CIVIL DEFAMATION LAW AND THE PRESS IN RUSSIA: PRIVATE AND PUBLIC INTERESTS, THE 1995 CIVIL CODE, AND THE CONSTITUTION

*Part One**

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INTRODUCTION

The legal status of the Russian press[1] has been transformed in the 1990s.[2] Beginning in 1990,[3] the state and Communist Party mass media monopoly has been abolished[4] and direct pre-publica-

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[1] For the purposes of this article, "press" refers to print and electronic purveyors of information, ideas, and opinion to the general public.

[2] For a history of the Soviet and post-Soviet press, including extensive bibliographies, see BRIAN MCNAIR, GLASNOST, PERESTROIKA AND THE SOVIET MEDIA (1991), and JOHN MURRAY, THE RUSSIAN PRESS FROM BREZHNEV TO YELTSIN: BEHIND THE PAPER CURTAIN (1994).

[3] The initial changes came with enactment of the country's first press law in June 1990. Zakon o pechati i drugikh sredstvakh massovoi informatsii [Law on the Press and Other Means of Mass Information], Vedomosti S"ezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR [Vedomosti SSSR], Issue No. 26, Item 492 (1990) [hereinafter 1990 Press Law], *translated in* 42 CURRENT DIG. SOVIET PRESS, No. 25, July 25, 1990, at 16. The 1990 Press Law is no longer in effect as a result of the dissolution of the U.S.S.R. in December 1991. In Russia, it has been replaced by legislation which became effective in February 1992, and remains in effect. Zakon o sredstvakh massovoi informatsii [Law on Mass Information Media], Vedomosti S"ezda Narodnykh Deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii [Vedomosti RF], Issue No. 7, Item 300 (1992) (enacted Dec. 27, 1991, effective Feb. 8, 1992) [hereinafter Mass Media Law]. For an English translation and commentary on the Mass Media Law, see Monroe E. Price, *Comparing Broadcast Structures: Transnational Perspectives and Post-Communist Examples*, 11 CARDOZO ARTS & ENT. L.J. 275, 285-96, 625-55 (1993).

Guarantees of freedom of speech and the press, with certain restrictions, are set forth in article 29 of the Russian Federation Constitution adopted in December 1993, and in article 19 of the International Covenant on Civil and Political Rights, to which the Russian Federation is a party. These provisions will be considered in part two.

[4] Article 7 of the 1990 Press Law expressly prohibited monopolization and granted the right to establish a mass media outlet to adult citizens of the U.S.S.R. as well as to state and public organizations, subject to registration requirements. 1990 Press Law, *supra* note 3, art. 7. Similar provisions are found in the Mass Media Law, *supra* note 3, art. 7.

Pluralism in mass media ownership has in many cases been accompanied by severe financial difficulties. *See infra* note 47 and accompanying text.

tion controls over content[5] have been outlawed,[6] fundamentally altering the nature of press-state relations. Writing in 1991, the authors of the initial draft of the 1990 Press Law declared, "[w]ithin a couple of years, a great leap forward has taken place—from total obedience to a degree of freedom that is hardly confined within legal limits."[7]

Meanwhile, equally fundamental changes have taken place in the press's horizontal relations with non-state parties in the sphere of individual personality rights protection.[8] Before 1990, the press operated under an extra-legal "duty to criticize" and therefore enjoyed broad latitude to subject to public criticism and ridicule individuals for whom the legal system offered limited protection.[9] Beginning with the 1990 Press Law,[10] however, and culminating in a new Civil Code effective January 1, 1995,[11] the press has been

[5] Regarding the formal and informal control mechanisms employed prior to the 1990 Press Law, see Ger P. van den Berg & F.J.M. Feldbrugge, *Press, in* ENCYCLOPEDIA OF SOVIET LAW 606-07 (F.J.M. Feldbrugge et al. eds., 2d ed. 1985), and Serge L. Levitsky, *Radio and Television, in* ENCYCLOPEDIA OF SOVIET LAW 652-54.

[6] Article 1 of the 1990 Press Law declared that the "print media and other forms of mass information are free" and expressly prohibited "censorship." 1990 Press Law, *supra* note 3, art. 1. Article 3 of the Mass Media Law also prohibits censorship, which it defines as pre-publication review and control of content. Mass Media Law, *supra* note 3, art. 3. These statutory provisions have not ended efforts to manipulate the press by indirect means. *See, e.g.*, Frances H. Foster, *Izvestiia as a Mirror of Russian Legal Reform: Press, Law, and Crisis in the Post-Soviet Era*, 26 VAND. J. TRANSNAT'L L. 675 (1993) (contested ownership and control of newspaper); Andrei Richter, *Direct Subsidies to the Press: Some Background*, POST-SOVIET MEDIA L. & POL'Y NEWSL., Jan. 27, 1994, at 2-3; Andrei Richter, *Newspapers: Free To Be Bankrupt*, POST-SOVIET L. & POL'Y NEWSL., Nov. 17, 1993, at 6-7.

[7] Yuriy M. Baturin et al., *The Road to Freedom for the Soviet Press*, 12 J. MEDIA L. & PRAC. 43, 43 (1991).

[8] Personality rights are defined as "personal non-property right[s] not associated with property rights . . . ." Serge L. Levitsky, *Copyright, Defamation, and Privacy in Soviet Civil Law, in* LAW IN EASTERN EUROPE SERIES, no. 22(1), xii *passim* (1979); *see also* Olympiad S. Ioffe, *Soviet Civil Law, in* LAW IN EASTERN EUROPE SERIES, no. 36, 4 (1988) (discussing "personal non-property relations"). They are therefore distinct from rights related to copyright. For purposes of this article, the interests which personality rights protect are reputation, privacy, and self-esteem. For a detailed comparative survey, see Pierre-Dominique Ollier & Jean-Pierre Le Gall, *Violation of the Rights of the Personality, in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, vol. XI (Torts), ch. 10, §§ 70-106 (Andre Tunc ed., 1986).

[9] Levitsky, *supra* note 8, at 49-54. Levitsky's study is an invaluable source on Soviet protection of personality rights from its inception in the 1960s to the late 1970s. For another discussion of pre-1990 Soviet civil defamation law, see Fred H. Cate, *Civil Defamation Law in the Soviet Union*, 23 STAN. J. INT'L L. 303 (1987). For a description of the extra-legal mechanisms by which the Communist Party stifled potential defamation claims, see Ioffe, *supra* note 8, at 13, 81.

The press's ability and mandate to criticize did not extend to publication of facts or commentary critical of Communist Party or governmental policies or leaders. Levitsky, *supra* note 8, at 53.

[10] Article 39 of the 1990 Press Law expanded upon the existing Civil Code provision protecting against false defamatory publications by making the press responsible for infliction of "other" non-material injuries, and introducing a remedy of monetary damages. 1990 Press Law, *supra* note 3, art. 39. Regarding the damages remedy, see *infra* note 12 and accompanying text.

[11] The new Civil Code, part 1, was enacted by the Russian State Duma on October 21, 1994, and signed into law by President Yeltsin on November 30, 1994. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII, CHAST' PERVAIA [RUSSIAN FEDERATION CIVIL CODE, PART ONE], ROSSIISKAIA GAZETA [ROS. GAZ.], Dec. 8, 1994, at 4 [hereinafter 1995 Civil Code], *translated in* F.B.I.S.-SOV (SUPP.), Jan. 13, 1995, at 1. An English translation of articles 1 and 150 through 152 of the 1995 Civil Code is reproduced in the appendix.

made subject to a comprehensive system of post-publication civil responsibility for dissemination of statements injurious to personality interests. The scope of protection for individual rights of personality has been broadened incrementally to include new protected interests, such as a right to privacy, and a potent new remedy—recovery of monetary damages for non-material harm ("moral damages").[12]

This expansion of personality rights protection has been accompanied by a significant increase in the number of civil lawsuits, many of them against press defendants.[13] Among those recognizing the new possibilities afforded plaintiffs has been State Duma Deputy Vladimir Zhirinovskii, who in a news conference candidly warned reporters:

> [I want to] inform you that those newspapers that have been trying to defame me—the latest case was that with the *Moscow Guardian*. The Leningradskii [district] court imposed a 10 million-ruble fine on the newspaper. The newspaper has disappeared, but we will find it abroad, and it will pay. Therefore, you should be quite cautious. I am a lawyer, and any attempts to

[12] For the purposes of this article, "moral damages" refers to the remedy of money damages for harm which cannot strictly be measured in monetary terms. According to the Russian Supreme Court, moral harm is mental or physical trauma resulting from injury to protected non-material interests including personal and business reputation, individual dignity, and privacy. Postanovlenie No. 10 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "Nekotorye voprosy primeneniia zakonodatel'stva o kompensatsii moral'nogo vreda" [Decree No. 10 of the Plenum of the Russian Federation Supreme Court, "Some Questions on the Application of Legislation Concerning Compensation for Non-Material Harm"] (Dec. 20, 1994), *in* ROSSIISKAIA IUSTITSIIA [ROS. IUST.], No. 4, 60, 61 (1995) [hereinafter Decree of December 20, 1994]. For a detailed comparative analysis of moral damages, see Hans Stoll, *Redress for Injury, in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 8, ch. 8, §§ 8-17, 8-35 to 8-48; *see also* P.R. Handford, *Moral Damage in Germany*, 27 INT'L & COMP. L.Q. 849 (1978).

[13] The Russian Ministry of Justice, citing the continuing increase in the number of civil defamation actions, reported in early 1995 that the number of such actions in the first half of 1994 increased by 42% over the previous year. A. Gagarskii, *O Rabote Sudov Rossiiskoi Federatsii za 1-e Polugodie 1994 Goda [Activity of Russian Federation Courts in the First Half of 1994]*, ROS. IUST., No. 1, 41, 46 (1995).

For accounts in the press, see Victoria Clark, *Suing is All the Rage in Russia's Top Circles*, OBSERVER, Nov. 27, 1994, at 20; Jean MacKenzie, *Bearding the Old Guard in Ivanovo*, MOSCOW TIMES, Nov. 5, 1994, at 1 (quoting Mikhail Smirnov, the editor of *Budni*, a weekly newspaper in the city of Ivanovo: "We have had so many lawsuits filed against us that I can't even keep track of them"); Mike Trickey, *Word 'Fascist' Costly Insult for Russians*, OTTAWA CITIZEN, Sept. 27, 1994, at D12; Sonni Efron, *Russia's New Revolution: Libel Suits*, L.A. TIMES, Sept. 16, 1994, at 17; Jon Auerbach, *The Price of 'Honor and Dignity'; Backed by New Consumer Protection Laws, Russians are Quick to File Lawsuits*, HOUS. CHRON., June 12, 1994, at 24 (quoting Boris Klim, legal counsel for the Moscow newspaper *Kommersant*: "It's raining lawsuits!").

> defame the party's leader or the party itself will be immediately followed by a law suit. Before writing articles, you should check whether there is money in your coffers, in the coffers of your newspaper.[14]

The increasing litigiousness is occurring amid widespread concern over perceived press abuses and the general level of discourse in the mass media. In June 1995, a joint declaration by the Union of Russian Journalists and the Judicial Chamber for Information Disputes, a tribunal of jurists and journalists which makes nonbinding determinations in individual complaints against the mass information media, decried the widespread dissemination of inaccurate information, willful distortions, and "crude, insulting" journalistic style, warning that such publications "discredit the mass information media in the eyes of the public." The declaration cited the increased level of suits against the press as testimony to the "ease" with which the mass media irresponsibly flout human rights, vilify reputations, and engage in willful falsification.[15]

Although issues relating to the expansion of personality rights protection have received considerable attention in the academic and professional literature,[16] relatively little has been devoted to its

[14] Vladimir Zhirinovskii, Press Conference (Official Kremlin Int'l News Broadcast, Jan. 26, 1994), *available in* LEXIS, News Library, Curnws File.

Referring to Zhirinovskii's litigation against some 69 mass media outlets, a journalist observed that "a person who considers himself offended by a journalist has the right to claim any sum up to the country's budget, taking no risks and paying a ridiculously small fee." Pavel Gutiontov, Remarks at a News Conference Sponsored by the *Glasnost'* Defense Foundation (Feb. 11, 1994), *available in* LEXIS, News Library, Curnws File. The Russian Supreme Court in December 1994 upheld the use of a ten ruble filing fee—an amount equivalent to a fraction of one U.S. cent—in defamation actions rather than a percentage fee based on the amount of damages sought by the plaintiff. Decree of December 20, 1994, *supra* note 12, at 62-63; *see also* V. Zhuikov, *Vozmeshchenie Moral'nogo Vreda* [*Compensation for Non-material Harm*], BIULLETEN' VERKHOVNOGO SUDA ROSSIISKOI FEDERATSII [BIULL. VERKH. SUDA RF], No. 11, 6, 13-14 (1994).

[15] *Rekomendatsii Sudebnoi Palaty po Informatsionnym Sporam pri Prezidente Rossiiskoi Federatsii i Soiuza Zhurnalistov Rossii "O Svobode Massovoi Informatsii i Otvetstvennosti Zhurnalistov"* [*Recommendations of the Presidential Judicial Chamber for Information Disputes of the Russian Federation and the Union of Russian Journalists "On Freedom of Mass Information and Responsibility of Journalists"*] (June 15, 1995), ROS. GAZ., July 11, 1995, at 6.

[16] Recent publications on the subject of personality rights protection include: P. Trubnikov, *Primenenie Sudami Zakonodatel'stva o Zashchite Chesti, Dostoinstva, i Delovoi Reputatsii* [*Application by the Courts of Legislation Concerning Defense of Honor, Dignity, and Business Reputation*], ZAKONNOST', No. 6, 5, and No. 5, 7 (1995); E.A. KOVALEV & V.D. SHEVCHUK, ZASHCHITA CHESTI, DOSTOINSTVA I DELOVOI REPUTATSII V SUDE [DEFENSE IN THE COURTS OF HONOR, DIGNITY AND BUSINESS REPUTATION] (1995); N.Z. Bashirov, *Ne Boisia Suda, a Boisia Sud'i?* [*Do Not Fear the Court, but Fear the Judge?*], ZHURNALIST, Mar. 1995, at 39; S. Nikolaev, *Litsa, Uchastvuiushchie v Delakh po Sporam o Zashchite Chesti i Dostoinstva* [*Persons Participating in Disputes Concerning Defense of Honor and Dignity*], ROS. IUST., No. 4, 42 (1995); V. Mamai, *Zashchita Chesti i Dostoinstva* [*Defense of Honor and Dignity*], ROS. IUST., No. 1, 28 (1995); A. L. ANISIMOV, CHEST', DELOVAIA REPUTATSIIA: GRAZHDANSKO-PRAVOVAIA ZASHCHITA [HONOR, DIGNITY, AND BUSINESS REPUTATION: DEFENSE IN CIVIL LAW] (1994); O. Diuzheva, *Pravo na Zashchitu Chesti, Dostoinstva, i Delovoi Reputatsii* [*Law on Defense of Honor, Dignity, and Business Reputation*], *in* GRAZHDANSKOE PRAVO [CIVIL LAW] 365 (E. Sukhanov, ed., 1994); N.S. Malein, *O Moral'nom Vrede* [*Concerning Non-Material Harm*], GOSUDARSTVO I PRAVO [GOS. I PRAVO], No. 3, 32 (1993) [hereinafter Malein, *Non-Material Harm*]; V. Zhuikov, *supra* note 14; P. Trubnikov, *Primenenie Sudami Zakona o Pechati* [*Application by the Courts of the Law on the Press*], SOTS. ZAK., No. 11, 7 (1991); V. Zamiatin, *Pochem Nynche Chest' i Dostoinstvo?* [*How Much Are Honor and Dignity Worth These Days?*], SOTS. ZAK., No. 7, 13 (1991); E.A. Prianishnikov, *Sovershenstvovanie Grazhdansko-Pravovykh Norm o Zashchite Chesti i Dostoinstva Grazhdan* [*Improving Civil Law Norms Concerning Defense of Honor and Dignity of Citizens*], SOVETSKOE GOSUDARSTVO I PRAVO [SOV. GOS. I PRAVO], No. 7, 30 (1990); NIKOLAI MALEIN, CIVIL LAW AND THE PROTECTION OF PERSONAL RIGHTS IN THE USSR (1985) (English translation of GRAZHDANSKII ZAKON I OKHRANA PRAV LICHNOSTI V SSSR (1981)) [hereinafter MALEIN, CIVIL LAW].

Publications examining the relationship between personality rights protection and freedom of the press include: N.Z. Bashirov, *supra*; Max Khazin, *Neprikosnovennyi Fashizm* [*Inviolable Fascism*], IZVESTIIA, Feb. 4, 1995, at 5; Max Khazin, *General'naia Prokuratura Razdeliaet Tochku Zreniia 'Izvestiia' i E. Gaidara* [*The General Procurator Shares Its View of 'Izvestiia' and E. Gaidar*], IZVESTIIA, Jan. 21, 1995, at 2; Kronid Lyubarsky, *Zhirinovsky's "Honour" More Valuable than Freedom of Speech?*, NEW TIMES, Dec. 1994, at 23; and Leonid Rozhetskin, *Strict Defamation Laws Amount to Censorship*, MOSCOW TIMES, Feb. 14, 1995, § 650, *available in* LEXIS, Nexis Library, Curnws File; *see also* KOVALEV & SEVCHUK, *supra*, at 31-32, warning that unreasonable moral damages claims create the possibility of "financial terror" against mass media outlets, "threatening their destruction."

[17] Sandra Coliver, *Comparative Analysis of Press Law in European and Other Democracies, in* ARTICLE 19, INTERNATIONAL CENTRE AGAINST CENSORSHIP, PRESS LAW AND PRACTICE: A COMPARATIVE STUDY OF PRESS FREEDOM IN EUROPEAN AND OTHER DEMOCRACIES 266 (1993) [hereinafter PRESS LAW AND PRACTICE]; Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53, 57-59, 61-68 (1990).

impact on the press. This article examines the shift from the Soviet regime's promotion or tolerance of offensive expression in the press which might injure an ordinary citizen's reputation, sense of privacy, or personal feelings, to the Russian Federation's system favoring protection of individuals against such expression. It will focus on the defamation action—Russia's oldest and most widely invoked form of personality rights protection—which permits recovery for injury to an individual's honor or dignity.

This article will appear in two parts. Part one, in this issue, describes and analyzes current civil defamation law in Russia, both in its statutory basis and as applied in judicial proceedings, and to identify the factors which have shaped its development. Part two, in a forthcoming issue of the *Cardozo Arts & Entertainment Law Journal*, will examine the textual basis for the possible application of public interest considerations, in the form of constitutional or international law norms, to that law.

I. CURRENT CIVIL DEFAMATION LAW

A. *The Statutory Scheme*

Following a pattern common to a number of legal systems,[17] Russia employs both criminal and civil law to regulate public dis-

course[18] and provide protection of personality interests. The Criminal Code, articles 130 and 131, protects against intentional injuries to reputation by "defamation" [*kleveta*][19] and to self-esteem by "insult" [*oskorblenie*].[20] Although recently invoked in several highly publicized cases,[21] these statutes have not been utilized as often as Russia's civil law system,[22] which provides the availability of moral damages, and unlike the Criminal Code does not require a showing of defendant's intent to injure.[23]

The statutory rules governing civil defamation actions are found in articles 151 and 152 of the 1995 Civil Code,[24] which in

[18] For an analysis of an alternative form of dispute resolution—an Information Arbitration Tribunal comprised of jurists and journalists—to resolve in a non-binding fashion complaints concerning the use of state-owned broadcasting facilities during the December 1993 Russian election campaign, including campaign attacks upon opponents, see Melissa Dawson, *Case Study in Media Regulation: The 1993 Elections and the Information Arbitration Tribunal*, POST-SOVIET L. & POL'Y NEWSL., Sept. 10, 1994, at 10. Shortly after the election, President Yeltsin made the Tribunal permanent under its current name—the Presidential Judicial Chamber for Information Disputes—and broadened its jurisdiction to cover complaints against all mass information media. *See supra* note 15 and accompanying text.

[19] UGOLOVNYI KODEKS RF art. 130 (1993) [hereinafter CRIMINAL CODE]. Article 130 is set forth in full in the appendix.

[20] *Id.* art. 131. Article 131 is set forth in full in the appendix. Unlike article 130, article 131 does not allow truth as a defense.

[21] For examples of recent "defamation" and "insult" cases, see John Lloyd, *Puppets Ready To Do Battle With Yeltsin: Satire Show Is An Insult Too Far For Leadership*, FIN. TIMES, July 19, 1995, at 3 (defendant satirical television puppet show's portrayal of President Boris Yeltsin and Prime Minister Viktor Chernomyrdin as hapless vagrants); Viktor Filippov, *Glubinka Primeriaet Stalinskii French* [*Deep Places Try On the Stalinist Trenchcoat*], IZVESTIIA, Jan. 17, 1995, at 5 (defendant small-town newspaper editor's publication of an article declaring that President Yeltsin is not acquainted with the Constitution); Mikhail Shevtsov, *Russian Defense Minister Appeals to Procurator General*, TASS, Oct. 21, 1994 (defendant newspaper *Moskovskii Komsomolets*' publishing of charges of corruption against Defense Minister Pavel Grachev). In the *Moskovskii Komsomolets* case, a Moscow court on October 27, 1995, found the newspaper's deputy editor guilty of violating article 131 and sentenced him to one year of corrective labor and a thirty percent salary reduction. The corrective labor penalty was immediately pardoned under a parliamentary amnesty declared to honor the fiftieth anniversary of the end of the war with Germany. Olga Solodova, *Journalist Sentenced to 1 Year of Forced Labour and Amnestied*, TASS, Oct. 27, 1995, *available in* LEXIS, News Library, Curnws File. The charges against the puppet show were dropped on October 12, 1995. *Russia Drops Criminal Case Against Puppet Show*, REUTERS WORLD SERV., Oct. 12, 1995, *available in* LEXIS, News Library, Curnws File.

[22] The increased use of civil law for redress of injuries to personality interests is not limited to Russia. *See* Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1, 25 n.166 (1994); Coliver, *supra* note 17, at 266 (citing Austria); GEORG NOLTE, BELEIDIGUNGSSCHUTZ IN DER FREIHEITLICHEN DEMOKRATIE [DEFAMATION LAW IN DEMOCRATIC STATES] 53, 260 (1992); V. Zeno-Zencovich, *Damage Awards in Defamation Cases: An Italian View*, 40 INT'L & COMP. L.Q. 691 (1991). For an argument favoring the use of private law remedies in this area, see KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 726-27 (T. Weir trans., 2d rev. ed. 1992).

[23] Regarding the standard of liability without fault in civil cases, see *infra* notes 48-55 and accompanying text.

[24] Chapter eight of the 1995 Civil Code, entitled "Non-Material Benefits and Their Protection," is comprised of articles 150 through 152. Article 152 governs defamation actions in defense of honor and dignity, whereas article 150 identifies other protected personality interests including privacy and an unspecified category of "other." 1995 Civil Code, *infra*

cases involving press defendants is supplemented by the Mass Media Law.[25] In addition, important principles of civil defamation law have been established by the Russian Federation Supreme Court and supreme courts in the Soviet era,[26] in the form of "guiding instructions" to the lower courts as to construction and application of statutory law.[27]

The defamation provisions in article 152 protect the "honor" [*chest'*], "dignity" [*dostoinstvo*], and "business reputation" [*delovaia reputatsiia*] of natural and juridical persons.[28] The statutory elements for determination of liability in civil defamation—dissemination to at least one third party of a false defamatory statement—have remained the same since the introduction into Soviet law of such a right of action in the 1960s.[29]

Of these elements, only the showing of dissemination places an evidentiary burden of proof on the plaintiff. The law presumes that a defamatory statement is false, placing the burden of proving truth on the defendant.[30] Whether the statement in question has a

appendix, arts. 150, 152. Article 151, entitled "Compensation of Moral Damages," applies to both articles 150 and 152. *Id.* art. 151.

[25] Mass Media Law, *supra* note 3. The 1995 Civil Code supersedes all legislation which is inconsistent with it. 1995 Civil Code, *supra* note 11, art. 3(2), para. 2.

[26] The Supreme Court of the Russian Federation is the highest judicial authority on civil, criminal, and administrative cases and stands at the apex of general jurisdiction trial and appellate courts. It is a body separate from the Russian Federation Constitutional Court, and has specialized jurisdiction over interpretation and application of the Constitution. In addition, a separate judicial hierarchy exists for those specialized courts which have jurisdiction over commercial law cases. KONST. RF [RUSSIAN FEDERATION CONSTITUTION] arts. 125-27 (1993); F.J.M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, *in* LAW IN EASTERN EUROPE SERIES, No. 45, 202 (1993). It is a separate body, with different jurisdiction, from the Constitutional Court of the Russian Federation. The Supreme Court is the successor to the Supreme Court of the Russian Soviet Federated Socialist Republic. In addition, under the Soviet Union's federal structure, the highest court during the Soviet era was the U.S.S.R. Supreme Court. For a discussion of the important role of the U.S.S.R. Supreme Court, see Peter H. Solomon, Jr., *The U.S.S.R. Supreme Court: History, Role, and Future Prospects*, 38 AM. J. COMP. L. 127, 135-36 (1990).

[27] A responsibility of the Russian Federation Supreme Court is the issuance of binding directives ("guiding explanations") to the lower courts on matters of court practice, including statutory interpretation. Feldbrugge, *supra* note 26, at 194, 202. The U.S.S.R. and R.S.F.S.R. Supreme Courts also issued guiding explanations. W.E. BUTLER, SOVIET LAW 104-06 (2d ed. 1988).

[28] The addition of "business reputation" came in 1991 amendments to the applicable civil legislation.

[29] E.A. Sukhanov, *O Proekte Novogo Grazhdanskogo Kodeksa Rossii* (*Concerning the Draft of a New Russian Civil Code*), VESTNIK MOSKOVSKOGO UNIVERSITETA, SERIIA 11, PRAVO, No. 5, at 3, 7 (1993) (the "traditional norms" of civil defamation law were retained in the draft for the new Code).

[30] 1995 Civil Code, *infra* appendix, art. 152(1) and (5); Postanovlenie No. 6 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O vnesenii izmenenii i dopolnenii v nekotorye postanovleniia Plenuma Verkhovnogo Suda Rossiiskoi Federatsii" [Decree No. 6 of the Plenum of the Russian Federation Supreme Court "On Revisions and Amendments to Certain Decrees of the Russian Federation Supreme Court"] (Apr. 25, 1995), *in* BIULL. VERKH. SUDA RF, No. 7, 3, 5 (1995) [hereinafter Decree of April 25, 1995]. Defamatory statements

defamatory meaning is a question of law for the court to decide.[31] The Russian Supreme Court fashioned the currently applicable definition of "defamatory meaning" in 1992:

> False communications which are defamatory are those which contain assertions about the violation by a citizen or organization of applicable legislation or moral principles (about commission of dishonorable acts, incorrect behavior in the workplace or in private life, or other statements discrediting productive economic or social activity, reputation, and so on), diminishing their honor and dignity.[32]

However, the standard for making this determination is not altogether clear. The identification of both honor and dignity as protected interests suggests consideration of objective and subjective elements. Honor is viewed as requiring an objective appraisal of the effect on the plaintiff's reputation, whereas dignity suggests the plaintiff's own evaluation of his or her standing in the community as a result of the statement.[33] These concepts in turn stem from the nature of honor as a matter of reputation, whereas dignity is more closely related to individual self-esteem. As a result, it is not clear whether courts are to judge defamatory meaning from the perspective of an objective "reasonable person" or by some other standard.[34]

Available remedies against a mass media defendant include retraction, right of reply, and moral damages.[35] As applied by the

were also presumed to be false under article 152's predecessor statute, enacted in the 1960s. Cate, *supra* note 9, at 308-09; Levitsky, *supra* note 8, at 57-64.

31 This was the case under article 152's predecessor statute, as interpreted by the U.S.S.R. and R.S.F.S.R. Supreme Courts. Levitsky, *supra* note 8, at 34. Neither article 152 nor subsequent Russian Federation Supreme Court guiding explanations have suggested any change to place a burden of persuasion on the plaintiff.

32 Postanovlenie No. 11 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O nekotorykh voprosakh voznikshikh pri rassmotrenii sudami del o zashchite chesti i dostoinstva grazhdan i organizatsii" [Decree No. 11 of the Plenum of the Russian Federation Supreme Court "Concerning Several Questions Arising in Consideration by the Courts of Cases Concerning Defense of Honor and Dignity of Citizens and Organizations"] (Aug. 18, 1992), *in* BIULL. VERKH. SUDA RF, No. 11, 7 (1992) [hereinafter Decree of August 18, 1992]. For eariler definitions by the Soviet courts, see *infra* notes 115-19, 133, and accompanying text.

33 Honor and dignity have been described as social and internal criteria of personality, "closely linked together, one quality inseparable from the other." KOVALEV & SHEVCHUK, *supra* note 16, at 4. Regarding disagreement among Soviet jurists on this issue, see Levitsky, *supra* note 8, at 34-35.

34 In the Soviet era, judges were expected to view this question from the perspective of a "right-thinking member of society" who adheres to the law and to "Rules of Socialist Community Life" and "Communist Morality." Levitsky, *supra* note 8, at 35; *see also infra* notes 77-78, 116, and accompanying text.

35 1995 Civil Code, *infra* appendix, arts. 151, 152(1)-(3), (5); Mass Media Law, *supra* note 3, arts. 43, 46, 62. Article 46 states that the right of reply does not extend to "editorial

courts, moral damages are potentially available to all successful plaintiffs and there are no categorical limitations on the availability of the remedy.[36] The courts have broad discretion as to the size of moral damages awards, although the 1995 Civil Code does set forth certain criteria: article 151(2) directs courts to take into account the degree of the defendant's fault, the depth of non-material suffering linked with the victim's individual characteristics, and "other circumstances deserving of attention."[37]

These remedial provisions, particularly moral damages, have important implications for mass media organizations and individual journalists. In the Mass Media Law, a detailed catalog of the duties of "journalists"[38] identifies a broad range of persons who are potentially responsible for violations of personality rights. Journalists must verify the reliability of information which they receive and more generally must "respect the rights, legal interests, and honor and dignity of citizens and organizations."[39] In addition to journalists, mass media outlets themselves and their founders, publishers, editorial offices, and "authors"[40] are subject to liability for violations of the statute's provisions.[41] Whether individual members of

comments" [*redaktsionnye kommentarii*]. However, this exception would appear to be overruled by the broader language of article 152(3) of the Civil Code.

36 *But see infra* notes 47-49 and accompanying text.

37 The 1995 Civil Code is the first piece of legislation to provide guidelines to the courts on this question. The Russian Supreme Court, going beyond the statutory language, has added further considerations that a court "may" take into account if the false defamatory statement was disseminated in the mass media: "the character and make-up of the publication, the extent of dissemination of the false information, and other circumstances deserving of attention." Decree of April 25, 1995, *supra* note 30, at 5-6. The criteria in article 151 and the Supreme Court Decree do not include consideration of whether the statement at issue was of public interest.

The average size of moral damages awards by the courts, operating under the pre-1995 Civil Code system, was not large by United States standards. According to the Ministry of Justice, the average award in civil defamation cases against mass media defendants in the first half of 1994 was 2.04 million rubles—an amount equal to approximately $1,020 U.S. dollars at prevailing exchange rates. Gagarskii, *supra* note 13, at 46.

38 The Mass Media Law defines a "journalist" as a person who "engages in the editing, creation, collection or preparation of reports and materials for the editorial staff of a registered mass media outlet." Mass Media Law, *supra* note 3, art. 2 (un-numbered paragraph).

39 *Id.* art. 49(2) and un-numbered paragraph.

40 This term refers to natural persons, not employed by the mass media outlet in question, who have contributed reports or commentary. An example of an "author" within the meaning of the statute is Egor Gaidar, who wrote the commentary which led to the defamation action in *Zhirinovskii v. Gaidar*. *See infra* notes 60-71 and accompanying text.

41 Mass Media Law, *supra* note 3, art. 56. Article 57 enumerates certain circumstances in which editorial offices, editors-in-chief, and journalists shall be exempt from individual liability, such as in cases where defamatory information was obtained from mandatory reports, information agencies, or press services of state agencies or other organizations. In cases where article 57 applies, the Russian Supreme Court has ruled that courts still have the power to entertain actions against "organizations" [*organizatsii*] and "citizens" [*grazhdane*] for monetary damages, and to require editorial boards to disseminate information about the court's decision in the case. Decree of August 18, 1992, *supra* note 32, at 7, 8. In the Decree, the Court did not define the terms "organizations" or "citizens."

an editorial office are subject to liability is somewhat ambiguous, although it appears that they are.[42] Although the provisions regarding responsibility are complex, it is clear that the entity most often named as a defendant, and therefore most often vulnerable to imposition of moral damages, will be the editorial office.[43]

This complex of rules has purposes that are both retrospective and forward-looking. It provides responsibility under the remedial structure in the 1995 Civil Code and the Mass Media Law, but is also meant to deter future abuses. According to one of the legislative sponsors of the 1990 Press Law, a moral damages provision was necessary because "it is necessary to cool off pens which are too feverish."[44] Other commentators have spoken approvingly of the benefits of moral damages' deterrent effect in systems of personality rights protection generally.[45] Given these considerations, it is presumable that journalists will be sensitive to potential litigation costs, including not only damages awards themselves, but also the costs of defense.[46]

B. *Standard of Liability*

The civil defamation statutory scheme does not expressly address two questions of particular significance: the standard of liability and the treatment of statements not easily susceptible to an objective truth/falsity determination. As to the former, the 1995 Civil Code is silent, suggesting a liability without fault standard that imposes liability in all cases of false defamatory expression.[47] The

[42] Under article 19 of the Mass Media Law, an "editorial office" [*redaktsiia*] shall be a juridical person or any other entity organized in a form permitted by law (although the definition of "editorial office" in article 2 appears to include a natural person as well). Mass Media Law, *supra* note 3, art. 19. Since article 56 refers explicitly to an "editorial office" as one of the entities or persons subject to liability, editors who are natural persons (such as the "editor-in-chief" [*glavnyi redaktor*]) might arguably be relieved of responsibility. *Id.*, art. 56. On the other hand, article 56 includes among responsible persons the category of "journalist," the definition of which clearly includes one who exercises editorial functions. *Id.* Nikolaev concludes that in cases where the editorial office is not a juridical person, the proper defendants should be the founder and the responsible person at the organization which handles the mass media outlet's business affairs. *See* Nikolaev, *supra* note 16, at 42-43. Nikolaev's article is a detailed survey of the complex questions, many of them awaiting clarification, concerning identification of the proper parties in defamation actions against the press.

[43] Nikolaev, *supra* note 16, at 42.

[44] *Bessporno i Spornoe* [*Non-debatable and Debatable*], ZHURNALIST, No. 1, 8, 11 (1990) (interview with Georgii Shakhnazarov, Deputy to the Supreme Soviet).

[45] *See* MALEIN, CIVIL LAW, *supra* note 16, at 98; *see also* B.S. Markesinis, *The Right to be Left Alone Versus Freedom of Speech*, PUB. L. 67, 73 (1986) (discussing self-censorship in United States and German law).

[46] The experience of mass media in other countries demonstrates that the latter are probably of greater concern to media organizations and individual journalists. *See* Coliver, *supra* note 17, at 270.

[47] Article 57 of the Mass Media Law contains certain exceptions to liability. *See supra* note 41. However, they are limited to certain enumerated categories, and their significance has been considerably diminished by the Russian Supreme Court. *See supra* note 41.

"degree of fault" criterion in article 151 relates to measurement of moral damages in individual cases, not the determination of liability itself. The Soviet courts, interpreting the existing defamation statute, concluded as far back as the 1960s that it called for a liability without fault standard—an approach never altered and grounded in the rationale that a fault-based standard was unnecessary because moral damages were not an available remedy.[48]

The introduction of moral damages in the 1990s, however, has rendered the old rationale obsolete, and continued use of liability without fault combined with the damages remedy conflicts with a rule of statutory interpretation recently reiterated by the Russian Supreme Court. In a review of the various statutes in Russian legislation providing for moral damages, the Court stated that a condition for their imposition must be the fault of the defendant, unless expressly stated otherwise in the applicable legislation. As an example of such legislation, the Court cited the statute governing compensation for employee injuries, which contains an express liability without fault standard for injuries suffered in the course of highly dangerous work assignments.[49]

If the Court's directive is applied to the statutes governing civil defamation, it should follow that liability resulting in moral damages must be conditioned on a finding of the defendant's fault, since neither the Mass Media Law nor articles 150 through 152 of the 1995 Civil Code contain any express contradictory provisions. Despite this, published reports of civil defamation cases in the 1990s do not give any indication that courts have considered application of standards other than liability without fault. This problem would perhaps be alleviated if article 151 of the 1995 Civil Code were to make fault a condition for imposition of moral damages, and not solely a factor in determining their amount. If so, restorative remedies might be available even in the absence of fault, although moral damages would not be.

The absence of a clearly defined standard of liability,[50] when combined with the broad discretion granted courts as to the mea-

[48] *See infra* notes 108-13 and accompanying text.

[49] Decree of December 20, 1994, *supra* note 12, at 61.

[50] Russian law does not employ standards such as "journalistic care" or "good faith." However, it is possible that the "duty to verify" in article 49(2) of the Mass Media Law might serve as the basis for development of such a standard. *See supra* note 39 and accompanying text. It also remains to be seen whether courts applying the "degree of fault" criterion in article 151 will distinguish between willful and negligent violations of personality rights.

sure of moral damages,[51] results in a significant element of unpredictability in Russia's system of personality rights protection. In addition, the ambiguity concerning a standard serves to negate the creation of parameters for defenses as to the issue of liability itself. Addressing the availability of moral damages in 1994, a Council of Europe delegation to Russia made the following observation:

> This has been described as a provision which can be easily abused to undermine the economic viability of certain media. There appears to have been a considerable number of cases brought under this provision, and it was observed that the courts are as yet rather unexperienced in determining damages, due to lack of clear legal rules and the absence of an established case-law approved by the higher courts.[52]

In sum, with the exception of certain limited exceptions set forth in the Mass Media Law,[53] the law imposes liability on all disseminated defamatory statements, unless the defendant can prove the truth of the statement at issue.[54] Whether moral damages are available in all cases of liability is unclear, but it is evident that courts have not signalled any particular concern about reconciling the inconsistent aspects of this question and have continued to apply a liability without fault standard. Meanwhile, the limitation of applicable defenses to a showing of truth also raises issues in a second area not addressed in the statutes and subject to judicial interpretation: the treatment of critical commentary or defamatory opinion.

C. *Defamatory Opinion: the Fascist Cases*

As do all legal systems seeking to protect personality rights,[55] Russia's confronts the choice of treating all defamatory statements alike or fashioning difficult distinctions between assertions of fact and statements of opinion. In the Russian Criminal Code, a distinction is made between false statements of fact (the subject of article 130) and insulting forms of expression for which a truth/

51 *See supra* note 37 and accompanying text.

52 *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards*, 15 HUM. RTS. L.J. 249, 257 (1994).

53 *See supra* note 41.

54 It is unclear whether this exception represents legislative balancing of the private interests of defamation plaintiffs and defendants or recognition of a public interest in the dissemination of truthful information. According to one jurist, writing in 1990: "Society is always interested in the truth, in the correct evaluation of the acts of each of its members. But if false information defaming a famous person is disseminated, this frequently entails irreparable harm to society." Prianishnikov, *supra* note 16, at 31.

55 Coliver, *supra* note 17, at 267-68; NOLTE, *supra* note 22, at 66-81; RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.09 (1994).

falsity determination is not relevant (the subject of article 131).[56] In the Soviet era, jurists debated whether some sort of distinction should also be made in the Civil Code,[57] and in post-Soviet Russian law it appears that the question has been resolved in favor of treating all defamatory statements as susceptible to a determination as to their truth or falsity. As a result, because the burden of proof in defamation lies on the defendant, the effect of such treatment is the imposition of liability even in cases where the statement in issue is arguably opinion and where an assertion of facts was not intended.

This conclusion, based in part on the absence of such a distinction in scholarly commentary on civil defamation law, is buttressed by the courts' treatment of recent cases involving defendants' use of the term "fascist" to label plaintiffs or their beliefs.[58] These cases are among a number of high-visibility defamation lawsuits in the 1990s that have involved leading public officials or political figures as plaintiffs[59] and in which the challenged state-

56 CRIMINAL CODE, *supra* note 19, arts. 130-31. *See supra* notes 19-20 and accompanying text.

57 Levitsky, *supra* note 8, at 46.

58 The most highly publicized case has been a 1994 action by Vladimir Zhirinovskii against Egor Gaidar and the newspaper *Izvestiia*. *See infra* notes 60-71 and accompanying text. For reports on other cases where treatment of the appellation "fascist" as an assertion of fact was dispositive, see Boris Beliaev, *General Makashov Wins Lawsuit Defending His Honor*, TASS, Jan. 19, 1995, *available in* LEXIS, Nexis Library, Curnws File (plaintiff awarded the equivalent of $2,500 U.S. dollars in moral damages); and *Calling Zhirinovsky Fascist Is No Insult*, ITAR-TASS, Mar. 18, 1994, *available in* LEXIS, Nexis Library, Curnws File (defendant not guilty of charges by Vladimir Zhirinovskii's Liberal Democratic Party ("LDP")). In the latter case, a local court of first instance in the city of Vologda ruled that the defendant, a professor of German history, had met his burden of showing a factual basis that Zhirinovskii's election campaign in fall 1993 was comparable to that of Adolf Hitler's in 1933, and that the LDP was "a pro-fascist political organization." *Id.* The defendant's evidentiary submissions included quotations from United States and Italian researchers, identification of six characteristics of fascist ideology, and statements by Zhirinovskii. According to the ITAR-TASS account, the court determined that it was not an "insult" to compare the LDP with fascists. It is therefore unclear from the report whether the court ruled that the statements in question had a "defamatory meaning." However, if the court ruled that they did not, it is not clear why evidentiary submissions were made on the truth/falsity question.

59 In terms of numbers, the leading plaintiff has probably been Deputy Zhirinovskii, who reportedly had filed nearly 100 suits by early July 1994. Liudmila Aleksandrova, *Zhirinovsky-Gaidar Lawsuit Postponed Till September*, ITAR-TASS, July 7, 1994. Other multi-suit plaintiffs include Moscow Mayor Iurii Luzhkov (at least 25 cases) and former Russian Federation Vice President Aleksander Rutskoi. *See generally* Clark, *supra* note 13.

The tactic of multiple lawsuits has its antecedents: a member of the United States Congress, Representative Martin L. Sweeney of Ohio, filed at least seventy-five defamation lawsuits against publications which reported in 1939 that he opposed the appointment of a man as federal judge because the nominee was "a Jew, and one not born in the United States." *See* David Riesman, *Democracy and Defamation: Fair Game and Fair Comment* (pts. 1 & 2), 42 COLUM. L. REV. 1085, 1090 n.18 (1942), 42 COLUM. L. REV. 1282, 1290, 1298-1300 (1942).

Also, the use of the defamation lawsuit as a political weapon recalls the widespread use of similar actions in Europe and the United States in the 1920s and 1930s. *See* Riesman,

ments were made in the context of discussion about political topics.

In *Zhirinovskii v. Gaidar*,[60] Deputy Vladimir Zhirinovskii sued former Prime Minister Egor Gaidar and the newspaper *Izvestiia*, seeking twenty-five million rubles (approximately $12,500) in moral damages for publication of a May 17, 1994, article in which Gaidar described Zhirinovskii as "a fascist populist" and "the most popular fascist in Russia." In September 1994, a Moscow district court determined that the statements were false and ordered the defendants to pay moral damages totalling one million rubles (approximately $500).[61] In so ruling, the court rejected the defendants' argument that the article in question had been "a purely analytical one," investigating Zhirinovskii's "political essence," and therefore the term "fascist" was used as a "political characteristic only." The defense had also sought to refute Zhirinovskii's charge on a factual basis, introducing into evidence Adolf Hitler's *Mein Kampf*, Zhirinovskii's book *The Last Dash South*, and the *Encyclopedia of Philosophy*.

Two months later, that decision was upheld on appeal by the Moscow City Court. According to published accounts of the proceeding, the court's primary focus was upon the truth or falsity of the statement that the plaintiff was a "fascist."[62] Zhirinovskii rejected this designation, stating instead that he considers himself a "national-socialist," and his attorney argued that the defendants'

supra, at 1085, 1090-91, 1100 (documenting frequent use by, among others, members of the Nazi Party, including Adolf Hitler.)

60 As in all defamation cases prior to January 1, 1995, this case was heard pursuant to article 7 of the pre-1995 Civil Code. Article 7 and the provisions of the 1995 Civil Code are not materially different as to the legal issues in the "fascist" cases.

For reports on this litigation, see Igor Belsky, *Court Hearings Begin on Zhirinovsky's Suit Against Gaidar*, ITAR-TASS, Sept. 8, 1994, *available in* LEXIS, Nexis Library, Curnws File; Jeff Berliner, *Zhirinovsky Wins "Fascist" Suit*, UPI, Sept. 15, 1994, *available in* LEXIS, Nexis Library, Curnws File; Efron, *supra* note 13; Viktor Khamrayev, *Justice: Vladimir Zhirinovsky Isn't a Fascist Anymore*, SEVODNYA, Sept. 16, 1994, at 1, *reprinted in* CURRENT DIG. POST-SOVIET PRESS, vol. XLVI, No. 37 (Oct. 12, 1994), at 16; Khazin, *Inviolable Fascism*, *supra* note 16; Khazin, *The General Procurator Shares Its View of 'Izvestiia' and E. Gaidar*, *supra* note 16; Max Khazin, *Zhirinovskii ne Fashist—Tak Reshil Moskovskii Gorodskoi Sud* [*Zhirinovskii Is Not a Fascist—So Decided the Moscow City Court*], IZVESTIIA, Nov. 16, 1994, at 2; Max Khazin, *Tochki Zreniia Narodnogo Suda i Zhirinovskogo na Fashizm Polnost'iu Sovpali* [*The Points of View of the People's Court and Zhirinovskii Completely Coincide*], IZVESTIIA, Sept. 17, 1994, at 2; Lyubarsky, *supra* note 16; and Yulia Rakhayeva, *Drama in the Palace of Justice*, NEW TIMES, Dec. 1994, at 22.

Max Khazin, author of some of the above reports, is an attorney for *Izvestiia* who represented the newspaper in this litigation.

61 The low damages award displeased Zhirinovskii's supporters. Viktor Novoseltsev, an LDP spokesman, chided the court for setting the value of Zhirinovskii's "honor and dignity at such a paltry sum as one million rubles." Berliner, *supra* note 60.

62 Khazin, *Zhirinovskii Is Not a Fascist—So Decided the Moscow City Court*, *supra* note 60, at 2; Lyubarsky, *supra* note 16, at 23; Rakhayeva, *supra* note 60, at 22.

evidentiary support for their assertions was inadequate. Attorneys for the defendants, on the other hand, sought to convince the court that their clients had not intended to make a statement of fact, but rather a "political assessment" or "diagnosis." As in the lower court, they also sought to draw parallels between the plaintiff and Adolf Hitler, presenting evidence of their writings as well as historical parallels between Germany in the 1920s and Russia in the 1990s—political assessments which the plaintiff's lawyer urged the court to ignore because they were not related to the facts.

In upholding the lower court's decision, the Moscow City Court ruled that the defendants had failed to meet their burden of proof. The court rejected the use of scholars' conclusions as evidence, stating that these conclusions represented "private opinion" and questioning the validity of claimed similarities between Zhirinovskii's writings and Hitler's *Mein Kampf*. One of the judges stated that no official documents had been presented to show that Zhirinovskii's Liberal-Democratic Party is a fascist organization.[63]

The Moscow City Court's decision was the subject of a January 1995 protest by the Deputy Procurator General to the Civil Law Chamber of the Russian Supreme Court.[64] The grounds for the protest were that the *Izvestiia* article was an exercise of free expression guaranteed by the Russian Constitution: a discussion of the political and ideological characteristics of the views of Deputy Zhirinovskii and an analysis of those views by means of comparing them with those of other political figures.[65] In February, the Civil Chamber denied the protest and thereby declined to review the decision.[66]

In addition to its rejection of the constitutional argument, the Supreme Court's denial of the protest suggests that Russian law might be incorporating into its system of personality rights protection the elements of a civil action based on "insult," or "abusive

63 This declaration prompted commentator Kronid Lyubarsky to remark: "It seems the ideal proof for the court would be a document with a stamp imprinted on it, certifying that Zhirinovskii is a fascist." Lyubarsky, *supra* note 16, at 24.

64 Under Russian law, the parties to most disputes do not have a right of appeal beyond the regional appellate courts such as the Moscow City Court. However, in their supervisory role over the legality of court decisions, certain members of the Russian Supreme Court and the Procurator-General may file a "protest" of the appellate court decision with the appropriate chamber (civil or criminal) of the Supreme Court. The office of Procurator-General is a state organ which supervises compliance with the law by state agencies, including the courts.

65 Khazin, *The General Procurator Shares Its View of 'Izvestiia' and E. Gaidar*, *supra* note 16; Khazin, *Inviolable Fascism*, *supra* note 16.

66 Khazin, *Inviolable Fascism*, *supra* note 16. Khazin's report does not state whether the Civil Chamber discussed the basis for the denial.

comment," as is found in certain other European legal systems[67] and which might correspond to the crime of "insult" under article 131 of the Russian Criminal Code.[68] The courts' statutory authority for protection of self-esteem, independent from its linkage with reputation as a protected interest in defamation, lies in the unspecified category of "other" among the protected personality interests in article 150(1) of the 1995 Civil Code. Truth is not identified in the Code as a defense against alleged invasion of article 150(1) interests. An action based on insult would be consistent with this, since the key question of whether an expression is insulting "in form" is not susceptible to a factual determination.[69]

Whether it is more accurate to say that the courts in the fascist cases treated the use of the term "fascist" as an assertion of fact or in reality viewed it as "abusive comment," it is clear that their approach was consistent with the statutory scheme governing protection of personality rights. The conclusion that the Moscow City Court strictly followed statutory requirements in *Zhirinovskii v. Gaidar* is reinforced by the remarks of two observers, Yulia Rakhayeva and Kronid Lyubarsky. While both authors were sympathetic to the defendants and disagreed with the court's decision, they did not suggest that the panel was incompetent, or was motivated by anything other than an effort to apply the existing law.[70]

67 For an extensive discussion of the action known as *Schmahkritik* (abusive criticism) in German law, see NOLTE, *supra* note 22, at 66-81. For the tort of "affront" in Swedish law, see Hans-Gunnar Axberger, *Freedom of the Press in Sweden*, *in* PRESS LAW & PRACTICE, *supra* note 17, at 156. The tort also is comparable to the tort of intentional infliction of emotional distress in the United States.

68 CRIMINAL CODE, *supra* note 19, art. 131. *See supra* note 20 and accompanying text. The delict, or tort, of insult dates back to the Roman law *actio iniuriarum aestimatoria* that provided a remedy for any intentional act

> which showed contempt of the personality of the victim or was of a nature to lower him in the estimation of others, and was so intended. All that was needed was that the act be insulting in kind and intentional and unjustified. . . . It rested not on economic loss, but on outraged feelings.

W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 585-86 (1921), *cited in* Jon A. Lehman, *The Right of Privacy in Germany*, 1 N.Y.U. J. INT'L L. & POL. 106, 109 (1968); *see also* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 215-17 (1982).

Recognition of a right of action for "hurt feelings" has been a goal of personality rights reformers in Russia since at least as far back as the 1970s. *See* Levitsky, *supra* note 8, at 394.

69 It is under similar reasoning—that statements of opinion or value judgments cannot be proven true or false and that therefore the defendant should not bear the burden of proving truth—that the European Court of Human Rights has overturned defamation convictions in cases such as *Lingens v. Austria* (1986) and its progeny. Sandra Coliver, *Press Freedom under the European Convention on Human Rights*, *in* PRESS LAW AND PRACTICE, *supra* note 17, at 225-26.

70 Yulia Rakhayeva concluded her article by stating:

> There was a gratifying circumstance, however. Under the present alignment of forces in society the Moscow City Court passed a decision that will not bring fame to it. The judges could not but realize this in pronouncing their judgment. I shall venture that they acted so not because they defend fascists. Perhaps the court is, indeed, becoming a free institution.

Rakhayeva, *supra* note 60, at 23.

The authors' frustration with the court's decision appears to stem from the absence in the law of public interest considerations.[71]

II. COMMUNAL VALUES AND PRIVATE INTERESTS: 1960s TO 1995

The fact that Russian law has neither developed an explicit standard of liability linked with creation of defenses other than truth, nor attempted to fashion distinctions in the difficult area of defamatory opinion, is in large part attributable to the treatment of defamation as purely private law, devoid of public interest considerations other than protection of the interests of private victims of offensive expression. As construed by the courts in *Zhirinovskii*, for example, defamation law does not permit intervention of public interest concerns beyond perhaps the legislature's determination that truthful statements are exempt from liability. Personality rights protection cases are treated from the same perspective as private property or contract disputes, in which the courts are called upon to consider the relations between private parties and allocate their rights and duties as set forth in the Civil Code.

The status of personality rights protection in the 1990s as purely private law represents a transformation in Russia's treatment of offensive expression. To understand the reasons for this new approach it is necessary to examine its roots and the dynamics of its predecessor's component parts: the communal ethos of the Soviet era and the legal reformers' adherence to fundamental tenets of the civil law tradition. In the Soviet era, the ongoing tension between two conflicting tendencies—the regime's imposition of public values and jurists' preference for protection of private interests against outside intervention—shaped the setting for the creation and evolution of the system of personality rights protection.

A. *Pre-1990*

1. The Soviet Regime and Communal Values: Offensive Expression as a Public Good

The intrusion of public values, in the form of state and Communist Party[72] interests, into private relationships was a defining

71 Kronid Lyubarsky, a lawyer and long-time human rights activist, concluded that while the court did not "seem to have the least particle of civil responsibility," it was correct in a formal sense in "surgically restor[ing] Zhirinovskii's innocence." Lyubarsky, *supra* note 16, at 25.

72 Regarding the leading role of the Communist Party as an unwritten source of Soviet

characteristic of the Soviet regime and its approach to law. This theme was sounded by V.I. Lenin in 1922, when he admonished the drafters of the first civil code—jurists schooled in the civil law tradition that excluded the state as a party in private law relations[73]—"not to adopt the old, bourgeois understanding of civil law, but to create a new one."[74]

The primacy of public goals played an important part in the approach to offensive expression in the mass media. Critical to the public ideology and communal goals of the Soviet regime was the instrumental use of mass information, voiced both positively to publicize examples of citizens' exemplary conduct and negatively to expose anti-social acts to public ridicule. To promote the latter role, the regime imposed a "duty to criticize" on the press, espousing public criticism as a means of furthering political and social discipline.[75]

This role of the press as an instrument of social discipline was emphasized during the Khrushchev era, when the regime sought to displace the terrorist extra-legal mechanisms of Stalinist rule by promoting communal values, associated with the parental role of law.[76] State and Communist Party documents proclaimed proper

civil law, see Ioffe, *supra* note 8, at 11-14 (oral Communist Party directives concerning application or non-application of certain laws superior to published legal norms).

73 John Quigley, *The Romanist Character of Soviet Law, in* THE EMANCIPATION OF SOVIET LAW, LAW IN EASTERN EUROPE SERIES No. 44 (F.J.M. Feldbrugge ed., 1992); BUTLER, *supra* note 27, at 23, 176.

74 This admonition appeared in a letter which stated further:

> We do not recognize anything as 'private'. For us, *everything* in the field of the economy is *based in public law*, and not private . . . . [You must] expand the application of state intervention into 'private law-based' relations, expand the law of the state to abrogate 'private' agreements, and apply not the *corpus juris romani* to 'civil law relations' but *our revolutionary legal consciousness.*

Cited in A.L. Makovskii, *Razvitie Kodifikatsii Grazhdanskoogo Zakonodatel'stva [Development of Codification of Civil Legislation], in* RAZVITIE KODIFIKATSII SOVETSKOGO ZAKONODATEL'STVA 102, 103-04 (S.N. Bratus' ed., 1968) (emphasis in the original); *see also* BUTLER, *supra* note 27, at 176-77 (identifying examples of state intervention introduced in the 1922 Civil Code, including "the view that private rights acknowledged by the Code were conditional upon not being exercised contrary to their socio-economic purpose"); Eugene Huskey, *From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917-1990, in* TOWARD THE "RULE OF LAW" IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD 23, 26 (Donald D. Barry ed., 1992) [hereinafter TOWARD THE "RULE OF LAW" IN RUSSIA?].

75 Regarding the duty to criticize, see E.V. Shorina, *Kontrol'nye Funktsii Sovetskoi Pechati, [Control Functions of Soviet Publishing]*, SOV. GOS. I PRAVO, No. 7, 13 (1981); Levitsky, *supra* note 8, at 49-54; Cate, *supra* note 9, at 305.

76 *See* HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 70-72 (1963); Molly W. Lien, *Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion*, 30 STAN. J. INT'L L. 41, 76-78 (1994). Pursuant to the notion of the parental or educational role of law in Soviet society, the regime promoted informal mechanisms as an alternative to formal legal procedures and remedies in the resolution of certain disputes between citizens. *See* BERMAN, *supra*, at 81, 277-311. Among these mechanisms were the "Comrades' Courts," which had jurisdiction over many defamation claims, as well as mass organizations including the Communist Party. The task of the Comrades' Courts was to promote the spirit of the "new Communist man" by discouraging anti-social acts through public persuasion. F. Gorle, *Comrades' Courts, in* ENCYCLOPEDIA OF SOVIET LAW, *supra* note 5, at 153-57. Selected provisions of the 1961 Statute on Comrades' Courts are set forth *in* IDEAS AND FORCES IN SOVIET LEGAL HISTORY: A READER ON THE SOVIET STATE AND LAW 391-94 (Zigurds L. Zile ed., 1992) [hereinafter SOVIET LEGAL HISTORY].

rules of everyday social behavior, grounded in communal values, under the headings of "Rules of Socialist Community Life" and "Communist Morality."[77] Of particular significance for the press and for personality rights protection were the directives of the 1961 Communist Party Program, which in section 5 declared the "important part" played by the mass media in the "molding of the new man" and the role of the "general public, public opinion, and extensive criticism and self-criticism" in combating "survivals of the past" such as the "remnants of private-owner psychology, superstitions, and prejudices" and "manifestations of individualism and selfishness."[78]

Operating under such directives, the tightly controlled monopoly press regularly targeted by name private citizens and lower-level public administrators, often vilifying them with, in the words of one commentator, "coarse insults, ridicule, broad innuendoes, . . . abusive adjectives and epithets, and [with] ominous generalizations and frankly biased or cynical editorial comments."[79] Instead of words, caricatures were often employed:[80] for example, the case of a passenger whose face in a tram car poster was joined to the body of a pig because she was caught riding without a ticket.[81] Citizens' private lives were considered appropriate material for such commentary.[82]

77 Levitsky, *supra* note 8, at 35-44; F.J.M. Feldbrugge, *Rules of Socialist Community Life, in* ENCYCLOPEDIA OF SOVIET LAW, *supra* note 5, at 678-79.

78 PROGRAM OF THE COMMUNIST PARTY OF THE SOVIET UNION, 119-20, 124 (1963). Excerpts of the Program are reproduced in SOVIET LEGAL HISTORY, *supra* note 76, at 384-87.

79 Colorful epithets often found in the Russian press include: "slackers," "malingerers," "misfits," "incompetents," "schemers," "hooligans," "ideological waverers," "wife-beaters," "pilferers of public property," "speculators," and "dregs of society." Levitsky, *supra* note 8, at 50.

During the Stalin era, the language was often even more virulent and filled with more ominous portent. At the time of the infamous "doctors' plot," the newspaper *Izvestiia* described the alleged medical murderers in the following fashion:

> The actions of these monsters were masterminded by foreign intelligence services. Most of them have sold themselves, body and soul, to a branch of American intelligence . . . [in this way] the monster Vovsi received his instructions to destroy the top people in the USSR. These instructions were passed on to him by a Moscow doctor, Shchimeliovich, and the notorious Jewish bourgeois-nationalist Mikhoels. Other members of the terrorist group (Vinogradov, M. Kogan, Yegorov) have been proven to be long-standing agents of the British intelligence service.

Cited in YAKOV RAPOPORT, THE DOCTORS' PLOT OF 1953 79 (1991).

80 *See* Ioffe, *supra* note 8, at 81-82; Levitsky, *supra* note 8, at 206-09.

81 Levitsky, *supra* note 8, at 47, 208.

82 *Id.* at 52 ("[R]ecognizing the educational role of the press," Soviet law "permits criti-

2. Russian Jurists and Codification: The Civil Law Tradition

In the last decades of tsarist rule, Russian legal scholars were developing a private law system grounded in the precepts of the continental European civil law tradition.[83] That legal culture was marked in the early twentieth century by elements inherited from ancient Roman law and nineteenth-century laissez-faire European liberalism, including a jurisprudential emphasis on conceptualization and categorization of legal rules, a sharp distinction between private[84] and public[85] law, an influential role for legal scholars in elucidating legal rules,[86] legislative supremacy under which written codes serve as the primary sources of law,[87] and a maximum of individual autonomy in private legal relationships,[88] including tort.[89] The method for effectuating and safeguarding these precepts is codification, in which the legislature calibrates the proper adjustment of rights and duties in private relationships.

The Bolshevik victory did not result in eradication of this burgeoning civil law tradition.[90] In later reform periods,[91] under the

cal comment upon the private and social behavior of citizens and public officials . . ."). This leeway did not extend to criticism of the Communist Party or governmental leadership. *See supra* note 9.

83 Regarding the "civil law tradition," see generally JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985). For Russia as a civil law country sharing many common features with the legal systems of continental Europe, see Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 L.Q. REV. 56, 60-62 (1994); Quigley, *supra* note 73, at 27, 33-34; BUTLER, *supra* note 27, at 23, 176; and WILLIAM B. SIMONS, THE SOVIET CODES OF LAW XXXIII-IV (1980). Russian jurists were among the prominent westernizers and bearers of western liberal thought in late nineteenth to early twentieth-century Russia. *See generally* ANDRZEJ WALICKI, LEGAL PHILOSOPHIES OF RUSSIAN LIBERALISM (1987).

In the years 1910 through 1913, a draft civil code was prepared and submitted to the Russian Parliament, but was not enacted. BUTLER, *supra* note 27, at 23.

84 Private law is viewed as the adjustment of rights and duties between non-state actors in areas such as private property, contracts, torts, inheritance, and family relationships. Formulated by the legislature, the rules of private law are shielded from intrusion by the executive and administrative arms of the state, and the role of the judiciary is limited to allocation in specific disputes of the rights recognized in that legislation. MERRYMAN, *supra* note 83, at 91-100. The distinction between private and public law originated in ancient Roman law. NICHOLAS, *supra* note 68, at 2; Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 255 n.23 (1989). On the sharp distinction in the civil law tradition between private and public law in the context of freedom of expression issues, see Quint, *supra*, at 255.

85 In public law, the state—its executive and administrative agencies—is an active party. MERRYMAN, *supra* note 83, at 91-97; Quint, *supra* note 84, at 256.

86 MERRYMAN, *supra* note 83, at 56-60; Quigley, *supra* note 73, at 34.

87 MERRYMAN, *supra* note 83, at 23-24. In pre-Soviet Russian law, see Quigley, *supra* note 73, at 34; in Soviet law, see Gianmaria F. Ajani, *The Supremacy of Statutory Law in Socialist Systems: Scholarly Opinions and Operative Rules*, 11 REV. SOCIALIST L. 123, 126 (1985).

88 Under the prevailing nineteenth-century liberal ideology, this meant a particular emphasis on the sanctity of private property and the freedom of contract between parties of equal legal status. MERRYMAN, *supra* note 83, at 91-92.

89 Quint, *supra* note 84, at 255-58.

90 Huskey, *supra* note 74, at 25-27.

slogans of "socialist legality"[92] in the Khrushchev years, and a "law-based state" (*pravovoe gosudarstvo*) in the Gorbachev era,[93] Soviet civilians promoted codification as the best mechanism for fulfilling the objectives of establishing a system based on statutory rather than administrative supremacy and respect for individual rights.[94] In the immediate post-Stalin years, for example, proponents of socialist legality, seeking a law-based system which would limit the abuse of state power, actively participated in the intense codification activity which began in the late 1950s and included enactment in the 1960s of new Civil and Criminal Codes in the Soviet Republics.[95] It was in this setting that civil law jurists sought to create a system of personality rights protection.

3. Personality Rights Protection: 1960s to 1990

Soviet Russia's system of personality rights protection was created amid the clash of the competing tendencies of communal ethos and "socialist legality" in the Khrushchev reform era,[96] and reflected the amalgam of these two components, the former replete with denunciations of individualism and the latter seeking to safeguard individual rights. The result was a limited system of personality rights protection imbued with communal values and providing a restorative remedy—retraction.

Within the movement for civil law reform and codification, a group of Soviet jurists renewed the effort to establish a system of personality rights protection.[97] These efforts coincided with the

91 On legal reform periods in Soviet history, see Huskey, *supra* note 74, at 23-42.

92 Hiroshi Oda, *Socialist Legality*, in ENCYCLOPEDIA OF SOVIET LAW, *supra* note 5, at 706-08. The term "socialist legality" itself appears to reflect an attempt to combine the regime's public values and civil law goals.

93 Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat) With Special Reference to the Soviet Union*, *in* TOWARD THE "RULE OF LAW" IN RUSSIA?, *supra* note 74, at 43.

An extended discussion of these issues took place in a roundtable conducted by the journal *Sovetskoe Gosudarstvo i Pravo* and published under the title: *Lichnost' v Sotsialisticheskom Pravovom Gosudarstve* [*Personality in a Socialist Law-Based State*]; SOV. GOS. I PRAVO, No. 9, at 45-56 (1989); No. 10, at 28-36 (1989); and No. 11, at 26-42 (1989).

94 See the comments of personality rights protection advocate N.A. Pridvorov in the 1989 *Sovetskoe Gosudarstvo i Pravo* roundtable, *supra* note 93, No. 9, at 47 (speaking of the relevance of late nineteenth-century German jurisprudence and propounding the principle of maximum latitude for "creative activity, independence, and personal individuality").

95 Huskey, *supra* note 74, at 31-32; Makovskii, *supra* note 74, at 116-41. In 1957, the Union Republics regained the right to enact their own civil codes.

96 Regarding Khrushchev's "ambiguous legal legacy," see Huskey, *supra* note 74, at 32.

97 Efforts were made in 1939 draft civil code deliberations to include protection of non-material interests; however, these, like the draft code itself, were never enacted. A.V. BELIAVSKII & N.A. PRIDVOROV, OKHRANA CHESTI I DOSTOINSTVA LICHNOSTI V SSSR [PROTECTION OF INDIVIDUAL HONOR AND DIGNITY IN THE USSR] 45-46 (1971). Among the long-time advocates of personality rights protection have been E.A. Fleishits, O.S. Ioffe, A.V. Beliavskii, N.A. Pridvorov, and N.S. Malein. Regarding E.A. Fleishits, who was among those advocating inclusion of such protection in the 1939 draft civil code, see E.P. Gavrilov & Z.G.

post-World War II expansion of personality rights protection in other countries, marked in particular by the West German Supreme Court's recognition in 1954 of a "general right of personality"[98] and the recognition of personality rights in certain East European countries.[99] These developments were in large part a response to the horrors of the Nazi regime and World War II.[100] The basic tenets of the European personality rights movement, which sought codified protection of individual autonomy from arbitrary state and third party action, were viewed by the reformers as particularly applicable to the development of post-Stalinist socialist legality,[101] although they did not cite the West German experience, presumably because expression of such receptivity would have been precluded for ideological reasons. However, the similar circumstances of West Germany and the Soviet Union in the 1950s, during which time both were seeking a restoration of legality after totalitarian rule,[102] suggest parallels between the aspirations of personality rights advocates in both countries. In this regard, it is noteworthy that an effort—ultimately unsuccessful—was made in West Germany in the late 1950s to codify the precepts of personality rights protection contained in the decisions of the West German Supreme Court.[103]

In the Soviet Union too, personality rights advocates met with strong opposition. These advocates drafted a chapter of norms for comprehensive protection of personal non-property rights, but only one survived the legislative process[104] to become part of the

Krylova, *Pamiati Ekateriny Abramovny Fleishits* [*Remembrances of Ekaterina Abramovna Fleishits*], Sov. Gos. i Pravo, No. 4, 146 (1988).

For the enactment of civil defamation legislation as part of the general movement for liberalization of Soviet law after Stalin, see Berman, *supra* note 76, at 73.

98 The general right of personality is a source right from which new rights may be derived by the courts as the need arises. Harry D. Krause, *The Right to Privacy in Germany—Pointers for American Legislation?*, 1965 Duke L.J. 481, 501; Lehman, *supra* note 68, at 114-16.

99 Beliavskii & Pridvorov, *supra* note 97, at 125-26; Levitsky, *supra* note 8, at 395-96; Th. J. Vondracek, *Commentary on the Czechoslovak Civil Code, in* Law in Eastern Europe Series, no. 37, 23 (1988).

100 B.S. Markesinis, A Comparative Introduction to the German Law of Tort 37 (1986); Vondracek, *supra* note 99, at 23; Zweigert & Kotz, *supra* note 22, at 729-30. Regarding the "devastating effect of systematic defamation during the Nazi period," see David P. Currie, The Constitution of the Federal Republic of Germany 191 n.67 (1994).

101 O.S. Ioffe, *Grazhdansko-Pravovaia Okhrana Interesov Lichnosti v SSSR* [*Civil Law Protection of Personality Interests in the USSR*], Sov. Gos. i Pravo, No. 2, 55, 64-66 (1956).

102 *Id.* at 55. For a later discussion, see A.P. Vershinin, *Deformatsiia Sudebnoi Zashchity Grazhdanskikh Prav i Interesov v Kontse 20-kh—Nachale 30-kh Godov* [*Deformation of Defense of Civil Rights and Interests in the Courts in the End of the 1920s and Beginning of the 1930s*], Sov. Gos. i Pravo, No. 8, 132 (1989).

103 *See* Krause, *supra* note 98, at 489-99 (including English translation of the "Draft Law for the Reform of the Protection of Personality and Honor in Civil (Private) Law").

104 According to Professor Ioffe, a participant in these developments, "no other chapter of the various drafts of the new civil law codification met with such stubborn resistance as did the chapter on personal non-property rights." Ioffe, *supra* note 8, at 80. He did not elaborate on the grounds or the source of that opposition.

1964 Civil Code of the Russian Soviet Federated Socialist Republic: "Defense of Honor and Dignity."[105] In addition, as a part of copyright law,[106] a "Right to One's Own Image" was placed in the Code.[107]

Article 7 provided a civil cause of action for defamation based on three elements, all of which remain part of the current system: dissemination, defamatory meaning, and falsity.[108] Two important considerations governed the questions of remedies and the standard of liability. First, because article 7 protected nonmaterial interests, the prevailing view among Soviet jurists was that money damages should not be made available to successful plaintiffs and that the sole remedy should be retraction. The successful opponents of moral damages viewed them as inconsistent with article 7's restorative goals.[109] Second, the individualistic acquisitiveness rep-

105 Grazhdanski Kodeks RSFSR art. 7 (1964) [hereinafter 1964 Civil Code]. This code was adopted in conformity to the U.S.S.R. Fundamental Principles enacted in 1961. In the Soviet federal system, all-Union Fundamentals of Legislation, enacted by the federal parliament, set forth the norms to be implemented in the codes of the various republics.

106 Technically, this provision did not relate to personality rights, since a right to one's own image was viewed as a property interest related to copyright. The provision is included in this discussion, however, because of its similarity to a right to privacy, and because under the 1995 Civil Code it would clearly fall into that category. 1995 Civil Code, *infra* appendix, art. 150(1).

107 1964 Civil Code, *supra* note 105, art. 514. Article 514 stated in full:

> *Article 514. Protection of the interests of a citizen depicted in a work of pictorial fine arts.* The publication, reproduction, or dissemination of a work of pictorial fine arts in which another person is depicted is permitted only with the consent of the person depicted or, after his death, with the consent of his children and surviving spouse. No such consent is required when these actions are carried out in the interests of State or society, or when the person depicted has posed for the author for a fee.

This provision, if interpreted broadly, would have had considerable impact on the press, because it could have governed the widespread use of cartoons and caricatures (most of them negative) meant to portray particular individuals.

108 *Id.* art. 7. Article 7 stated in full:

> *Article 7. Protection of Honor and Dignity.*
>
> Citizens and organizations shall have the right to sue at law for retraction of statements defamatory to their honor and dignity, if the person disseminating such statements fails to prove that they are true.
>
> Where such statements are disseminated by the press, they must, if found untrue, be retracted also in the press. The manner of retraction in other cases shall be established by the court.
>
> If the court's decision has not been carried out, the court may impose a fine on the offender which shall be collected as State revenue. Payment of the fine does not relieve the offender from the duty to perform the act prescribed by the court's decision.

109 O.S. Ioffe, *Novaia Kodifikatsiia Sovetskogo Grazhdanskogo Zakonodatel'stva i Okhrana Chesti i Dostoinstva Grazhdan* [*The New Codification of Civil Law and Protection of the Honor and Dignity of the Citizen*], Sov. Gos. i Pravo, No. 7, 59 (1962), *translated in* Soviet Rev., Fall 1963, at 54, 58-59.

resented by money damages was discordant with the communal ethos.[110] Damages were available to plaintiffs, but only to the extent that they could show actual material loss resulting from the defamatory publication.[111]

As to the standard of liability, in contrast to the general Soviet legal principle that liability for material damages arose only upon a finding of the defendant's intent or negligence, the standard of liability in article 7 cases was liability without fault.[112] The rationale for this absence of a fault-based standard was the fact that the moral damages remedy was unavailable.[113]

In practice, article 7 was subject to the intrusion of external, public values in two ways. The first was the use by the Communist Party of extra-legal means to discourage defamation actions or to influence the outcome of particular cases, a method which could effectively be employed to shield the state- and Communist Party-controlled press.[114] The second was the intrusion of communal values into interpretation and application of the law in ways that limited the opportunities for redress available to plaintiffs. This process of limitation was the result of judicial and scholarly interpretation on two important questions: defamatory meaning and critical commentary.

The definition of "defamatory meaning" was limited to the scope of the directives in section 5 of the 1961 Communist Party Program,[115] so that whether a statement was to be judged legally

110 In 1962, S.S. Alekseeva, a leading Soviet civil jurist wrote:

> Soviet society reacts with disapproval to the conduct of those citizens who only seek a material benefit for themselves and pursue mercenary goals in ordinary everyday interrelations. The taking of compensation for the temporary lending of articles of personal use, interest-bearing loans, the rendition of personal services for pay, etc.—all these are not infrequently regarded as departures from the rules of socialist community life.

SOVIET LEGAL HISTORY, *supra* note 76, at 402.

Moral damages were also greatly disfavored in nineteenth-century Germany, on the grounds that recovery of monetary compensation for injury to reputation would be dishonorable. *See* Handford, *supra* note 12, at 855; Ollier & Le Gall, *supra* note 8, § 8-36; *see also* Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 699 (1986) (discussing similar concerns in the common law).

111 MALEIN, CIVIL LAW, *supra* note 16, at 94-99.

112 *Id.* at 56-59; Ioffe, *supra* note 8, at 81; Levitsky, *supra* note 8, at 65.

113 Ioffe, *supra* note 101, at 58; *see also* Levitsky, *supra* note 8, at 17 n.60 (restoration of personal, as opposed to pecuniary, rights does not require a finding of fault).

114 Ioffe, *supra* note 8, at 13. In what might have been an example of such influence, the courts in 1984 reportedly refused to consider an article 7 complaint filed by dissident Elena Bonner, who sought retraction of published reports that she was "a Zionist-Masonic agent, and a scheming seducer and even a murderess," who manipulated her "intimidated and mentally ill" husband Andrei Sakharov. *Cited in* Joseph J. Darby, *The Influence of Marxian Socialism on the Soviet Law of Torts*, 23 COLUM. J. TRANSNAT'L L. 373, 378 (1985); *see also* Serge Schmemann, *Sakharov's Wife Sues a Historian*, N.Y. TIMES, Oct. 3, 1983, at A14.

115 *See supra* note 78 and accompanying text.

injurious to a plaintiff's reputation was to be viewed from the perspective not of a "reasonable person" but from that of a "right-thinking" member of society who adheres to the Rules of Socialist Community Life and Communist Morality.[116] This approach to "defamatory meaning" was articulated by the Civil Chamber of the U.S.S.R. Supreme Court in 1964:

> Defamatory, within the meaning of Section 7 of the Principles, is not just any negative information disseminated [by the defendant], but only such which is deserving of a negative evaluation by society, from the point of view of law, of the rules of socialist community life, and of the ethical principles of our own society.[117]

Thus, article 7 as interpreted by the U.S.S.R. Supreme Court did not provide an unconditional right to protection of an individual's reputation when injured by a false statement. The simple fact of injury, in the eyes of a "reasonable person," was not sufficient to create a presumption of injury to reputation. Rather, a statement was injurious to reputation, and therefore defamatory, only if it accused the plaintiff of behavior violating a tenet of law or the Rules of Socialist Community Life or Communist Morality, as understood by one who adheres to those norms. For example, a false statement that a man owned a house was not defamatory, even though he demonstrated that he was denied an apartment in a government housing project as a result. In another case, a magazine article's description of a scholar's work as "incoherent" was not deemed defamatory.[118]

In this way, the scope of article 7 protection was narrowed and broad categories of offensive expression made exempt from its reach. Research indicated that under the interpretation of "defamatory meaning," most actionable cases involved statements concerning a limited range of activities, primarily those involving interpersonal relations in the home and workplace.[119] Of particu-

116 Levitsky, *supra* note 8, at 33-35. This was in keeping with the maxim that public interest was as defined in Communist Party and state documents. *Id.* at 54.

117 SOTS. ZAK., No. 12, at 18 (1964), *translated in* Levitsky, *supra* note 8, at 38.

118 Levitsky, *supra* note 8, at 30-35; Cate, *supra* note 9, at 316-17. This approach was based in part on the association of tort with criminal law "in the work of promoting good standards of behaviour in the community." *See* Levitsky, *supra* note 8, at 30-31.

119 The Soviet legal scholar A.V. Beliavskii identified nine categories of actionable statements: (1) those imputing non-fulfillment of labor or professional obligations; (2) charges of dishonesty or unlawful appropriation of sums of money; (3) alleged violations of the rules of communal living in multifamily dwellings; (4) charges of violation of civic or filial duties; (5) imputations of characteristics disapproved of by communist morality (such as being "an accomplished demagogue" or a "careerist"); (6) charges of disorderly conduct, lack of self-discipline, and insults to the honor of a woman; (7) imputations of crimes

lar note here, in light of developments in the 1990s, is that questions of offensive expression within the context of open political debate—such as in the mass media—were not included, and almost undoubtedly were not even contemplated.

The scope of article 7 was also limited regarding statements of opinion or commentary, where the regime's directive that the press engage in public criticism to further communal values operated to insulate some of the most highly visible forms of expression from liability. Concern about application of article 7 to commentary formed the basis for much of the press' vocal opposition to adoption and implementation of article 7.[120] The amount of insulation to be afforded critical commentary—such as whether a defendant would be required to prove the truth of underlying facts—was a controversial topic among Soviet jurists. The debate put in stark form the question of how much public value the legal system should assign to mass information and commentary, particularly in light of the fact that the law allowed, and the system encouraged, such expression.[121] For the most part, in the case law, this issue was resolved by the courts in favor of mass media defendants, on grounds that plaintiffs' claims of defamatory meaning were unfounded on public interest grounds.[122]

As for the right of protection of one's own image, article 514 contained an explicit reservation for depictions "carried out in the interests of the State or of society . . . ."[123] Thus, practices such as the widespread dissemination of the likenesses of persons charged with anti-social acts (such as intoxication or riding public transportation without tickets) were not actionable.[124] Indeed, as pointed out by Levitsky, this exception tended to swallow the rule as it related to publications by the mass media, since such activity was intended to instruct the general public.[125]

(such as having set fire to a neighbor's house, stealing apples from a neighbor's garden, or stealing goods from a store); (8) alleged membership in a religious sect; and (9) charges of scandal-mongering, pettifogging, and inveterate slandering, among other things. *Listed in* Levitsky, *supra* note 8, at 38-43 (citing several publications and adding that this list was not meant to be exhaustive).

120 *Id.* at 51.

121 Personality rights advocates opposed the use of such an exception. *Id.* at 44-54. As the "fascist" cases demonstrate, their approach ultimately prevailed in the 1990s.

122 *Id.* at 49-54.

123 1964 CIVIL CODE, *supra* note 105, art. 514. *See supra* note 107.

124 *See* Ioffe, *supra* note 8, at 81-82; Levitsky, *supra* note 8, at 206-09.

125 Levitsky, *supra* note 8, at 207-08. Regarding the use of caricatures, Levitsky cites the 1961 *Soviet Journalist's Handbook* to the effect that caricatures "help in the fight against survivals of capitalism in the consciousness and in the daily life of the Soviet people, against all that is stagnant, backward and obsolete" and must possess "a deep ideological content." *Id.* at 208.

Not satisfied with the limited possibilities offered by existing law, personality rights advocates continued their efforts throughout the 1970s and 1980s, pressing for recognition of new protected interests, including a right to protection against offensive *truthful* statements, and introduction of a moral damages remedy.[126] Citing examples from the legislation of other socialist countries, the advocates of moral damages argued that theoretical concerns about the incompatibility of monetary compensation for non-material harm should give way to money damages as a form of "compensation" or "satisfaction" (with a certain punitive element as well).[127]

B. *Post-1990*

1. The Triumph of Private Law

Enactment of Russia's current system of personality rights protection marks the culmination of the long campaign by personality rights advocates.[128] Their success is attributable in large part to the congruity of their goals with the larger reform movement for a restoration of Russia's place in the civil law tradition. Grounded in the principles of that tradition, it is part of the resurgence of private law which has taken place in the 1990s, of which the 1995 Civil Code is a leading example,[129] and which is linked to aspirations of development of a "civil society."[130] Thus, personality rights protection has been shorn of its communal ethos and infused with a new set of values geared to Civil Society values and the marketplace:

126 *Id.* at 394-95.

127 *Id.* at 395-98; BELIAVSKII & PRIDVOROV, *supra* note 97, at 125-26; MALEIN, CIVIL LAW, *supra* note 16, at 95-98; Malein, *Non-Material Harm*, *supra* note 16, at 34.

128 With remarkable prescience, Levitsky foresaw such a result in the late 1970s:

> [O]ne should not underestimate the significance of those pressures which a number of Soviet civilists have begun to exert upon jurisprudential and legislative opinion with the aim of bringing about the recognition of the principle of pecuniary compensation for non-pecuniary harm, including injury to feelings. In due time, these efforts will succeed: The trends in Soviet legal philosophy, and logic, are on their side.

Levitsky, *supra* note 8, at 394.

129 For example, compare article 1(1) and (2), paragraph 2, with articles 1 and 5 of the 1964 RSFSR Civil Code (all of which are reprinted in the appendix).

130 Rudden, *supra* note 83, at 57-58. To its adherents, the Civil Society is marked by the separation of autonomous social relationships from the state. Iu. A. Dmitriev, *Sootnoshenie Poniatii Politicheskoi i Gosudarstvennoi Vlasti v Usloviiakh Formirovaniia Grazdanskogo Obshchestva* [*Correlation of Concepts of Political and State Power in Conditions of the Formation of Civil Society*], GOS. I PRAVO, No. 7, 28, 30 (1994) (civil society as a complex of social relationships, separate from the state but interacting with it, and characterized, among other things, by creation of an autonomous sphere of activity for individuals and their organizations protected by law against direct interference by state legal power and policy); *see also* A.V. Odintsova, *Grazhdanskoe Obshchestvo: Vzgliad Ekonomista* [*Civil Society: the View of an Economist*], SOV. GOS. I PRAVO, No. 8, 98 (1992).

individual autonomy; moral damages as the leading remedy;[131] the addition of business reputation as a protected interest; and the absence of public interest concerns external to civil legislation, such as those which had previously narrowed the scope of defamatory meaning or created a broad privilege for critical commentary.

2. The Absence of a Public Ideology

Coincident with Russia's reclamation of its place in the civil law tradition has been the evaporation of any notion that offensive expression has potential public value. Such a notion has been discredited in the 1990s in the wake of the rejection of Marxist-Leninist ideology and its emphasis on communal values.[132]

In March 1991, the U.S.S.R. Supreme Court revised the definition of "defamatory meaning" for purposes of article 7 interpretation, making a small deletion which discarded nearly thirty years of the ideological basis for determining actionable claims of civil defamation. In the new definition, the perspective from which the defamatory statement determination was to be made no longer included Rules of Socialist Community Life and Principles of Communist Morality.

> False communications which are defamatory are those which diminish the honor and dignity of a citizen or organization in public opinion or in the opinion of individual citizens in regard to observance of laws and moral principles of society (for example, communications about commission of dishonorable acts, unworthy behavior in the workplace or in the family, or communications discrediting productive-economic activity, reputation, and so on).[133]

This new definition reflected the withdrawal of the ideologically-based communal ethos as a basis for law which occurred when the Soviet legislature in 1990 deleted the "leading role of the Party" from article 6 of the U.S.S.R. Constitution.

The effect of these changes was to remove Marxist ideology

131 Restorative remedies such as retraction and the right of reply have been retained in article 152 of the 1995 Civil Code and in the Mass Media Law. *See supra* note 35 and accompanying text. However, they clearly receive less attention in litigation and the legal literature than do moral damages.

132 For example, N.S. Malein recently dismissed the argument that moral damages are "foreign to our legal consciousness" as "a typical example of the total intrusion of ideology [*ideologizatsiia*] into law and disregard for the protection of personality interests." *See* Malein, *Non-Material Harm*, *supra* note 16, at 33.

133 Postanovlenie No. 4 plenuma Verkhovnogo Suda SSSR [Decree No. 4 of the Plenum of the U.S.S.R. Supreme Court] (March 29, 1991), *in* Sov. Iust., No. 10, at 26 (1991). In August, 1992, the Russian Federation Supreme court adopted a similar definition. *See supra* note 32 and accompanying text.

and the regime's version of communal values from their place as the primary determinants of the "public value" of mass information and commentary, thereby curtailing any legal support for the press's duty to criticize. Without these ideological moorings, the role of the press was cut adrift from any "public interest" foundation. As a result, information as a "public value" in the 1990s no longer functions as a legal rationale and therefore has been rendered inapplicable to cases of personality rights protection.

The absence of a public ideology in civil defamation law is manifested in several significant ways. For one thing, the statutory and judicial criteria for measurement of moral damages do not include public interest factors.[134] The absence of defenses other than the truth of the contested statement.[135] In addition, it is particularly in cases regarding expressions of critical opinion in political debate that the absence of public interest considerations has been shown to have important implications. Prior to the 1990s, much public criticism—including that which was by any standard insulting or abusive—was insulated from legal sanctions on the grounds that it served a public purpose.[136] Now, however, with the disappearance of public interest considerations, limitations upon civil actions for allegedly offensive statements of opinion have been removed.

In light of the current system's historical roots, however, it would be a mistake to assume blithely that these features are manifestations of authoritarianism or illustrative of a weakly-developed legal culture. Rather, Russia's current system is grounded in the civil law aspirations of nineteenth-century European liberalism, and the conviction that the strongest protection of individual autonomy rights is found in civil code codification. This ideology is marked by aversion to the infusion by outside forces, including the state, of public values outside those considered by the legislature.

As a result, legal dialogue in Russia has lacked any opportunity for consideration of the notion that offensive expression should be viewed as anything other than an actionable invasion of private interests. A key to understanding Russia's current system has been the absence of any procedural or substantive vehicle for infusion of public values other than through the communal ethos, including the duty to criticize imposed on the press, sought by the Soviet regime. At this point, Russian law does not recognize any other

134 *See supra* note 37 and accompanying text.

135 *See supra* notes 47-48 and accompanying text.

136 Levitsky, *supra* note 8, at 49.

rationale to replace Marxist ideology as a "public interest" consideration. However, the structural prerequisites for such recognition now exist in Russia's new constitutional structure.[137] The anticipated dialogue about consideration of a constitutional dimension in Russian personality rights protection law is the subject of part two of this article.

APPENDIX

1. 1995 Civil Code (Part One) (selected provisions)[138]

Article 1. Basic principles of civil legislation.

1. Civil legislation shall be based on the recognition of the equality of the participants in the relations which it regulates, the inviolability of property, the freedom of contract, the inadmissability of arbitrary intervention by anyone whomsoever into private matters, the necessity for unhindered implementation of civil rights, and the provision for restoration of violated rights and their judicial protection.

2. [paragraph 2] Civil rights may be limited on the basis of federal law, and only in that measure to which this is necessary for purposes of protecting the principles of the constitutional order, morality, health, or the rights and lawful interests of other persons, or ensuring the defense of the country and the security of the state.

Article 150. Non-material benefits and their protection.

1. Life and health, dignity of the individual, personal inviolability, honor and one's good name, business reputation, inviolability of personal life, personal and family privacy, right to unrestricted movement, choice of place of habitation and residence; right to one's name; right of authorship and other personal non-property rights and other non-material benefits belonging to a citizen from birth and by virtue of the law, are inalienable and not transferable by other means. In the cases and in the order created by law, personal non-property rights and other non-material benefits belonging to a deceased person may be exercised and protected by other persons, including by the heirs of the holder of said rights.

2. Non-material benefits are protected in accordance with the present Code and also by other laws in the cases and in the order provided by them, as well as in those cases and to those limits in which the use of methods of protection of civil rights (article 12) stems from the essence of the violated non-material right and character of consequences of this violation.

Article 151. Compensation of moral damages.

If moral damages (physical or moral suffering) have been inflicted upon a citizen by actions which violate his personal non-property rights or which encroach upon other non-material benefits belonging to the citizen, as well as in other cases specified by law, the court may impose upon the violator the obligation of monetary compensation for the inflicted damages.

In determining the amounts of compensation of moral damages, the court takes into consideration the degree of fault of the violator and other circumstances deserving of attention. The court must also consider the degree of physical and moral suffering associated with the individual peculiarities of the person upon whom the damages were inflicted.

Article 152. Protection of honor, dignity and business reputation.

1. A citizen has the right to demand in court a retraction of information which defames his honor, dignity or business reputation, if the person who has spread such information cannot prove that it corresponds to reality.

At the demand of interested persons, the protection of honor and dignity of a citizen after his death is permitted.

2. If the information defaming the honor, dignity or business reputation of a citizen is distributed in the mass media, it must be retracted in these same mass media.

If the said information is contained in a document originating from an organization, such document is subject to replacement or repeal.

The order of retraction in other cases is established by the court.

3. A citizen in regard to whom the mass media publishes information which infringes upon his rights or legally protected interests has the right to publish his rebuttal in the same mass media.

4. If a court ruling is not implemented, the court has the right

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137 Since December 1993, Russia has witnessed the adoption of a new Constitution, the resumption of activity by the Constitutional Court, and enactment of a statute governing the Court's jurisdiction and procedures. Meanwhile, although freedom of expression is a fundamental right secured under the Russian Constitution and Russia's treaty obligations, *see supra* note 3, its rationale remains largely unexplored and its contours undefined.

138 Source: Foreign Broadcast Info. Serv., Daily Rep. Supp. (Jan. 13, 1995) (English translation).

to impose a fine upon the violator, collected in the amount and in accordance with the procedure specified in the procedural legislation and payable to the income of the Russian Federation. Payment of the fine does not absolve the violator of the responsibility of fulfilling the action specified by court ruling.

5. A citizen in regard to whom information defaming his honor, dignity or business reputation has been disseminated has the right, along with retraction of such information, to demand compensation of losses and moral damages inflicted by its dissemination.

6. If it is impossible to determine the identity of the person who disseminated the information defaming the honor, dignity or business reputation of a citizen, the person in regard to whom such information was disseminated has the right to appeal to court with a petition on recognizing the distributed information as not corresponding to reality.

7. The rules of the present article on protection of the business reputation of a citizen are respectively applied also to the protection of the business reputation of a legal entity.

2. Russian Criminal Code (selected provisions)

Article 130. Defamation.

1. Defamation, that is, the dissemination of fabrications known to be false which defame another persons, shall be punished by imprisonment not exceeding one year, by correctional labor not exceeding one year, by a fine not exceeding twice the minimum monthly wage index, by imposition of a duty to make amends for the harm, by public reprimand, or by application of measures of public influence.

2. Defamation in a published or otherwise reproduced publication or means of mass information, or in an anonymous letter, or by a person previously convicted of defamation, shall be punished by correctional labor not exceeding two years, or by a fine not exceeding twenty times the monthly minimum wage index as well as deprivation of the right to assume certain professional responsibilities.

3. Defamation combined with an accusation of a crime against the state or other grave offense shall be punished by imprisonment not exceeding five years.

Article 131. Insult.

1. Insult, that is, the intentional diminution of the honor and dignity of a person, expressed in indecent form, shall be punished by correctional labor for a term not exceeding six months, by a fine not exceeding the minimum monthly wage index, by imposition of a duty to make amends for the harm, by public reprimand, or by application of measures of public influence.

2. Insult in a printed publication or means of mass information, or insult inflicted by a person previously convicted of insult, shall be punished by correctional labor not exceeding two years or by a fine not exceeding twenty times the minimum monthly wage index as well as deprivation of the right to assume certain professional responsibilities.

3. 1964 Civil Code of the Russian Soviet Federated Socialist Republic (selected provisions)

Article 1. Tasks of the Civil Code of the RSFSR.

The Civil Code of the Russian Soviet Federated Socialist Republic regulates property and related personal non-property relationships, in order to create the material-technological foundation of communism and to satisfy ever more fully the material and spiritual needs of citizens. In those cases specified by law, this Code also regulates other personal non-property relationships.

The basis of property relationships in Soviet society is the socialist economic system and socialist ownership of the equipment and means of production. The economic life of the RSFSR is determined and directed by the state economic plan.

Article 5. Exercise of civil rights and performance of obligations.

Civil rights are protected by law, except in instances in which they are exercised in contradiction to their purpose in a socialist society in the period of the building of communism.

In exercising their rights and performing their obligations, citizens and organizations must observe the law, and must respect the rules of socialist communal living and the moral principles of a society which is building communism.