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

*Part Two**

PETER KRUG**

I. INTRODUCTION: SOURCES OF DEFAMATION LAW

Part I of this article described the statutory scheme which, as interpreted and applied by the ordinary courts,[1] serves as the sole source of Russian civil defamation law. This scheme, found in the 1995 Civil Code[2] and the Mass Media Law,[3] seeks to protect natural

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[1] The term "ordinary courts" will be used to include the Russian Federation Supreme Court and all lower appellate and first instance courts of general jurisdiction. It does not include Russia's specialized judicial branches—the Russian Federation Constitutional Court or the *Arbitrazh* courts which have jurisdiction over economic disputes [hereinafter, the "Arbitration courts"]. Regarding the Arbitration courts, which during the Soviet era primarily adjudicated disputes between state enterprises and which in the 1990s have acquired jurisdiction over economic disputes between private entities as well, see 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, 208-11 (1993), and O. Boikov, *Novoe zakonodatel'stvo ob arbitrazhnykh sudakh* [*New Legislation Concerning the Arbitration Courts*], ROSSISKAIA IUSTITSIIA [ROS. IUST.], No. 8, at 10 (1995). That jurisdiction now includes civil defamation cases involving business entities. Arbitrazhnyi Protsessual'nyi Kodeks Rossiiskoi Federatsii [APK RF] [Arbitration Procedure Code of the Russian Federation] art. 22(2) (Apr. 5, 1995) (effective July 1, 1995), *available in* Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF], Issue No. 19, Item No. 1709 (1995).

The Supreme Court and its predecessors, the USSR Supreme Court and the RSFSR Supreme Court, have played an important role in the development of Russian civil defamation law through their interpretation of statutory provisions. *See* Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution*, 13 CARDOZO ARTS & ENT. L.J. 847, 853 nn.26-27 (1995).

[2] 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. For an English translation of articles 1, and 150 through 152 of the 1995 Civil Code, see Krug, *supra* note 1, app. at 876-79.

[3] Zakon o sredstvakh massovoi informatsii [Law on Mass Information Media], Vedomosti S"ezda Narodnykh Deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossi-

and juridical persons from defamatory expression without the intrusion of public interest considerations other than those recognized and codified by the legislature. This body of law has developed against the background of the resurgence of private law in Russia[4] and post-Soviet Russian jurists' antipathy toward public interest concerns as a discredited notion corrupted by the Soviet regime.[5]

Recently, however, another notion has been introduced into Russia's expanding dialogue concerning defamation law. It has been argued that certain public interest considerations, centering on the public value of free expression, must also be taken into account in the clash between personality rights and free expression interests.[6] The Deputy Procurator-General's unsuccessful protest in early 1995 of the result in *Zhirinovskii v. Gaidar*[7] was based on alleged infringement of constitutional free expression guarantees.[8] Later in 1995, then-Russian Foreign Minister Andrei Kozyrev unsuccessfully sought the Russian Constitutional Court's invocation

iskoi Federatsii [Vedomosti RF], Issue No. 7, Item 300 (1992) (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, app. 625-55 (1993).

4 S. Khokhlov, *Razvitie chastnogo prava v Rossii* [*Development of Private Law in Russia*], ROS. IUST., No. 8, at 52 (1995). For this trend on a broader geographical scale and outside the narrow context of personality rights protection, see Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 95 (1995) (noting a "complete emancipation from ideology" in post-Soviet legal systems); *see also* Ethan Klingsberg, *The State Rebuilding Civil Society: Constitutionalism and the Post-Communist Paradox*, 13 MICH. J. INT'L L. 865 (1992) (regarding Hungary).

5 *See* Krug, *supra* note 1, at 863-64 & nn.72-74. For the Soviet legal system's emphasis on the "public importance of private rights" and its mechanisms for infusion of "public considerations into the adjudication of private disputes," see Inga Markovits, *Socialism and the Rule of Law: Some Speculations and Predictions*, *in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY [hereinafter MERRYMAN ESSAYS] 205, 213 (David S. Clark ed., 1990).

6 *See* sources cited in Krug, *supra* note 1, at 850 n.16; Iurii Feofanov, *Na svobodu slova nadevaiut ugolovnuiu uzdu* [*Criminal Bridle Placed on Freedom of Speech*], IZVESTIIA, Nov. 2, 1995, at 2; *infra* text accompanying note 11. For a comprehensive survey and analysis of Russian press law written by a former Minister of Press and Information, and one of the authors of the 1990 USSR Press Law and the current Russian Mass Media Law, see Mikhail Fedotov, *Rossiiskii Maiatnik: ot tsenzury k svobode i obratno* (*Russian Pendulum: From Censorship to Freedom and Back*), *in Glasnost'* Defense Foundation & Article 19, ZAKONY I PRAKTIKA: SREDSTV MASSOVOI INFORMATSII V EVROPE, AMERIKE I AVSTRALII [PRESS LAW AND PRACTICE IN EUROPE, AMERICA, AND AUSTRALIA] 185 (1996) [hereinafter Fedotov, *Russian Pendulum*]. An abridged version may be found at Mikhail Fedotov, *Zakon o smi i konstitutsionnye normy v Rossii* [*The Mass Media Statute and Constitutional Norms in Russia*], ZAKONODATEL'STVO I PRAKTIKA SREDSTV MASSOVOI INFORMATSII [ZPSMI], No. 9, at 11 (1995) [hereinafter Fedotov, *Constitutional Norms in Russia*]. I am indebted to Professor Andrei Richter, the editor of *ZPSMI*, for providing these materials. For Fedotov's treatment of Russian defamation law, see Fedotov, *Russian Pendulum*, *supra*, at 202-05.

7 Decision of Nov. 14, 1994 (Zhirinovskii v. Gaidar), Moscow City Court. For reports on this case, see sources cited in Krug, *supra* note 1, at 860 n.60.

8 *See* Krug, *supra* note 1, at 860-63.

of the Constitution's free expression guarantees to invalidate the statutory basis for a civil defamation suit brought by Vladimir Zhirinovskii against him and a television broadcasting company.[9] Not long after the *Kozyrev* decision, Justice Tamara Morshchakova, Deputy Chairman of the Constitutional Court, reportedly told a session of the Russian Supreme Court[10] that while a right to protection of reputational interests is "unquestionable," the rights of freedom of speech and of the press must also receive protection.[11] In an article which reported Justice Morshchakova's remarks and which focused primarily on a highly visible criminal defamation case,[12] legal commentator Iurii Feofanov described the competing interests in defamation actions by public officials against the press and discussed the public value of free expression in a democratic society.[13]

Feofanov's commentary explored in greater depth certain

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9 Decision of Sept. 27, 1995 (Kozyrev), Konstitutsionnogo Suda Rossiiskoi Federatsii [Russian Federation Constitutional Court], *in* Ros. Gaz., Nov. 22, 1995, at 3. For an English translation, see Garant Serv.-Econ. L. Russia 5439 (1996), *available in* LEXIS, Intlaw Library, Rflaw File. The Constitutional Court dismissed Kozyrev's complaint on jurisdictional grounds, while at the same time declaring that free expression guarantees are implicated in the defamation context. *See* discussion *infra* notes 40-52 and accompanying text.

The Constitutional Court, which began its work in 1991, resumed activity in February 1995, following a sixteen-month suspension. *See* Robert Sharlet, *Reinventing the Russian State: Problems of Constitutional Implementation*, 28 J. Marshall L. Rev. 775, 781, 784-85 (1995). The Court currently operates under a statute enacted in 1994: Federal'nyi konstitutsionnyi zakon O Konstitutsionnom Sude Rossiiskoi Federatsii [Federal Constitutional Law on the Constitutional Court of the Russian Federation], SZ RF, Issue No. 13, Item No. 1447 (July 25, 1994) (effective July 23, 1994) [hereinafter the Constitutional Court Statute], *translated in* F.B.I.S. SOV-94-145-S, July 28, 1994.

The Constitutional Court Statute was the first piece of legislation to be enacted as a "constitutional statute"—a new category introduced in the 1993 Constitution which requires a super-majority in the Russian Parliament for enactment. Sharlet, *supra*, at 778, 780.

10 As Russia's highest court for civil and criminal matters, the Supreme Court periodically examines current legal questions and issues "guiding explanations" to the lower ordinary courts containing its conclusions. *See* Krug, *supra* note 1, at 853 n.27. The October 31, 1995, session at which Justice Morshchakova spoke was devoted to the subject of the application of constitutional norms by the ordinary courts, and resulted in issuance of guiding explanations on the subject. Ocherednoi plenum verkhovnogo suda rossiiskoi federatsii [Regular Plenary Session of the Russian Federation Supreme Court], Biulleten' Verkovnogo Suda Rossiiskoi Federatsii [Biull. Verkh. Suda RF], Issue No. 1, Item No. 1 (1996). For the guiding explanations, see Postanovlenie No. 8 plenuma verkhovnogo suda Rossiiskoi Federatsii "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia" [Decree No. 8 of the Plenary Session of the Russian Federation Supreme Court, "On Particular Questions of Application by the Courts of the Russian Federation Constitution in the Administration of Justice"] (Oct. 31, 1995), Biull. Verkh. Suda RF, No. 1, 3 (1996) [hereinafter Decree of October 31, 1995].

11 Feofanov, *supra* note 6, at 2. Justice Morshchakova's comments were consistent with the *Kozyrev* opinion's declaration that Russia's ordinary courts should recognize a constitutional dimension in defamation law. *Id.*

12 The action was brought on behalf of Defense Minister Pavel Grachev against the newspaper *Moskovskii Komsomolets* and its editor Vadim Poegli for publication of critical charges of corruption against Grachev. *See* Krug, *supra* note 1, at 852 & n.21.

13 *See* Feofanov, supra note 6, at 2.

themes sounded earlier by other observers. Lawyer and human rights activist Kronid Lyubarsky, commenting on the outcome in *Zhirinovskii v. Gaidar*, acknowledged the literal correctness of the Moscow appellate court's decision, but at the same time concluded that the court lacked "the least particle of civil responsibility."[14] Another attorney, Leonid Rozhetskin, equating Russian defamation law to censorship, has written that the public's constitutional right to freedom of information "is stifled by the justified concerns of editors who feel that negative information will engender lawsuits."[15]

These remarks reflect the confluence of two at times conflicting tendencies in Russian legal reform: the campaign to replace rule by administrative or extra-legal command with statutory supremacy,[16] and the movement to subject even legislative action to conformity with fundamental norms.[17] Both Feofanov and Lyubarsky are critical of court decisions in which Russia's defamation laws were applied against press defendants, even though the judges in these cases apparently acted independently and followed the applicable law, rather than extra-legal commands, in making their decisions.[18] Their criticism is based on the conviction that adjudication of disputes involving expressive activity requires consideration of additional sources of law that introduce values beyond those recognized and codified by the legislature.

It is likely that further efforts will be made to convince courts to apply constitutional or international norms to Russian defamation law.[19] Some of the impetus for such efforts will undoubtedly

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14 Kronid Lyubarsky, *Zhirinovsky's 'Honour' More Valuable than Freedom of Speech?*, NEW TIMES, Dec. 1994, at 23, 25. *See* Krug, *supra* note 1, at 851 n.16, 860 nn.62-63, 863 n.71.

15 Leonid Rozhetskin, *Strict Defamation Laws Amount to Censorship*, MOSCOW TIMES, Feb. 14, 1995, *available in* LEXIS, News Library, Curnws File. *See* Krug, *supra* note 1, at 850-51 & n.16.

16 *See* Vladimir A. Kartashkin, *Human Rights and the Emergence of the State of the Rule of Law in the USSR*, 40 EMORY L.J. 889, 893-94 (1991); Svetlana Polenina, *The Development of Soviet Legislation on the Basis of the USSR Constitution of 1977: Trends and Prospects*, *in* THE IMPACT OF PERESTROIKA ON SOVIET LAW [LAW IN EASTERN EUROPE SERIES No. 41], 33, 36 (Albert J. Schmidt ed., 1990).

17 Anders Fogelklou, *New Legal Thinking in the Soviet Union*, *in* THE EMANCIPATION OF SOVIET LAW [LAW IN EASTERN EUROPE SERIES, No. 44], 3, 17-21 (F.J.M. Feldbrugge ed., 1992).

18 *See* Feofanov, *supra* note 6, at 2; Lyubarsky, *supra* note 14, at 24; *see also* Julia Rakhayeva, *Drama in the Palace of Justice*, NEW TIMES, Dec. 1994, at 2 (commenting on the *Zhirinovskii v. Gaidar* case and opining that "[p]erhaps the court is, indeed, becoming a free institution"). Other observers have also reported growing confidence in the independence of the Russian courts. *See* Valeri Rudnev, *Courts Are Gaining More Power—Society Will Be Better Off For It*, IZVESTIIA, May 30, 1995, at 4, *translated in* CURRENT DIG. POST-SOVIET PRESS, vol. XLVII, No. 22, June 28, 1995, at 17; *Russian Law: Groping Ahead*, ECONOMIST (U.S. ed.), Sept. 2, 1995, at 42, *available in* LEXIS, News Library, Curnws File.

19 Because domestic application of international norms is addressed in the Russian Constitution, see *infra* notes 79-80, analysis of "constitutionalization" throughout this arti-

be provided by the example of other legal systems[20] where attempts to include constitutional norms among the sources of defamation law have been successful.[21] The immediate origins of such constitutionalization lie in decisions from the late 1950s and early 1960s by the West German Federal Constitutional Court [*Bundesverfassungsgericht*][22] and the United States Supreme Court.[23] Since then, the European Court of Human Rights[24] and domestic courts in Ja-

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cle will include *consideration of international norms, as well as express constitutional provisions*, as a potential source of law.

Many recent works devote considerable commentary to a broad range of defamation law issues without considering the application of constitutional or international norms to defamation law. *See, e.g.*, sources cited in Krug, *supra* note 1, at 850-51 n.16; Fedotov, *supra* note 6; M.L. Sheliutto, *Sudebnaia praktika po delam o zashchite chesti i dostoinstva* [*Judicial Practice in Cases Concerning Defense of Honor and Dignity*], *in* INSTITUT ZAKONODATEL'STVA I SRAVNITEL'NOGO PRAVOVEDENIIA PRI PRAVITEL'STVE ROSSIISKOI FEDERATSII [RUSSIAN FEDERATION INSTITUTE FOR LEGISLATION AND COMPARATIVE JURISPRUDENCE], KOMMENTARII SUDEBNOI PRAKTIKI, VYPUSK 2 [COMMENTARY ON JUDICIAL PRACTICE, ISSUE 2] 59-66 (1995).

20 For the purposes of this article, the term "legal systems" incorporates not only domestic systems but also supra-national regimes such as those established under the European Convention on Human Rights, see *infra* note 24, and the International Covenant on Civil and Political Rights, see *infra* note 35. Thus, constitutionalization has occurred not only within domestic systems such as those described here, but also in the supervision of domestic systems by the European Court of Human Rights. For example, regarding the impact of the European Court's decisions on Austrian law, see Walter Berka, *Press Law in Austria*, *in* ARTICLE 19, INTERNATIONAL CENTRE AGAINST CENSORSHIP, PRESS LAW AND PRACTICE: A COMPARATIVE STUDY OF PRESS FREEDOM IN EUROPEAN AND OTHER DEMOCRACIES 22, 37 (1993) [hereinafter PRESS LAW AND PRACTICE].

21 *See, e.g.*, the comments of Andrei Kozyrev's attorney, Andrei Rakhmilovich, reported in Leonard Gankin, *How to Divorce Judgements and Facts?*, MOSCOW NEWS, Nov. 3, 1995 *available in* LEXIS, News Library, Curnws File.

22 7 BVerfGE 198 (1958) (*Lüth*), and 12 BVerfGE 113 (1961) (*Schmid-Spiegel*), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 368, 377 (1989). Neither of these cases involved civil defamation case law; however, *Lüth* dealt with the crucial third-party effect issue, and *Schmid-Spiegel* with the question of the application of a public interest dimension in a criminal defamation case. These principles have since been applied in a number of civil defamation cases. *Id.* at 387-94.

Hereinafter, the *Bundesverfassungsgericht* will be referred to as the "German Constitutional Court."

23 New York Times Co. v. Sullivan, 376 U.S. 254 (1964). To the author's knowledge, this was the first direct application in any legal system of a constitutional norm in a civil defamation case. For comparison of the constitutional thought of the U.S. Supreme Court and the German Constitutional Court in the area of free expression, see GEORGE NOLTE, BELEIDIGUNGSSCHUTZ IN DER FREIHEITLICHEN DEMOKRATIE [DEFAMATION LAW IN DEMOCRATIC STATES] (1992) and Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980).

24 Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 416 (1986), and its progeny. The European Court construes and applies the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR]. The ECHR guarantees freedom of expression, with certain enumerated restrictions, in article 10. For a thorough summary and analysis of press law issues under article 10, see Sandra Coliver, *Press Freedom under the European Convention on Human Rights*, *in* PRESS LAW AND PRACTICE, *supra* note 20, at 217-39. On article 10 generally, see Anthony Lester, *Freedom of Expression*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 465-91 (R. St. J. MacDonald, et al. eds., 1993) [hereinafter EUROPEAN SYSTEM]; *see also* Eric Barendt, *Towards a European Media Law?*, 1 MAASTRICHT J. EUR. & COMP. L. 41 (1994).

pan,[25] Canada,[26] England,[27] Spain,[28] Hungary,[29] India,[30] and Australia[31] have been among those which have also recognized the presence of a constitutional dimension in defamation law.[32] The goal of these efforts has been to blur the distinction between private and public law. Proponents of constitutionalization have not sought to eliminate the protection of personality rights, yet they have claimed that it must at times be superseded by a public interest in furthering free expression.[33]

This article will examine several key issues that can be expected to arise in future efforts to include free expression guarantees in article 29 of the Russian Federation Constitution[34] and

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[25] Judgment of June 11, 1986 (Hoppo Journal Co. v. Kozo Igarashi), Saikosai [Supreme Court], *discussed in* Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53, 72-77 (1990). Regarding the constitutionalization of defamation law in Japan, see *id.* at 69-77. *See generally* Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution in Japan's Legal Culture* (Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 3 (1991)); Ellen M. Smith, *Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws*, 14 MICH. J. INT'L L. 871 (1993).

[26] Judgment of Aug. 27, 1992, (Zundel v. The Queen), 95 D.L.R. (4th) 202 (invalidating criminal code provision which was used to prosecute author whose publication denied the fact of the Holocaust during World War II).

[27] Derbyshire County Council v. Times Newspapers Ltd., 2 W.L.R. 449 (H.L. 1993); Rantzen v. Mirror Group Newspapers, 4 All E.R. 975 (C.A. 1993). *See* Eric Barendt, *Libel and Freedom of Speech in English Law*, 1993 PUB. L. 449, 449-58.

[28] Judgment of Feb. 15, 1994 (No. 41/1994), Tribunal Constitucional, (establishing parameters of constitutional protections in defamation), *summarized in* EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, BULLETIN ON CONSTITUTIONAL CASE LAW No. 1, at 60 (1994).

[29] Judgment of June 24, 1994 (No. 36/1994), Alkotmánybíróság [Constitutional Law Court] (declaring unconstitutional article 232 of the Penal Code which prohibited publication of defamatory statements against public officials), *summarized in* EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, BULLETIN ON CONSTITUTIONAL CASE-LAW No. 2, at 130 (1994), *cited and described in* Sept. 24, 1994, Declaration of Agnes Frech, submitted by Article 19, the International Centre Against Censorship, to the European Court of Human Rights in Judgment of Apr. 26, 1995 (Prager & Oberschlick v. Austria), Eur. Ct. H.R. (slip opinion on file with author). Dr. Frech is Presiding Judge of the Appellate Division of the Capital Court, Budapest.

[30] Rajagopal v. State of Tamil Nadu, JT 1994 (6) SC 524 (India 1994) (on file with author and the *Cardozo Arts & Entertainment Law Journal*). *See* Anthony Lester, *Defaming Politicians and Public Officials*, 1995 PUB. L. 1, 4.

[31] Theophanous v. Herald & Weekly Times Ltd., 124 A.L.R. 1 (Austl. 1994), *reprinted in* 68 AUSTL. L.J. REP. 713 (Oct. 12, 1994) (implied free expression guarantee in the Australian Constitution renders defamation claim non-actionable in absence of knowledge of falsity or reckless intent). *See* Lester, *supra* note 30, at 4.

[32] Some of these decisions involved criminal, not civil, defamation. However, with the exception of the third-party effect issue, see *infra* part III.B, the constitutional issues raised in them should be applicable in the civil law context as well.

[33] The interjection of public interest considerations into private relations has been accomplished by such judicial mechanisms as balancing competing interests, distinguishing between defamation plaintiffs, distinguishing between statements of fact and opinion, and imposing heightened standards of liability. *See infra* notes 178-79 and accompanying text.

[34] The Russian Federation Constitution went into effect in December 1993, following its approval in a national referendum. For the history of constitutionalism in Russia, including the 1993 Constitution, see Molly Warner Lien, *Red Star Trek: Seeking a Role for Consti-*

article 19 of the International Covenant on Civil and Political Rights ("ICCPR")[35] as additional sources of Russian civil defamation law. Thus, part III of the article, following a discussion in part II of the Constitutional Court's *Kozyrev* decision, will explore three issues that have received consideration in other legal systems.[36] Part IV considers questions which can be expected to arise in a judicial inquiry extending beyond literal reading of the relevant texts.

II. THE CONSTITUTIONAL COURT'S DECISION IN *Kozyrev*

In his complaint to the Constitutional Court,[37] Andrei Kozyrev argued that article 29 of the Constitution should shield him from bearing the burden of proving the truthfulness of his statement, made over the air on television station NTV [Independent Televi-

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tutional Law in Soviet Disunion, 30 STAN. J. INT'L L. 41 (1994). Regarding the cloud over the December 1993 referendum due to questions about the vote tally, see Sharlet, *supra* note 9, at 775, 777.

Article 29, which guarantees freedom of expression with certain limitations, is set forth in the appendix.

35 Russia is the successor state to the USSR, which ratified the ICCPR in 1976. In July 1995, Russia's Justice Minister, Valentin Kovalev, reported to the Human Rights Committee ("HRC") on Russia's progress toward incorporation of the ICCPR into the Russian legal system. Konstantin Pribytkov, *Human Rights Committee to Consider Russia's Report*, TASS Report, July 17, 1995, *available in* LEXIS, News Library, Curnws File; Konstantin Pribytkov, TASS Report, July 19, 1995, *available in* LEXIS, News Library, Curnws File.

In 1992, Russia acceded to the ICCPR's Optional Protocol, which in article 1 recognizes the competence of the HRC established under article 28 of the Covenant to receive and consider individual claims of ICCPR violations. Article 46(3) of the Russian Constitution states that all persons are entitled under international treaties, to which Russia is a party, to apply to international human rights decision-making bodies if they have exhausted all available domestic means of legal protection. A Polish scholar, reviewing the constitutions of east-central European states, has observed that this provision gives the Russian Constitution "the most intricate link to international standards" among those surveyed. Leszek Leszczynski, *International Standards of Human Rights in Polish Constitutional Regulations and Practice*, 29 INT'L LAW. 685, 695 (1995).

Article 19, which guarantees freedom of expression with certain limitations, is set forth in the appendix, along with article 20, which requires state parties to prohibit certain categories of free expression.

On the basis of actions taken by the Council of Europe in early 1996, it is probable that an additional potential source of international law norms will soon be the European Convention on Human Rights. *See infra* note 67 and accompanying text.

36 Among the publications which have been useful for this study are DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 174-201 (1994); Ulrich Karpen, *Legal Protection of Individuals Against Encroachments of Media, in Particular Defamation—the Case of Germany*, 14 J. MEDIA L. & PRAC. 57 (1993); KOMMERS, *supra* note 22; Kommers, *supra* note 23; PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY (Pnina Lahav ed., 1985); NOLTE, *supra* note 23; Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989); Kyu Ho Youm, *supra* note 25; and PRESS LAW AND PRACTICE, *supra* note 20.

37 *See supra* note 9. The author is unaware of a publication where the full opinion is published. Normally, dismissals of complaints by the Court are not published; however, an exception was made in this case, perhaps due to the Court's estimate of the importance of the message it seeks to convey to the ordinary courts, the jurisdictional issue, or the prominence of the litigants.

sion] in February 1994, that Vladimir Zhirinovskii holds "Fascist-like views."[38] Specifically, his complaint called upon the Court to invalidate the civil code provisions supporting Zhirinovskii's civil defamation lawsuit because the absence in them of a fact/opinion distinction is inconsistent with paragraphs 1 and 3 of article 29.[39]

In finding Kozyrev's complaint inadmissible, the Court paid close attention to the jurisdictional requirements of Russia's system of constitutional review. Operating under a system of constitutional control which combines elements of centralization and diffusion,[40] the Russian Federation Constitutional Court and ordinary courts are empowered to review those acts that fall within their respective competencies. Under that system, the Court has exclusive jurisdiction to declare parliamentary statutes[41] invalid if they are deemed inconsistent with constitutional norms.[42] The Court's competence includes adjudication of constitutional challenges to legislation brought by individual complainants (such as Andrei Kozyrev) against whom the statute in question has been applied or will be applied in a concrete case.[43] In addition, the Court may exercise judicial review upon referral to it of a concrete case by an ordinary court that has concluded that application of a particular statute violates the Constitution.[44] In cases involving constitutional

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38 Gankin, *supra* note 21.

39 KONST. RF art. 29, set forth in the appendix.

40 A centralized or "concentrated" system of judicial review, with exclusive jurisdiction in one specialized constitutional court, contrasts with a "diffuse system," such as in the United States, where courts of general jurisdiction are empowered to resolve constitutional issues. Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741, 743-44 (1992).

41 The Russian Parliament (officially, the "Federal Assembly", which is divided into two houses—the State Duma and the Federation Council) is not the only body empowered to enact federal legislative norms. For example, the President may issue decrees and directives which have general binding force throughout the Russian Federation ("normative presidential acts") so long as they comply with the Constitution and statutes enacted by Parliament. KONST. RF art. 90. When requested to do so by other state bodies, but not by means of an individual citizen's complaint, the Constitutional Court is competent to review normative presidential acts. KONST. RF 125(2)(a), (4). Because the norms governing defamation law are in statutory form in the 1995 Civil Code and the Mass Media Law, this study will focus on the legislature as the source of those rules.

42 KONST. RF art. 125(4); CONSTITUTIONAL COURT STATUTE art. 1.

43 KONST. RF art. 125(4), set forth in the appendix; CONSTITUTIONAL COURT STATUTE arts. 96-100, set forth in the appendix. Admissibility requirements for an individual constitutional complaint are set forth in article 97 of the Constitutional Court Statute. It is noteworthy that exhaustion of appellate review in the ordinary courts is not an admissibility requirement.

Although the Court's competence over individual complaints is limited to those arising out of concrete cases, the Court also exercises abstract norm control over adjudication of questions certified to it by various governmental bodies including the President and the Parliament. KONST. RF art. 125(5).

44 KONST. RF art. 125(4); CONSTITUTIONAL COURT STATUTE arts. 101-104. The provisions for individual constitutional complaint and referral by ordinary courts closely resemble those in Germany. *See* Helmut A. Steinberger, *American Constitutionalism and German Consti-*

challenges to governmental acts other than legislation, however, the Court lacks jurisdiction; instead, such cases fall under the competence of Russia's ordinary courts.[45] Reasoning that treatment of Kozyrev's complaint would entail examination of factual questions,[46] the Court relied on article 3 of the Constitutional Court Statute[47] to conclude that review of the issues raised was a matter only for the ordinary courts.[48]

While ruling Kozyrev's complaint inadmissible, the Court nevertheless discussed several substantive issues. First, the Court questioned Kozyrev's assertion that the civil code provision in question[49] was constitutionally suspect, given that it represented statutory implementation of article 23(1) of the Constitution,

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tutional Development, in LOUIS HENKIN & ALBERT J. ROSENTHAL, CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 199, 210-11 (1990).

The degree to which an ordinary court is required to refer a question regarding a purportedly unconstitutional statute to the Constitutional Court, thereby refraining from unilaterally refusing to apply the statute in a concrete case, is unclear and a subject of considerable disagreement between the Constitutional and Supreme Courts. Justices of both courts exchanged views on this subject at the Supreme Court's October 31, 1995, plenary session, *see supra* note 10, and in December, the topics at a Constitutional Court seminar were the ability of the ordinary courts to apply the Constitution directly and jurisdictional disputes between the two courts. *From the Center*, 4 E. EUR. CONST. REV. 91 (1995). For similar jurisdictional disputes between the Constitutional and Supreme Courts in South Korea, see James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73, 84, 88 (1992).

[45] CONSTITUTIONAL COURT STATUTE art. 3; Kh. Sheinin, *Konstitutsionnyi Sud RF v sisteme organov sudebnoi vlasti* [*The Russian Federation Constitutional Court in the System of Organs of Judicial Power*], ROS. IUST., No. 3, 19, 21 (1995). Thus, exclusive jurisdiction over constitutional challenges to judicial and administrative acts is reserved to the ordinary courts, except when jurisdiction in those cases lies in the Arbitration Courts. This diffusion of judicial review authority contrasts with the broader powers concentrated exclusively in the German Constitutional Court. Regarding that court's competence to adjudicate constitutional complaints, see KOMMERS, *supra note* 22, at 15-17. By 1990, German citizens had filed over 78,000 constitutional complaints, the "overwhelming majority" of which were directed against judicial decisions. Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 847 (1991). The German Constitutional Court's seminal *Lüth* decision, *supra* note 22, arose out of a constitutional complaint against an ordinary court action. *See* discussion *infra* notes 109-13 and accompanying text.

[46] The Court's opinion, at least as published in abridged form, does not go into detail on this point. It implies, however, that the exercise of distinguishing between statements of opinion and those of fact would constitute the prohibited factual examination.

[47] The section of article 3 cited by the Court states:

> In conducting judicial proceedings the Russian Federation Constitutional Court shall abstain from establishing or investigating factual circumstances in all cases when this falls within the competence of other courts or organs.

CONSTITUTIONAL COURT STATUTE art. 3.

[48] Under article 43(1) of the Constitutional Court Statute, the Court must dismiss a complaint if resolution of the question raised in the complaint falls outside the Court's jurisdiction. The Court's decision is final and not subject to appeal. CONSTITUTIONAL COURT STATUTE art. 79.

[49] Article 7 of the RSFSR Civil Code, which the Court noted has now been superseded but not changed by article 152 of the 1995 Civil Code. Regarding these provisions, see discussion in Krug, *supra* note 1, at 852 n.24, 877-78.

which guarantees protection of one's honor and good name.[50]

At the same time, however, the opinion states that Kozyrev's complaint posed "an important and topical question": how in a specific case to reconcile the protection of an individual's honor and good name with "the interest of free discussion of political issues in democratic society?" Having thereby articulated recognition of a public interest element in the defamation calculus, the Court declared to the ordinary courts that it would be necessary for them to determine whether the statement in question in a specific case "fits in the sphere of political discussion," how to distinguish generally between assertions of fact and political value judgments, and whether it is possible to make an objective evaluation of the truth or falsity of the latter. So that the ordinary courts will correctly carry out their duty to "insure the requisite equilibrium between the constitutional rights to protection of one's honor and dignity and the freedom of speech," the Court suggested strongly to the Russian Supreme Court that it issue "guiding explanations"[51] for resolution of the difficult questions posed by Kozyrev's complaint.[52]

While the Court's declarations on these substantive matters might be viewed as contradictory, the first suggesting that the statutory scheme does not implicate Article 29 and the second asserting that it does, it is probably of little consequence since they are not legally binding.[53] Because of the nature of Russia's system of exclusive competencies over different categories of judicial review, the ordinary courts are not obligated to follow the Constitutional Court's declarations.[54] Thus, the only conclusive result of the

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[50] Article 23(1) is set forth in the appendix. For discussion on this question, see *infra* notes 174-75 and accompanying text.

[51] *See supra note* 11 and *accompanying text.*

[52] It appears from the *Kozyrev* opinion that the Court has concluded that article 152 of the 1995 Civil Code is somehow constitutionally suspect. However, rather than treating this as a matter of statutory invalidity—an issue that falls squarely within the Court's competence—the Court appears to suggest that this is a matter of law application, and that any potential insufficiencies can be overcome by the ordinary courts' infusion of constitutional values into consideration of the differing fact situations presented by specific cases. Put another way, the Court is perhaps declining to engage in case-by-case balancing, particularly where two countervailing constitutional rights are asserted, as a jurisprudential method. To this author's knowledge, *Kozyrev* is the only case in which the Constitutional Court has considered a direct confrontation between competing rights guaranteed under chapter two of the 1993 Constitution.

[53] Given the Court's express statement that it found the complaint inadmissible pursuant to article 43(1) of the Constitutional Court Statute, it must be concluded that the opinion's statements about article 23(1) of the Constitution are without effect because they would constitute a determination on the merits and recognition that the complaint was admissible. The Court could have chosen to decide this matter as a question of substantive law, but chose not to.

[54] Whether they will choose to is certainly another question. At this time, the only ac-

Kozyrev decision is that one can say with certainty that the Constitutional Court will not for the foreseeable future be disposed to exercise jurisdiction over a constitutional complaint grounded in the purported unconstitutionality of the statutory scheme's lack of a fact/opinion distinction. Therefore, the Court has agreed that the questions of a constitutional dimension to defamation law, at least the fact/opinion problem, should be subject to a diffuse form of judicial review and law application analysis. As a result, Russia's ordinary courts will probably be the leading fora for consideration of possible constitutionalization of Russian defamation law—in other words, those questions identified by the Constitutional Court in *Kozyrev*, as well as others considered in this article, such as normativity and third-party effect. It is to those questions that we now turn.

III. Textual Analysis: The Russian Constitution, the ICCPR, and Russian Civil Defamation Law

The provisions of article 29 in the Constitution and article 19 in the ICCPR guarantee the exercise of free expression. However, as is generally the case with such textual protections,[55] they are sufficiently indeterminate[56] to allow the exercise of broad judicial discretion as to their construction and application. Before applying them as sources of law in a specific defamation case, a Russian court[57] would have to resolve several issues. The first of these pertains to normativity—whether constitutional norms operate with direct effect as a source of enforceable rights and duties in litigation, and are therefore distinct from a declaratory political program.[58] Moving closer to issues specific to defamation law, the court would also have to determine whether to recognize "third

tion known to the author taken by the Supreme Court related to defamation law and the Constitution is that Court's dismissal of the protest in early 1995—prior to *Kozyrev*—in the *Zhirinovskii v. Gaidar* litigation. *See supra* note 7 and accompanying text.

55 Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, *in* Constitutionalism, Identity, Difference and Legitimacy 353, 356 (Michel Rosenfeld ed., 1994).

56 Thomas Franck has defined "determinacy" as "the literary property of a rule: that which makes its message clear." Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46, 56 (1992).

57 While the *Kozyrev* decision indicates that these questions will in most cases be heard in Russia's ordinary courts, it is possible that the Constitutional Court might exercise jurisdiction over a constitutional complaint which is based on grounds different from those which Kozyrev advanced—for example, a challenge to the moral damages provisions in articles 151 and 152(5) of the 1995 Civil Code and article 62 of the Mass Media Law. *See* Krug, *supra* note 1, at 854-55.

58 Rainer Wahl, *Constitutionalism*, *in* XIIIth International Congress of Comparative Law, Montreal 1990: Reports on German Public Law 85, 85-86 (Rudolf Bernhardt & Ulrich Beyerlin eds., 1990).

party effect," the notion that constitutional norms are applicable to legal relations even in the absence of state action. Finally, it is unclear whether the constitutional text mandates exclusion of all defamatory statements from its protection. Each of these issues—normativity, third-party effect, and exclusion of defamatory expression—will now be examined.

A. *Normativity*

This threshold question asks whether constitutional provisions serve as an independent source of rights and duties in a case before the courts, or whether they act solely as a declaration of political goals to be implemented by the legislature. Put another way, this question of the direct effect or applicability of constitutional norms is a choice between two variants, which I will call "legislative" and "judicial" normativity. The distinction centers on which branch will serve as the ultimate author of the specific parameters of indeterminate constitutional norms, so as to make them applicable to the facts of a specific case.

1. Legislative Normativity

Under legislative normativity,[59] the legislature serves as the sole or primary agent of constitutional normativity—in other words, constitutional provisions lack direct effect until the enactment of statutes that implement and shape the contours of those indeterminate rights. Until the legislature acts, constitutional and international law provisions simply represent symbolic political programs and do not serve as sources of directly enforceable rights. This system of legislative normativity, which one commentator has described as characterized by the "sanctification of statutes,"[60] predominated in the continental civil law tradition until the post-World War II creation of constitutional justice systems,[61] and has

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59 This term is used to emphasize that the legislative branch is not only supreme, but also adheres to the political program articulated in the constitution.

60 Louis Favoreu, *American and European Models of Constitutional Justice*, *in* MERRYMAN ESSAYS, *supra* note 5, at 105, 107.

61 *Id.*; Mauro Cappelletti, *Balance of Powers, Human Rights, and Legal Integration: New Challenges for European Judges*, *in* MERRYMAN ESSAYS, *supra* note 5, at 341, 341-47; MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 153-63 (1989) [hereinafter JUDICIAL PROCESS]. Regarding the "grand debate" among jurists in Weimar Germany over these questions, see Steinberger, *supra* note 44, at 210-11. For a discussion of concerns about the potentially negative impact of judicial review on a representative democracy (West Germany), see Christine Landfried, *Constitutional Review and Legislation in the Federal Republic of Germany*, *in* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON [hereinafter CONSTITUTIONAL REVIEW] 147-67 (Christine Landfried ed., 1988).

been a hallmark of English law for three hundred years.[62]

Judicial normativity and the constitutionalization of an area of law such as defamation represent a fundamental departure from legislative normativity, which excludes the judiciary from a decision-making role beyond that of statutory application. The primary characteristic of judicial normativity is the concept of independent court review[63] of governmental acts, using sources of law other than legislation.[64]

Current Russian defamation law reflects a system that in its practical effect operates in accordance with the precepts of legislative normativity.[65] The only determinacy to article 29 has been rendered by the Parliament. For example, in defamation law article 29's contours have been specified in chapter eight of the 1995 Civil Code and the Mass Media Law. Thus, it may be concluded that article 29 protection extends only to non-defamatory expression or to defamatory statements that are grounded in facts.[66] The broader implications of such a viewpoint are that in the area of defamation law, the legislature commands almost total deference and has exclusive domain over the clarification of indeterminate constitutional human rights protection norms. Support for this conclusion lies in the Russian courts' treatment of defamation cases and in scholarly commentary. In *Zhirinovskii v. Gaidar*, for example, the courts relied entirely on the applicable Civil Code provisions,[67] and according to a leading Russian constitutional scholar, commenting on article 29, statutory Civil Code and Mass Media Law provisions establish limitations on the exercise of article 29 rights.[68]

Legislative normativity represents a thread of continuity with the Soviet constitutional system, which in turn shared this characteristic with most pre-World War II European constitutional sys-

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62 CAPPELLETTI, JUDICIAL PROCESS, *supra* note 61, 126-30; ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 16-19, 22-25 (1989).

63 In some legal systems, such constitutional control has been the responsibility of non-judicial bodies. For example, in Soviet constitutional law, the executive body of the Parliament (the Presidium) and the Procurator-General exercised such responsibilities, a system that its advocates considered more deferential to representative government than one permitting judicial review. Vladimir Tumanov, *Guarantees for Constitutionality of Legislation in the U.S.S.R.*, *in* CONSTITUTIONAL REVIEW, *supra* note 61, 213, 214-17.

64 CAPPELLETTI, JUDICIAL PROCESS, *supra* note 61, at 131-32.

65 The Russian Constitutional Court's opinion in *Kozyrev*, while suggesting that this should not be the case, does not alter this conclusion. *See supra* note 53 and accompanying text.

66 *See* Krug, *supra* note 1, at 847 & n.3.

67 At the time, article 7 of the former civil code. Article 7 did not materially differ from its successor's provisions in articles 150 to 152 of the 1995 Civil Code. *See supra* note 49.

68 E.A. Lukasheva, *Stat'ia 29 [Article 29]*, *in* KONSTITUTSIIA ROSSIIKSOI FEDERATSII: KOMMENTARII 179 (B.N. Topornin ed., 1994) [hereinafter TOPORNIN COMMENTARY].

tems. A defining tenet of Soviet constitutional theory was that the legislature gave constitutional provisions determinate form and made them directly effective. Thus, the 1977 USSR Constitution was considered a hortatory political program that required the implementation of domestic legislation to give its provisions legal force.[69] In this way, the free expression guarantees in the 1977 Constitution received normativity in 1990 with legislative enactment of the 1990 Press Law (abolition of censorship, for example)[70] and in post-Soviet Russia, enactment of the Mass Media Law.

Although legislative supremacy was the goal of Soviet legal reformers, in reality the Communist Party's public interest concerns were applied to statutes in extra-legal fashion or by the judiciary effectuating Party commands such as those requiring conformity to the Rules of Socialist Community Life.[71] In this way, the Soviet system differed from those pre-World War II European models that it so closely resembled in form. This situation led reformers in the late 1980s to press for the establishment of a law-based state where the legislature would in reality, and not just in constitutional theory, exercise exclusive constitutional normativity.[72] In the mid-1990s, the question is whether such a legislative normativity approach is compatible with Russia's new constitutional order.

2. The Russian Constitution and Judicial Normativity

In the past two years, Russia has sought to put in place a constitutional order, based on the December 1993 Constitution,[73] which identifies and guarantees human rights and is grounded in explicit textual recognition of judicial normativity.[74] As to substan-

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69 Antti Korkeakivi, *A Modern Day Czar? Presidential Power and Human Rights in the Russian Federation*, 2 J. CONST. L. IN E. & CENT. EUR. 76, 83-84 (1995); O.S. Ioffe, *Administrative Law in the Soviet Legal System: Concluding Remarks*, *in* SOVIET ADMINISTRATIVE LAW: THEORY AND POLICY 499 (George Ginsburgs et al. eds., 1989); Tumanov, *supra* note 63, at 214-17 (judicial review as exercised by the United States Supreme Court and West German Constitutional Court "hardly compatible with the principle of the supremacy of representative bodies"). It is noteworthy that Professor Tumanov is now the Chairman of the Russian Constitutional Court. His comments appear to reflect, at least in part, the adherence of reformers in the late 1980s to the concept of the law-based state, grounded in legislative supremacy over extra-legal administrative mechanisms. *See* discussion in Krug, *supra* note 1, at 873-75; *supra* notes 16-17 and accompanying text.

70 1990 Press Law art. 1. Regarding the 1990 Press Law, see Krug, *supra* note 1, at 847-49.

71 *See* Krug, *supra* note 1, at 871 & nn.117-18; Fedotov, *Russian Pendulum*, *supra* note 6, at 42.

72 Kartashkin, *supra* note 16, at 893-94.

73 The Constitution in Russian and in English translation may be found in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, vol. XVI, 1, 43 (Albert P. Blaustein & Gilbert H. Flanz eds., 1994) [hereinafter WORLD CONSTITUTIONS].

74 Because it is limited to human rights constitutionalism, this discussion does not address those parts of the Russian constitutional order dealing with governmental relations:

tive rights, chapter two of the Constitution ("Rights and Freedoms of Man and Citizen")[75] sets forth individual rights which are recognized and guaranteed in articles 19 through 54.[76] Explicit provisions demonstrate that chapter two is intended to be more than a declaratory political program: articles 15(1) and 18 expressly provide that the constitutional norms, including the rights and freedoms recognized in chapter two, shall have direct effect.[77]

As to international norms such as those set forth in the ICCPR,[78] the Constitution explicitly mandates the incorporation of agreements to which the Russian Federation is a party into the domestic "legal system";[79] however, it is unclear as to whether this formulation means that they are self-executing and therefore receive the same direct effect as constitutional norms themselves.[80] The Russian Federation Statute on International Treaties, enacted in 1995,[81] seeks to clarify the general issue, but does not provide guidance as to the treatment of the ICCPR. Under article 5(3) of the statute, an international agreement to which Russia is a party will be self-executing in domestic law unless the agreement itself requires enactment of implementing domestic legislation.[82] How-

executive versus legislative powers, or questions of federalism. For publications in English regarding the human rights provisions in the 1993 Constitution, see Korkeakivi, *supra* note 69, at 83-86, 91-94; William W. Schwarzer, *Civil and Human Rights and the Courts Under the New Constitution of the Russian Federation*, 28 INT'L LAW. 825 *passim* (1994); Lien, *supra* note 34, at 108-13; and Sharlet, *supra* note 9, at 777-78. A survey in Russian of the civil, political, and personal rights guaranteed by the Constitution may be found in A.I. Kovalenko, OSNOVY KONSTITUTSIONNOGO PRAVA ROSSIISKOI FEDERATSII (FUNDAMENTALS OF THE CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION) 34-48 (1994); *see also* the commentaries on specific constitutional provisions in TOPORNIN COMMENTARY, *supra* note 68, and KOMMENTARII K KONSTITUTSII ROSSIISKOI FEDERATSII (L.A. Okun'kov et al. eds., 1994) [hereinafter KOMMENTARII].

75 KONST. RF arts. 17-64.

76 KONST. RF art. 17(1), set forth in the appendix.

77 KONST. RF arts. 15(1), 18, set forth in the appendix.

78 *See supra* note 35 and accompanying text.

79 KONST. RF art. 15(4). *See* Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 464-67 (1994). For the significance of the term "Russian legal system" (a notion encompassing not only legislation, but administrative acts and legal practice as well), see *id.* at 464-65. According to Danilenko, the wording of article 15(4) "obviously includes sources of general international law, in particular general customary law." *Id.* at 465. Article 17(1) of the Constitution specifies that the fundamental rights set forth in articles 19 through 54 shall be recognized and guaranteed "in conformity with" international norms. KONST. RF art. 17(1), set forth in the appendix.

80 Gennady M. Danilenko, *Primenenie mezhdunarodnogo prava vo vnutrennei pravovoi sisteme Rossii: praktika konstitutsionnogo suda* [*Incorporation of International Law in the Domestic Russian Legal System: The Practice of the Constitutional Court*], GOSUDARSTVO I PRAVO [GOS. I PRAVO], No. 11, 115, 119-24 (1995).

81 *Zakon o mezhdunarodnykh dogovorakh Rossiiskoi Federatsii* [*Statute on International Treaties of the Russian Federation*], ROS. GAZ., July 21, 1995, at 5-6 (adopted by the State Duma on June 16, 1995), *translated in* William E. Butler, 34 INT'L LEGAL MATERIALS 1370 (1995).

82 Article 5(3) states in full:

> The provisions of officially published international treaties of the Russian Federation which do not require the publication of intra-state acts for application

ever, this does not resolve the question of whether the ICCPR should be self-executing because consensus is lacking as to whether it is intended to be directly applicable[83] and therefore leaves open the question of how to apply the criteria of article 5(3) of the Statute on Treaties. As a result, it cannot be stated conclusively on the basis of the constitutional text or the applicable legislation that the ICCPR serves as a source of law which may be invoked before domestic courts in the absence of implementing legislation.[84] Meanwhile, however, the Russian Constitutional Court has applied or cited the ICCPR on at least two occasions, in decisions invalidating legislative acts, without expressly addressing the self-execution question.[85]

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shall operate in the Russian Federation directly. Respective legal acts shall be adopted in order to effectuate other provisions of international treaties of the Russian Federation.

Butler, *supra* note 81, at 1375-76. Article 7(2) of the 1995 Civil Code sets forth a similar formulation. *See infra* notes 129, 133-34 and accompanying text.

These provisions reflect the distinction between the question of self-execution of international agreements as a matter of domestic law, and the question of whether the agreement's parties intended it as a matter of international law to be directly applicable in the parties' domestic legal systems. *See* Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 317-21 (1992).

[83] This disagreement centers on interpretation of article 2(2) of the ICCPR, which calls upon parties to the Covenant to adopt necessary measures "to give effect to the rights recognized" within its provisions in those cases where not already provided for in "existing legislative or other measures." MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 54 (1993); *see* Antonio Cassese, *Modern Constitutions and International Law*, 192 RECUEIL DES COURS 331, 397-98 (1985); Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin ed., 1981) [hereinafter INTERNATIONAL BILL OF RIGHTS], 311, 312-15; *see also* Buergenthal, *supra* note 82, at 337-40 (discussing article 2 in the American Convention on Human Rights, which was modelled after ICCPR article 2(2)).

The question of direct applicability is distinct from that of the extent of a state-party's discretion to decide the means of implementing the ICCPR's terms in its domestic legal system; rather, it asks whether as a matter of international obligation a state-party is required to make the agreement self-executing under their domestic law.

[84] The same can be said regarding the ECHR, see *supra* note 24 and accompanying text, assuming that Russia decides to accede to it. Regarding the unsettled nature of the question of direct applicability under the ECHR, see Buergenthal, *supra* note 82, at 335-37.

On February 8, 1996, the Committee of Ministers of the Council of Europe approved Russia's application to become the Council's 39th full member, on condition that Russia take several steps including accession to the ECHR. In anticipation of such approval, the Russian Federation State Duma in July 1994 proclaimed Russia's readiness to take such action. *State Duma Declares Commitment to Human Rights*, COMTEX INT'L INTELLIGENCE REP., July 26, 1994, *available in* LEXIS, News Library, Curnws File. Due to the extensive jurisprudence of the European Court of Human Rights concerning ECHR article 10, see *supra* note 24 and accompanying text, accession to the ECHR will perhaps have a significant impact on Russian defamation law. However, since accession has not yet occurred at the time of this writing, such questions are beyond the scope of this article.

[85] Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti statei 220(1) i 220(2) Ugolovno-protsessual'nogo kodeksa RSFSR v sviazi s zhaloboi grazhdanina V.A. Avetiana [Decree of the Russian Federation Constitutional Court in the Case Concerning Verification of the Constituionality of Articles 220(1) and 220(2) of the RSFSR Code of Criminal Procedure in Connection with the Complaint of

In addition to having direct effect, the Constitution's norms are expressly made superior to all legislative acts or other domestic laws in the event of a conflict.[86] The supremacy of chapter two rights is complemented by article 55(2), which prohibits "[l]aws which deny or diminish human and civil rights and freedoms . . . ."[87] Provisions in treaties to which Russia is a party also are accorded higher rank in the legal hierarchy than are conflicting domestic laws.[88] Statutes limiting the exercise of fundamental rights are invalid unless they conform to the specific requirements enumerated in article 55(3).[89]

In institutional form, this human rights protection system is based on judicial normativity, with the Constitutional and ordinary courts empowered to exercise judicial review over those governmental acts that fall within their respective spheres of competency[90]. In the event of a challenge to a statute based on its alleged non-conformity with international norms, meanwhile, it appears

citizen V.A. Avetian], SZ RF, Issue No. 19, Item No. 1764 (May 8, 1995) (referring to the ICCPR Preamble for persuasive authority) [hereinafter *First Code of Criminal Procedure Case*]; Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti statei 2(1) i 16 Zakona RSFSR ot 18 oktiabria 1991 goda "O reabilitatsii zhertv politicheskikh repressii" (v redaktsii ot 3 sentiabria 1993 goda) v sviazi s zhaloboi grazhdanki Z.V. Aleshnikovoi [Decree of the Russian Federation Constitutional Court in the Case Concerning Verification of the Constituionality of Articles 2(1) and 16 of the RSFSR Statute "On the Rehabilitation of Victims of Political Repression" of October 18, 1991 (amended September 3, 1993) in Connection with the Complaint of citizen Z.V. Aleshnikova], SZ RF, Issue No. 22, Item No. 2168 (May 29, 1995) (applying the equal protection provisions in ICCPR art. 26) [hereinafter *Rehabilitation of Victims Case*]. Regarding the latter case, see Danilenko, *supra* note 80, at 123. It should be noted that the ICCPR did not serve as the sole grounds for the Court's decisions in these cases.

86 KONST. RF art. 15(1), set forth in the appendix.

87 KONST. RF art. 55(2), set forth in the appendix.

88 KONST. RF art. 15(4), set forth in the appendix. Because of the explicit language to this effect in this Article, it must be assumed that this is the case regardless of whether the treaty is deemed self-executing. Danilenko, *supra* note 80, at 119, 123-24.

89 Article 55(3) of the Constitution enumerates the circumstances in which limitations may be placed on the exercise of constitutional rights. KONST. RF art. 55(3), set forth in the appendix.

90 The role of the Arbitration Courts in this system is somewhat unclear. According to the applicable legislation, these courts are empowered to make referrals to the Constitutional Court for review of the constitutionality of legislation applied or subject to application in cases pending before them. Federal'nyi konstitutsionnyi zakon ob arbitrazhnykh sudakh v Rossiiskoi Federatsii [Federal Constitutional Law on the Arbitration Courts of the Russian Federation], SZ RF, Issue No. 18, Item No. 1589 (1995) (Apr. 28, 1995) (effective July 1, 1995), arts. 10(1)(4) (Supreme Arbitration Court), 26 (Arbitration Circuit Courts of Appeal), 36(4) (Arbitration Courts of First Instance). As in the case of the ordinary courts, see *supra* note 44, the degree to which this imposes a duty to refer on the Arbitration Courts is unclear. Meanwhile, review of decisions of the Arbitration Courts, including those on questions of referral, is not within the jurisdiction of the Constitutional Court. As to non-legislative governmental acts, the Arbitration Courts are prohibited from applying them if they are inconsistent "with law"—a phrase which might include the Constitution as well as legislation. ARBITRATION PROCEDURE CODE art. 11(2). In sum, the place of the Arbitration courts in Russia's system of constitutional control appears to be similar to that of the ordinary courts. V. Zhuikov, *Novaia Konstitutsiia i sudebnaia vlast' v Rossiiskoi Federatsii*

that the ordinary courts are authorized to refuse application of the statute, rather than required to refer it to the Constitutional Court.[91] For the arbitration courts, this principle is expressly stated in the applicable statute.[92] These questions are potentially significant in light of article 7(2) of the 1995 Civil Code, which states with certain exceptions that the Code's provisions are subordinate to conflicting norms in international agreements to which Russia is a party.[93]

Both the Constitutional Court and the ordinary courts in 1995 demonstrated their willingness to exercise judicial review and give direct effect to constitutional norms. Since its resumption of activity in early 1995, the Constitutional Court has exercised its powers of concrete norm control in at least seven cases, invalidating provisions in the Housing Code,[94] Criminal Procedure Code,[95] and three other statutes.[96] In the first five months of its activity in 1995,

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[*The New Constitution and Judicial Power in the Russian Federation*], ROS. IUST., No. 1, at 2 (1994).

91 Danilenko, *supra* note 80, at 116, 122-24; Danilenko, *supra* note 79, at 466.

92 If a statute conflicts with an international agreement to which Russia is a party, an arbitration court must give the international norm superior force. ARBITRATION PROCEDURE CODE art. 11(3).

93 *See infra* note 134-38 and accompanying text.

94 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti chastei pervoi i vtoroi stat'i 54 Zhilishchnogo kodeksa RSFSR v sviazi s zhaloboi grazhdanki L.N. Sitalovoi [Decree of the Russian Federation Constitutional Court in the Case Concerning Verification of the Constitutionality of Parts 1 and 2 of Article 54 of the RSFSR Housing Code in Connection with the Complaint of Citizen L.N. Sitalova], SZ RF, Issue No. 18, Item No. 1708 (May 1, 1995), [hereinafter, *First Housing Code Case*]; Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti chasti pervoi i punkta 8 chasti vtoroi stat'i 60 Zhilishchnogo kodeksa RSFSR v sviazi s zaprosom Muromskogo gorodskogo narodnogo suda Vladimirskoi oblasti i zhalobami grazhdan E.R. Taknovoi, E.A. Ogloblina, A.N. Vashchuka [Decree of the Russian Federation Constitutional Court in the Case Concerning Verification of the Constitutionality of Part 1 and Part 2(8) of Article 60 of the RSFSR Housing Code in Connection with the Inquiry of the Murom City People's Court of Vladimir Province and the Complaints of Citizens E.R. Taknova, E.A. Ogloblin, and A.N. Vashchuk], SZ RF, Issue No. 27, Item No. 2622 (July 3, 1995) (invalidating article 60(2)(8) of the Housing Code). Regarding these decisions, see Peter B. Maggs, *The Russian Constitutional Court's Decisions on Residence Permits and Housing*, 2 PARKER SCH. J. E. EUR. L. 561 (1995).

95 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti chasti piatoi stat'i 209 Ugolovno-protsessual'nogo kodeksa RSFSR v sviazi s zhalobami grazhdan R.N. Samigullinoi i A.A. Apanasenko [Decree of the Russian Federation Constitutional Court in the Case Concerning Verification of the Constitutionality of Article 209, Part Five, of the RSFSR Code of Criminal Procedure in Connection with the Complaints of Citizens R.N. Samigullina and A.A. Apanasenko], SZ RF, Issue No. 47, Item No. 4551 (Nov. 20, 1995); *First Code of Criminal Procedure Case*, *supra* note 85.

96 *Rehabilitation of Victims Case*, *supra* note 85; Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti abzatsa 2 chasti sed'moi stat'i 19 Zakona RSFSR ot 18 aprelia 1991 goda "O militsii" v sviazi s zhaloboi grazhdanina V.M. Minakova [Decree of the Russian Federation Constitutional Court in the Case Concerning Verification of the Constitutionality of Article 19(7)(2) of the RSFSR Statute "On the Militia" of April 18, 1991 in Connection with the Complaint of citizen V.M. Minakov], SZ RF, Issue No. 24, Item No. 2342 (June 12, 1995); Decree of Dec. 20, 1995, *reported in* B.B.C.

the Court received 3,101 communications requesting that it take action. Of those, some 600 survived initial screening to be reviewed for admissibility,[97] with some fifty petitions undergoing the Court's substantive review.[98]

Among the ordinary courts, the Court of Appeals for Iaroslavl' Province, in two decisions affirmed by the Supreme Court's Civil Chamber in March 1995,[99] which were in turn affirmed by the Supreme Court's Presidium four months later, relied on the direct effect provision of Constitution article 15(1) to invalidate acts by the Province's administrative organs.[100] In addition, the Supreme Court's guiding explanations, issued on October 31, 1995, strongly endorse the normativity of constitutional norms and call upon lower ordinary courts to give them direct effect and supreme legal force over governmental acts, including legislation.[101]

Despite these affirmations of judicial normativity, the specific area of Russian defamation law appears to straddle the gap between the reality of legislative normativity and the aspirations of judicial normativity. On the one hand, in practice it exhibits the characteristics of the former; on the other, it operates within a constitutional order that on a textual basis and in the Constitutional Court's actual exercise of judicial review is directed toward the latter. However, it may be concluded that nothing in current Russian law mandates a legislative monopoly on normativity. Therefore, if courts were to apply the Constitution and ICCPR as additional sources of law, giving articles 29 and 19 direct effect, such action would have a solid foundation.

Report, Dec. 20, 1995, *available in* LEXIS, News Library, Curnws File (invalidating a provision, in effect since the Soviet period, of Article 64 of the Russian Criminal Code which defined treason to include the act of escaping abroad and refusing to return home).

97 Under article 40 of the Constitutional Court Statute, a communication must initially be screened to determine if it falls under the Court's jurisdiction, satisfies format requirements, has been submitted by a person or organization with standing, and is accompanied by the appropriate filing fee. If deficiencies regarding the second and fourth of these criteria are eradicated, the petition may be resubmitted.

98 Interview with V.A. Tumanov, Constitutional Court Chairman, Gos. i Pravo, No. 9, at 3-4 (1995). Of those cases under substantive review by the Court, eleven had been decided at the time of the interview.

99 Decision of Mar. 1, 1995 (Case #8G-95-1), and Decision of Mar. 1, 1995 (Case #3G-95-2), *published with introductory note in* Gos. i Pravo, No. 7, at 11-18 (1995). The courts in these cases concluded that the administrative acts in question, which were challenged by residents of several municipalities in Iaroslavl' Province, were inconsistent with article 130(1) of the Constitution and therefore unenforceable. Article 130(1) guarantees certain rights of local self-government. Konst. RF art. 130(1).

100 Decree of July 5, 1995, Biull. Verkh. Suda RF, Issue No. 9, at 1 (1995) (consolidated decision denying a protest by the Russian Federation Deputy Procurator-General based on the claim that the cases fell within the exclusive jurisdiction of the Constitutional Court).

101 *See supra* note 10; *see also* Zhuikov, *supra* note 90, at 2-3. Justice Zhuikov is Deputy Chairman of the Supreme Court.

B. *Normativity in Private Relations: Third-Party Effect*

Although constitutional norms might have direct effect as a general principle, they will not be imposed on private legal relations unless the courts recognize the principle of third-party effect,[102] which has been characterized as "recognition of constitutional rights in private legal relationships."[103] Opposition to this principle is based on the notion of strict separation of the public and private spheres.[104] Put another way, the third-party effect question is an extension of the legislative versus judicial normativity "grand debate":[105] it asks whether assessment of the effect of constitutional norms in relations between private parties is the exclusive domain of the legislature, with the result that a constitutional provision without legislative implementation may be construed to bind only the state.

This issue has been examined in a number of legal systems[106] and is similar to the state action question in the United States.[107] When considered in the defamation law context, it has been accompanied by examination of the nature of constitutional free expression guarantees. In 1956, the Japanese Supreme Court rejected a defamation defendant's constitutional defense while ruling that the issues in the case "related only to private law."[108] Two

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102 Often referred to by its German term: *Drittwirkung*. *See* Andrew Clapham, *The 'Drittwirkung' of the Convention*, *in* THE EUROPEAN SYSTEM, *supra* note 24, at 163.

103 Quint, *supra* note 36, at 337. The third-party effect issue is distinguished from the broader "horizontal effects" question, which concerns the validity of imposition of positive duties on the state. NOWAK, *supra* note 83, at 37-38.

104 *See* Clapham, *supra* note 102, at 202 ("[t]he destruction of the public/private barrier conjures up Orwellian visions of intrusions into every area of private life"); *see also* Quint, *supra* note 36, at 258; CURRIE, *supra* note 36, at 182-84. Regarding Russia specifically, *see* Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 L.Q. REV. 56 (1994).

105 *See* Steinberger, *supra* note 44, at 211; *supra* text accompanying notes 59-72.

106 Clapham, *supra* note 102, at 164 (regarding Germany, Austria, Switzerland, and the Netherlands); KURT HELLER, OUTLINE OF AUSTRIAN CONSTITUTIONAL LAW 43 (1989). Regarding Japan and Germany, see discussion *infra* at notes 108-10 and accompanying text. The European Court of Human Rights implicitly recognized the principle in a recent determination that a large damages award in a civil defamation case was a violation of article 10 of the ECHR, even though article 10(1) guarantees the right to exercise freedom of expression "without interference by public authority." Tolstoy Miloslavsky v. United Kingdom, 20 Eur Ct. H.R. (Ser. A), at 442 (1995).

107 In United States First Amendment jurisprudence, unless "state action" is present, the free expression guarantees do not apply against acts by private persons. *See* Quint supra note 36, at 264-73, 302 n.180. An important element in the landmark decision in *New York Times v. Sullivan* was the United States Supreme Court's conclusion that state action is present in the judiciary's adjudication of civil defamation cases. 376 U.S. at 265.

108 Judgment of July 4, 1956 (Kageyama v. Oguri), Saikosai [Supreme Court], *translated in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN, SELECTED SUPREME COURT DECISIONS, 1948-1960 47, 48-49 (1964). *See* discussion in Youm, *supra* note 25, at 69-70. The Court's more recent case law reflects a reversal of this position: *Id.* at 72-77 (discussing the 1986 decision in *Hoppo Journal Co. v. Kozo Igarashi*).

years later, the German Constitutional Court faced similar questions in its seminal *Lüth* decision.[109] While not a defamation case, *Lüth* serves as the forerunner of the trend toward constitutionalization of this area of law, due to its treatment of the third-party effect issue.[110]

Lüth was decided amidst considerable controversy over the third-party effect issue.[111] The issues in the case centered on the availability of injunctive relief to the plaintiff film producer and distributor against the defendant's published appeal, based on the plaintiff's Nazi past, for a boycott of the plaintiff's film. The trial court, upholding the plaintiff's claim based on article 826 of the German Civil Code,[112] viewed the case as one involving solely private interests.[113] The defendant responded with a complaint to the Constitutional Court, grounded in the free expression guarantees in article 5(1) of the Basic Law. In resolving the case, the Constitutional Court considered three options: (1) denial of the complaint, based on the inapplicability of the Basic Law to private law relations; (2) reversal of the civil court decision, giving direct effect to article 5(1); or (3) a middle ground retaining the fundamental aspects of the private law scheme, but requiring consideration of constitutional norms.

In the part of the decision most significant for the third-party effect question, the Court chose the third option. Acknowledging that German historical experience dictated that fundamental rights guarantees have their fullest impact against the state, the Court at the same time concluded that the reach of constitutional values must also extend to all legal relationships.[114] Although the Court did not give those values direct effect, it adopted the concept of "reciprocal (or indirect) effect,"[115] whereby constitutional norms influence, rather than supersede, private values in a balancing analysis,[116] and thereby rejected the notion of the private sphere's impermeability from public interests.

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109 7 BVerfGE 198 (1958). *See* KOMMERS, *supra* note 22, at 368.

110 Regarding *Lüth*, see Kommers, *supra* note 23, at 687-88; CURRIE, *supra* note 36, at 178-88; Quint, *supra* note 36, at 252-65.

111 Quint, *supra* note 36, at 254-58.

112 Article 826, "Wilful Damage Contrary to Public Policy," states in full: "A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage." GERMAN CIVIL CODE art. 826, *translated in* SIMON L. GOREN, THE GERMAN CIVIL CODE 153 (1994).

113 KOMMERS, *supra* note 22, at 376.

114 CURRIE, *supra* note 36, at 175.

115 *Id.* at 180.

116 Quint, *supra* note 36, at 261-64, 273.

In Russia, as in Germany,[117] the constitutional text does not appear to speak explicitly to the third-party effect question,[118] and the issue apparently has not yet been directly addressed in a concrete case before the Russian courts.[119] One commentator, meanwhile, has concluded that the Constitution unequivocally requires recognition of third-party effect, due to the language of article 17(3), which prohibits the exercise of human rights when it violates the rights of others.[120] While such an interpretation is certainly plausible, it should be noted that the language of article 17(3) is similar to certain provisions of the German Basic Law[121] that the German Constitutional Court did not find sufficient to require third-party effect in the *Lüth* case. The Russian and German texts also contain similar provisions guaranteeing access to the courts in the case of claimed violations of rights, but in cases where the acts in question have been committed by *public* officials.[122] However, what the German Basic Law lacks, and the Russian Constitution contains, is a more general guarantee of court access[123]—a provision that when read in conjunction with article 17(3) would support application of third-party effect.

Under Russia's constitutional structure, another question is whether international law might decide the third-party effect issue.

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117 One author has observed that the German Basic Law "does not yield a definite conclusion on whether constitutional rights should generally apply to regulate legal relationships among private individuals." *Id.* at 257.

118 This issue, of course, does not arise in criminal law, and therefore would not enter into analysis of the constitutionality of articles 130 and 131 of the Russian Criminal Code. *See* Krug, *supra* note 1, at 852 & nn.19-21.

119 G. Gadzhiev, *Neposredstvennoe primenenie sudami konstitutsionnykh norm* [*Direct Application of Constitutional Norms by the Courts*], ROS. IUST., No. 12, at 24, 27 (1995). Justice Gadzhiev is a member of the Constitutional Court.

120 Lien, *supra* note 34, at 108 n.336. Article 17(3) is set forth in the appendix.

121 Article 2 of the Basic Law, "Rights of liberty," states in full:

> (1) Everyone shall have the right to the free development of his personality *in so far as he does not violate the rights of others* or offend against the constitutional order or the moral code.
>
> (2) Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. *These rights may only be encroached upon pursuant to a law.*

GRUNDGESETZ [Basic Law] [GG] art. 2 (F.R.G.), *translated in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 227 (Ulrich Karpen ed., 1988) [hereinafter ESSAYS ON THE BASIC LAW] (emphasis added).

122 Article 46(2) of the Russian Constitution states in full: "Decisions and actions (or inaction) by organs of state authority, organs of local self-government, public associations, or officials may be appealed against in court." KONST. RF art. 46(2). Article 19(4) of the German Basic Law states in relevant part: "Should any person's right be violated by public authority, recourse to the court shall be open to him." GG art. 19(4), *translated in* ESSAYS ON THE BASIC LAW, *supra* note 121, at 235.

123 Article 46(1) states in full: "Each person shall be guaranteed protection of his or her rights and freedoms." KONST. RF art. 46(1).

The German Constitutional Court did not consider the application of international law in *Lüth.* In 1958, the ICCPR did not exist, and although West Germany was a party to the ECHR, that agreement had received little application. Moreover, the Basic Law is somewhat ambiguous regarding the domestic normativity of provisions in international agreements.[124] Under the 1993 Russian Constitution, on the other hand, the ICCPR's norms, including the free expression provisions in article 19, are a direct part of the Russian legal system.[125] As a result, the extent to which the ICCPR's norms apply to private relations in Russia should depend on whether those norms themselves are intended to operate with third-party effect.

Russian courts would not find abundant outside direction in attempting to determine whether the ICCPR addresses this problem because the effectiveness of the ICCPR depends upon agreed interpretation and uniform application,[126] international law is the source of law for interpretation, and the Human Rights Committee[127] has declared that its provisions are to be interpreted independent of any particular domestic legal system and of all dictionary definitions.[128] The HRC provides interpretation through decisions in optional protocol cases and interstate complaints (none had been made by 1993),[129] as well as "general comments" made pursuant to article 40(4).[130] However, this leaves considerable room for interpretation of international law by domestic courts, since there is little definition of the contours of a number of the ICCPR's indeterminate norms, including those in article 19.[131]

Although little interpretation has been made of the relevant

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124 Article 25 of the Basic Law, entitled "Public international law and federal law," states in full: "The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory." GG art. 25, *translated in* ESSAYS ON THE BASIC LAW, supra note 121, at 237. Whether this provision applies to rules found in international agreements, as well as to customary international law, is not clear from the text.

125 KONST. RF arts. 15(4), 17(1), 18. *See* discussion *supra* at notes 77-85 and accompanying text.

126 Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in* INTERNATIONAL BILL OF RIGHTS, *supra* note 83, at 32, 67-68.

127 *See supra* note 35.

128 DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, §§ 4.46-4.48, at 158-60 (1991).

129 Dinah Shelton, *Compliance Mechanisms, in* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 149, 160 (Hurst Hannum & Dana D. Fischer eds., 1993).

130 MCGOLDRICK, *supra* note 128, at 498-508.

131 For a list of countries where ICCPR provisions have been invoked before domestic courts, see MCGOLDRICK, *supra* note 128, at § 1.37, at 21.

ICCPR provisions,[132] scholarly commentary supports the view that numerous ICCPR provisions, including article 19, are intended to have third-party effect.[133] If so, this would be controlling in Russian law, due to article 15(4), even if it were to be determined that article 29 of the Constitution does not operate with third-party effect.

Outside the Constitution and ICCPR, the Russian Parliament itself perhaps has resolved the third-party effect question by including provisions in articles 2 and 7 of the 1995 Civil Code that act as "portals"[134] into private law for the entry of public values in the form of constitutional and international norms. Stating that human rights and freedoms "are protected by civil legislation," article 2(2)[135] appears to dictate that the 1995 Civil Code be interpreted and applied in conformity with constitutional norms: a provision of considerable potential significance in civil defamation law because of the opportunities for judicial interpretation[136] and exercise of discretion in specific cases.[137] Article 7(2) recognizes the direct effect of international treaties on private relations recognized in the Code, and their supremacy over conflicting statutory provisions, unless the treaty in question is deemed to require domestic implementing legislation.[138]

More explicit than the so-called "general clauses" in German Civil Code sections such as 826,[139] these provisions, which are set forth in the "General Part" of the 1995 Civil Code and therefore control the personality rights protection provisions of chapter eight,[140] demonstrate legislative intent that the third-party effect

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132 Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT'L L.J. 371, 400, 407, 409, 417 (1992).

133 NOWAK, *supra* note 83, at 289, 344.

134 The term "portals" is borrowed from Quint, *supra* note 36, at 264 n.65. Examination of a statute is significant here because opposition to third-party effect would not be grounded in a constitutional provision, but rather in a doctrinal preference for insulation of the statutory scheme from constitutional intervention. If the Parliament itself has rejected this position, that is perhaps dispositive of the general third-party effect issue.

135 1995 CIVIL CODE art. 2(2), set forth in the appendix. This article establishes the general rule. The potential exclusion set forth in it for certain "non-material benefits" [*nematerial'nye blaga*], even if construed to apply to a constitutional right [*prava*] such as freedom of expression, is simply an exception to the general principle.

136 For example, on such questions as the standard of liability and existence of a fact/opinion distinction. *See* Krug, *supra* note 1, at 848-49, 856-58.

137 For example, the statutory discretion afforded the courts in assessing the extent of moral damages. *See* Krug, *supra* note 1, at 849 & n.12, 851-56.

138 *See* discussion in Danilenko, *supra* note 80, at 122.

139 In Germany, the courts have interpreted indeterminate language such as "good morals" in article 826 to incorporate fundamental norms. Quint, *supra* note 36, at 253 n.18, 264. Regarding application of article 826 in *Lüth*, *see supra* notes 111-16 and accompanying text. For similar construction of general clauses such as "good faith" in the Austrian Civil Code, see HELLER, *supra* note 106, at 43.

140 The General Part in a civil code accumulates all the rules relevant to any civil law

should apply to private relations in most cases.[141] Less conclusive is the question of whether article 7(2) requires giving the ICCPR third-party effect: although article 7(2) dictates that international norms generally are applicable to private civil relations and will supersede conflicting statutory provisions, it is possible that the ICCPR might fall under the exception for treaties that as a matter of international law require domestic legislative implementation.[142] In this regard, however, it should also be noted that the Constitutional Court has cited or applied the ICCPR without considering the necessity of an implementation requirement.[143]

In conclusion, literal textual analysis does not yield a clear-cut conclusion as to whether constitutional and international norms would be found to operate with third-party effect in Russian law. If confronted with this question, it is possible that a Russian court would go beyond the texts in order to resolve it, which might involve examination of the German Constitutional Court's decision in *Lüth*. *Lüth* was decided in a setting with interesting parallels to 1990s Russia. For example, both 1950s West Germany[144] and 1990s Russia experienced a resurgence of private personality rights protection law that was viewed as essential to a legal order emerging from totalitarian or authoritarian rule, along with the creation of new constitutional courts with broad powers of judicial review.[145] For this reason, among others,[146] the German experience is per-

issue, thereby relieving subsequent chapters from the necessity of repeating the same rules or making cross-references to them. Olimpiad S. Ioffe, *Soviet Civil Law, in* LAW IN EASTERN EUROPE SERIES, No. 36, 15 (1988).

141 There are no public legal relations in the 1995 Civil Code. 1995 CIVIL CODE art. 1, §§ 1-2, set forth in the appendix.

142 Regarding differing interpretations of the ICCPR on this question, and the ambiguities in the Russian Constitution on the self-execution question generally, see *supra* notes 78-84 and accompanying text.

143 *See supra* note 85 and accompanying text.

144 For example, the West German Supreme Court's recognition in 1954 of a general right of personality to buttress protections afforded in the 1900 Civil Code. *See* Quint, *supra* note 36, at 278-79.

145 Although Weimar Germany had a Constitutional Court, its jurisdiction was limited, including an absence of competence to adjudicate individual constitutional complaints. Steinberger, *supra* note 44, at 209-10. In West Germany, on the other hand, the 1951 Constitutional Court statute provided for review of such complaints—a feature that received constitutional basis in 1969. *Id.* at 214-15; KOMMERS, *supra* note 22, at 15-17.

146 For example, the radiating power of German legal models, including the Constitutional Court. For a collection of German legal materials in the field of mass information law recently translated into Russian, see GERMAN GOETHE CULTURAL CENTER AND THE RUSSIAN *Glasnost'* Defense Fund, GERMANIIA: MATERALY K KONFERENTSII [GERMANY: CONFERENCE MATERIALS] (1993).

The German Constitutional Court has exerted powerful influence throughout central and eastern Europe, including the former Soviet Union. *See* Schwartz, *supra* note 40, at 741 (describing the Court as "one of the most highly esteemed courts in the world"); *see also* CURRIE, *supra* note 36, at xi (describing Germany as a fertile field for comparative constitu-

haps of particular relevance to mid-1990s Russia.

In this regard, in addition to the German Court's analysis described above, a Russian court in an effort to reconcile those textual requirements that support third-party effect and the concerns of its opponents might draw upon distinctions made by the *Lüth* court between different branches of private law, such as tort and contract. The German Court concluded that in contrast to contract law, where the substantive rules of private relations are created primarily by agreement between the parties, tort rules are creations of state policy-making enforced by the courts. As a result, they bear a strong element of mandatory state action, piercing the protective shell of autonomous private relations.[147] This line of reasoning suggests that perhaps recognition of a third-party effect in Russian defamation law need not lead to substantial intrusion of public law into such areas as contract.

C. *Defamation Law and Free Expression Guarantees*

Recognition of third-party effect as a general principle would trigger the more specific inquiry into whether broad indeterminate constitutional guarantees of expressive activity do not protect defamatory statements and are therefore not to be included among the sources of defamation law. The core question in a court's examination of a defamation defendant's constitutional challenge would be whether application of the current statutory scheme would implicate the exercise of constitutional rights guaranteed in article 29 of the Constitution.

Article 29 sets forth broad guarantees of freedom of expression and communication.[148] Each person is guaranteed freedom of thought and speech,[149] and freely to seek, receive, transmit, produce, and disseminate information.[150] No one may be compelled to express one's opinions and convictions or to renounce them.[151] Finally, freedom of the mass information media is guaranteed, with censorship prohibited.[152]

These rights, however, are not absolute. Express categorical

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tional law); Clapham, *supra* note 102, at 189 (including influence of *Lüth* on ECHR defamation law decisions.)

147 *See* Quint, *supra* note 36, at 264; *see also* New York Times v. Sullivan, 376 U.S. 245, 265 (1964).

148 Similar guarantees are found in article 19 of the ICCPR. *See* KONST. RF art. 29 and ICCPR art. 19, set forth in the appendix.

149 KONST. RF art. 29(1).

150 KONST. RF art. 29(4).

151 KONST. RF art. 29(3).

152 KONST. RF art. 29(5).

restrictions on their exercise are found in article 29 itself, along with more ambiguous provisions that might be construed to permit the same result. Thus, certain content—propaganda or "hate speech" directed against groups—is categorically prohibited,[153] and more generally protected communicative activities are limited to those that may be carried out by "any lawful method" [*liubym zakonnym sposobom*].[154]

In addition, certain constitutional provisions outside article 29 could be interpreted to permit restrictions on the exercise of free expression. Personality rights are also protected by the Constitution,[155] and therefore are among those that may not be violated by the exercise of other rights and freedoms.[156] In order to resolve such clashes of countervailing constitutional rights, federal statutes may restrict the exercise of human rights and freedoms in order to protect the rights and lawful interests of other persons.[157]

The question, then, is whether any of these provisions within or without article 29 operates to exclude false defamatory expression[158] from article 29 protection. As to the enumerated categorical content restrictions in article 29(2), they do not include defamatory statements or other potential intrusions on individual personality interests.[159] Also, in contrast to instruments such as the German Basic Law,[160] the South Korean Constitution,[161] ECHR,[162]

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153 KONST. RF art. 29(2).

154 KONST. RF art. 29(4).

155 *See* KONST. RF arts. 21(1), 23(1) (protection of individual dignity and of privacy and reputational interests, respectively), set forth in the appendix.

156 KONST. RF art. 17(3).

157 KONST. RF art. 55(3). However, this provision contains the limitation that federal statutes may so operate "only to the extent necessary" to protect those lawful interests. *See infra* note 183 and accompanying text. The Constitutional Court's opinion in *Kozyrev* did not discuss the possible application of article 55(3) to a conflict between rights of expression and protection of one's honor and good name. *See supra* notes 51-52 and accompanying text.

158 In other words, a statement which lowers a victim's reputation and which the defendant is unable to prove as factually truthful.

159 The article 29(2) list resembles the mandatory prohibitions set forth in ICCPR art. 20, set forth in the appendix, which also does not include restrictions intended to protect individual personality rights.

160 Articles 5(1) and (2) of the Basic Law state in full:

> (1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures, and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.
> (2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, *and by the right to inviolability of personal honor.*

GG art. 5, §§ 1-2, *translated in* KOMMERS, *supra* note 22, at 506 (emphasis added).

161 Article 21(1) of the Constitution of the Republic of Korea states in full: "All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association." Article 21(4) states in full: "Neither speech nor the press shall violate the honor or rights of

and the ICCPR,[163] explicit language restricting the exercise of expressive activity for the purpose of protecting personality rights is not found in any of article 29's provisions.[164]

On the basis of the article 29 text, therefore, one Russian scholar has concluded that the only constitutional limits on freedom of expression are those content restrictions enumerated in article 29(2).[165] However, two other Russian scholars have concluded that article 29(2) contains an implied term, incorporating ICCPR article 19(3)(a), which includes intrusion on personality interests, including reputation, among the abuses of freedom of expression that are outside the protective mantle of the article 29 guarantees.[166] Neither author suggests that balancing of competing interests is required.[167] This approach implies that article 29(2) is sufficiently indeterminate to require the placement of false defamatory expression into the same legal category as those types of content enumerated in article 29(2). It may be assumed that all actionable statements under the 1995 Civil Code and Mass Media Law would not have constitutional protection under this approach, because Russian law treats all defamatory statements as susceptible to objective determinations of truth or falsity.[168]

The invocation by these authors of the ICCPR requires exami-

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other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom." SOUTH KOREAN CONSTITUTION art. 21(1), *translated in* WORLD CONSTITUTIONS, *supra* note 73, vol. X (Supp. 1987), at 26-27. *See* discussion in Youm, *supra* note 25, at 56-57.

162 ECHR art. 10(2) states in relevant part:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . . .

163 *See* ICCPR art. 19(3)(a), set forth in the appendix.

164 It should be noted that despite the presence of these explicit restrictions, the bodies interpreting and applying them have generally not applied a categorical approach to exclude consideration of free expression interests altogether. The German Constitutional Court and the European Court of Human Rights have used balancing methodology in defamation cases. *See infra* note 186 and accompanying text. Regarding the strict test employed by the HRC in applying article 19 of the ICCPR, see *infra* text accompanying notes 169-71.

165 KOVALENKO, *supra* note 74, at 42.

166 Lukasheva, *supra* note 68, at 178-81; S.A. Piatkina, *Stat'ia 29, in* KOMMENTARI, *supra* note 74, at 92-93.

167 *See* Lukasheva, *supra* note 68, at 178-81; Piatkina, *supra* note 166, at 92-93; *see also* Fedotov, *Russian Pendulum*, *supra* note 6, at 202-03 (suggesting that guarantees of personality rights protection in articles 21 and 23 of the Russian Constitution categorically exclude offensive expression from article 29 protection).

168 *See* Krug, *supra* note 1, at 858-63 & n.58. This statement applies only to defamation, and not to other causes of action, such as invasion of privacy or "insult" under chapter 8 of the 1995 Civil Code, since the truth/falsity issue is not an element of liability in those cases. *See* discussion *id.*

nation of ICCPR article 19(3)(a) to determine whether it can be read as a categorical exclusion. In contrast to article 29 of the Constitution, article 19(3) does provide that the exercise of expressive activity may be subject to certain restrictions, including those "for respect of the rights or reputations of others"; however, it qualifies this by requiring that "these shall only be such as are provided by law" and are "necessary" to accomplish these goals. The Human Rights Committee[169] and commentators[170] have interpreted the "necessity" requirement as imposing a heavy burden of justification upon a state seeking to restrict the exercise of free expression. While the HRC has not applied the "necessity" requirement in a defamation case, it has done so in examining a restriction imposed pursuant to article 19(3)(b). In a challenge to the Province of Quebec's restrictions on outdoor advertising in the English language, the HRC required Quebec to show that no alternative means were available for advancing its aims, and concluded that it had failed to do so.[171]

In addition, the text, legislative history, and interpretation of ICCPR article 17 suggest that it does not dictate a categorical denial of protection for all defamatory statements, even those determined to be false. Article 17(1) requires that a state party guarantee legal protection against "unlawful attacks" on a person's honor and reputation.[172] The legislative history of the ICCPR establishes that the term "unlawful attacks" was intended to limit the scope of this protection to intentional acts, lest legitimate commentary and criticism be suppressed.[173]

For these reasons, although the term "unlawful attacks" in article 17(1) is open to interpretation, it is doubtful that the ICCPR can be employed, either as a matter of direct application or to inform the constitutional text, to exclude all defamatory statements,

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169 *See supra* note 35.

170 George H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 47-48 (1995) (identifying the formulation as "absolutely necessary"); NOWAK, *supra* note 83, at 351 (the restriction must be proportional in severity and intensity to the proponent's purpose, and subject to narrow interpretation cases of doubt).

171 McIntyre v. Canada, (Mar. 31, 1993, para. 11.4) (violation of freedom of expression of English speaking citizens of Quebec), *reprinted in* 14 HUM. RTS. L.J. 171, 176 (1993). An even more stringent formulation has been identified: "absolutely necessary." Fox & Nolte, *supra* note 170, at 47-48. *See* Alexandre C. Kiss, *Permissible Limitations on Rights*, *in* INTERNATIONAL BILL OF RIGHTS, *supra* note 83, at 290, 308 ("necessary" means "essential" or "inevitable").

172 *See* ICCPR art. 17.

173 NOWAK, *supra* note 83, at 305-07; David Filvaroff et al., *The Substantive Rights and United States Law*, *in* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 71, 116 n.192 (Hurst Hannum & Dana D. Fischer eds., 1993); Fernando Volio, *Legal Personality, Privacy, and the Family*, *in* INTERNATIONAL BILL OF RIGHTS, *supra* note 83, at 185, 198-200.

or even all false defamatory statements, from article 19 protection (protection from free expression determined to be false). The ICCPR is not sufficiently determinate to contain such an express categorical limitation.

Returning to the Constitutional text, several provisions might be relevant. Looking outside article 29, two commentators have suggested that offensive expression should be outside the parameters of article 29 because it implicates the guarantees of personality rights protection in articles 21(1) and 23(1),[174] and therefore violates article 17(3).[175] This appears to be the analysis used in that part of the *Kozyrev* decision where the Constitutional Court questioned the complainant's assertion that his article 29 rights were implicated by the statutory defamation scheme.[176] However, articles 21 and 23 are also indeterminate in that they are silent regarding restrictions on expression, and article 17(3) also says nothing specific about defamation law. Although article 17(3) could be construed to exclude free expression guarantees from the defamation law calculus, it might just as readily be read to exclude all protection of personality interests when they clash with the exercise of article 29 rights. Another plausible construction of article 17(3) is that it calls for balancing of countervailing constitutional rights on a case-by-case basis rather than wholesale protection of one set of rights at the expense of the other.

Within article 29 itself, the inclusion of the indeterminate phrase "any lawful means" to qualify exercise of free expression rights in article 29(4) is perhaps problematic even well beyond the context of defamation law. This qualifying condition, which suggests a return to legislative normativity, is sufficiently ambiguous to support a determination that because the legislature has established remedies against false defamatory statements, their dissemination is automatically precluded. On the other hand, again, the text of article 29(4) is not sufficiently determinate to suggest that it refers to defamatory expression at all. In this regard, it should be noted that Professor Piatkina has concluded that "lawful means" operates solely to exclude dissemination of state secrets as defined by the legislature.[177]

In sum, although article 29, particularly paragraph (4), is

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174 Piatkina, *supra* note 166, at 92-93; Fedotov, *Russian Pendulum*, *supra* note 6, at 202-03. *See* KONST. RF arts. 21(1), 23(1), set forth in the appendix.

175 Piatkina, *supra* note 166, at 92-93. *See* KONST. RF art. 17(3) (prohibiting the exercise of human rights when it violates the rights of others), set forth in the appendix.

176 *See supra* notes 49-50 and accompanying text.

177 Piatkina, *supra* note 166, at 93.

open to differing interpretations, it can be concluded that literal examination of the constitutional text does not dictate categorical exclusion of all defamatory expression from constitutional protection. As a result, it is likely that a judicial effort to resolve the constitutionalization question—whether the civil defamation scheme implicates the exercise of interests protected by article 29—would rest in the application of other methods of interpretation. In such an exercise, the Russian courts and legal community will perhaps be compelled to address the nature of free expression guarantees—a task beyond literal textual analysis.

IV. Beyond the Texts: Accommodation of Private and Public Values

If a court were to conclude that the relevant texts do not categorically exclude recognition of constitutional and international norms as sources of defamation law, this would be only the first step in resolving the clash of countervailing interests. A Russian court perhaps would consider methodologies, such as the categorical and balancing approaches,[178] which other legal systems have used in attempting to complete this task. For example, the United States employs a categorical approach, calibrated to constitutionally relevant distinctions such as the status of a defamation plaintiff,[179] while the German Constitutional Court[180] and the European Court of Human Rights[181] rely on ad hoc balancing methodology that identifies and prioritizes a range of factors specific to each individual case. Given in particular the constitutional guarantees

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178 A categorical approach basically weighs the competing interests prior to the application (analysis of facts) stage of adjudication, thereby establishing rules which can be applied to future cases as well. An ad hoc balancing approach weighs the relevant factors, including the specific facts, on a case-by-case basis. *See* Peter Krug, *Justice Thurgood Marshall and News Media Law: Rules over Standards?*, 47 Okla. L. Rev. 13, 14-15 (1994); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 Va. L. Rev. 1521, 1535-38 (1992).

179 Plaintiffs who are public officials or public figures must prove that a defendant acted with "actual malice"—actual knowledge of falsity or reckless disregard of whether the statements were false. New York Times v. Sullivan, 376 U.S. at 279-80. Private plaintiffs may not establish liability without proving some level of fault on the part of the defendant. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In *Gertz*, the U.S. Supreme Court explicitly rejected a case-by-case ad hoc balancing approach. *Id.* at 346.

180 Kommers, *supra* note 22, at 387-94, 422-23; Quint, *supra* note 36, at 312-14.

181 Lester, *supra* note 24, at 484-91. The most recent example of the European Court's balancing approach is in *Prager & Oberschlick v. Austria*, *supra* note 29, in which the Court in a 5-4 vote upheld the criminal conviction of defamation against the publication of commentary critical of an Austrian judge. The Court cited the "special role of the judiciary in society," including the fact that judges are subject to a duty of discretion which precludes them from replying to critical attacks, as well as its conclusion that the defendant reporter's research "does not appear adequate to substantiate" his allegations. *Id.* at paras. 34, 37.

afforded personality rights[182] and constitutional limitations on restrictions on the exercise of fundamental rights,[183] as well as the attraction of German models, it is likely that Russian jurists would be more inclined toward the latter approach rather than creation of strict categories.[184]

Regardless of the chosen methodology, recognition of a constitutional mandate to accommodate would entail identification of constitutionally relevant balancing factors or categories[185]—for example, a distinction between critical opinion and assertions of fact.[186] The Constitution itself perhaps provides a basis for distinguishing opinion and fact by setting aside a discrete provision guaranteeing protection of the former.[187] Also of potential relevance to the Fascist cases in the Russian courts[188] is the status afforded to public official plaintiffs in the United States and European Court of Human Rights. In the United States, the plaintiff's status as a public figure triggers an elevated standard of liability; under the

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[182] KONST. RF arts. 21, 23. In this regard, the Russian Constitution is akin to the German Basic Law, ICCPR, and ECHR, all of which guarantee protection of personality rights. This perhaps explains in part why the German and European courts rely on balancing, and why the United States, where such guarantees are absent, employs a categorical approach. *See* Quint, *supra* note 36, at 314-18.

[183] KONST. RF arts. 17(3), 55(3). The "necessary" limitation in article 55(3), see *supra* note 157, lends itself to a balancing approach. In Germany, the Constitutional Court approaches the clash of countervailing interests pursuant to the principle of "practical concordance"—an inquiry into proportionality which includes a requirement that a means of protecting rights must have the least restrictive effect on a constitutional value. KOMMERS, *supra* note 22, at 53.

[184] This appears to be the methodology suggested by the Constitutional Court to the ordinary courts in *Kozyrev*, although the Court's statements about article 23(1) make this a somewhat mixed message. Meanwhile, by declining to engage in something akin to case-by-case law application analysis, the Court is perhaps signalling that its limited jurisdiction precludes it from engaging in ad hoc balancing. *See supra* notes 41-52 and accompanying text.

[185] Schauer, *supra* note 55, at 360-61.

[186] This is the course urged upon the ordinary courts by the Constitutional Court in *Kozyrev*. The jurisprudence of the German Constitutional Court and the European Court of Human Rights on these questions is extensive. *See* NOLTE, *supra* note 23, at 66-80, 191-209; Coliver, *supra* note 24, at 266-68, respectively. For a recent example of one legal system's struggle with this difficult problem, see Rytis Juozapavicius, *Defamation Cases: Lithuanian Journalists and Judges Struggle to Define Fact and Opinion*, ZAKONODATEL'STVO I PRAKTIKA SREDSTV MASSOVOI INFORMATSII, No. 1, at 8 (1996).

[187] *See* KONST. RF art. 29(3), set forth in the appendix. An interesting question is whether this provision is as broad as the first sentence of article 5(1) of the German Basic Law, which states: "Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures, and freely to inform himself from generally accessible sources." GG art. 5, § 1, *translated in* KOMMERS, *supra* note 22, at 506. The German Constitutional Court construed this provision to invalidate an ordinary court's injunction against a candidate's allegations of a political party's Nazi tendencies in the *Campaign Slur Case*), 61 BverfGE 1 (1982). *See* KOMMERS, *supra* note 22, at 387-91.

The ICCPR contains a provision, similar to article 29(3) of the Russian Constitution, which guarantees the "holding" of opinions. *See* ICCPR art. 19(1), set forth in the appendix.

[188] *See* Krug, *supra* note 1, at 858-63.

ECHR, it requires the plaintiff to tolerate a higher degree of public criticism (in other words, greater weight is given to the public interest).[189] The point, however, is that under both approaches the status of plaintiffs as public officials is deemed constitutionally relevant, whereas Russian law makes no such distinction, although in *Kozyrev* the Constitutional Court recently declared that one should be made.[190]

An essential element of this inquiry into accommodation would be assessment of the nature of the article 29 and article 19 free expression guarantees—an exercise laden with value considerations. A conception of free expression guarantees as individual and private in nature would be consistent with what might be called a "civil society" model of defamation. The alternative view that free expression guarantees should also further public values would reflect a "democratic" model.

The Civil Society Model recognizes freedom of expression from unwarranted state interference (such as pre-publication censorship) as an individual private right, protected as an attribute of personality and means of promoting individual self-fulfillment.[191] However, when balanced against protection of personality interests, the free expression guarantees must give way to a considerable extent. Current Russian defamation law reflects the Parliament's implicit acceptance of this model: thus, free expression is not entirely without protection, since defamatory statements that a defendant can prove to be based upon true facts are exempt from liability.[192] Under this view, the nature of article 29 guarantees and the goals of the current statutory scheme are congruent.

Underlying the constitutionalization debate in other legal systems, however, has been a different vision of the nature of free expression guarantees—the Democratic Model—which views freedom of expression as dual in nature,[193] imbued with a public di-

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189 Coliver, *supra* note 24, at 224-25, 229.

190 *See generally supra* part II.

191 *See* discussion in 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? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD 23, 52-53 (Donald D. Barry ed., 1992) (identifying as one of the goals of the "Civil Society" chapter of the 1990 Russian Federation Draft Constitution that "the mass media should be free [and] censorship is prohibited," a formulation codified in article 1 of the 1990 Press Law and article 3 of the Mass Media Law).

192 The defense of truth is not available in criminal law actions based on article 131 of the Criminal Code, nor would it be if "insult" is recognized as a civil cause of action. *See* discussion in Krug, *supra* note 1, at 852 & n.20.

193 *See* Clapham, *supra* note 102, at 189, 203 (citing the ECHR's recognition of "the dual nature of freedom of expression" in *Lingens v. Austria*). Proponents of such an approach in Russia could be expected to point to the right guaranteed in article 29(4) of the Constitution to receive, as well as to disseminate, information.

mension grounded in the essential value of information and ideas to a pluralistic democratic society.[194] According to proponents of the Democratic Model, this public dimension must at times take precedence over protection of personality rights even when the defamatory statement cannot be proven to be true.[195]

The differences in the free expression values recognized in the Civil Society and Democratic Models coalesce around assessment of the so-called "chilling effect"[196]—the values served or impaired by the deterrent effect posed by the threat of sanctions, including moral damages, for dissemination of defamatory statements. In the Civil Society Model, free expression interests, while recognized, are simply outweighed by the competing individual personality interests that require a deterrent effect to make such protection effective.[197] The Democratic Model, meanwhile, views the self-censorship inherent in the defamation law deterrence goal as the greater threat to democracy and therefore to society.[198] This fundamental difference over deterrent effect lies at the core of the clash between private and public values in civil defamation law.[199]

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194 NOWAK, *supra* note 83, at 336 (free exchange of information and ideas as the cornerstone of democracy); Franck, *supra* note 56, at 56; Fox & Nolte, *supra* note 170, at 2.

The German Constitutional Court stated in *Lüth*:

> To a free democratic constitutional order . . . [free expression] is absolutely basic . . . for it alone makes possible the continuing intellectual controversy, the contest of opinions that forms the lifeblood of such an order. In a certain sense it is the basis of all freedom whatever, "the matrix, the indispensable condition of nearly every other form of freedom."

7 BVerfGE 198, 208 (1958) (quoting Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 327 (1937)), *translated in* CURRIE, *supra* note 36, at 175.

195 *See e.g.*, *New York Times*, 376 U.S. at 278-79; Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A), at 418-19 (1986).

196 *New York Times*, 376 U.S. at 300 (Goldberg, J., concurring).

197 *See* discussion in Krug, *supra* note 1, at 856, 873-74. Similar perspectives were expressed to the author in conversations with Russian jurists in visits to Russia in 1994 and 1995.

198 The impact of the chilling effect is viewed as creating a threat of self-censorship resulting not only from the threat of sanctions themselves, but from the costs of legal defense. Sandra Coliver, *Comparative Analysis of Press Law in European and Other Democracies, in* PRESS LAW AND PRACTICE, *supra* note 20, at 266.

199 The Russian concerns with regulation of election campaign discourse illustrate the conflicting values—the sanctioning of offensive expression versus dissemination of information of value to voters—in a new pluralistic democracy. In September 1995, the Conciliatory Commission for the Implementation of the Public Accord Agreement issued an appeal to candidates in the upcoming parliamentary election not to abuse their opportunities to use the mass media and "to keep from circulating untrustworthy materials casting a slur on candidates' honour and dignity." Lyudmila Alexandrova, *Call for Civilised Behaviour During Election*, TASS, Sept. 28, 1995, *available in* LEXIS, News Library, Curnws File. The Russian Constitutional Court also expressly cited the problems inherent in political campaigns in its *Kozyrev* decision as support for its declaration to the ordinary courts to fashion a means of accommodating the competing interests. Regarding Russian efforts to regulate the level of civic discourse generally, see Melissa Dawson, *Free Speech and the Mass Media in Russia: Lessons from the December 1993 Election and Constitutional Referendum*, 13 CARDOZO ARTS & ENT. L.J. 881 (1995).

If a Russian court were to opt for the Democratic Model, it would compete directly with the Parliament in a contest over who will be the arbiter of the proper balance between public and private interests.

At the same time, however, it is possible that such an interaction might contain within itself an opportunity for reconciliation, in the form of both sides' shared interest in rejecting the intervention of state executive or administrative agencies as arbiters, as occurred in the Soviet system. In contrast to the extra-legal mechanisms employed in the Soviet era, constitutional norms under a Democratic Model would serve as a new vehicle for the entry of public values into private law. As a result, for perhaps the first time in Russian history the notion of "public interest" might not be synonymous with "state interest," and the ideology underlying application of public values would not be the discredited communal ethos, but pluralistic democracy.

V. Conclusion

A.

In the early 1990s, advocates of press freedoms in Russia achieved two goals: legislative recognition of pluralism in mass media ownership, and the abolition of direct pre-publication censorship. Pursuit of these objectives, and their realization in statutory form, have been consistent with the individual self-fulfillment values which underlie Russia's civil defamation law.

The recognition and effectuation of this first generation of press rights, while illustrative of Russia's new departures in freedom of expression, did not exhaust the legal issues faced by the mass media relating to content regulation. One of the forms of post-publication regulation to emerge has been a civil defamation scheme weighted in favor of plaintiffs and featuring expanded civil remedies against false defamatory expression.

The basic elements of this scheme, although now grounded in the 1995 Civil Code, reflect Russia's institutional configuration in the several years prior to the adoption of the Russian Federation Constitution in 1993—a configuration marked by the legislature's exclusive definition of the contours of mass media rights and duties. In its exercise of these responsibilities, the legislature perceived rights of freedom of expression as defensive, serving individual, self-expression values. This two-part study has sought to identify the various elements that characterize this approach: Russia's roots in the civil law tradition and the attraction of continental

European models; Russian jurists' quest for legality as manifested by the achievement of legislative supremacy; and hostility toward infusion of public interest concerns into private legal relations. The latter component, which distinguishes Russia from many of those continental legal systems that its civil jurists sought to emulate in the post-World War II period, was engendered in large part by the Soviet regime's use of extra-legal methods to thwart claims against state-controlled mass media which often employed offensive expression to further collectivist goals.

Part II of this study has examined the legal setting which came into being in December 1993, in order to determine whether a foundation for a second generation of press freedoms is under construction—a constitutional basis for press activity grounded in a theory of free expression that emphasizes not only individual self-fulfillment, but also a public dimension. What distinguishes the post-1993 Russian legal system in this regard is not so much the text of article 29 of the Constitution, but rather the textual dismantling of legislative supremacy in the form of direct applicability and supremacy of constitutional norms, and the institution of judicial review as a means of constitutional control of governmental acts. As a result, it may be concluded that an institutional and textual basis for such constitutionalization exists; however, in practice Russian defamation law remains securely anchored in its solid pre-1993 foundations. Constitutional and international norms do not operate as independent sources of Russian defamation law, but instead serve at most as an expression of broad political principles.[200] In a

200 President Boris Yeltsin and the Presidential Judicial Chamber for Resolution of Information Disputes have referred to the constitutional free expression provisions, but only in the sense of broad political principles and without attempting to define their specific contours. *See, e.g, Yeltsin Vetoes Broadcasting, Anti-ORT Bills*, POST-SOVIET MEDIA L. & POL'Y NEWSL., Issue 19 (June 27, 1995), at 1 (President Yeltsin's June 1995 veto of proposed legislation on privatization of state broadcasters, on grounds including its noncompliance with constitutional guarantees of mass media freedoms); Presidential Decree Concerning Rights of Information, Dec. 31, 1993, *in* SUDEBNAIA PALATA PO INFORMATSIONNYM SPORAM [JUDICIAL CHAMBER ON INFORMATION DISPUTES], NORMATIVNYE AKTY, KOMMENTARII, OBZOR PRAKTIKI [NORMATIVE ACTS, COMMENTARY, AND SURVEY OF ACTIVITY] 18 (1995) (citing article 29(4) of the Constitution) [hereinafter NORMATIVE ACTS].

The Judicial Chamber is described in Krug, *supra* note 1, at 850 n.15. Discussing constitutional rights of free expression, the Chamber in early 1995 declared that "[f]reedom of mass information has great social value, is a strong achievement of democratic Russia, and is a guarantee of statehood". NORMATIVE ACTS, *supra*, at 177. The Chamber has rendered a number of decisions in the area of defamatory expression; however, it does not appear to have applied article 29 in them. *See* Krug, *supra* note 1, at 850 & n.15 (discussing the general declaration, not deciding a specific dispute, issued by the Chamber and the Russian Union of Journalists in June 1995). A number of the Chamber's non-binding decisions up to March, 1995, are collected in NORMATIVE ACTS, *supra*. A number of Chamber decisions, translated into English by Professor Frances Foster, have been published in the *Post-Soviet Media Law and Policy Newsletter*. *See, e.g.*, POST-SOVIET MEDIA L. & POL'Y

manner consistent with the principle of legislative normativity, they find their only application in the notion that legislative actions, such as the chapter eight of 1995 Civil Code and the Mass Media Law, are an expression of the constitutional commands, and are consistent with them. The contours of article 29 remain solely as defined by the legislature, and perhaps reflect a preference among the Russian people for a system heavily weighted in favor of defamation plaintiffs.

It is anticipated, however, that litigants will continue to urge the Russian courts to include articles 29 and 19 among the sources of defamation law, and to apply them so as to invalidate certain provisions of the legislative scheme. This effort will receive further stimulus if, as expected, Russia accedes to the European Convention on Human Rights.

It is therefore a matter of considerable importance for the future development of Russian civil defamation law that it will evolve within a diffuse system of constitutional review, with ordinary first instance and appellate courts throughout the country, as well as the Russian Federation Supreme Court and perhaps the Arbitration Courts, empowered to decide questions raised by litigants seeking its constitutionalization. In its *Kozyrev* decision, the Russian Constitutional Court voiced recognition of a constitutional dimension in defamation law; however, the Court found itself compelled to refrain from subjecting the statutory scheme to judicial review and instead called upon the ordinary courts, particularly the Supreme Court, to fashion the proper methodology for resolving the clash of countervailing rights. On the one hand, this dispersal of power to the ordinary courts might result in an integration into Russia's system of judicial constitutional control that is deeper than that experienced by their counterparts in legal systems with concentrated review.[201] On the other, it might hinder the attainment of uniformity and clarity in this body of law or result in inattention to the issues raised in the Constitutional Court's opinion.[202] Thus far, the ordinary courts, in particular the Supreme Court as demonstrated in its denial of the protest in *Zhirinovskii v. Gaidar*,

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NEWSL., Issue 21 (Sept. 27, 1995), at 9 (three decisions); POST-SOVIET MEDIA L. & POL'Y NEWSL., Issue 20 (July 27, 1995), at 7 (four decisions).

201 Zh. Ovsepian, *Sub"ekty prava na obrashchenie v Konstitutsionnyi Sud RF* [*Subjects of the Right to Petition the Russian Federation Constitutional Court*], ROS. IUST., No. 1, at 10 (1996). This goal has been affirmatively articulated by at least one Constitutional Court Justice. Gadzhiev, *supra* note 119, at 25 (declaring that the ordinary courts "have a realistic opportunity to act in the capacity of organs of constitutional control").

202 One commentator recently voiced these kinds of concerns about development of a diffuse system modeled on the U.S. judicial system. Ovsepian, *supra* note 201, at 10.

have not been inclined to consider the application of constitutional norms in concrete defamation cases; however, it is too early to know whether the Constitutional Court's entreaties in *Kozyrev* will persuade them to consider a new approach.

In such challenges, a question will be whether the 1993 Constitution adds anything new to the existing defamation law calculus. In this regard, examination of the issues expected to arise in a constitutional challenge demonstrates that the first issue—that of judicial normativity—can be resolved with little difficulty: the 1993 Constitution expressly introduced into Russian law the notions of direct effect and supremacy of constitutional and (somewhat less emphatically) international norms. Moreover, in their 1995 decisions invalidating a range of statutory provisions, the Constitutional Court and ordinary courts have demonstrated their ready acceptance of such constitutional normativity. The questions of third-party effect and literal exclusion of defamatory expression from the article 29 and article 19 guarantees are less amenable to simple answers; however, it can at least be said that the relevant texts provide significant support for the conclusion that the statutory defamation scheme implicates the exercise of constitutional rights.

If so, and a court were to examine a challenge on its merits, that judicial body probably would consider itself compelled to go beyond the literal text toward identification and articulation of the contours of the indeterminate provisions of articles 29 and 19. Such an exercise would almost undoubtedly entail examination of the nature of these indeterminate free expression guarantees: a prospective norm development function extending beyond concrete norm control. This inquiry—whether free expression guarantees have not only an individual dimension, but a public one as well—will go to the heart of the conflict between private and public interests inherent in defamation law. In this process, an element would be determination of the necessity, or lack thereof, of making constitutionally-relevant distinctions, such as between plaintiffs based on their status or between statements of fact and opinion. Such determinations would be heavily weighted in value judgments; for example, it is possible that a Russian court could recognize a public dimension in defamation law and at the same time conclude that under article 29 the public interest requires placement of a higher priority on deterring offensive expression in order to protect civic discourse than on fostering uninhibited free expression.

Whatever the outcome, consideration of such questions will necessitate examination and articulation of the values underlying

free expression guarantees—a process that might have consequences beyond civil defamation itself. First, it might provide a means of reconciling the clash between the public and private spheres: the sensitive problem of "practical concordance."[203] From one perspective, the current polarization between personality rights protection adherents and free press advocates can be viewed as a clash between competing visions of human rights protection—the former supportive of representative institutions' enactment of barriers against unwarranted state interference in private relations, and the latter of judicial organs applying constitutional and international norms as restraints on unbridled legislative supremacy. In this regard, the "portals" in the 1995 Civil Code[204] might reflect legislative recognition of a potential compatibility between private and public interests that sweeps aside notions that civil autonomy is dependent upon absolute exclusion of public interest concerns, or that pursuit of private goals is inconsistent with the public interest. Put another way, perhaps the Civil Code portals reflect an implicit conclusion that the application of constitutional and international norms by judicial organs is not to be equated with intervention by state executive and administrative agencies as a threat to the goals of civil society.

Second, by triggering development of a theory of free expression, examination of a constitutional challenge to civil defamation law might increase the determinacy of articles 29 and 19 by opening the door to identification and articulation of their contours in other areas of press activity as well. An obvious example would be the Criminal Code provisions governing defamation and insult.[205] In addition, if this exercise were to examine whether other areas involving expressive activity should be subject to pluralistic sources of law, it might extend to the informal attempts at intimidation or manipulation which Russian journalists frequently cite.[206] Finally, if the courts were to some extent to adopt a Democratic Model of free expression, that determination might result in an examination of whether affirmative constitutional duties should be imposed on state institutions in areas such as public access to governmental activities and documents[207] or the establishment of structural restrictions on ownership to reduce de jure or de facto state control or to

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[203] *See supra* note 183.
[204] *See supra* notes 134-42 and accompanying text.
[205] *See* Krug, *supra* note 1, at 852 & nn.19-23.
[206] *See* Krug, *supra* note 1, at 872-73 & nn.125-27.
[207] Although the Mass Media Law requires public access in articles 38 through 40 and article 47, many journalists find such provisions ineffective. For example, responses from mass media outlets in preparation for a December 1995 Moscow conference on possible

promote media diversity.[208]

B.

It has not been the goal of this study to analyze future developments in Russian defamation law from the perspective of legal culture. Instead, it has been to identify the historical roots of the existing scheme, as well as those elements that characterize it today, and to speculate as to the institutional and textual grounds for the introduction of a public dimension into defamation law by means of the interpretation and application of constitutional and international norms.

At the same time, it must not be forgotten that many of these questions have arisen in an extraordinarily short time frame. In the past ten years the hierarchy of sources of Russian law has shifted swiftly and dramatically from a legal system marked by extra-legal Party supremacy, to a law-based state grounded in legislative normativity and supremacy, to a constitutional order featuring judicial review of governmental acts. The institutional anchors of this new system—the Constitution, new Constitutional Court, Constitutional Court Statute, ordinary courts with competence to exercise judicial review of certain governmental acts, and the 1995 Civil Code—are at most barely two years old. However, as evidenced by the work of the courts in 1995, the institutional basis for a system of constitutional review is now in place, and the Constitutional Court and ordinary courts are engaged in norm control and development.

Considerable concern has been voiced regarding the short-term prospects for this new constitutional order; instead, it has been said, constitutionalization must await the development of a legal culture receptive to such a process.[209] If the concept of legal

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amendment of the Mass Media Law listed improvements in this area as a top priority (copies of the letters in possession of the author).

208 For a discussion of the consequences of the German Constitutional Court's decision in *Lüth*, *see* CURRIE, *supra* note 36, at 184 n.37, 187. For an argument that an instrumental approach based on recognition of affirmative state duties creates a threat of governmental manipulation of expressive activity, see Frances Foster, *Information and the Problem of Democracy*, AM. J. COMP. L. (forthcoming) (on file with author).

209 *See, e.g.*, Harold J. Berman, *Counterrevolution or Transition: A Response to Human Rights and the Emergence of the State of the Rule of Law in the USSR*, 40 EMORY L.J. 903, 909 (1991) ("it will take at least a decade for the Soviet judiciary to acquire the independence, the training, the experience, and the prestige necessary to exercise such a vast and complex power in an effective and an acceptable way"). Similar thoughts were expressed to this author in 1994 and 1995 in conversations with Russian jurists and journalists regarding the applicability of constitutional norms to mass media law. Regarding constitutionalization and Russian legal culture generally, see Alexander M. Yakovlev, *The Rule-of-Law Ideal and Russian Reality*, *in* LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN 5-19 (Stanislaw Frankowski & Paul B. Stephan III eds., 1994).

culture is understood as a long-standing historical tradition of constitutionalism and judicial review, or as one linked to pluralistic democracy, the example of a country such as post-World War II Germany suggests that such an assessment might be unduly pessimistic. Indeed, some authors have questioned the basis for viewing the existence of a "constitutional culture" as a prerequisite for constitutionalization.[210] On the other hand, it is perhaps the case that successful constitutionalization, however that might be gauged, requires lengthy exposure to a *Rechtsstaat* or law-based state tradition of legality marked by legislative supremacy over administrative rule.[211] In Russia, jurists have sought to instill such precepts into the legal system since the nineteenth century,[212] including efforts beginning in the 1950s to establish a system of personality rights protection.[213] Whether these efforts have been sufficient to provide a foundation for a transition to constitutionalism, and whether they themselves are compatible with notions such as the perceived need for a public dimension in defamation law, must await the evolution of Russia's constitutional order. Judicial examination of efforts to constitutionalize defamation law may be expected to play a part in that process.

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210 Klaus von Beyme, *The Genesis of Constitutional review in Parliamentary Systems, in* CONSTITUTIONAL REVIEW, *supra* note 61, at 21, 37; Favoreu, *supra* note 60, at 110; Lawrence M. Friedman, *Some Thoughts on Comparative Legal Culture, in* MERRYMAN ESSAYS, *supra* note 5, at 49, 57.

211 Von Beyme, *supra* note 210, at 37.

212 Among numerous works on this subject, see Berman, *supra* note 209, at 905-08, and ANDRZEJ WALICKI, LEGAL PHILOSOPHIES OF RUSSIAN LIBERALISM ch. VII (1987) (emphasizing the overlooked Russian legal tradition).

213 *See* Krug, *supra* note 1, at 868 & nn.101-07.

APPENDIX: SELECTED CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Russian Federation Constitution

Article 15.

1. The Constitution of the Russian Federation shall have supreme legal force and direct effect, and shall be applicable throughout the entire territory of the Russian Federation. Laws and other legal acts adopted by the Russian Federation may not contravene the Constitution of the Russian Federation.

2. Organs of state power and local self-government, officials, citizens and their associations must comply with the laws and the Constitution of the Russian Federation.

. . . .

4. The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.

Article 17.

1. The basic rights and freedoms in conformity with the commonly recognized principles and norms of international law shall be recognized and guaranteed in the Russian Federation and under this Constitution.

2. The basic rights and freedoms of the human being shall be inalienable and shall belong to everyone from birth.

3. The exercise of rights and freedoms of a human being and citizen may not violate the rights and freedoms of other persons.

Article 18.

The rights and freedoms of man and citizen shall have direct effect. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local self-government, and shall be secured by the judiciary.

Article 21.

1. The dignity of the person shall be protected by the state. No circumstance may be used to justify its diminution.

. . . .

Article 23.

1. Each person shall have the right to the inviolability of private life, personal and family secrecy, and protection of one's honor and good name.

. . . .

Article 29.

1. Each person is guaranteed freedom of thought and speech.

2. Propaganda or agitation exciting social, racial, national or religious hatred and enmity is not permitted. Propaganda of social, racial, national, religious or language supremacy is prohibited.

3. No one may be compelled to express his opinions and convictions or to renounce them.

4. Each person has the right freely to seek, receive, pass on, produce and disseminate information by any lawful method. The list of information constituting a state secret is determined by federal law.

5. The freedom of mass information is guaranteed. Censorship is prohibited.

Article 55.

. . . .

2. Laws which deny or diminish human and civil rights and freedoms shall not be enacted in the Russian Federation.

3. Human and civil rights and freedoms can be curtailed by federal law only to the extent to which it may be necessary for the purpose of protecting the foundations of the constitutional system, morality and the health, rights and legitimate interests of other individuals, or of ensuring the country's defense and the state's security.

Article 125.

. . . .

4. The Constitutional Court of the Russian Federation, proceeding from complaints about violations of constitutional rights and freedoms of citizens and requests from courts shall review the constitutionality of the law applied or due to be applied in a specific case in accordance with procedures established by federal law.

2. International Covenant on Civil and Political Rights

Article 19.

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20.

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

3. Russian Constitutional Court Statute

Chapter XII. The Examination of Cases on the Constitutionality of Laws Following Complaints About the Violation of Citizens' Constitutional Rights and Freedoms

Article 96. The Right to Appeal to the Russian Federation Constitutional Court.

Citizens whose rights and freedoms are violated by a law which is applied or is due to be applied in a specific case, associations of citizens, as well as other organs and people mentioned in the federal law, have the right to lodge an individual or collective complaint with the Russian Federation Constitutional Court about the violation of their constitutional rights and freedoms.

In addition to the documents listed in article 38 of this federal constitutional law, a copy of the official document confirming the application of or possibility of application of the law in question when resolving a specific case is appended to the complaint. The

petitioner is issued with a copy of this document at his request by the official or organ examining the case.

Article 97. The Admissibility of the Complaint.

A complaint about a law's violation of constitutional rights and freedoms is admissible if:

1) the law affects citizens' constitutional rights and freedoms; [and]

2) the law is applied or is due to be applied in a specific case examination of which has been completed or initiated by a court or other organ which applies the law.

Chapter XIII. The Examination of Cases on the Constitutionality of Laws Following Courts' Requests.

Article 101. An Appeal to the Russian Federation Constitutional Court.

When examining a case at any level and concluding that the law applied or due to be applied in the said case does not correspond with the Russian Federation Constitution, a court asks the Russian Federation Constitutional Court to verify the constitutionality of the law in question.

Article 102. Admissibility of the Request.

A court's request is admissible if the law is applied or is due to be applied, in the court's opinion, in the specific case under examination.

4. 1995 Civil Code (Part One)

Article 1. Basic principles of civil legislation.

1. Civil Legislation shall be based on the recognition of the equality of 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. Citizens (individuals) and legal entities acquire and exercise their civil rights through their own will and in their own interest. They are free in establishing their rights and responsibilities on the basis of agreement and in determining any conditions of the agreement which do not contradict the legislation.

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 2. Relations regulated by civil legislation.

. . . .

2. Inalienable human rights and freedoms and other non-material benefits are protected by civil legislation, unless otherwise dictated by the essence of these non-material benefits.

Article 7. Civil legislation and standards of international law.

1. Generally accepted principles and standards of international law and international treaties of the Russian Federation are, in accordance with the Constitution of the Russian Federation, an integral part of the legal system of the Russian Federation.

2. International treaties of the Russian Federation are directly applied to relations specified in points 1 and 2, article 2 of this Code, except for cases when it follows from an international treaty that enactment of implementing domestic legislation is required for such application.

If an international treaty of the Russian Federation establishes different rules than those which are provided in the civil legislation, the rules of the international treaty are applied.