauguration Shows How Popularity Has Crumbled*, TELEGRAPH, (May 7, 2012 8:10 PM), www.telegraph.co.uk/news/worldnews/vladimir-putin/9250729/Vladimir-Putin-inauguration-shows-how-popularity-has-crumbled.html. Putin served as President from 2000 to 2008, for two consecutive four-year terms, and as Prime Minister of Russia from 2008 to 2012. Josh Voorhees, *Putin's Now Talking Openly About Running For Yet Another Term*, SLATE (Sept. 19, 2013, 2:24 PM), http://www.slate.com/blogs/the_slatest/2013/09/19/vladimir_putin_s_fourth_term_russia_strongman_admits_he_s_weighing_another.html. His third term as President began on May 7, 2012, and will continue for six years. Parfitt, *supra*.

²⁹ See *infra* Part II.B.

³⁰ KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] Sect. II.

³¹ *Id.* art. 29. Article 29 of the Constitution of the Russian Federation provides:

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.

Id.

reflect the newly established freedoms.³² The 1993 Constitution also adopted the international law provisions as a part of the Russian legal system.³³ This line of positive changes indicated a promising development toward the new democratic society. It was also the first step of the new Russian government toward the promised freedoms and the first “brick” in building protection of fundamental human rights.

This Comment will focus on the extent to which the new Russian government took its promise seriously and will analyze to what extent it actually protected the freedom of expression. Considering that the majority of Russian law was inherited from the Soviet Union, perhaps it was expected that it would take significant effort and time to amend it. Also, given the Russian history and heritage on freedom of expression discussed above, the new government knew that it would be difficult to overcome the old policies and maintain its promise of democracy. The discussion below examines the freedom of expression in the “New” Russia, both during its years of transition and in the modern days, and the extent to which Russia committed to its promise of democracy.

II. FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Russian Federation ratified the Convention on May 5, 1998.³⁴ The ratification was performed by the new Russian government as the first step in a commitment to its promise of democracy and to building a system of human rights. This was a large step in the newly established and developing democratic system. Given the Soviet heritage and the long history of prohibitions on freedom of expression, the government of the New Russia,

³² UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code] arts. 1(2), 2(1), *translated in* CRIMINAL CODE OF THE RUSSIAN FEDERATION 1–2 (William E. Butler ed. trans., 4th ed. 2004).

³³ KONSTITUTSIYA ROSSIYSKOY FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4). Article 15(4) of the Constitution of the Russian Federation provides:

Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.

Id. This provision of the Russian Constitution appears to allow international treaties to automatically preempt domestic statutes.

³⁴ See *Chart of Signatures and Ratifications*, *supra* note 2.

nevertheless, made an important step toward what was a promising development.

A. *Protection of Freedom of Expression under Article 10*

Freedom of expression is protected under Article 10 of the Convention,³⁵ which ultimately encompasses political speech as well as speech related to government criticism.³⁶ In upholding this protection, the ECHR has declared that freedom of expression “constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man.”³⁷ The ECHR has repeatedly stressed the importance of protecting freedom of expression in several recent decisions by defining it as “one of the basic conditions for its progress and for each individual’s self-fulfillment.”³⁸

Under Article 10, Paragraph 1, the freedom of expression includes the freedom to hold opinions, freedom to impart information and ideas, and freedom to receive information and ideas.³⁹ These freedoms are almost

³⁵ Convention, *supra* note 9, art. 10. Article 10 provides:

- (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.

Id.

³⁶ MONICA MACOVEI, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7 (Council of Eur., Human Rights Handbook Ser. No. 2, 2004), available at [www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-02\(2004\)_en.pdf](http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-02(2004)_en.pdf) (“As a matter of principle, the protection given by Article 10 extends to any expression notwithstanding its content, disseminated by any individual, group or type of media. The only content-based restriction applied by the Commission has dealt with the dissemination of ideas promoting racism and the Nazi ideology, and inciting to hatred and racial discrimination.”).

³⁷ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); see also JACOBS, WHITE & OVEY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 425 (5th ed. 2010).

³⁸ See, e.g., *Lindon v. France*, 2007-IV Eur. Ct. H.R. 183, 211 (2007); *Maronek v. Slovakia*, 2001-III Eur. Ct. H.R. 337, 349 (2001); *Thoma v. Luxembourg*, 2001-III Eur. Ct. H.R. 67, 84 (2001); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 11, 26 (1986).

³⁹ Convention, *supra* note 9, art. 10(1).

absolute⁴⁰ and must be exercised free of interference by the state and its public authorities.⁴¹ “State interference” is deemed as any interference stemming from any authority possessing power, such as the police, courts, government officials, and any decision-making bodies.⁴²

The application of the Convention provisions by the domestic courts of contracting states causes the biggest difficulty in applying Paragraph 2 of Article 10. Paragraph 2 sets some limitations that could be imposed on freedom of expression by the domestic courts of member states of the Convention under the doctrine of margin of appreciation.⁴³ This international law doctrine allows each member state a degree of discretion in deciding and regulating matters that fall both within the provisions of Convention and under the domestic laws by means within each state’s unique circumstances.⁴⁴ The degree of discretion varies depending on the substance of the matter. While the domestic courts possess considerable discretion and a broader margin of appreciation in economic and commercial matters, for freedom of expression cases this margin is very limited and almost non-existent.⁴⁵ The exhaustive list of limitations set in Paragraph 2 has long been interpreted by the ECHR very narrowly and on a case-by-case basis.⁴⁶

Prior to bringing their matters to the ECHR the citizens of the Member states must exhaust all avenues available to them under their domestic legal system.⁴⁷ In deciding cases on violation of Article 10, the ECHR considers the constitution of the state against which the claim was brought and the domestic laws of the country, and places a high burden on the state authorities to justify any interference with freedom of expression.⁴⁸ In deciding whether the

⁴⁰ See MACOVEI, *supra* note 36, at 8.

⁴¹ See Convention, *supra* note 9, art. 10(1).

⁴² MACOVEI, *supra* note 36, at 30.

⁴³ Convention, *supra* note 9, art. 10(2); see also DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 104 (3d ed. 2010); MACOVEI, *supra* note 36, at 6–48.

⁴⁴ See BEDERMAN, *supra* note 43, at 104; see also Grinberg v. Russia, App. No. 23472/03, at 7 (Eur. Ct. H.R. 2005), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69835>.

⁴⁵ MACOVEI, *supra* note 36, at 8–9.

⁴⁶ Romanenko v. Russia, App. No. 11751/03, at 11 (Eur. Ct. H.R. 2010) (citing Krasulya v. Russia, App. No. 12365/03, at 7 (Eur. Ct. H.R. 2007) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79574> (“In examining the necessity of the interference in the particular circumstances of the case, the Court will take the following elements into account: the subject matter of the publication, the position of the applicants, the position of the person against whom the criticism was directed, characterization of the contested statements by the domestic courts, the wording used by the applicants, and the penalty imposed on them.”); see also MACOVEI, *supra* note 36, at 35–36.

⁴⁷ Convention, *supra* note 2, art. 35.

⁴⁸ See MACOVEI, *supra* note 36, at 30.

domestic court of the State exceeded its margin of appreciation, the Court applies a three-part test that was established in its 1979 decision *The Sunday Times v. United Kingdom*.⁴⁹ Within the exceptions set in Paragraph 2, the interference of domestic authorities in the exercise of freedom of expression may be justified if three conditions are met: (1) The interference was “prescribed by law;” (2) the interference pursued a “legitimate aim” of protecting the interests of others for the purposes set in Article 10(2) of the Convention; and (3) the interference was “necessary in a democratic society.”⁵⁰

The ECHR, in applying this test, afforded a high degree of protection to political speech in several of its decisions. *Lingens v. Austria* held that the public has the right to receive information and ideas of public interest, specifically political issues.⁵¹

Political criticism inevitably collides with the right to protect one’s reputation defined under Article 8 of the Convention.⁵² In drawing the line, the ECHR recognized that most political criticism affects the reputation of public officials in one way or another, and some interference may be justified in protecting the reputation of public officials and their privacy.⁵³ On several occasions, the ECHR held that the politicians running for office should have a reduced expectation of privacy, as their performance will be subject to political criticism, and the protection of their reputation may be outweighed by public interest in discussing political issues.⁵⁴

⁴⁹ *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 29 (1979).

⁵⁰ *Id.* at 29, 38.

⁵¹ *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986) (explaining that it is incumbent on the press “to impart information and ideas on *political issues* just as on those in other areas of public interest.”) (emphasis added).

⁵² *Id.* at 25. Convention, *supra* note 9, art. 8. Article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

⁵³ See *Tammer v. Estonia*, App. No. 41205/98, at 15 (Eur. Ct. H.R. 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59207>; *von Hannover v. Germany*, App. No. 59320/00, at 22 (Eur. Ct. H.R. 2004), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61853>

⁵⁴ See, e.g., *Lingens*, 103 Eur. Ct. H.R. at 26 (“The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at

B. *Russia's Implementation of Article 10 in the Domestic Legal System*

Russia began its commitment to its promises by implementing the international law provisions in its domestic legal system. During the early post-Soviet era, the international law provisions were implemented in the Russian legal system in several ways: through the adopt of special provisions in the Russian Constitution; through the ratification of the Convention; and through the interpretation of the ECHR decisions by the Supreme Court of Russia for further implementation by local courts.⁵⁵

The implementation of the international law provisions in Russian Law began in 1993 when Russia adopted its new Constitution, thus replacing the previous Soviet Constitution of 1978 that remained in force for the first few years after the collapse.⁵⁶ Article 15(4) of the 1993 Constitution provides that the international agreements and conventions, to which Russia is a party, are considered part of the Russian legal system.⁵⁷ In addition, Article 46(3) adopts a new standard of affording higher values to individual human rights and establishes a right to the individual complaint procedure.⁵⁸ Article 46(3) provides that every individual has a right to petition to the international organizations for protection of his or her human rights and liberties.⁵⁹

large, and he must consequently display a greater degree of tolerance. No doubt [the protection of] Article 10 § 2 . . . extends to politicians too even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”).

⁵⁵ See KONSTITUTSIYA ROSSIYSKOY FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4); O. Shepeleva, *Praktika Rossiiskikh Sudov: Faktory, Vliiaushchie na Primenenie Norm Evropeiskoi Konventsii Prav Cheloveka i Osnovnikh Svobod i Reshenii Evropeiskogo Suda po Pravam Cheloveka Rossiiskimi Sudami (predvaritel'nye rezul'taty analiza)*, in MATERIALY SEMINARA 27 (2007); *Chart of Signatures and Ratifications*, *supra* note 2.

⁵⁶ Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 451–52 (1994).

⁵⁷ KONSTITUTSIYA ROSSIYSKOY FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4). Article 15(4) of the Constitution of the Russian Federation provides:

Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.

Id.

⁵⁸ See *id.* art. 46(3).

⁵⁹ *Id.* Article 46 provides:

1. Everyone shall be guaranteed protection in court of his (her) rights and freedoms.
2. Decisions and actions (or inaction) of State government bodies, local self-government bodies, public organisations and officials may be appealed against in court.

Additionally, in 1995, Russia passed a federal law on international agreements that reflected and reinforced the provisions of the Constitution and incorporated international agreements into the Russian legal system.⁶⁰ These adoptions represent a significant change to the policies used by prior governments, and especially those established during Soviet times.

The second change in Russian policies came with the adoption of the Convention. The standards set by the Convention represented a much higher level of protection to the individual human rights than those that were in place in Russia. The ratification of the Convention in 1998 brought two significant lines of changes in the domestic legal system.⁶¹ One line of improvements involved amendments of the local laws to bring them into compliance with the requirements of Convention, and the second line involved changes in practice and procedure used by the local courts. While the former took several years to accomplish, the latter took decades and still lacks significant improvement.

1. Implementation of the Convention Provisions through Legislative Amendments

After the ratification of the Convention, the majority of legislative changes were performed during the first few years. Russia amended Article 1, Section 2 of its Criminal Code in 2001,⁶² and amended Article 1, Section 2 of its Civil Code in 2002.⁶³ Both amendments contained similar provisions stating that, if a Russian treaty stipulates procedural rules other than those provided by Russian law, then the treaty's rules apply.⁶⁴ By adding these provisions in both codes, Russia assured its citizens and the international community of its

3. Everyone shall have the right in accordance with international treaties of the Russian Federation to appeal to interstate bodies for the protection of human rights and freedoms if all available internal means of legal protection have been exhausted.

Id.

⁶⁰ Federal'nyi Zakon RF o Megdunarodnykh Dogovorakh Rossiiskoi Federatsii [Federal Law of the Russian Federation on the International Agreements of the Russian Federation], ROSSIISKAIA GAZETA [ROS. GAZ.] July 21, 1995.

⁶¹ Federal'nyi Zakon RF o Ratifikatsii Konventsii o Zashchite Prav Cheloveka i Osnovnykh Svobod i Protokolov k Nei [Federal Law of the Russian Federation on Ratification of the Convention on Human Rights and Fundamental Freedoms and its Protocols], SOBRANIE ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 54-FZ.

⁶² UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code], *translated in* CRIMINAL CODE OF THE RUSSIAN FEDERATION, *supra* note 32, at 1, art. 1(2).

⁶³ GRAZHDANSKIY KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1(2).

⁶⁴ *Id.*; UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 1(2), *translated in* CRIMINAL CODE OF THE RUSSIAN FEDERATION, *supra* note 32, at 1–2.

unequivocal commitment to the promise of democracy. At that time, the implementation of these provisions presented an important step in the protection of freedom of expression, and ultimately toward the establishment of democracy. By making this significant step, Russia declared for the first time that the provisions of an international treaty, such as the Convention, shall prevail.⁶⁵ However, these steps were made on paper and still had to be enforced by domestic courts.⁶⁶ For all these legislative changes to come into effect, they still had to be applied by Russian courts in their judicial practice.

2. *Implementation of the Convention Provisions in Russian Judicial Practice*

While the legislative amendments were slowly taking place, implementing the Convention's provisions in local judicial decisions presented a much harder task at hand. In practice, there is often a lapse in time between the date when legislation is enacted and when it is effectively enforced.⁶⁷ As explained in the examples below, the enforcement of the legislative provisions in the Russian judicial practice is often fragmented and unfinished in its character.

Two years prior to ratifying the Convention, Russian Legislation adopted the Federal Constitutional Law No. 1-FKZ⁶⁸ that mandated the application of treaty provisions in judicial decisions. This law expressly provides that the courts are to consider treaty provisions once the provisions are adopted by Russia and become a part of the Russian law.⁶⁹ While the Russian Federation ratified the Convention in 1998, its implementation in judicial decisions was done exclusively by the higher courts and was thoroughly avoided by the lower courts.⁷⁰ Although the legislative provisions discussed above mandated the application of treaty provisions in judicial decisions of all courts, the lower courts avoided applying the Convention in freedom of expression cases,

⁶⁵ See Sergei Yu. Marochkin, *International Law in the Courts of the Russian Federation: Practice of Application*, 6 CHINESE J. INT'L L. 329, 330–31 (2007).

⁶⁶ See Shepeleva, *supra* note 55, at 27.

⁶⁷ Marochkin, *supra* note 65, at 333.

⁶⁸ Federal'nyi Konstitutsionnyi Zakon RF o Sudebnoi Sisteme Rossiiskoi Federatsii [Federal Constitutional Law of the Russian Federation on the Judicial System of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1997, No. 1-FKZ.

⁶⁹ *Id.*

⁷⁰ Shepeleva, *supra* note 55, at 28.

demanding additional directives from higher courts as to the correct application of the Convention provisions.⁷¹

Responding to the demands of the lower courts, in October 2003, the Russian Supreme Court issued the first directive attempting to clarify how the local courts consider the Convention provisions in their decisions.⁷² At the same time, the Supreme Court still left the directive provisions very vague.⁷³ While some provisions of this directive mandated the application of the Convention, the others provided that the lower courts “may order a private determination or resolution, which draws attention to the relevant organizations and officials at the circumstances and facts of violation of these rights and freedoms, requiring necessary measures.”⁷⁴ This provision left local courts confused as to whether they were to award damages in the cases of human rights violations or simply to draw the attention of the relevant organization and officials.⁷⁵ In December 2003, another directive of the Supreme Court stated that the local courts should take into account the decisions of the ECHR that interpret the Convention provisions, thus leaving it discretionary for the lower courts.⁷⁶

Given the vague and optional language of these directives, most of the lower courts abstained from the application of the Convention’s provisions in their decisions for several reasons. Some judges expressly stated that the Russian judicial system is not a system of *stare decisis* and thus, they are under no obligation to consider any prior decisions of the ECHR.⁷⁷ Other courts were simply not familiar with the provisions of the Convention or did not know how to interpret them in order to preserve the uniformity of the law.⁷⁸ Additionally,

⁷¹ See *id.* at 31; see also E. Pershakova, *Primenenie Norm Evropeiskoi Konventsii i Reshenii Evropeiskogo Suda v Praktike Verkhovnogo Suda Rossii (Predvaritel'nye Rezul'taty Analiza)*, in MATERIALY SEMINARA 34, 43 (2007).

⁷² Postanovlenie Plenuma Verkhovnogo Suda RF “O Primenenii Sudami Obshchei Iurisdiktсии Obshchepriznannykh Printsipov i Norm Megdunarodnogo Prava i Megdunarodnykh Dogovorov Rossiiskoi Federatsii” ot 10 oktiabria 2003 g. [The Russian Federation Supreme Court Plenary Ruling on Application by the Courts of General Jurisdiction of the Generally Recognized Principles of International Law and International Agreements of the Russian Federation of October 10, 2003], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 2, 2003 [hereinafter Directive of the Russian Supreme Court of Oct. 10, 2003].

⁷³ See Marochkin, *supra* note 65, at 339–40.

⁷⁴ Directive of the Russian Supreme Court of Oct. 10, 2003, *supra* note 72, para.11 (emphasis added).

⁷⁵ See Marochkin, *supra* note 65, at 340.

⁷⁶ Postanovlenie Plenuma Verkhovnogo Suda RF “O Sudebnom Reshenii” ot 19 dekabria 2003 g., para. 4 [Paragraph 4 of the Russian Federation Supreme Court Plenary Ruling on Judicial Decisions of December 19, 2003], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 26, 2003.

⁷⁷ See Shepeleva, *supra* note 55, at 32.

⁷⁸ *Id.*

when Russia ratified the Convention, many of its domestic laws conflicted with the Convention's provisions.⁷⁹ Therefore, while the Legislature was in the process of amending domestic laws, the higher courts remained the main authority on reconciling the conflicts of law.⁸⁰ In order to avoid the conflict or incorrect application of the law, the local courts abstained from applying Convention provisions until the Supreme Court would issue more precise directives.⁸¹

The first directive that expressly addressed the application of Article 10 of the Convention was issued in 2005.⁸² Here, the Supreme Court declared that the purpose of this directive was to “ensure the correct and uniform application of the law.”⁸³ In particular, the Supreme Court was to issue the directives to the lower courts as to the correct application of the law, specifically, in matters involving the reputation of individuals and businesses when it comes in conflict with the freedom of expression.⁸⁴ In this directive, the Supreme Court emphasized that the right to protect one's reputation is a constitutional right in Russia, and the domestic courts are to consider this constitutional protection in the matters involving freedom of expression, and by inclusion, freedom of speech.⁸⁵ The Supreme Court went into extensive discussion of the domestic law provisions but provided little direction as to the application of Article 10 of the Convention.⁸⁶ In this directive, the higher court made an emphasis on the protection of reputation, which also applies to protecting the reputation of government officials. Perhaps more importantly, the Supreme Court also emphasized that the lower courts of general jurisdiction do not have subject matter jurisdiction over the cases involving “protection of business reputation in the field of business and other economic activities.”⁸⁷

⁷⁹ Pershakova, *supra* note 71, at 34.

⁸⁰ *Id.*

⁸¹ *See* Shepeleva, *supra* note 55, at 28.

⁸² Postanovlenie Plenuma Verkhovnogo Suda RF “O Sudebnoi Praktike po Delam o Zashchite Chesti i Dostoinstva Grazhdan, a takzhe Delovoi Reputatsii Grazhdan i Iuridicheskikh Lits” ot 24 fevralia 2005 g. [The Russian Federation Supreme Court Plenary Ruling on Judicial Practice on Protection of Honor and Dignity of Citizens, and Business Reputation of Citizens and Entities of February 24, 2005], ROSSIISKAIA GAZETA [ROS. GAZ.] Mar. 15, 2005.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ *See generally id.*

⁸⁷ *Id.* (citing ARBITRAZHNO-PROTSESUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] arts. 33(1)–(5)).

Thus, in practice, many domestic courts avoided the application of the Convention provisions in their decisions.⁸⁸ This approach resulted in a stream of litigation brought to the ECHR for violations of Article 10 of the Convention.

C. Cases Brought Before the European Court of Human Rights Against Russia for Violations of Article 10

The extent to which Russia did recognize the Convention can be determined from analyzing the cases brought before the ECHR on freedom of expression. Because the focus of Article 10 is the freedom of expression that involves political criticism, the analysis below will encompass only the cases that relate to criticism of the government or involve some type of political speech. Analysis of recent ECHR's decisions entered against Russia for violations of Article 10 corresponds with a significant increase in the number of cases involving political criticism.

The general principles applicable in deciding cases on freedom of expression in Russia were extensively discussed by the ECHR in *Grinberg v. Russia*.⁸⁹ Here, the ECHR provided an extensive assessment of the case law on freedom of expression, signified the special place of the press in a democratic society, and defined wider limits of criticism allowed to expressions concerning public officials.⁹⁰ *Grinberg* involved a Russian newspaper that published an article written by a local citizen criticizing the situation around the gubernatorial election.⁹¹ Four days after the publication, the governor brought a defamation action against the publisher, the author of the article, the editor's office, and the founder of the newspaper.⁹² The Russian domestic court found the founder of the newspaper and the author liable and ordered them to pay damages to the governor, as well as to publish the judgment.⁹³ This decision was subsequently upheld on appeal by the Regional Court and denied supervisory review by the Russian Supreme Court.⁹⁴ In the ECHR, the author asserted that his right to hold and impart opinions was guaranteed by the

⁸⁸ See Shepeleva, *supra* note 55, at 28–29.

⁸⁹ *Grinberg v. Russia*, App. No. 23472/03, at 5–6 (Eur. Ct. H.R. 2005), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69835>.

⁹⁰ *Id.* at 5–6.

⁹¹ *Id.* at 2.

⁹² *Id.* at 2–3.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

Convention and Article 29 of the Russian Constitution guaranteeing the freedom of ideas and speech.⁹⁵

In deciding this matter, the ECHR used the framework that was previously established in *Handyside v. the United Kingdom*⁹⁶ and *Lingens v. Austria*.⁹⁷ The ECHR first emphasized freedom of expression as fundamental for a democratic society and described its applicability to both favorable information and ideas, and also to those that “offend, shock or disturb.”⁹⁸ While the press is subject to some boundaries set in Article 10(2), the Court held that such exceptions must be construed strictly when applied to the press and to political speech.⁹⁹ The Court also emphasized the essential function of the press in a democratic society and its obligations and responsibilities to impart information and ideas on all matters of public interest and, at the same time, suggested that the press should enjoy wider protection on the freedom of expression.¹⁰⁰ In discussing potential restrictions on political speech, the Court held that “the limit of acceptable criticism is wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny . . . by both journalists and the public at large”¹⁰¹ The protection of the politician’s reputation must be weighed against the public interest in the “open discussion of political issues.”¹⁰²

The burden of establishing the necessity for limitations on freedom of expression was placed on the state. To meet the burden, the state must establish that the interference was “prescribed by law,” “pursued a legitimate aim,” and was “necessary in a democratic society.”¹⁰³ While there was no dispute that the limitation on freedom of expression was prescribed by Russian law and aimed to protect the reputation of the governor, it was unclear whether this limitation was “necessary in a democratic society.” In *Grinberg*, the ECHR applied a three-part test to determine “necessity in a democratic society,” which requires courts to determine (1) whether the state’s interference corresponded to a

⁹⁵ *Id.*; see also KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art.29.

⁹⁶ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) para. 49 (1976).

⁹⁷ *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986).

⁹⁸ *Grinberg*, App. No. 23472/03, at 5–6.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 6.

¹⁰² *Id.* This balancing principle has been previously established by the ECHR. *Lingens*, Eur. Ct. H.R. at 26.

¹⁰³ See *Grinberg*, App. No. 23472/03, at 6–7.

“pressing social need,” (2) whether it was “proportionate to the legitimate aim pursued,” and (3) whether the reasons given by the national authorities to justify it were “relevant and sufficient.”¹⁰⁴

In addition to applying the test of “necessity in a democratic society,” the ECHR discussed the margin of appreciation given to the national authorities and whether the Russian domestic court applied standards that are in conformity with the principles of Article 10 of the Convention.¹⁰⁵ The ECHR criticized the Russian law on defamation for making no distinction between value judgments, which are “not susceptible of proof,”¹⁰⁶ and statements of fact, which the local courts can require to prove truthfulness¹⁰⁷ in the action for defamation. The Court held that “[t]he requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.”¹⁰⁸ In conclusion, the ECHR awarded €1,120 in damages to the newspaper editor,¹⁰⁹ a sum not sufficient to act as a deterrent.

Russian defamation law specifies criminal penalties up to three years of imprisonment and remains a powerful vehicle for the government’s suppression of freedom of expression.¹¹⁰ Shortly after the *Grinberg* case, the ECHR received several other cases from the Russian courts imposing penalties and charges on the local newspapers and its editors for publishing materials criticizing the government. These decisions remained contrary to the ECHR’s decision in *Grinberg*.¹¹¹

In *Krasulya v. Russia*, for example, the Russian court convicted the editor-in-chief of a regional newspaper for criminal defamation, sentencing him to one year of imprisonment for publication of an article mentioning the governor of the region.¹¹² The publication criticized changes in the local election process

¹⁰⁴ *Id.* at 7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (citations omitted).

¹⁰⁹ *Id.* at 9–10.

¹¹⁰ *See infra* Part III.A.2.

¹¹¹ *See generally* *Krasulya v. Russia*, App. No. 12365/03, (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79574>; *Porubova v. Russia*, App. No. 8237/03, (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94840>; *Romanenko v. Russia*, App. No. 11751/03, (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94843>.

¹¹² *Krasulya*, App. No. 12365/03, at 2–4; *see also* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code], *supra* note 32, art. 129. Article 129(1) of the Criminal Code of the Russian Federation

of the town's mayor.¹¹³ According to the changes, the town's mayor was no longer elected by the town's residents, but was to be appointed by the town's legislature.¹¹⁴ The newspaper article alleged that these changes were made per the governor's demand.¹¹⁵ One month after publication, the prosecutor's office granted the governor's request for criminal proceedings against the editor-in-chief.¹¹⁶ Although the linguistic expert, who testified at trial, did not find any insulting language in the article, the court substituted the expert's opinion with its own assessment of the article.¹¹⁷ Even though it was impossible to determine who the author of the article was because it was signed by a pseudonym, the Russian court charged the editor with criminal defamation and dissemination of defamatory statements.¹¹⁸ On appeal, the editor claimed the protection of freedom of expression under Article 10 of the Convention,¹¹⁹ however, the Regional Court did not address the applicability of the Convention in its decision.¹²⁰

Delivering its opinion in *Krasulya*, the ECHR applied the same three-prong test used in *Grinberg*, but discussed additional factors that must be taken into consideration when determining whether the interference was "necessary in a democratic society."¹²¹ When deciding the necessity of limitations on freedom of expression in cases involving criticism of the government, the courts shall take into account the following elements: the position of the person criticizing the government, the position of the person against whom the criticism was directed, the subject matter of the publication, the characterization of the contested statement by the domestic court of the contracting state, the wording used by the person criticizing, and the harshness of the penalty imposed by the

defines slander as "dissemination of information known to be false defaming the honour and dignity of another person or undermining his reputation." *Id.* Article 129(2) provided that defamation disseminated in a public statement, publicly displayed work of art or in the mass-media is punishable by a fine and/or correctional work for a period of up to two years. *Id.* art 129(2). Article 129(3) penalized defamation, involving an accusation against a person that he or she committed a serious or especially serious crime, by up to three years imprisonment. *Id.* art. 129(3). Subsequently the defamation charges were taken out of the Criminal Code in 2011 by the President Dmitrii Medvedev and re-criminalized in 2012 by the President Vladimir Putin. *See* discussion *infra* Part III.A.2.

¹¹³ *Krasulya*, App. No. 12365/03, at 7.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2–3.

¹¹⁸ *Id.* at 2, 4.

¹¹⁹ *See id.* at 6.

¹²⁰ *See id.* at 5.

¹²¹ *Id.* at 7.

domestic court.¹²² The Court analyzed the third *Grinberg* factor and came to the conclusion that interference by authorities was not “necessary in a democratic society.”¹²³ The ECHR found that the journalist’s publication “did not exceed the acceptable limits of criticism,” the imposed criminal conviction was not compatible with the principles set out in Article 10, and the Russian court did not present sufficient reasons for justifying the interference with freedom of expression.¹²⁴ The ECHR held that the domestic courts “overstepped the narrow margin of appreciation afforded to them for restrictions on debates of public interests” under the limitations clause and “that the interference was disproportionate to the aim pursued and not ‘necessary in a democratic society.’”¹²⁵

Three years later, the ECHR faced similar allegations again in *Porubova v. Russia*¹²⁶ and *Romanenko v. Russia*.¹²⁷ While in *Romanenko* the Russian court imposed civil penalties on the founders of the newspaper for publishing an article criticizing the inaction of the court’s management department,¹²⁸ in *Porubova*, the domestic court convicted the editor-in-chief of criminal slander¹²⁹ and criminal insult,¹³⁰ and sentenced her to one and a half years of correctional work with retention of fifteen percent of her wages for the benefit of the State.¹³¹ These steep penalties imposed by the Russian courts present significant limitations on freedom of expression and act as a deterrent for other

¹²² *Id.* at 7–8; see also *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 69, 83.

¹²³ The first two *Grinberg* factors, “prescribed by law” and “pursued a legitimate aim,” were uncontested in this case. *Krasulya*, App. No. 12365/03, at 10.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Porubova v. Russia*, App. No. 8237/03, at 1, 4 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94840>.

¹²⁷ *Romanenko v. Russia*, App. No. 11751/03, at 1–2, 10 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94843>.

¹²⁸ *Id.* at 2.

¹²⁹ *Porubova*, App. No. 8237/03, at 5; see also UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code], *supra* note 32, arts. 129, 130. The Criminal Code of the Russian Federation has separate punishment provisions for criminal slander and criminal insult. Article 129(1) of the Criminal Code of the Russian Federation defines criminal slander as the dissemination of information known to be untrue that damages the honor and dignity of another person or undermines the person’s reputation. *Id.* art 129(1). Article 129(2) provides that criminal slander disseminated in a public statement, a publicly displayed work of art, or the mass media is punishable by a fine and/or correctional work for a period of up to two years. *Id.* art. 129(2). Article 130(1) of the Criminal Code defines criminal insult as undermining the honor and dignity of the victim in an obscene manner. *Id.* art 130(1). Article 130(2) provides that criminal insult disseminated in a public statement, a publicly displayed work of art, or the mass media is punishable by a fine and/or correctional work for a period of up to one year. *Id.* art. 130(2).

¹³⁰ *Porubova*, App. No. 8237/03, at 6.

¹³¹ *Id.* at 5.

newspapers, their founders, and editors-in-chief from publishing any criticism of the government, its entities, or government officials.

A slightly different matter was presented to the ECHR in *Saliyev v. Russia*,¹³² where the freedom of expression was obstructed by withdrawal of a newspaper from circulation. Here, Saliyev was the president of a NGO, Investory Kolymy, in Magadan.¹³³ He wrote an article on the acquisition of shares of a local energy-producing company by a group of Moscow firms, alleging that a high-level official from Moscow was behind the transaction.¹³⁴ The editor-in-chief of a local newspaper, which was owned and managed by the municipal authorities, agreed to publish the article.¹³⁵ The issue with Saliyev's article was sent for distribution to newsstands and kiosks, and later that same day were withdrawn from circulation and destroyed.¹³⁶ Three days later, the editor-in-chief who authorized the publication resigned from his position.¹³⁷ A subsequent investigation revealed that the newspaper was withdrawn from circulation because of Saliyev's article.¹³⁸ The withdrawal was authorized by the editor-in-chief at the request of the distributing company *Rospechat*, formerly a government-owned entity.¹³⁹ The article's author initiated a formal complaint against the head of the distributing company and the former editor-in-chief for unlawful interference with freedom of the press under Article 144 of the Russian Criminal Code.¹⁴⁰ However, the prosecutor concluded that no interference with freedom of the press had occurred.¹⁴¹ The domestic court examining this decision noted that, by Russian law, only the court can order withdrawal of a publication from circulation, but nevertheless, concluded that no violation had occurred here.¹⁴² The ECHR, after examining submissions by the parties and taking into consideration the Russian Media Act of 1991 prohibiting State censorship,¹⁴³ applied the same three-part test used in

¹³² *Saliyev v. Russia*, App. No. 35016/03, at 1 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101179>.

¹³³ *Id.* at 2.

¹³⁴ *Id.*

¹³⁵ *Id.* at 7.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 8.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 8; UGOLOVNYI KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code], *supra* note 62, art. 144.

¹⁴¹ *Saliyev*, App. No. 35016/03, at 9.

¹⁴² *Id.* at 19.

¹⁴³ *Id.* at 11. The Court examined the Russian Media Act of 27 December 1991, which prohibits censorship. *Id.* Section 3 of the Act provides that State bodies and officials cannot require a communication

Grinberg.¹⁴⁴ The ECHR examined whether there was an interference, whether the interference was done by a state authority, as well as whether the interference was justified, had legitimate aim, and was proportionate to the interests at stake.¹⁴⁵ The ECHR held that withdrawal of the newspaper issue, after it had already been published, was not justified under Article 10 of the Convention.¹⁴⁶

Analysis of the *Saliyev* case shows that the Russian court ignored the freedom of speech nature of the claim and treated it as a purely business transaction, focusing only on the contractual obligations of the parties. Turning a blind eye to the case, the domestic courts did not consider the right to freedom of speech under the Russian Constitution or the Convention.¹⁴⁷ The courts focused on the right of the newspaper to freely manage its property, without any regard to the author's rights, and concluded that the newspaper had no contractual obligations to the individual author to continue selling the publication.¹⁴⁸ The court did not analyze the content of the article, did not examine the reasons for the withdrawal, and did not balance the author's right to freedom of expression against any other interests involved.

These cases demonstrate the means the Russian government employs to limit political speech, particularly when it relates to criticism of the government. Imposing criminal charges not only on authors of articles, but also on the editors-in-chief and founders of the newspapers, creates a strong deterrent against future publication of any politically related pieces. The lack of distinction between value judgments and statements of fact in Russian defamation law allow domestic courts to reach any conclusion on statements published in the media. In deciding these cases, dependent judiciaries tend to substitute expert opinions for their own assessment of expressions criticizing government. These assessments are driven by factors different from those used by the ECHR. In deciding freedom of expression cases, the Russian domestic courts fail to take into account Article 10 of the Convention.

medium, such as a newspaper, to obtain prior authorization for the publication of material. *Id.* The Act also prohibits banning the distribution of certain material. *See* Federal'nyi Zakon RF o Sredstvakh Massovoy Informatsii [Russian Federation Law on Mass Media], ROSSIISKAIA GAZETA [ROS. GAZ.], Feb. 8, 1992, No. 2124-1.

¹⁴⁴ *See supra* note 104 and accompanying text.

¹⁴⁵ *Saliyev*, App. No. 35016/03, at 11.

¹⁴⁶ *Id.* at 21.

¹⁴⁷ *See id.* at 9–10.

¹⁴⁸ *Id.* at 10.

D. Limitation on Article 10 Protection by Indirect Means

In recent years, the ECHR and the international community have put significant pressure on the Russian government by putting the steps of the President, as well as government decisions, in the international limelight.¹⁴⁹ Attempting to circumvent the pressure, the Russian government slowly shifted from using direct methods of limitations on freedom of speech described above, to several indirect approaches, such as removing criticizing employees from their positions, imposing additional administrative requirements on the organizers of protests, and denying authorization to hold mass demonstrations.¹⁵⁰ Examples of such indirect approach were presented in two cases brought before the ECHR, *Kudeshkina v. Russia*¹⁵¹ and *Kuznetsov v. Russia*.¹⁵²

Kudeshkina involved the obstruction of free expression through firing an employee who was critical of the government.¹⁵³ Here, a Moscow City Court Judge was appointed to sit on a case concerning a large-scale customs and financial fraud investigation that involved a group of companies, and allegedly, certain high-ranking state officials.¹⁵⁴ After a detailed examination of the case and questioning of the victim, Judge Kudeshkina was removed from sitting on the case and the matter was given to another judge by the court's president.¹⁵⁵ A few months later, Judge Kudeshkina participated in an election campaign, running as a candidate for the Russian Duma.¹⁵⁶ During her election campaign and while not in an official capacity as a judge, she made a statement in a newspaper interview questioning the independence of the Russian judicial system.¹⁵⁷ Judge Kudeshkina was later terminated as a judge by the Judiciary Qualification Board of Moscow upon request of the president of the Moscow Judicial Council, after having served eighteen years in office.¹⁵⁸ Her criticism

¹⁴⁹ See Rizwan Syed, *Analysts See Freedom of Speech in Russia Slowly Eroding*, VOICE OF AMERICA (Aug. 17, 2012), http://www.voanews.com/content/analysts_see_freedom_of_speech_in_russia_slowly_eroding/1490461.html.

¹⁵⁰ See *Kudeshkina v. Russia*, App. No. 29492/05, at 11 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91501>; *Kuznetsov v. Russia*, App. No. 10877/04, at 3–4 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89066>.

¹⁵¹ *Kudeshkina*, App. No. 29492/05.

¹⁵² *Kuznetsov*, App. No. 10877/04.

¹⁵³ *Kudeshkina*, App. No. 29492/05, at 1.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *See id.* at 2–3.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.* at 5.

¹⁵⁸ *Id.* at 11.

of the judiciary was the basis of her termination.¹⁵⁹ Even though the ECHR subsequently found her statements to be within her right to freedom of expression, the Moscow court refused to reinstate Kudeshkina in her official capacity.¹⁶⁰

Another indirect approach to limit political speech and criticism was used in *Kuznetsov v. Russia*.¹⁶¹ Here, a picket organizer was charged with an administrative code violation for an alleged untimely filing of the picket notice.¹⁶² Under the Soviet Decree of 1988 and the Presidential Decree of 1992, the organizers of a demonstration, meeting, or picket must file a written notice with the municipal authorities no later than ten days before the planned assembly.¹⁶³ In return, the municipal authority must respond to the notice no later than five days before the assembly with an acknowledgement and authorization of the demonstration.¹⁶⁴ Here, the picket organizer, after receiving an official response from the town administration, proceeded with a picket to attract public attention on the violations of the right of access to a court.¹⁶⁵ At the picket, the organizers distributed leaflets criticizing the president of the regional court and his alleged involvement in corruption scandals.¹⁶⁶ Shortly after the picket, the organizer was charged with violating picket notice requirements, distributing leaflets of an insulting nature, and obstructing the passage of citizens into the courthouse.¹⁶⁷ Finding that the picket notice was sent to the town administration eight days prior to the date of assembly, instead of the required ten days, the Russian court found the organizer guilty of violating of the Code of Administrative Violations and imposed a fine.¹⁶⁸ Thus, even though the Constitution of the Russian Federation guarantees the right to freedom of peaceful assembly, the Code of Administrative Violations, on the other hand, established fines for “[v]iolating

¹⁵⁹ *Id.* at 11–12.

¹⁶⁰ Masha Karp, *The Case of Judge Kudeshkina*, RIGHTS IN RUSSIA (Feb. 10, 2010), <http://www.rightsinrussia.info/archive/blog/masha-karp/the-case-of-judge-kudeshkina>.

¹⁶¹ *Kuznetsov v. Russia*, App. No. 10877/04, at 3 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89066>.

¹⁶² *Id.*

¹⁶³ Ukaz Prezidiuma Verkhovnogo Soveta SSSR O Poryadke Organizatsii k Provedeniya Sobraniy, Mitingov, Ulichnykh Shestviy k Demonstratsiy v SSSR [Decree of the Presidium of the Supreme Soviet of the USSR on Organization to Hold Meetings, Rallies, Marches to Demonstrations in the USSR], IZVESTIYA, July 28, 1988, at 2.

¹⁶⁴ *Id.*

¹⁶⁵ *Kuznetsov*, App. No. 10877/04, at 2.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.* at 3–4.

a procedure established for arranging a meeting, rally, demonstration, procession or picket” in the amount of 1000 to 2000 Rubles for organizers and participants.¹⁶⁹ These fines, which could be imposed not only on the organizers, but also on any participant of the demonstration, function, in effect, as an indirect means of limiting freedom of expression.¹⁷⁰

A detailed examination of the cases brought against Russia demonstrates the multiple direct and indirect ways of suppressing freedom of expression, especially when it relates to the criticism of the government. Freedom of expression, while it is protected under the Russian Constitution, in practice does not enjoy a strict level of scrutiny or protection by the Russian courts. The wide variety of claimants who bring their matters to the ECHR on reoccurring issues demonstrate that, although Russia ratified the Convention which protected freedom of expression, the ECHR’s provisions are not being upheld by the local courts.

III. FREEDOM OF EXPRESSION IN RUSSIA TODAY

Recent developments in the legislative and judicial practice of Russia indicate an erosion of freedom of expression. The occurrences discussed below indicate the extent “New” Russia has fallen short on its promise to respect human rights and its promise to establish democracy.

A. *Current Problems with Freedom of Expression and Government Criticism*

The recent prosecution of demonstrators who participated in a march on Bolotnaya Square,¹⁷¹ the excessive sentencing of Pussy Riot,¹⁷² and the many other cases before the Russian courts cast doubt on the existence of freedom of

¹⁶⁹ KONSTITUTSIYA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 31; *see also* KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH PRAVONARUSHENIYAKH [KOAP RF] [Code of Administrative Violations of the Russian Federation] art. 20.2.1.

¹⁷⁰ KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH PRAVONARUSHENIYAKH [KOAP RF] [Code of Administrative Violations of the Russian Federation] art 20.2.

¹⁷¹ Phil Black, *Anti-Putin Protesters Clash with Police; More than 250 Arrested*, CNN (May 6, 2012), <http://www.cnn.com/2012/05/06/world/europe/russia-protest>; Maria Tsvetkova, “*Bolotnaya 17*” *Symbolize Russian Resistance to Putin*, CHI. TRIB. (Sep. 13, 2012), http://articles.chicagotribune.com/2012-09-13/news/sns-rt-us-russia-protestbre88c11a-20120913_1_riot-police-first-big-protest-moscow-s-bolotnaya-square.

¹⁷² Rizwan Syed, *Analysts See Freedom of Speech in Russia Slowly Eroding*, VOICE OF AMERICA (Aug. 17, 2012), http://www.voanews.com/content/analysts_see_freedom_of_speech_in_russia_slowly_eroding/1490461.html.

expression in Russia as it relates to political speech and, in particular, criticism of the government.

The new wave of government criticism came with the return of Vladimir Putin to the Presidency for his new six-year term. This is Putin's third term as President.¹⁷³ The public reaction to the eighteen years of Putin's governance began with questioning the transparency of the election process, as well as voicing strong opposition to the continuing presidency of the former KGB officer.¹⁷⁴ This opposition was quickly suppressed by the criminal sentences given to the participants.¹⁷⁵ The performance of the song "Holy Mother, Send Putin Packing!" by Pussy Riot during Putin's election campaign¹⁷⁶ and the march of thousands on Bolotnaya Square with the slogans "Russia without Putin" the day before his inauguration¹⁷⁷ resulted in severe punishment of many participants.¹⁷⁸ The participants of both events were sentenced to years in prison for conduct that otherwise could be viewed as an administrative violation, punishable by a fine.¹⁷⁹ The recent wave of excessive punishment for administrative violations, which involved criticism of the government and any form of political speech, serves as an indirect way of suppression of freedom of expression.

1. Cases Recently Brought Before the Russian Courts and Indirect Limitations on Freedom of Expression Existing in Practice

The long list of cases involving political prisoners, from Mikhail Khodorkovsky to Pussy Riot to participants of events on Bolotnaya Square, is a strong indication of the limitation, if not outright prohibition, of government criticism.

¹⁷³ Josh Voorhees, *Putin's Now Talking Openly About Running For Yet Another Term*, SLATE (Sept. 19, 2013, 2:24 PM), http://www.slate.com/blogs/the_slatest/2013/09/19/vladimir_putin_s_fourth_term_russia_strongman_admits_he_s_weighing_another.html.

¹⁷⁴ Ellen Barry, *Tens of Thousands Protest Against Putin in Moscow*, N.Y. TIMES, Dec. 11, 2011, at A1; Black, *supra* note 171.

¹⁷⁵ See *Figurant of the "Bolotnaya Square case" is Sentenced to 4.5 Years*, ITAR-TASS (Dec. 11, 2012, 11:55 AM), <http://www.itar-tass.com/en/c142/569311.html> [hereinafter *Figurant of the Bolotnaya Square*].

¹⁷⁶ See David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES (Aug. 17, 2012), <http://www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html?pagewanted=all>; Robert Mackey & Glenn Kates, *Russian Riot Grrrls Jailed for 'Punk Prayer'*, N.Y. TIMES: LEDE (March 7, 2012, 1:00 PM), <http://thelede.blogs.nytimes.com/2012/03/07/russian-riot-grrrls-jailed-for-punk-prayer/>.

¹⁷⁷ Black, *supra* note 171.

¹⁷⁸ See, e.g., *Figurant of the Bolotnaya Square*, *supra* note 175.

¹⁷⁹ See Herszenhorn, *supra* note 176; see also *Figurant of the Bolotnaya Square*, *supra* note 175.

Mikhail Khodorkovsky, once the wealthiest businessman in Russia,¹⁸⁰ was prosecuted during Putin's first term as President.¹⁸¹ His conviction resulted in a significant outcry in Russia and caught much attention in the international media.¹⁸² Khodorkovsky's sentence of nine years imprisonment and the disappearance of most of his wealth serve as an example that no one is immune to prosecution. He also faced new charges brought by the Russian government as his nine-year prison term was coming to an end.¹⁸³ The subject of the new charges appeared to concern the same business activity for which he was prosecuted several years earlier.¹⁸⁴ The series of government prosecutions and impositions of harsh punishments of Khodorkovsky and his associates caused the Russian people and mass media to consider Khodorkovsky a political prisoner.¹⁸⁵ The new charges and prosecution immediately before the end of his first sentence appeared to be not about justice, but about fear,¹⁸⁶ the fear of government prosecution and the fear of political noncompliance.

Putin's third presidential term coincided with international outcry following the conviction of the music group Pussy Riot.¹⁸⁷ The members of the young feminist rock group were sentenced to two years imprisonment after creating a music video titled "Holy Mother, Send Putin Packing!" and publishing it on YouTube.¹⁸⁸ In the matter of Pussy Riot, the court hearing the case refused to recognize the political nature of the performance and based its decision on religious hatred.¹⁸⁹ The court specifically declined to decide upon the political content and political nature of the speech¹⁹⁰ and completely

¹⁸⁰ See Jackson Diehl, *Russia On Trial*, WASH. POST (Nov. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/07/AR2010110704689.html>.

¹⁸¹ See Andrew Wood, *Russia Between the Elections*, in PUTIN AGAIN: IMPLICATIONS FOR RUSSIA AND THE WEST 3, 4 n.3 (2012).

¹⁸² Editorial, *Mikhail Khodorkovsky: Russia's Political Prisoner*, GUARDIAN (Dec. 27, 2010), <http://www.guardian.co.uk/commentisfree/2010/dec/28/mikhail-khodorkovsky-vladimir-putin>.

¹⁸³ See Diehl, *supra* note 180; Editorial, *supra* note 182.

¹⁸⁴ Diehl, *supra* note 180.

¹⁸⁵ See Editorial, *supra* note 182.

¹⁸⁶ *Id.*

¹⁸⁷ Yulia Ponomareva, *Putin's Third Term: Bolstering a Faltering Grip*, RUSS. BEYOND THE HEADLINES, (April 24, 2013), http://rbth.ru/politics/2013/04/24/putins_third_term_bolstering_a_faltering_grip_25397.html.

¹⁸⁸ See Herszenhorn, *supra* note 176; Mackey & Kates, *supra* note 176.

¹⁸⁹ See Prigovor Khamovnicheskogo Suda RF goroda Moskvi po Delu No. 1-170/12 ot 17 Avgusta 2012 g. [Judgment of the Khamovnichesky Court of Russian Federation in the City of Moscow in the Case No. 1-170/12 of August 17, 2012], at 38 [hereinafter Prigovor Khamovnicheskogo Suda RF], available at http://www.gazeta.ru/social/photo/pussy_riot.shtml.

¹⁹⁰ See *id.*; see also *Pussy Riot: Band Members' Conviction a Blow to Free Expression*, HUFFINGTON POST (Aug. 17, 2012 12:50 PM), http://www.huffingtonpost.com/human-rights-watch/-pussy-riot-band-members_b_1797649.html.

avoided any consideration of freedom of expression. The court prosecuted the activists, who protested Putin's reelection for a third Presidential term and fourth sequential term in government, under the Criminal Code, classifying their performance as a religious hate crime and abuse of church and religion.¹⁹¹ Careful examination of the forty-two-page decision reveals the express denial by the court of all arguments on freedom of expression.¹⁹² In its decision, the court did not examine the content of the performance and only focused on the effect of the group's performance on the religious considerations of general public.¹⁹³ The complete omission of the discussion on the freedom of expression alleged by the singers indicates the Russian Judiciary's refusal to enforce the freedom of expression when faced with government pressure and Putin's governance.

Significant prison sentencing has also been imposed recently on participants of the demonstration on Bolotnaya Square. The events on Bolotnaya, also known as the "March of Millions," involved a peaceful demonstration against Putin and his government with strong police intervention resulting in dozens of participants being arrested, several of whom are currently facing criminal charges amounting to over ten years in prison.¹⁹⁴ The first sentence was four and a half years in prison.¹⁹⁵ The demonstration was seen as a protest to Putin's presidency and took place days before his inauguration.¹⁹⁶ The media recognized that the drawing of tens of thousands of people on the streets of Moscow made it the biggest political event since the overthrow of the Soviet government.¹⁹⁷

In addition to the matters examined above, the ECHR continues to receive claims from Russian citizens similar to those the ECHR previously decided. This indicates that the Russian Judiciary, while recognizing the rule of international law within its territory, has not made any significant steps toward

¹⁹¹ Prigovor Khamovnicheskogo Suda, *supra* note 189, at 38; Herszenhorn, *supra* note 176; *see* UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code], *supra* note 32, art. 213.

¹⁹² *See* Prigovor Khamovnicheskogo Suda, *supra* note 189, at 38.

¹⁹³ *See id.*

¹⁹⁴ Miriam Elder, *Vladimir Putin's Return to Presidency Preceded by Violent Protests in Moscow*, GUARDIAN (May 6, 2012), <http://www.theguardian.com/world/2012/may/06/vladimir-putin-presidency-violent-protests-moscow>; *Putin Urged to Free Jailed Protesters*, ASSOCIATED PRESS, May 7, 2013, available at <http://www.bostonglobe.com/news/world/2013/05/06/thousands-demand-putin-free-political-prisoners/42nIWSFiopcHdMz683IWvK/story.html>.

¹⁹⁵ *Figurant of the Bolotnaya Square*, *supra* note 175.

¹⁹⁶ Black, *supra* note 171.

¹⁹⁷ Barry, *supra* note 174.

implementing the provisions of the Convention and the European Court decisions in practice. Therefore, the extent to which Russia has recognized the Convention provisions is very limited as it has very little application in the judicial practice of the Russian courts.

Thus, although Russia took significant steps in reformation of its legal system and declared freedom of expression as a fundamental human right, the practical aspects of such a declaration are lacking. As such, the commitment to the promise of democracy is unattainable in the absence of respect for declared human rights.

2. *Recent Developments in the Russian Law Limiting Freedom of Expression*

In the first few years following the ratification of the European Convention, Russia took many significant steps toward the recognition of individual human rights, and in particular, the right to freedom of expression.¹⁹⁸ However, the reforms and positive changes slowed in the recent years. Not only did Putin's thirteenth year in office and third presidential term begin with the prosecution and conviction of Pussy Riot and the Bolotnaya Square protestors, but also four new bills effectively limiting free speech were passed.¹⁹⁹ One such law allows a government agency to block a long list of internet websites from within Russia.²⁰⁰ The second bill returns the "slander" provision into the Criminal Code, after it was recently removed by former President Dmitry Medvedev.²⁰¹ The third provision imposes heavy fines on individuals who organize or participate in demonstrations not sanctioned by the government, which practically encompasses all anti-government street protests.²⁰² Fourth is the "foreign agents" bill that brands the externally funded non-governmental

¹⁹⁸ See *supra* Part II.B.

¹⁹⁹ Poel Karp, *Why Russia Needs a Defamation Law . . . a Proper One*, OPEN DEMOCRACY (Aug. 3, 2012), <http://www.opendemocracy.net/od-russia/poel-karp/why-russia-needs-defamation-law-proper-one>; see *Figurant of the Bolotnaya Square*, *supra* note 175; Herszenhorn, *supra* note 176.

²⁰⁰ *Russia Adopts Law Limiting Internet Freedom*, HRH LONDON (July 17, 2012), <http://humanrightshouse.org/Articles/18379.html>.

²⁰¹ See *Putin Signs Defamation Bill into Law*, RIA NOVOSTI (July 30, 2012), <http://en.rian.ru/society/20120730/174857347.html>. In December 2011, the former President Dmitry Medvedev decriminalized the prosecution for libel and insult by taking out "slander" provisions from the Criminal Code. *Medvedev Signs Amendments Introducing Forced Labor into Criminal Code*, RUSSIA TODAY (June 7, 2011), <http://rt.com/politics/medvedev-forced-decriminalizing-slander/>. Prior to that, the slander provision was widely used in prosecution of criminal cases against the media as well as against the individuals. *Id.*

²⁰² David M. Herszenhorn, *New Russian Law Assesses Heavy Fines on Protesters*, N.Y. TIMES, June 8, 2012, at A5.

organizations as “foreign agents” with significant limitations on their rights and functions.²⁰³ The latest proposition of the Russian legislature is to extend the law on disclosure of a “state secret” or “high treason” that originally applied only to government officials to now applying to any civilian citizen.²⁰⁴

All these proposals limit the freedom of expression either directly, by censoring the web content or fining the participants of demonstration that was not expressly authorized by the government, or indirectly, by limiting the functions of NGOs and by giving a power to the Prokuratura to charge any civilian with dissemination of “state secrets,” which historically had very broad applications, especially during Stalin’s time.

The analysis of the most recent legislative proposals demonstrates that under Putin’s regime, Russia is experiencing the decline, or practically the end, of freedom of expression, particularly in the area of government criticism. The discussion below provides additional details and analysis of these new laws and administrative proposals. The further analysis also provides a discussion of the reasons for limitations on freedom of expression, as well as suggestions and practical solutions to prevent its complete erosion.

IV. ANALYSIS

A. *Analysis of the Reasons for Limitations on Political Speech*

What would motivate the recent excessive limitation of freedom of expression, particularly freedom to criticize the government? In addition to the obvious influence of the executive branch, there could be several possible explanations.

First is the influence of Russian heritage. The judges themselves grew up in the era of Stalin’s repressions and Communist regime, where the KGB possessed wide discretion of prosecution and execution without trial and

²⁰³ Aleksey Druginyn, *Putin Signs Controversial ‘Foreign Agents’ Bill*, RUSSIA TODAY (July 21, 2012), <http://rt.com/politics/putin-foreign-agents-bill-742/>.

²⁰⁴ Vera Vasilieva, *When the Law Gives Rise to Lawlessness*, HUMAN RIGHTS IN RUSSIA (Oct. 3, 2012), <http://hro.rightsinrussia.info/archive/european-court/cip/strasbourg>. Article 283 of the Criminal Code of the Russian Federation is applicable only to disclosure of information that has become known through one’s office or work. The proposal is to extend this provision to information that becomes known, not only at work, but in the course of study. *Id.*; see also Maksim Solopov & Vyacheslav Kozlov, *Mogno Stat’ Shpionom, Dage Ne Podozrevaia ob Etom [One Can Become a Spy, Not Even Knowing It]*, GAZETA.RU (Sept. 21, 2012), <http://www.gazeta.ru/social/2012/09/21/4782769.shtml>.

judgment.²⁰⁵ These were times when political speech was prohibited and highly prosecuted.²⁰⁶

Second, the mentality of the educational system taught its citizens of the dominant rights of the state with little to no attention to the rights of the individual, even less the human rights of the individual.²⁰⁷ For hundreds of years the law in Russia has been focused on the dominant power of the state and the little to no power of the individual.²⁰⁸ This power pervaded all aspects of life, including freedom of expression. In different times this state power was enforced in different manners.²⁰⁹ In the early 1930s, government power was established through several methods of oppression and fear mongering: starvation of the nation artificially created by the government; placement its citizens into labor camps and deportations into remote and undeveloped areas of the country; and a period of mass repressions, when hundreds of thousands of people were executed without trial.²¹⁰ Individual rights remained erased for decades. After the collapse of the Soviet government and declared establishment of democracy, it took years before the legal community would again talk about evolving individual rights.²¹¹ Just as Russia was taking small steps in the direction of recognizing individual rights of citizens and ratified the Convention, it all came to an end with the election of Putin and his turn in policies.²¹²

The enormous increase in prosecution of political speech during Putin's presidency makes one wonder what the country has achieved in the fifteen years since it ratified the Convention and to what extent, if any, it remains committed to its promise of democracy. While the law appears to be fair and equitable on paper, as applied in the judicial decisions, it undermines the very core of the Russian democratic society and goes to the heart of its judicial institutions.

²⁰⁵ Victor V. Filippov, *The Next Russian Code of Criminal Procedure: The Next Step on the Path of Russia's Democratization*, 11 DEMOKRATIZATSIYA 397, 398-99 (2003); see *supra* Part I.A.; see also Greenberg, *supra* note 20; Viola, *supra* note 3.

²⁰⁶ See Bertrand M. Patenaude, *Regional Perspectives on Human Rights: The USSR and Russia, Part One—The USSR*, SPICE DIGEST, Fall 2012, at 1, available at http://iis-db.stanford.edu/docs/708/RPHR_part1.pdf.

²⁰⁷ *Id.*

²⁰⁸ See generally Mark D. Steinberg, *Russia's fin de siècle, 1900-1914*, in THE CAMBRIDGE HISTORY OF RUSSIA: THE TWENTIETH CENTURY, *supra* note 5, at 67, 72.

²⁰⁹ See SHEARER, *supra* note 7, at 209-10.

²¹⁰ See generally SNYDER, *supra* note 21, at 388.

²¹¹ See *supra* Part I.B.

²¹² See *supra* Part III.A.2.

On its face, the Constitution states:

We, the multinational people of the Russian Federation, united by a common fate on our land, establishing human rights and freedoms, civic peace and accord, preserving the historically established state unity, proceeding from the universally recognized principles of equality and self-determination of peoples, revering the memory of ancestors who have conveyed to us the love for the Fatherland, belief in the good and justice, reviving the sovereign statehood of Russia and asserting the firmness of its democratic basic, striving to ensure the well-being and prosperity of Russia, proceeding from the responsibility for our Fatherland before the present and future generations, recognizing ourselves as part of the world community²¹³

However, it is not enough to have a document that simply declares human rights. Without active enforcement of these rights, the Constitution lacks meaning. There is a need for an independent judiciary to enforce and give significance to the document. The Constitution is not a living instrument until there is an impartial judiciary to implement and uphold it.

Analysis of the cases brought to the ECHR against Russia²¹⁴ demonstrates that by prosecuting the judiciary, the wealthiest, the newspaper editors, journalists, and ordinary citizens, Putin's government is widely establishing that no one is immune from prosecution, and any criticism of the president, his government, or individual politicians and government officials is forbidden. Furthermore, this message is conveyed to the public by imposing outrageous prison sentences for misdemeanors and minor administrative violations, which otherwise would be subject to a fine.

The analysis of the judicial decisions entered by the Russian courts demonstrates that these decisions are based on providing further support for Putin's power and are directed to satisfy the expectations of the Kremlin, with little regard of the law and future development of the democratic society in the country. Terms such as "freedom of speech," "democracy," and principles of "fairness and equality" are not present in the recent judicial decision on matters involving criticism of Putin's government.²¹⁵ While the government is no longer repressing political dissent and conducting mass shootings for political criticism, similar to Stalin's regime, it continues to impose overly burdensome

²¹³ KONSTITUTSIYA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] pmb1.

²¹⁴ See *supra* Parts II.C–D, III.A.

²¹⁵ See *supra* Parts II.C, III.A.

incarcerations²¹⁶ and continues to send individuals to serve their sentences in remote areas of Siberia²¹⁷ and closer to places with radioactive waste.²¹⁸

Perhaps even more alarmingly, the recent steps taken by Putin's government further limit the freedom to criticize government. In this regard, the Russian parliament adopted a new bill authorizing the establishment of a "black list" of Internet sites that are to be blocked by Internet providers, raising alarming implications on freedom of expression.²¹⁹ The content of these websites is to be monitored and controlled by the Federal Service for Supervision of Communications, Information Technology and Mass Communication of the Russian Federation.²²⁰ The list of prohibited websites is to be modified on an ongoing basis and could be further expanded.²²¹ The new law legalizes government filters on Internet communications that will monitor all expressions communicated via the Internet.²²² The list of the sites to be blocked may even include some content available on public websites such as Facebook and YouTube.²²³

B. Proposed Measures of Improvement on Freedom of Political Speech in Russia

There will be no true freedom of expression in Russia without further reforms of its judicial system. The cases involving political speech on criticism of the government will not be decided in compliance with the provisions of the Convention until Russia takes further steps in practical implementation of the provisions it ratified. The measures of improvement discussed below propose several approaches, such as to require further reforms of the legal and judicial

²¹⁶ Prigovor Khamovnicheskogo Suda RF, *supra* note 188.

²¹⁷ Jeremy Page, *Sent to Siberia: The Oligarch Who Had it All—and Lost it*, TIMES ONLINE (Oct. 29, 2005), <http://www.timesonline.co.uk/tol/news/world/europe/article584066.ece>; *see also* Greenberg, *supra* note 20, at 31.

²¹⁸ Greenberg, *supra* note 20, at 31.

²¹⁹ *Komissar OON po Pravam Cheloveka Obespokoena Novymi Zakonami, Ogranichivaushchimi Prava Cheloveka v Rossii* [UN High Commissioner for Human Rights is Concerned about the New Laws that Restrict Human Rights in Russia], PRAVA CHELOVEKA V ROSSII (July 19, 2012), <http://www.hro.org/node/14665>.

²²⁰ *See* Andrew E. Kramer, *Russian Selectively Blocking Internet*, N.Y. TIMES (Mar. 31, 2013), available at http://www.nytimes.com/2013/04/01/technology/russia-begins-selectively-blocking-internet-content.html?_r=0.

²²¹ Olga Khazan, *Russia's Secret New Internet Blacklist*, WASH. POST: WORLDVIEWS (Nov. 9, 2012, 11:57AM), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/09/russias-secret-new-internet-blacklist/>.

²²² Khazan, *supra* note 221.

²²³ *Id.*

system by changing mentality of the judiciary, by increasing judicial independence, by introducing principle of equality before the law, by bringing public attention to the problem, by reducing the Kremlin's influence on censoring speech, and by timely updating the local courts on the decisions of the ECHR. Each proposed measure of improvement will be discussed in turn.

There could be no reformation of the legal and judicial system without changing mentality of the judges, as it remains at the foundation of the judicial approach. The first improvement of the judicial system requires a systemic change of mentality. Through its directives, the Russian Supreme Court should mandate the principles of democracy and equality to be at the foundation of every judicial decision. The judicial system of Russia was inherited from the Soviet period, where the approach to justice was based on the power of the State at the cost of individual rights.²²⁴ The mentality of the judiciary has to be shifted to allocate higher weight and value to individual human rights, which are always in natural tension with the rights of the State. While it is not an easy task to do, it is not impossible. Although fifteen years since the ratification of the Convention sounds like a fairly long time, it will likely take another generation of judges before the judicial approach will see effective and meaningful change.

If a change in mentality might not be a short-term objective, the second proposed measure of improvement includes increasing of judicial independence, which may be achievable in a much shorter period. The Russian judicial system has an urgent need for political and financial independence.²²⁵ The functioning independent judicial branch is a vital element of every democratic society. Without independence of the judiciary, there is no system of checks and balances. The Russian judicial branch is considered independent on the books, however, in practice, there could be no real independence while

²²⁴ Doriane Lambelet, *The Contradiction Between Soviet and American Human Rights Doctrine: Reconciliation Through Perestroika and Pragmatism*, 7 B.U. INT'L L. REV. 61, 64 (1989); see discussion *supra* Part II.B.2; see generally The Center for Political Technologies at the request of the Institute of Contemporary Development, *The Russian Judicial System. The Current State and Problems* 12 (Research Report, Moscow, Oct. 2009), available at http://www.google.ru/url?sa=t&rect=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.politcom.ru%2Ftables%2Fotchet_sud.doc&ei=wEhtUtaIGeufkQeYk4GIAg&usg=AFQjCNEUnmWQfVo41Cj_2QXPxM1qOtJsJw&bvm=bv.55123115,d.eW0&cad=rjt [hereinafter *The Russian Judicial System*].

²²⁵ See *The Russian Judicial System*, *supra* note 224, at 11; see generally Gordon B. Smith, *The Struggle over the Procuracy*, in REFORMING JUSTICE IN RUSSIA, 1864–1996: POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER 348, 360, 370 (Peter H. Solomon, Jr. ed., 1997).

the judges are taken off cases, or are even fired from their jobs, by request of government officials and following government criticism.

The second proposed measure of improvement includes raising an independence of the judiciary. The independence of the Russian judiciary can be achieved in various ways, some of which take less time than others. The people's ability to elect judges and criticize the existing judicial system are some of the most powerful methods of improving the judicial system in a relatively short time. To improve the general approach used by judges in deciding the cases, the courts could create a mandatory continuing education system for judges and their judicial assistants, improve professional training through lectures and seminars directed to increase the level of legal culture and honor of the profession as a whole, create a system of values and honors that would displace bribery and corruption, as well as solicit judges' opinions on improvement of the existing legal system and its procedures.

Additionally, part of the reason that the local courts are not adhering to the decisions of the higher courts or following the decisions of the ECHR is the informational vacuum in which the Russian local courts operate.²²⁶ Maintaining mandatory continuing education seminars and creating a universal information system similar to Westlaw or LexisNexis would speed up the publication of decisions and improve the specialized knowledge of local judges. On the local court level, changing the existing system of appointments and case assignments would take out a significant aspect of government-imposed loyalty and give judges an opportunity to approach their decisions on the principle of equality before the law.²²⁷ The principle of equality is what is currently missing in the decisions of the Russian courts, partially because equality between the individual and the state has never existed in the Soviet legal system and was likewise inherited by the judges from that era.²²⁸ Most of the currently active legal codes were created during the Soviet period and with the Soviet mentality of placing the interests of the State above the rights of individuals.²²⁹ Looking at the history of the country, and taking in consideration that government criticism was practically outlawed for decades, one may find a significant improvement in the freedom of criticism enjoyed by the Russian citizens today. However, to achieve the level of protection to

²²⁶ See *supra* Part II.B.2.

²²⁷ See *The Russian Judicial System*, *supra* note 224, at 12.

²²⁸ Lambelet, *supra* note 224, at 66; see discussion *supra* Part II.B.2; see also *The Russian Judicial System*, *supra* note 224, at 11–12.

²²⁹ See discussion *supra* Part II.B.2.

freedom of expression as it is established under the Convention and understood in Europe and America today, would take several steps and require a change in the mentality of not only judges, but also in the mentality of the people.

Changing the mentality of the judges would not be enough without input from the people. Society has to realize the deep-seated nature of the problem. As a fourth suggestion for improvement, the Russian people acting through NGOs must bring more publicity to the situation, both to the general populace and to the media. The sensitive nature of the problem requires a collective effort from the general public. The sporadic individual efforts of isolated editors-in-chief, while a positive move in the direction of change, are not sufficient to overcome the problem. The large scale of the problem requires strong opposition initiated by the people and supported by the mass media.

There are several ways to raise the attention of the media to the lack of freedom of expression. One way would be to start teaching the freedom of expression to students in journalism programs in colleges, and to offer such course in all institutions of higher education. This could be taught as a separate section of such courses like Constitutional Law and Constitutional Rights, or as an individual course that would emphasize the importance of the subject. This would also highlight the importance of the matter in the public mind and would give an opportunity to young journalists to work on the problem and define an open, honest environment for their trade.

The fifth way to improve would be to reduce the influence of the Kremlin in censoring speech, and in particular, in controlling political speech. The Kremlin should not be influencing the judiciary's decisions on who to punish, sentence length, and how to handle cases in general. The Russian Judiciary ought to recognize that, even in the absence of the system of *stare decisis*, its current judicial decisions are shaping the future of the country and undermining the necessary elements of democracy, such as freedom of expression. The four most recent amendments to the law proposed by Putin discussed above are clearly intended to control freedom of expression and criticism of the government. By abdicating the decision to examine these laws for their constitutionality, there is no effective system of checks and balances, and no practical enforcement for freedom of expression.

In addition, improvement of the current situation on political speech and criticism of the government requires practical adaptation of the Convention provisions in the domestic judicial decisions. After the Convention was ratified, the use of its provisions in practice remained an exclusive function of

the higher courts.²³⁰ The judicial system has to change its procedural practice through its higher courts by providing more clear directives to the lower courts, and unambiguously requiring all local courts to take into consideration the Convention's provisions when deciding cases involving violations of human rights. Even though these provisions were adopted into Russian law, in reality, the local courts are following the same procedure they inherited from the Soviet Era, and it has yet to change.²³¹ In applying the provisions of codes inherited from the Soviet Era, it is important to understand and take into consideration the environment in which those codes restricting freedom of expression were originally written. One of the objectives of the people at the overthrow of the Soviet government was to dispose of the policies pertaining to that era.

The wide range of cases analyzed in this article demonstrates that the steps taken in reformation of the Russian legal system often are very general, fragmented, and unfinished in its character.²³² In amending the legislative provisions and adopting higher standards of human rights on the legislative level, the legislative branch consistently "forgets" to amend the procedural provisions. It takes several years before the higher courts step in and issue directives that would amend and clarify the procedural provisions for the lower courts to follow. But, even if such amendments take place, they often have a "recommended" form and not a mandatory requirement.

Finally, the large number of the unenforced judicial decisions of the ECHR creates an atmosphere of relaxed requirements of adherence to the ECHR's decisions. Because the Russian courts are avoiding the application of the Convention protections in freedom of expression cases, the ECHR continues to receive multiple cases on recurring issues. The international community should be stricter in holding Russia responsible for its lack of execution of the Strasbourg Court's previous decisions. One of the measures that could be taken in this regard is the creation of the international universal electronic register of the unenforced ECHR decisions or even establishing a system of government liens against the government for non-compliance with decisions that would take priority in execution of payments for damages.

²³⁰ Abashidze & Alisieich, *supra* note 19, at 7.

²³¹ See discussion *supra* Part II.B.2; *The Russian Judicial System*, *supra* note 224, at 11–12; see generally Marochkin, *supra* note 65.

²³² Abashidze & Alisieich, *supra* note 19, at 9.

CONCLUSION

After the collapse of the Soviet Union and during the transition from the “Old” Soviet Russia to the “New” Russia, the new government declared its intent to establish a new democratic system.²³³ Part of this transition to a true democracy was a promise to respect fundamental human rights and the freedom of expression. The effective exercise of protection of human rights is the first indicator of democracy taken seriously.

During the first years of transition, Russia adopted the Convention.²³⁴ This step indicated a promising development in commitment to its promise of democracy made by the new government. However, the above analysis of the recent court decisions and legislative changes indicates the failure of the “New” Russia to respect human rights, including the right to freedom of expression.

The first years of transition were very promising. The Convention ratified by Russia fifteen years ago provided grounds for substantial reformation of the Russian legal system. The provisions of the Convention required higher standards for the protection of human rights than those employed by Russia after the collapse of the Soviet Union. This ratification of the Convention began significant legal changes, however, in practice there was little effect. The European Court of Human Rights continues to receive multiple claims from Russian newspapers and individuals on the recurring freedom of expression issues that are similar to the claims decided by the ECHR several years ago. This factor indicates that domestic courts are not taking into account previous decisions of the Strasbourg Court when deciding matters on violation of human rights.

Additionally, Vladimir Putin’s return to the presidency was accompanied by multiple restrictions and limitations on the freedom to criticize government. Starting with the conviction of Pussy Riot, followed by government intervention with the demonstration on Bolotnaya Square, accompanied by excessive prison sentencing to anyone involved in the criticism of the government, establishes a strong indication that government criticism is not invited and will be prosecuted in a strict manner. The new changes signed into the law in 2012 indicate further limitations on political speech. The most disturbing changes are the return of the slander provision into the Russian

²³³ See *supra* Part I.B.

²³⁴ *Chart of Signatures and Ratifications, supra* note 2.

Criminal Code, as well as Putin authorizing a government agency to censor the content of websites and giving the agency wide discretion in blocking whichever websites it sees fit. Both legislative changes impose significant limitations on freedom of expression.

The Convention provides strong protection for the freedom of expression that was interpreted by the European Court to include the freedom to criticize the government. However, in reality, the Russian judicial system affords little weight to its provisions. This is mostly due to the fact that the judicial system was inherited from the Soviet period, has undergone little procedural changes, and continues to operate on the archaic mentality of the judges, placing interests of the State above the values of the human rights.

While the Russian judiciary is struggling with overcoming the mentality of judges raised in the Soviet era and historical implications on the law, solutions to separate the judicial branch from the Kremlin's influence and ending internal corruption are difficult to resolve. These problems deserve a separate analysis that would be a subject for a discussion in another article. However, as the law is written today, it is perfectly within the power of the courts to become independent and reform the principles that are currently in the foundation of the judicial decisions. It is for the Russian judiciary to recognize that its current judicial decisions are shaping the future of the country and are undermining an essential element of democracy, such as freedom of expression.

The ability to criticize government is necessary as an external check for every society that wishes to reach a true state of democracy. It is of fundamental importance for Russia to create a culture of public discussion regarding the function of the government and its representatives. This would require reducing or even eliminating the direct and indirect limitations discussed above that are currently imposed by the State on freedom of expression.²³⁵

²³⁵ See *supra* Parts II.D, III.A.

The above analysis indicates that Russia performed extremely poorly on its promise to build a true democratic society. The changes brought in the most recent years are inconsistent with the intent to build a democracy and the culture of free and open speech.

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