Russian case-law in the framework of Article 10 of the European Convention

<u>Defamation practice in media related cases</u>

Defamation law has been used to protect public figures and powerful individuals from criticisms that are legitimate and healthy in a democratic society. High awards for damages and disproportionate sentences (both monetary compensation and prison sentences) are at times imposed. By imposing EUR 1,150,000 in compensation for reputation damage, the well known *Alfa Bank v. Kommersant daily* case , created an extremely powerful negative precedent which is now often used in the Russian arbitration courts' system.

In some cases, penalties have purposes other than protecting someone's reputation, for example to silence public debate on sensitive issues or protect a reputation that does not deserve to be protected. Politically-motivated harassment of outspoken media outlets has a "chilling effect" on the media and dissuades journalists from stimulating public debate on issues of public concern. Such was the case of the weekly newspaper *Novye Kolyosa* in Kaliningrad. 17 criminal and civil defamation cases were initiated in a very short period of time against journalists of this newspaper.

Even when awards are not very high, the practice of giving unfair judgments from a FOE protection point of view can have a detrimental effect on the free flow of information:

1) for small and under-resourced media outlets even relatively low awards can cause long-term financial problems;
2) judges often deliver so called "Solomon judgments", avoiding to express politically unfavorable views in the verdict, ruling in favor of the influential plaintiffs without finding a balance between FOE and other conflicting rights. They would unfairly consider that value judgments are false and amount to defamatory statements, and they would request refutation to be published by the media. At the same time they would award the plaintiff a very low or symbolic compensation, expecting the media not to appeal against this judgment (because this would be more "costly" in terms of time and money). This negative practice contributes to the already widespread view that the media should refrain from criticizing and challenging high-ranking public officials.
3) The principle of higher tolerance of public officials is only partially applied. Instead, in some cases, district courts have taken into account the status of a claimant, but only to raise the awards if a public official was defamed – an approach diametrically opposed to that taken by the European Court of Human Rights. It is obvious that public officials in

Russia have not accepted (or even are not acquainted with) the principle that they should tolerate more criticism and be exposed to public scrutiny. Public officials' reaction to satire (*Vladimir Rakhmankov case*) and fiction (*Pavel Astakhov case*) are examples of this trend. And such Solomon judgments only support this negative practice.

> In a case from October 2006, Vladimir Rakhmankov, editor of (the now defunct) Internet magazine *Kursiv*, was found guilty of criminal insult of the president and sentenced to pay 20,250 roubles (EUR 580). His crime was to have published a satirical article on Putin's plans to raise the country's birth rate entitled *Putin as Russia's Phallic Symbol*. In addition to the insult changes, investigators raided *Kursiv*'s offices, seized computers, sealed the premises and searched Rakhmankov's flat. The website was then blocked,[1] while *Kursiv*'s Internet Provider decided to discontinue its services, making reference to an unpaid debt that Romahkhov denied owing.[2] The treatment of Rakhmankov seemed to reflect a semi-official outlook that sees the president as being above criticism. For example, a Russian lawyer (and one of the authors of Russia's media law), stated: "The head of State is subject of national pride… and requires… respectful relations".[3] This is in direct contradiction with the principle, clearly established by the European Court of Human Rights, that public officials should be tolerant of criticism.

> In the *Astakhov* case the prominent lawyer and television presenter Pavel Astakhov was questioned in August 2007 about his novel *Raider*. The local law-enforcement officials said the book defamed them and created "widespread negative resonance" against the police's investigation directorate, despite the fact, as Astakhov noted, the work was a work of fiction.[4] The law-enforcement authorities asked the city prosecutor to initiate a criminal investigation against the writer. (The novel's main character bribes the local police officers to open criminal cases and raid local companies.)

There are a number of other disturbing trends:

4) Russia retains and applies criminal defamation, which can lead to imprisonment.
5) the use of defamation provisions to silence the media during election time;
6) the simultaneous filing of civil and criminal lawsuits for the same incident, and multiple criminal cases against the same media outlet (*Novye Kolyosa case*), with the sole aim of intimidation;
7) Judges and plaintiffs have limited knowledge and rarely use alternative non-pecuniary measures to solve the conflict, such as the right of reply, self-regulatory mechanisms, that unfortunately still have limited trust from the media community.

This has to be seen in the context of the generally unfavorable FOE situation in Russia, where journalism is a dangerous profession. The resulting "chilling effect" can discourage even the most motivated journalists.

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[1] Committee to Protect Journalists, *Attacks on the Press in 2006, Russia,* http://www.cpj.org/attacks06/europe06/rus06.html
[2] Committee to Protect Journalists, *Russia: Story Satirising Putin's Birth Goal Prompts Government Retaliation*, 24 May 2006, http://www.ifex.org/en/content/view/full/74588.
[3] Whitmore, B*, Russia: Phallic' Case Threatens Internet Freedom*, Radio Free Europe / Radio Liberty, 2 June 2006.
[4] Urken, R, The Moscow Times, 15 August 2007.

Russian lawyers often experience difficulties in applying European Convention on Human Rights' (ECHR) standards in domestic cases. This is not only the case with Article 10, although this article presents specific challenges, particularly because it has so many dimensions and requires to balance conflicting interests - the right to freedom of expression (FOE) and other rights, such as reputation, or the right to private life, etc.

Some of the main challenges in implementation are:

1) Russian legal and, in particular, court practices are based on the implementation of solid codified legal norms. This makes it difficult to apply ECHR case law and international standards spread out in various judgments.

2) Russian judges have no previous experience and quite limited understanding of the meaning of "legal precedent". And the fact that the interpretation of Article 10 by the European Court of Human Rights is not static and continues to be developed makes this implementation even more complicated and unclear for general legal practitioners and judges, in particular. For Russia, a relatively new Council of Europe member state, absorbing the significance of Article 10 and the entire body of case law is not an easy task, and it is no surprise that Russian judges feel more comfortable with their domestic legal system. According to a survey on defamation case-law in Russia[5] carried out in 2007 by the Mass Media Defence Center in cooperation with the international NGO ARTICLE 19, most judges prefer not to be pioneers in implementing international standards, but to observe the conduct of others and wait for more precise guidelines presented by domestic high instance courts (Supreme Court of the RF, Constitutional Court, High Arbitration court).
3) There is no common understanding among judges of the extent to which the Court's jurisprudence should be applied. Judges' approaches differ, the main views being that they ought to implement:
    i. The whole body of the Court's case law;
    ii. The case law developed since Russia became a Council of Europe member; or
    iii. Only the case law on Russia.

   Consequently, the European Convention is often only applied in a limited way.
4) The majority of legal professionals (including judges) do not feel the need to implement ECHR case-law. They believe (particularly judges) that Russian legal provisions are

[5] "The cost of reputation: defamation law and practice in Russia"// Published in English by Article 19, 2007. Published in Russian by MMDC, 2008.

sufficient for a good and fair judgment, and generally it is possible to avoid applying international standards, for the following reasons:

- International documents are not adapted to Russian reality;
- International documents are perceived as being general recommendations: the rights are merely stated and there are no details of liability for the infringement of these rights, which lawyers are used to read in legal texts;
- Russian legislation regulates "all legal relations", so there is no need for additional provisions;
- There is a long-established practice of using only Russian legislation;
- There is a lack of experience and knowledge of working with international standards, treaties and case-law.

5) Judges confirmed during the course of in-depth interviews that before considering the ECHR they analyzed a case in the context of Russian legislation, exploring the possibility of applying the ECHR only if a "gap" was identified.
6) As a result, there is no tradition to refer to other cases to formulate a legal position or as a supporting argument in a judgment - some of the judges do not even consider the case law of the Court to be "law" as such. They regard the European Court as simply giving views on legal issues, rather than providing legal norms. For this reason, judges might reject references to the Court's case law to provide protection to FOE. This is partially due to the fact that legal education in the country did not include the use of precedents and still it is the case in the majority of law schools.
7) Some judges firmly believe that there is no need to make a case (a judgment) more complicated and incorporate reasoning based on ECHR case-law and international standards, because all needed legal provisions are already in the national legislation, which they believe to be in complete compliance with international law.

As a result:

References to international documents often have a "decorative" character, sometimes they are incorrect. Some judges might simply cite international cases for formal reasons, without these references actually playing a significant role in the formulation of fair and progressive judgment. This is often the case when the judge has not had prior experience with (or undergone training in) the European Court of Human Rights' jurisprudence.

Despite its prominence in international standards of FOE, provisions covering reasonable publication are not applied in Russian judicial practice. The public interest principle is also missing in Russian law, and is only very rarely referred to on the basis of the European Court of

Human Rights' jurisprudence. The most frequently used principle is the necessity to distinguish fact and value judgments (Supreme Court Resolution of 2005 on defamation cases directly underlines importance of such distinguishing).

Still, progress has been made by Russian domestic courts in recent years. In some cases, the training of judges has resulted in a marked improvement in their performance, with growing references to the ECHR and professionalism in implementing its principles. The official position taken by the Supreme Court of the RF in the 2005 Resolution on defamation cases, by drawing special attention to the interpretation of the ECHR's Article 10, simplified the implementation of its provisions in practice.

What has to be done to improve the situation:

1. Training is a crucial aspect of the implementation of the European Convention on Human Rights (ECHR), equipping judges with the skills they need to apply Article 10 principles.

2. Reference materials are also essential to raise the professional standards of judges (and other legal professionals) in the application of the ECHR. Many Russian lawyers, and judges in particular, are not sufficiently fluent in English or French to read judgments in the original languages of the Council of Europe.

3. There is also the issue of authenticity of the legal texts once they have been translated into Russian. Some judges require to be provided with "officially approved" translations. Since most judges have access to the case law of the European Court of Human Rights through translations, this creates a number of problems:

   a. there is only limited availability of translated materials;
   b. and inaccuracies in translations,
   c. as well as the fact that a number of expressions common in European jurisprudence have no direct Russian equivalent.

Conclusions:

Overall, despite some positive developments, judges still rarely implement international standards. There are many reasons for this, including:

1) lack of experience, particularly in the application of legal precedents;
2) lack of training opportunities and materials (including endorsed translations);
3) the feeling that Russian law "is enough";
4) lack of detailed and clear guidelines;

5) the sense that international principles are remote and non-applicable in the Russian context;
6) and the fact that at times international standards are perceived as vague principles rather than “law”.
7) most judges also believe Russian law to be completely in line with international standards, and do not see added value in the application of the latter.

There are difficulties in applying general measures to ensure implementation of the ECHR, due to the need for legal and structural reform in Russia. The Committee of Ministers and the Parliamentary Assembly of the Council of Europe (PACE) have also noted several structural hindrances and a “lack of effective domestic mechanisms” to enforce judgments.

In addition, the cases against Russia in the European Court of Human Rights have helped to raise the awareness of judges and lawyers, and to some extent the general public, of the need to apply the ECHR in domestic courts.

Russia might also benefit from a similar approach to that taken in Ukraine, which has incorporated a number of principles of international law into its domestic legislation. Research shows that some judges face difficulties in applying general principles arising from the case law of the European Court of Human Rights; but integrating them in the domestic law could be an effective solution to this problem.

Finally, general awareness-raising is needed to modify existing practices. Only if changes happen, will the media be able to fulfil their role as disseminator of information in the public interest and make a positive contribution to democratic governance.

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