

Internalizing European Court of Human Rights Interpretations: Russia's Courts of General
Jurisdiction and New Directions in Civil Defamation Law

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I. INTRODUCTION

Over the past several years, Russia's courts of general jurisdiction [*hereafter*, "Ordinary Courts"] have made significant changes in Russia's system of civil defamation law.¹ In February, 2005, utilizing its power to issue interpretations of legislation, the Supreme Court of the Russian Federation ["SC"] consolidated and made generally applicable throughout the ordinary court system a set of modifications,² a number of which certain lower courts already had applied in adjudication of discrete disputes. The simultaneous threshold steps in this process were the courts' expansion of the range of applicable sources of law beyond the Russian Federation Civil Code to include also free expression guarantees in the European Convention on Human Rights ("ECHR")³ -- -- an international treaty to which Russia acceded in 1998 -- -- and their internalization of the interpretative practice of the European Court of Human Rights ("ECtHR").

Although it will examine closely certain lower court decisions that foreshadowed and accompanied the SC's 2005 Explanation, this article is not a comprehensive empirical study of

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¹ For this paper, I will use the following definition of "defamation": the private law (civil) system of legal protection, providing post-dissemination remedies including monetary compensation, against dissemination of false communications that harm individual reputation. Defamation is one within a larger category of legal actions recognized in many European legal systems, including Russia's, for protection of individual "personality rights", including individual reputation, dignity, and privacy. For example, in Russia the legal action of "insult", separate from defamation with distinct elements, protects individual dignity against offensive statements. Regarding insult in the Russian legal system, see discussion *infra* note 62 and accompanying text. Because of the close relationship between defamation and insult, this article will examine aspects of both, but with far greater emphasis on the former.

² Postanovlenie N. 3 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 24 Fevralia 2005 g. "O sudebnoi praktike po delam o zashchite chesti i dostoinstva grazhdan, a takzhe delovoi reputatsii grazhdan i iuridicheskoi lits" [Decree Number 3 of the Plenum of the Russian Federation Supreme Court Dated February 24, 2005 "Concerning judicial practice in disputes regarding protection of individual honor and dignity, as well as the business reputation of physical and legal persons"] (*hereafter*, the "2005 Explanation"). *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii [BVS]*, 2005, No. 4, p. 2, *also available* at http://www.supcourt.ru/vscourt_detale.php?id=2536 (last visited on March 7, 2006).

³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (last visited on March 18, 2006). The ECHR entered into force on September 3, 1953.

the operation of Russian civil defamation law.⁴ Instead, the article will focus on three inter-related inquiries: (1) the recent changes effected in civil defamation law and practice; (2) the nature of the judicial process of internalizing ECtHR interpretive practice; and (3) the potential implications for further development of the new approaches and expansion of their scope.

These developments have taken place within a context of intense external and internal scrutiny of the Russian legal system and the ordinary courts in particular. When Russia joined the Council of Europe in 1996, considerable skepticism was voiced about its ability to meet its obligations, particularly those under the ECHR if it were to become a party.⁵ Much of this skepticism centered on the ordinary courts, and their perceived inexperience or inability to apply effectively constitutional provisions dictating the direct applicability and direct effect of Russia's international human rights treaties.⁶ Severe criticism of Russia's human rights record has continued, with much of it directed at concerns about freedom of the press: expressions of concern that in turn often have singled out the system of civil defamation.⁷

⁴ In contrast, see the richly detailed empirical study of defamation law in the People's Republic of China, in Benjamin Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 *Harv. Int'l L. J.* 33 (2006).

⁵ The ECHR makes clear that the primary responsibility for its observance lies with the domestic legal systems of the member-states themselves. ECHR, *supra* note 3, Article 1.

Russia's entry was accompanied by considerable doubt within the Council of Europe as to its readiness. The entry resolution was approved by the Parliamentary Assembly of the Council of Europe ("PACE") on January 25, 1996 -- of 263 deputies, 214 participated in the voting, with 164 voting to approve, 35 against, and 15 abstaining. Even more reflective of skepticism were the various CofE reports at this time. See: Mark Janis, "Russia and the 'Legality' of Strasbourg Law", 8 *European Journal of International Law* 93 (1997) ["[G]iven Russia's lack of experience in protecting human rights at the level of municipal law, it is likely that a great many violations of European human rights law will be committed there, and that they will not be remedied domestically"], *available at* <http://www.ejil.org/journal/Vol8/No1/art5.html> (last visited March 18, 2006); Maxim Ferschtman, "Russia," in *Fundamental Rights in Europe: The European Convention on Human Rights and its member States, 1950-2000* (Robert Blackburn and Jorg Polakiewicz, eds.) (Oxford University Press, 2001), 731-735; and J.D. Kahn, *Russia's "Dictatorship of Law" and the European Court of Human Rights*, 29 *Review of Central and East European Law*, 1, 3-4 (2004, No. 1).

⁶ Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 *European Journal of International Law* 51, 58 (1999), *available at* <http://www.ejil.org/journal/Vol10/No1/ab3.html> (last visited March 5, 2006) (the ordinary courts "have much less experience in applying international law than does the [Russian Federation] Constitutional Court"); Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 *American Journal of International Law* 451, 464, 466, 470 (1994); Tarja Langstrom, *Transformation in Russia and International Law* (2003), 430-431.

⁷ In June, 2005, the Parliamentary Assembly of the Council of Europe ("PACE") issued a report on the status of human rights protection in Russia. Sections 389-393 addressed defamation law. Section 389 stated in full:

We are concerned by the current defamation legislation and its application by the Russian judiciary and executive powers. Journalists are often prosecuted through libel suits (approximately 8-10,000 lawsuits a year). As reported by the Centre for Journalism in Extreme Situations, the number of prosecutions of journalists has increased significantly as from 2000. 49 criminal cases were opened in 2002 and, on average, 30-35 criminal proceedings were instituted against journalists in 2003-2004.

Doc. 10568, par. 389 (report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), cited in PACE Resolution 1455 (22 June 2005), footnote 1), *available at* <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1455.htm> (last visited March 5, 2006).

For a recent pessimistic assessment of the state of media freedoms in Russia, see IREX's Media Sustainability Index 2005 [<http://www.irex.org/msi/index.asp>], released on January 30, 2006.

These challenges have included external and internal litigation. On the out-bound side, in July, 2005 the ECtHR for the first time ruled on a Russian defamation case, holding that Russia had violated the free expression guarantees in Article 10 of the ECHR.⁸ The ECtHR also has found at least seven similar applications to be admissible.⁹ Internally, lawyers representing journalist and media entity defendants at the national and local levels¹⁰ have made concerted efforts to present spirited defenses, including abundant references to ECtHR practice, in defamation litigation.

At their core, the vocal criticisms and legal challenges to operation of Russian civil defamation law have centered on two questions that in these particular circumstances became closely intertwined: (1) a defamation law doctrinal question concerning identification of the applicable sources of law; and (2) a constitutional law question concerning the domestic incorporation of international treaty norms and the internalization of ECtHR interpretations of the ECHR in particular.¹¹ These issues will be the topic of Parts III-IV of this article, which follow a description of the ordinary court system in Part II. Part V will describe the most significant practical applications of the new, multi-source system of civil defamation law, and Part VI will examine the possible implications of the new system, including the SC's mandate that the ordinary courts "take into account" ECtHR practice in their decision-making, for further defamation law issues and beyond.

⁸ Grinberg v. Russia (decided July 21, 2005).

⁹ The ECtHR found four applications admissible on December 9, 2004: Godlevskiy v. Russia, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=russia&sessionid=6269301&skin=hudoc-en>; Krasulya v. Russia, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=russia&sessionid=6269301&skin=hudoc-en>; Porubova v. Russia, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=russia&sessionid=6269301&skin=hudoc-en>; and Zakharov v. Russia, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=russia&sessionid=6269301&skin=hudoc-en>. The ECtHR also ruled the following applications admissible: Chemodurov v. Russia (August 30, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=russia&sessionid=6269301&skin=hudoc-en>; Filatenko v. Russia (June 13, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=russia&sessionid=6269301&skin=hudoc-en>; and Dyuldin and Kislov v. Russia (May 13, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=russia&sessionid=6269301&skin=hudoc-en>. The decisions on the merits in all of these cases are pending as of mid-March, 2006.

¹⁰ A number of these lawyers work on behalf of non-governmental organizations (NGO's), both those that are indigenous and those that are connected to international organizations. In January, 2006, President Vladimir Putin signed legislation that imposes new requirements and limitations on NGO's. Federal Law #18-FZ, *SZ RF 2006, No. 3, item 282 (January 10, 2006)* [*Krug perhaps should add a newspaper report*]. It is difficult at this point to assess the impact of this legislation on matters related to the subjects of this article. Was defamation, or legal matters generally, a concern of Russia's lawmakers in enacting this legislation? Is defamation (or law generally) distant enough from more immediate political concerns? These considerations must remain outside the scope of this article.

¹¹ I refer to this as a constitutional law question because the Constitution, Article 15(4), serves as the conduit for incorporation of international treaty norms in the Russian legal system. See discussion *infra* note 75 and accompanying text.

While there is a rapidly-growing literature on the domestic incorporation of international norms [including the large book with Butler contribution about Russia that I found at UW law library on 12-20-05], the domestic legal effect of extra-national judicial interpretation of those norms has received less attention. An exception to this statement is the Venice Com'n conference in Kiev in Oct., 2005 [Venice Com'n website (button for "Calendar of Events") see the Kiev conference (10-14-05) re "Influence of ECtHR's case-law on national constitutional jurisprudence"].

II. THE ORDINARY COURTS

The ordinary court system is the largest of the three branches of the federal judicial system in Russia, the other two being the Constitutional Court of the Russian Federation ("CC") and the *Arbitrazh* ("commercial") courts. With certain exceptions not relevant to this article,¹² all courts in Russia are part of the federal judiciary.

With the exception of the SC in Moscow at its apex, the ordinary court system is organized on a territorial basis, with a separate hierarchical structure within each of the 89 federal units ("Subjects") of the Russian Federation. Thus, in addition to Justice of the Peace courts, within each Subject are found district courts, which in cases outside the competence of the Justice of the Peace courts usually serve as the courts of first instance, and subject-level ["regional"] courts that are divided into civil and criminal chambers which serve primarily as courts of appeal. Each of the latter courts also has a Presidium, a body made up of the President and certain other judges of the subject-level court, which is empowered in certain circumstances to review decisions of the civil and criminal chambers.

In the 1990s, the ordinary courts became the leading arena for examination of doctrinal issues in civil defamation law.¹³ They continue to play this role today, due in large part to the allocation of judicial competence in Russia.

II.A. The Allocation of Judicial Competence

The ordinary courts have competence over all matters not allocated exclusively to the CC or the *Arbitrazh* courts.¹⁴ The *Arbitrazh* courts have exclusive competence over disputes involving one or more parties engaged in entrepreneurial and other forms of economic activity.

As to jurisdiction over defamation disputes, the ordinary courts exercise competence over all cases except those that fall within the exclusive jurisdiction of the *Arbitrazh* courts.¹⁵ Some important and controversial litigation has taken place in the *Arbitrazh* courts; however, little

¹² The Subjects (federal units) of the Russian Federation may establish their own constitutional, or "Charter", courts, which have jurisdiction to review the compatibility of Subject legislation and sub-legislative acts with Subject Constitutions or Charters. William Burnham, Peter B. Maggs, and Gennady M. Danilenko, *Law and Legal System of the Russian Federation*, 41 (3rd ed., 2004: Juris Publishing, New York). In addition, the Subjects may establish "Justice of the Peace" courts, which occupy the lowest level of the ordinary court system. *Id.*, 55-56 and 73-74. Like the Subjects' constitutional courts, the Justice of the Peace courts do not have competence to adjudicate defamation disputes.

¹³ Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution, Part One*, 13 *Cardozo Arts and Entertainment Law Journal* 847-879 (1995), and *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution, Part Two*, 14 *Cardozo Arts and Entertainment Law Journal* 297 (1996).

¹⁴ On allocation of judicial competencies generally, see Burnham et al, *supra* note 12, 50-52, 70, 73-78, 81-129. Regarding the CC's jurisdiction, see also T.G. Morshchakova, "Konstitutsionnyi Sud Rossiiskoi Federatsii" [Constitutional Court of the Russian Federation], in *Sudebnaia vlast'* [The Judicial Power], I.L. Petrukhin, ed. (2003), 336-342.

¹⁵ The *Arbitrazh* Procedure Code of the Russian Federation, Art. 33, par. 5, grants the *Arbitrazh* courts competence over disputes "concerning the protection of business reputation in the sphere of entrepreneurial and other economic activity". *Arbitrazhno-Protssessual'nyi Kodeks RF* (*Arbitrazh* Procedure Code of the Russian Federation), Federal Law No. 95-FZ, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* ("SZ RF") 2002, No. 30, item 3012 (July 24, 2002). The SC also confirmed this grant of competence in the 2005 Explanation, *supra* note 2, section 3, which stated that this competence is exclusive.

consideration of doctrinal questions has taken place in those courts.¹⁶ Meanwhile, although it has competence to adjudicate individual complaints alleging unconstitutionality of legislative acts,¹⁷ the CC has not ruled on substantive defamation law questions. This is because the CC has viewed these as matters of judicial law application, and it lacks competence to review the constitutionality of judicial acts.¹⁸ The CC has maintained this position since denying, on these grounds, the admissibility of a defamation defendant's complaint in 1995.¹⁹

¹⁶ There is one exception to this statement. In the late 1990s, several decisions of the Supreme *Arbitrazh* Court Presidium rejected legal persons' claims for monetary compensation for non-economic harm, ruling (in contrast to the Supreme Court) that a legal person cannot experience the "pain and suffering" which is a prerequisite for that remedy. However, in mid-2005, the Supreme *Arbitrazh* Court upheld lower court decisions in the highly visible case of *Al'fa Bank v. Kommersant* that granted the moral damages remedy to a legal person. See Peter Krug, *Protection of Business Reputation in the Civil Code: Damages, the Constitution, and International Norms* [paper presented at Conference on Commercial Law Reform on Russia and Eurasia, Kennan Institute, Woodrow Wilson International Center for Scholars, Washington, D.C. (April 9, 2005), at http://www.reec.uiuc.edu/events/Conference/ACConf/lawconf_papers.htm]. In revised form, this paper will be published as part of a forthcoming book with collection of papers from the conference. The revised paper is available upon request.

Meanwhile, the Supreme *Arbitrazh* Court never has used its authority under Article 127 of the Constitution to issue general interpretations of the Civil Code's defamation provisions; instead, it has deferred to the SC on these questions. See, for example, the statements of the Supreme *Arbitrazh* Court representative at the December 23, 2004 Plenum that adopted the 2005 Explanation, *infra* at note 95 and accompanying text [Krug must supply summary of the statement].

¹⁷ RF Constitution, Article 125(4). This is a power of concrete, not abstract, review: in other words, the complainant must show that the legislative act in question was applied or would be applied in a discrete case. Absence of precision in the constitutional text has yielded considerable controversy over the question of whether the ordinary courts also have the power to hold legislative acts unenforceable in concrete cases because they conflict with the federal Constitution. See Burnham et al, *supra* note 12, 82-120, and Peter Krug, *Departure From the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, 37 *Virginia Journal of International Law* 725 (1997).

¹⁸ The grant of competence to adjudicate individual complaints in Article 125(4) of the Constitution, *supra* note 17, is limited to review of legislative acts only, and no other constitutional provision extends the CC's competence to review judicial acts. See also Article 3 of the CC's Statute, Federal'nyi konstitutsionnyi zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii" [Federal Constitutional Law "On the Constitutional Court of the Russian Federation"], Federal Constitutional Law No. 1-FKZ, *SZ RF* 1994, No. 13, Item 1447 (July 21, 1994) [*hereafter*, the "CC Statute"]. An English translation of the CC Statute can be found in *Statutes and Decisions: The Laws of the USSR and its Successor States*, Vol. 31, No.4 (July-August 1995) (S.J. Reynolds, ed.). See also Burnham et al, *supra* note 12, 52, and Krug, Virginia article, *supra* note 17. Thus, in this regard, the CC's powers are considerably more limited than those of its leading model, the German Federal Constitutional Court, which includes review of judicial acts within its competence. Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press: 2nd ed., 1997), 14-15.

In determining the constitutionality of a legislative act, the CC is authorized to identify and take into account the ordinary courts' construction of that act as reflected in their practice. CC Statute, Article 74(2). The CC has used this provision to articulate what it views as the constitutionally-permissible interpretation of the legislative act in question and to direct all law-applying agencies, including the ordinary courts, to employ it in future adjudications even if it differs from the ordinary courts' construction. See, for example, the CC's February 27, 2003 Decree (#1-P), section 6 [*SZ RF* 2003, No. 10, item 953 (March 10, 2003)]. However, whatever the degree of bindingness of such determinations, they do not approximate a power to exercise repressive review and declare unenforceable discrete ordinary court decisions.

¹⁹ *Opredelenie Konstitutsionnogo Suda RF ot 27 sentyabrya 1995 g. N. 69-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina Kozyreva Andreia Vladimirovicha". Complaint of A.V. Kozyrev, Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii (VKS)*, no. 6 (1995), p. 2. Also in *Rossiiskaia Gazeta [Ros. Gaz.]*, Nov. 22, 1995, p. 3. Also available at http://www.ksrf.ru:8081/SESSION/S__okIoTZL3/PILOT/main.htm (last visited March 18, 2006). For detailed discussion, see Krug, Cardozo Part Two, *supra* note 13, at 303-307. Theoretically, the CC would be

Meanwhile, the allocation of competencies, including the CC's lack of authority to review judicial acts, also ensures that the ordinary court system has broad autonomy in the interpretation and application of the norms of international agreements to which Russia is a party. This authority therefore extends to the ordinary courts' consideration of international norms in their construction of domestic legislation.²⁰ As a result, as will be discussed below, the ordinary courts as a system have been free to fashion their own approaches to the questions of the relationship between international norms, such as those in the ECHR, and domestic defamation law.

II.B. The Ordinary Courts and Judicial Authority

The judicial actions examined in this article are of two types: (1) the SC's issuance of abstract, generally-applicable "Explanations"; and (2) the adjudication by all ordinary courts of discrete disputes.

II.B.1. Explanations of the SC

The Supreme Court's powers are multi-dimensional.²¹ They include, in addition to the SC's indirect influence over judges through the exercise of its administrative authority over the entire ordinary court system,²² the issuance of interpretive Explanations and powers of appellate and supervisory review over discrete lower court decisions. For purposes of this article, the issuance of Explanations is by far the most important function: the SC's acts most directly relevant to the development of civil defamation law all were Explanations issued in 1992 (amended in 1993 and 1995),²³ 2003,²⁴ and 2005.²⁵ To this author's knowledge, the last SC adjudicative decision in a discrete defamation law case was in 1997.²⁶

competent to review the constitutionality of the defamation legislative base itself, but it did state in the *Kozyrev* decision (without making a formal determination) that the applicable Civil Code provisions appeared to have a constitutional basis. To this author's knowledge, the CC since that time has not been presented with a complaint alleging the unconstitutionality of the defamation legislative base itself.

²⁰ In regard to the CC's authority under Article 74(2) of the CC Statute, see *supra* note 18, it does not appear that the CC ever has invoked Article 74(2) to examine the conformity to international treaty norms of ordinary court applications of legislative acts.

²¹ See, generally, Burnham et al, *supra* note 12, 76-77.

²² See Krug, Virginia article, *supra* note 17, at 736-737.

²³ Postanovlenie No. 11 plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O nekotorykh voprosakh voznikshikh pri rassmotrenii sudami del o zashchite chesti i dostoinstva grazhdan i organizatsii" [Decree No. 11 of the Plenum of the Russian Federation Supreme Court "Concerning Several Questions Arising in Consideration by the Courts of Cases Concerning Defense of Honor and Dignity of Citizens and Organizations"] (Aug. 18, 1992), in *BVS*, No. 11, p. 7 (1992), available at http://www.supcourt.ru/vscourt_detale.php?id=889 (last visited March 18, 2006). Certain provisions of this Decree were amended in the 1993 and 1995. The 1993 amendments were made in Postanovlenie plenuma Verkhovnogo Suda Rossiiskoi Federatsii N. 11 "O dopolnenii i izmenenii nekotorykh postanovlenii Plenuma Verkhovnogo Suda Rossiiskoi Federatsii" [Decree No. 11 of the Plenum of the Russian Federation Supreme Court "Concerning Additions and Amendments to Certain Decrees of the Plenum of the Russian Federation Supreme Court"] (December 21, 1993), in *BVS*, No. 3, p. 8 (1994), available at http://www.supcourt.ru/vscourt_detale.php?id=919 (last visited March 18, 2006). The 1995 amendments were made in Postanovlenie plenuma Verkhovnogo Suda Rossiiskoi Federatsii N. 6 "O vnesenii izmenenii i dopolnenii v nekotorye postanovleniia Plenuma Verkhovnogo Suda Rossiiskoi Federatsii" [Decree No. 6 of the Plenum of the Russian Federation Supreme Court "Concerning the Insertion of Amendments and Additions into Certain Decrees of the Plenum of the Russian Federation Supreme Court"] (April 25, 1995), in *BVS*, No. 7, p. 4 (1995), available at http://www.supcourt.ru/vscourt_detale.php?id=4134 (last visited March 18, 2006). *Hereafter*, the 1992 Decree and 1993 and 1995 amendments will be referred to collectively as the "1992 Explanation".

This interpretive function is vitally important for two reasons.²⁷ First, it plays an important role in defining the normative base, serving as a gap-filler to refine ambiguous or unaddressed questions in statutory texts. Second, particularly in light of the absence of a tradition in Russia of judicial precedent,²⁸ it serves as an integral means of promoting uniformity of decision-making throughout the vast ordinary court system. Explanations are of great importance for the practice of the ordinary courts, which often cite to them in their decisions.²⁹

Although debate remains on the question of whether the Explanations constitute a binding source of law, it is apparent that consensus exists for the proposition that they are, at the least, "an important and effective instrument of judicial power."³⁰ Thus, Explanations have direct, immediate prospective effect throughout the entire ordinary court system.

The promulgation of these interpretations has distinctive elements of legislative process. Members of the Plenum review and discuss preliminary drafts, and often outside parties, both from other governmental agencies and representatives of public organizations, are invited to comment on drafts and to speak at the Plenum.

II.B.2. Adjudication and Hierarchy in the Ordinary Courts

Supervision of the adjudicatory acts of the ordinary courts lies exclusively within the ordinary court system. Review by higher level regional courts, as well as the Supreme Court, can take place in one of two ways (or both, as often is the case): appellate review and discretionary supervisory review (*nadzor*).³¹ The SC's adjudicative functions lie almost entirely in the appellate and supervisory review of its civil and criminal chambers, and the power of supervisory review that the Presidium exercises over Chamber decisions. The effectiveness of Explanations is anchored by the systems of hierarchical administration and discrete case review in the ordinary courts.

²⁴ Postanovlenie No. 5 plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 10 oktiabria 2003 g. "O primeneniі sudami obshchei iurisdiktsii obshchepriznannykh printsipov i norm mezhdunarodnogo prava i mezhdunarodnykh dogovorov Rossiiskoi Federatsii" [Decree No. 5 of the Plenum of the Russian Federation Supreme Court "Concerning the Application by the Courts of General Jurisdiction of Generally-recognized Principles and Norms of International Law and International Treaties of the Russian Federation"] (October 10, 2003), *BVS*, 2003, No. 12, p. 3, available at http://www.supcourt.ru/vscourt_detale.php?id=1961 (last visited March 4, 2006). *Hereafter*, this Decree will be referred to as the "October 10, 2003 Explanation".

²⁵ The 2005 Explanation, *supra* note 2.

²⁶ The *Vologda* decision: see discussion *infra* note 82 and accompanying text.

²⁷ E.B. Abrosimova, "Pravovoi status Verkhovnogo Suda Rossiiskoi Federatsii" [Legal status of the Supreme Court of the Russian Federation], in *Sudebnaia vlast'*, *supra* note 14, 359-361.

²⁸ See Peter B. Maggs, *Judicial Precedent Emerges at the Supreme Court of the Russian Federation*. 9 J. E. Eur. L. 479, 484-485 (2002). In this article, Professor Maggs identifies indications of a developing acceptance at the SC of a level of bindingness for certain SC decisions, particularly in the invalidation of administrative regulations. See also Burnham et al, *supra* note 12, 19-20, and Sergei Potapenko, *Pravovaia pozitsiia verkhovnogo suda RF po diffamatsionnym sporam* [Legal positions of the Russian Federation Supreme Court concerning defamation disputes], *Sud'ia*, 2005, #4, available at http://www.supcourt.ru/news_detale.php?id=2601 (last visited March 4, 2006) [*hereafter*, "Potapenko 2005"].

²⁹ Abrosimova, *supra* note 27. See also Burnham et al, *supra* note 12, 20-22.

³⁰ I.L. Petrukhin, "Vvedenie" [Introduction], in *Sudebnaia vlast'*, *supra* note 14, 11 ("[M]any jurists consider them authoritative and refer to them as sources of law"). See also: Abrosimova, *supra* note 29, 360-361 [stating definitely that Explanations operate as a source of law]; Danilenko, 1999 *EJIL*, *supra* note 6, at 58; and Burnham et al, *supra* note 12, 20-22.

³¹ For description, see Burnham et al, *supra* note 12, 62-62, and Krug Virginia article, *supra* note 17, at 733-735.

III. THE SOURCES OF LAW QUESTION IN DEFAMATION LAW

In seeking to protect individual reputation, defamation law by its nature implicates the activity that produces the perceived harm -- -- the dissemination of communication. Thus, the question is raised as to the function of normative guarantees protecting freedom of expression: do they represent only expressive interests for lawmakers to consider in fashioning the binding, generally-applicable rules of a defamation normative system, or are they among the sources of law that courts must interpret and apply in adjudicating discrete defamation disputes? This is the sources of law question that many domestic legal systems have confronted over the past half-century: whether striking the balance between the countervailing interests in defamation is the exclusive authority of lawmakers or is an exercise susceptible to the intervention of other sources of law in the form of freedom of expression guarantees found in constitutional or international norms ["external norms"]. The former approach, under which the defamation normative base is insulated from external norm intervention, I will call the "autonomy principle"; the latter I will call the "plurality principle".

When a given legal system's normative order includes freedom of expression guarantees in either a constitution or an applicable international agreement,³² or both, its identification as one adhering to either the autonomy or plurality approach will depend on two criteria:³³ (1) "accessibility" -- -- whether external norms generally are directly applicable in the legal system and may be invoked by individuals,³⁴ and (2) "applicability" -- -- whether the judiciary has recognized the operation of reputational protections as an "interference" with the exercise of rights guaranteed under such external norms.³⁵ If external norms meet both criteria and therefore are what I will call "active", then the legal system follows the plurality principle. On the other hand, if external norms generally are accessible but not applicable in the defamation context,

³² These considerations are outside the question of whether freedom of expression generally is a norm of customary international law.

³³ These matters concern in part the domestic status of international law norms, including customary (general) international law, in domestic systems that are viewed either as monist or dualist. In the latter, international norms lack legal effect within the domestic legal order in the absence of some affirmative act such as a constitutional provision or legislative act. Thus, the sources of law question in defamation law exists regardless of whether the legal system is monist or dualist. In the sources of law question, the issue is not the legal system's *general* stance toward incorporation of international norms; instead, it is whether the judiciary in a concrete case will recognize the operation of a private defamation law system as an interference with rights guaranteed under an incorporated international norm.

The USSR adhered to a strictly dualist approach to these questions, while Article 15(4) of the 1993 Russian Constitution, see *infra* note 75 and accompanying text, has moved Russia away from this stance. See Danilenko, 1999 EJIL, *supra* note 6, at 52. The Russian Federation still retains certain hallmarks of dualism, however, as illustrated by Article 5(3) of the Russian Law on Treaties [Rossiiskaia Federatsiia Federal'nyi Zakon "O mezhdunarodnykh dogovorakh Rossiiskoi Federatsii", Federal Law No. 101-FZ, *SZ RF* 1995, No. 29, item 2757 (July 15, 1995), which states that in certain circumstances (not relevant to the defamation law questions examined in this article) the incorporation of treaty norms requires enactment of implementing domestic legislation. See William E. Butler, The Law of Treaties in Russia and the Commonwealth of Independent States: Text and Commentary (2002), 36-38, and Burnham et al, *supra* note 12, 35.

³⁴ These correspond to the principles of direct applicability and direct effect.

³⁵ The terms "accessibility" and "applicability", as used here, are my own. "Interference", a term taken from ECHR Article 10(1), is not synonymous with "violation" of protected rights. Instead, a finding of interference is a pre-condition for determination of whether the act constituted a violation. Recognition of an interference is only the first (but necessary) step toward resolution of the question of a violation. In defamation law, the core interference question is whether subsequent punishment for a defamatory communication implicates the exercise of freedom of expression or whether interferences are limited solely to prior restraints on dissemination.

they are what I will call "passive". In such circumstances, the legal system adheres to the autonomy principle.

For example, it was the activation of external norms that led in the 1960's to the "constitutionalization" of defamation law in Germany³⁶ and the United States.³⁷ In the 1980's, the ECtHR introduced a new dimension into this process: the applicability of an international norm, Article 10 of the ECHR, to domestic systems of reputational protection.³⁸ In the ECtHR's seminal 1986 Lingens v. Austria decision,³⁹ the applicant was a journalist who had been found guilty in a criminal prosecution for a defamatory communication. The ECtHR applied to the defamation context its standard approach to applications based on Article 10, treating the "interference by a public authority" as the threshold determination.⁴⁰ If an interference is found, the ECtHR then will examine the interference under the requirements of Article 10(2) to decide if it is a violation of the ECHR, an exercise that will entail determinations of whether the interference was "prescribed by law", had an aim that is legitimate under Article 10(2), and was "necessary in a democratic society" for the advancement of that aim.⁴¹ In Lingens, the ECtHR first determined that Austria's application of post-publication sanctions was an "interference" under Article 10(1)⁴² that was not justified under the standards of Article 10(2).

³⁶ The term "constitutionalization" is borrowed from Basil S. Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (Oxford, United Kingdom, and Portland, Oregon, USA, Hart Publishing: 4th ed., 2002), 28-32 (describing the intervention of constitutional ideas into the sphere of private law in Germany, beginning particularly with the German Federal Constitutional Court's 1958 *Luth* decision).]. See also Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 Maryland Law Review 247 (1989), and Kommers, *supra* note 18, 361-371.

³⁷ See the landmark U.S. Supreme Court decision in New York Times v. Sullivan, 376 U.S. 254 (1964), in which the Court for the first time recognized the First Amendment as applicable to common law defamation. *Cf.* the Court's decision in Patterson v. Colorado, 205 U.S. 454 (1907), in which recognized First Amendment interferences were limited strictly to prior restraints. A forerunner of New York Times v. Sullivan was the Court's decision in Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) (not a defamation case), in which the Court recognized a subsequent punishment scheme as an interference with the exercise of First Amendment rights (stating that in "operation and effect" the scheme operated like a prior restraint, 283 U.S. at 708-713).

³⁸ The text of Article 10 is set forth *infra* at note 73 and accompanying text. Under Article 10, as interpreted by the ECtHR, the sources of law question centers on application of Article 10(1). If that provision is deemed applicable, then it is possible that application of one or more of the legitimate restrictions in Article 10(2), along with the "necessary in a democratic society" test, will operate to uphold the appropriateness of the state's interference.

There is a sizeable literature on the ECtHR's Article 10 jurisprudence. For citations, see the recent study by Dan Kozlowski, "*For the Protection of the Reputation or Rights of Others*": *The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)*, 11 Comm. L. & Pol'y 133 (2006).

³⁹ 103 Eur. Ct. H.R. (ser. A) (1986), available at <http://www.echr.coe.int/eng> (last visited March 18, 2006). In addition to its acceptance of subsequent punishment as an Article 10.1 interference, *Lingens* was the ECtHR's first decision to interpret the "for the protection of the reputation or rights of others" restriction in Article 10.2. See Kozlowski, *supra* note 38, at 141.

⁴⁰ This question usually will first be examined in the ECtHR's admissibility determination. One of the substantive grounds for the Court's denial of admissibility is a determination that an application is "manifestly ill-founded". ECHR, Article 35(3).

⁴¹ See Lingens v. Austria, *supra* note 39, par. 35.

⁴² That determination in fact was made in the December 11, 1981 admissibility decision of the European Commission (the ECtHR's former screening institution). 4 EHRR 373 (1982). At the Court, Austria did not dispute the existence of an interference. Lingens v. Austria, *supra* note 39, par. 35.

Because *Lingens* involved a criminal prosecution and conviction, a question could be raised about whether a private plaintiff's civil law action for defamation also constitutes an act of "public authority". This is the *drittwirkung* (third-party effect) issue addressed in Luth and Sullivan, and which both the German Constitutional Court and the U.S. Supreme Court resolved by concluding that the acts of law-creation and adjudication by state

The sources of law question before the Russian courts since the early 1990's presented a cluster of these considerations. In particular, following Russia's accession to the ECHR in 1998, the issues centered on the choice between the autonomy and plurality principles and the legal effect of ECtHR interpretations of ECHR Article 10.

IV. THE SOURCES OF RUSSIAN CIVIL DEFAMATION LAW: FROM LEGISLATIVE AUTONOMY TO PLURALISM

IV.A. The Legislative Base

Building on elements from Soviet law and adding the powerful remedy of compensation for non-economic harms ("moral damages"), Russian lawmakers in the first half of the 1990's constructed a private law structure for protection of individual reputation and other personality rights⁴³ that remains largely unchanged in 2006. This legislative base identifies the protected interests, establishes the circumstances under which those interests might legally be harmed, identifies defenses, and prescribes remedies. It contains what the Supreme Court until 2005 viewed as the exclusive, self-contained, comprehensive system of rules for resolution of personality rights disputes.⁴⁴ Indeed, until certain lower court decisions starting in 2002,⁴⁵ the proponents of the Civil Code system successfully withstood all efforts to introduce the plurality principle into civil defamation law.⁴⁶

IV.A.1. The Civil Code

The legislative base is set forth in the 1995 Civil Code of the Russian Federation,⁴⁷ Articles 150-152,⁴⁸ supplemented by Articles 1099-1101.⁴⁹ Article 150 ("Nonmaterial Values")

organs represent "public" or "state" action sufficient to implicate the constitutional protections. In subsequent decisions involving civil law defamation, the ECtHR has indicated that it takes the same approach. See, for example, *Tolstoy Miloslavsky v. United Kingdom*, July 13, 1995, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=united%20%7C%20kingdom&sessionid=6274499&skin=hudoc-en> (last visited March 19, 2006).

⁴³ Krug, Cardozo Part One, *supra* note 13. An action for civil defamation first was recognized in 1964. The remedies were limited to retraction and right reply until the addition of monetary compensation in the early 1990s.

⁴⁴ See, for example, the detailed comments of SC Justice Viktor Knyshev in "Voprosy zashchity chesti i dostoinstva v praktike Verkhovnogo Suda RF" (Questions of Protection of Honor and Dignity in the Practice of the Supreme Court of the Russian Federation), *Zakonodatel'stvo i praktika sredstv massovoi informatsii (Law and Practice of the Mass Information Media)*, 1997, No. 12 (December), <http://www.medialaw.ru/publications/zip/40/questions.html>.

⁴⁵ See discussion *infra* notes 83-89 and accompanying text.

⁴⁶ See discussion *infra* notes 79-82 and accompanying text. See also Krug, Cardozo Part One, *supra* note 13, at 873-876, and Krug, Cardozo Part Two, *supra* note 13, at 299-301.

⁴⁷ The Civil Code consists of three "Parts". Part I (Articles 1-453) was signed by President Yeltsin on November 30, 1994, and entered into force on January 1, 1995. *Grazhdanskii Kodeks Rossiiskoi Federatsii (Chast' pervaya)* [Civil Code of the Russian Federation (Part One)], Federal Law No. 51-FZ, *SZ RF* 1994, No. 32, item 3301 (November 30, 1994). Part II (Articles 454-1109) was signed by President Yeltsin on January 26, 1996, and entered into force on March 1, 1996. *Grazhdanskii Kodeks Rossiiskoi Federatsii (Chast' vtoraya)* [Civil Code of the Russian Federation (Part Two)], Federal Law No. 14-FZ, *SZ RF* 1996, No. 5, item 410 (January 26, 1996). Part III (Articles 1110-1224) was signed by President Putin on November 26, 2001, and entered into force on March 1, 2002. *Grazhdanskii Kodeks Rossiiskoi Federatsii (Chast' tret'ia)* [Civil Code of the Russian Federation (Part Three)], Federal Law No. 146-FZ, *SZ RF* 2001, No. 49, item 4552 (November 26, 2001). For detailed discussion of these steps, see *Grazhdanskii Kodeks Rossiiskoi Federatsii (Civil Code of the Russian Federation)*, edited and translated into English by Peter M. Maggs and Alexei N. Zhiltsov (2003), 10-11. In this article, I will refer to the entire Code as the 1995 Civil Code (as amended). All English translations of the Civil Code provisions discussed in this article are taken from this source.

identifies a number of protected legal interests, including honor and good name, business reputation, dignity of personality, and inviolability of private life.

IV.A.1.a. Civil Defamation -- -- Protection of Reputation Against False Defamatory Communications

Of the various legal interests identified in Article 150, only reputation receives detailed codification in the Civil Code. Article 152 (“Protection of Honor, Dignity, and Business Reputation”) is devoted solely to protection of reputational interests: individual honor and business reputation.⁵⁰ Under Article 152(1), as construed by the Supreme Court, a successful civil defamation claim has three elements: (1) dissemination of a communication [*svedenie*] concerning the plaintiff; (2) that is defamatory [*porochashchie*]; and (3) is false.⁵¹ Falsity is presumed, subject to the defendant’s proof that the communication was true.⁵² Liability is strict, not fault-based.⁵³

Article 152 identifies the post-publication remedies available to victims of false defamatory communications. These include retraction,⁵⁴ a right of reply if the defendant is a mass media outlet,⁵⁵ and monetary compensation for economic and non-economic harm.⁵⁶ The non-monetary remedies have been retained from Soviet legislation enacted in 1964,⁵⁷ while monetary compensation was introduced into the legislative base in the early 1990’s in a move that increased significantly the number of civil defamation lawsuits.

Articles 151 and 1100-1101 address the remedy of compensation for non-economic harm (“moral damages”). “Moral harm” is defined as “physical or mental suffering” experienced as a result of violation of one of the Article 150 legal interests.⁵⁸ Moral damages are available for harm to honor, dignity, and business reputation “regardless of the fault of the one who caused the

Prior to 1995, civil defamation provisions were found in two primary sources -- -- the 1964 RSFSR Civil Code (as amended) and *Osnovy* of the USSR (the most recent of which were enacted in 1991: 1991 Fundamentals of Civil Legislation of the USSR, No. 2211-1, *Vedomosti SSSR* 1991, No. 26, item 733 (May 31, 1991)) -- -- supplemented beginning in 1990 with provisions in mass media legislation (the 1990 USSR Law on the Press, supplanted in 1991 by the Mass Media Law).

⁴⁸ Articles 150-152 comprise Chapter Eight of the Civil Code (“Nonmaterial Values and Their Protection”).

⁴⁹ Articles 1099-1101 comprise Section Four (“Compensation for Moral Harm”) of Chapter 59 (“Obligations as a Result of the Causing of Harm”) of the Civil Code.

⁵⁰ Of these, the former have grounding in constitutional rights (1993 Constitution, Articles 21 and 23); the latter does not.

⁵¹ Article 152(1), and the 2005 Explanation, *supra* note 2. See also Dmitrii Golovanov & Sergei Potapenko, *Primenenie rossiiskimi sudami polozhenii Konventsii o zashchite prav cheloveka i osnovnykh svobod i praktiki Evropeiskogo suda po pravam cheloveka: teoreticheskie i prakticheskie aspekty* [Application by the Russian courts of European Human Rights Convention provisions: theoretical and practical aspects], *Zakonodatel'stvo i praktika mass media*, 2005, #3, <http://www.medialaw.ru/publications/zip/127/4.htm> [*hereafter* “Golovanov and Potapenko 2005”]. See also Potapenko 2005, *supra* note 28, at 6.

⁵² Article 152(1).

⁵³ *Krug Cardozo Part One*, *supra* note 13, and *Krug Cardozo Part Two*, *supra* note 13. Article 1100 of the Civil Code states also that the imposition of moral damages in defamation cases shall not be based on fault of the defendant.

⁵⁴ Article 152(1).

⁵⁵ Article 152(3).

⁵⁶ Article 152(5). Articles 15, 1064, and 1082 of the Civil Code are applicable to harms to business reputation that are eligible for compensation as economic (not moral harm) losses (*ubytki*). See Burnham et al, *supra* note 12, 370-373.

⁵⁷ See *Krug, Cardozo Part Two*, *supra* note 13, at 867-873.

⁵⁸ Article 151 (“Compensation for Moral Harm”).

harm”.⁵⁹ The court determines the quantum of moral damages, basing its decision on factors such as the degree of the victim’s physical and mental suffering and the guilty party’s degree of fault.⁶⁰ In addition, the Civil Code requires that the court must consider “the requirements of reasonableness and justice” in determining the amount of moral damages compensation.⁶¹

IV.A.1.b. Related personality rights claims: civil insult and invasion of privacy

Often intermingled with adjudication of civil defamation claims is judicial consideration of claims based on insult and/or violation of privacy. The courts recognize these as claims separate from civil defamation. The Civil Code does not identify the claims’ elements. Instead, the courts have grafted them from the Criminal Code of the Russian Federation.

The claim of “insult” [*oskorblenie*] is viewed as civil protection of the interest of individual dignity. Because it is not expressly addressed in the Civil Code, the courts use the definition of “insult” found in Article 130 of the Criminal Code of the Russian Federation, which states in relevant part that insult is “the demeaning of the honor and dignity of another person, expressed in an indecent form”.⁶² Thus, it should be noted that truth is not a defense to this claim.

The elements of invasion of privacy (*narushenie neprikosновенности частной жизни*) are taken from Article 137 of the Criminal Code. In relevant part, Article 137 defines this violation as:

The illegal gathering or dissemination of information about the personal life of a person without that person's permission which information constitutes a personal or family confidence, or the dissemination of such information...by means of the mass media, if such actions are undertaken for reasons of financial gain or personal benefit and cause harm to the rights and legal interests of citizens.⁶³

IV.A.2. The Law on Mass Information Media

The 1992 Law on Mass Information Media (“Mass Media Law”)⁶⁴ is another component of the legislative base. It provides certain exceptions from liability for journalists and media entities in Article 57. It also sets forth rules for non-monetary remedies that basically amplify the refutation remedy in Article 152 of the Civil Code. Noteworthy here is the provision (Art. 46) that requires right of reply for someone identified in a true defamatory statement. It also reiterates the moral damages remedy in cases of violations of personality rights by journalists and media entities.

⁵⁹ Article 1100 (“Bases for Compensation for Moral Harm”).

⁶⁰ Articles 151 and 1101(2) (“Method and Amount of Compensation for Moral Harm”).

⁶¹ Article 1101(2).

⁶² Ugolovyi Kodeks Rossiiskoi Federatsii [Criminal Code of the Russian Federation], Federal Law 63-FZ, *SZ RF* 1996, No. 25, item 2954 (June 13, 1996) (effective January 1, 1997, as amended through January 5, 2006), available at <http://www.systema.ru/development/inc/bdoc.asp?Id=58568> (last visited March 8, 2006). [English translation from 39 *Statutes and Decisions*, 2003, Issue 4 (July-August), 102].

⁶³ *Translation from Burnham et al, supra note 12, 571.*

⁶⁴ Zakon o sredstvakh massovoi informatsii [Law on Mass Information Media], *Vedomosti S"ezda Narodnykh Deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii* [Vedomosti RF], Issue No. 7, Item 300 (1992) (enacted Dec. 27, 1991, effective Feb. 8, 1992) [last amended July 21, 2005 (No. 93-FZ)], available at http://www.medialaw.ru/laws/russian_laws/txt/2.htm (last visited March 8, 2006). English language version (up to and including amendments of December 8, 2003) available at http://www.medialaw.ru/e_pages/laws/russian/massmedia_eng/massmedia_eng.html (last visited March 8, 2006).

IV.A.3. Supreme Court Interpretations: the 1992 and 2005 Explanations

Of great importance for the practice of the ordinary courts are the SC's Explanations that interpret the legislative base. From its promulgation to its replacement in February, 2005, the 1992 Explanation⁶⁵ served as a leading source for the ordinary courts in their adjudication of defamation disputes. The Explanations among other things seek to eliminate judicial uncertainty as to the meaning of indeterminate or ambiguous legislative texts. For example, both the 1992 and 2005 Explanations defined the term "defamatory meaning" as found, but not defined, in Article 152 of the Civil Code.⁶⁶

In sum, the legislative base reflects the legislature's policy determinations as to the proper balance⁶⁷ between reputational and free expression interests. The defamation law system established in the early 1990s reflected the aspirations and success of personality rights advocates, who viewed it as a long-awaited vehicle of effective recourse for individuals targeted in public fora for ridicule and humiliation, particularly by more powerful media entities.⁶⁸ This structure consciously was weighted heavily in favor of plaintiffs, and it quickly became a popular form of legal action.⁶⁹ It provided not only strict liability and placement of the burden on defendants to prove the truth of impugned communications, as well as broad judicial discretion as to the quantum of damages, but also a broad construction of "communication" and "defamatory meaning" to include not only assertions of fact but also statements of opinion.

IV.B. External Norms, Particularly the ECHR

Because of the new directions begun in 2002 and culminating in the SC's 2005 Explanation, it now is accepted that civil defamation law is grounded in the plurality principle, with multiple active sources of law: the legislative base, Article 29 of the 1993 Constitution of the Russian Federation, and Article 10 of the ECHR. The steps in this process involved

⁶⁵ *Supra* note 23.

⁶⁶ 1992 Explanation, *supra* note 23, Section 2; 2005 Explanation, *supra* note 2, Section 7. The latter slightly revised the Section 2 definition.

⁶⁷ Potapenko 2005, *supra* note 28, at 4.

⁶⁸ Krug, Cardozo Part One, *supra* note 13, at 863-876.

⁶⁹ Krug, Cardozo Part One, *supra* note 13, at 848-851. Some recent statistics are provided in a 2005 report by the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe ("OSCE"). On page 130, the report states:

"According to data from the governmental statistical reporting for 2002, 7,464 court judgements were issued on civil cases connected with the protection of honour, dignity and business reputation, for 2003, 6,498 and for the first six months of 2004, 3,320 such judgements were issued."

"Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve. A comprehensive database on criminal and civil defamation provisions and court practices in the OSCE region" (March, 2005), <http://www.osce.org/fom/documents.html>.

A recent detailed study of defamation actions in one province -- -- Arkhangel'sk -- -- is found at [<http://www.arhcourt.ru/?Documents/Civ/Gen/200417170003>]. Dated August 23, 2004, its title is: *Obobshchenie po rezul'tatam izucheniia sudebnoi praktiki po delam o zashchite chesti i dostoinstva grazhdan, a takzhe delovoi reputatsii grazhdan i iuridicheskikh lits za period 2002-2004 gody (izvlechenie)* [General conclusions on the results of a study for the period 2002-2004 of judicial practice in cases concerning protection of honor and dignity of citizens and business reputation of citizens and legal persons (excerpts)]. Authored by Judge N.A. Pushkarev of the Arkhangel'sk provincial court, the report stated that courts in the province heard 336 civil defamation cases in the thirty-month period starting January 1, 2002.

recognition of the applicability of the ECHR as an active external source of law in both scattered lower court decisions and SC Explanations generally applicable to the entire ordinary court system.

Even before 2002, the pre-conditions for applicability of external norms existed. External norms were available. Article 29 of the 1993 Russian Constitution includes express guarantees for freedom of speech and the press.⁷⁰ In addition, throughout the period in question, Russia was a party to the International Covenant on Civil and Political Rights (ICCPR), which includes free expression guarantees in its Article 19.⁷¹ Finally, and most central to this article, Russia in 1998 acceded to the ECHR.⁷² Article 10 ("Freedom of Expression") of the ECHR states in full:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

⁷⁰ Article 29 states in full:

1. Everyone shall be guaranteed freedom of thought and speech.
2. Propaganda or agitation inciting social, racial, national or religious hatred or enmity shall not be allowed. The propaganda of social, racial, national, religious or language superiority shall be prohibited.
3. No one may be forced to express his or her opinions and convictions or to renounce them.
4. Everyone shall have the right to freely seek, receive, transmit, produce and disseminate information in any lawful way. The list of data that constitute state secrets shall be established by federal statute.
5. Freedom of the mass media shall be guaranteed. Censorship shall be prohibited.

Translation from Burnham et al., supra note 12, 643.

⁷¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (adopted by the U.N. General Assembly on December 16, 1966; entered into force on March 23, 1976). The USSR ratified the ICCPR on March 23, 1976, and Russia is the successor state to the USSR. ICCPR Article 19 states in full:

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.

⁷² *Federal'nyi zakon "O ratifikatsii Konventsii o zashchite prav cheloveka i osnovnykh svobod i Protokolov k nei* [Federal Law "On the ratification of the Convention on Protection of Human Rights and Fundamental Freedoms and its Protocols"] Federal Law No. 54-FZ, SZ RF 1998, No. 14, Item 1514 (March 30, 1998) [*Hereafter*, ECHR Accession Act].

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁷³

Articles 29, 19, and 10 also were accessible.⁷⁴ Under Articles 15(1) and 15(4) of the Constitution, both constitutional and international treaty norms are directly applicable in the legal system and in fact superior to conflicting legislation.⁷⁵ Article 18 provides that human rights protections operate with direct effect -- -- that is, individuals have standing to invoke them in the courts.⁷⁶ In addition, actors in the legal system must recognize and guarantee the human rights and freedoms enumerated in the Constitution in conformity with "generally recognized principles and norms of international law and in accordance with this Constitution".⁷⁷

In an affirmation of the availability of external norms and their accessibility, the SC in 1995 directed the ordinary courts to use external norms as active sources of law when applicable, and to refrain from applying legislative acts that conflict with those norms.⁷⁸ In other words, the

⁷³ ECHR, *supra* note 3.

⁷⁴ See *supra*, notes 34-35, for discussion of accessibility and applicability.

⁷⁵ Articles 15(1) and 15(4). Article 15(1) states in full:

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 any other legal acts adopted within the Russian Federation may not contravene the Constitution of the Russian Federation.

Article 15(4) states in full:

Generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute an integral part of its legal system. If an international treaty of the Russian Federation establishes rules other than those provided for by the law, the rules of the international treaty shall apply.

Translations from Burnham, *et al.*, *supra* note 12, 640. For detailed discussion of Article 15(4), see Danilenko, *supra* note 6, 88 AJIL at 464-466, and Danilenko, *supra* note 6, 1999 EJIL at 52, 57-58, and 68. According to one commentator, Justice Vereshchetin of the ICJ, Article 15(4) reflected the adoption of a "radically new principle" in Russian law. In contrast, he noted, "The former Constitutions of the Soviet Union and of Russia never contained general principles on the relationship between international law and internal law." Vladlen S. Vereschchetin, "New Constitutions and the Old Problem of the Relationship between International Law and National Law," 7 European Journal of International Law 1, 9 (1996). *available at* <http://www.ejil.org/journal/Vol17/No1/art2.pdf> (last visited March 18, 2006).

The Civil Code, *supra* note 50, itself allows for this in regard to the relationship between its provisions and international treaty norms. The second paragraph of Article 7(2) states in full: "If an international treaty of the Russian Federation establishes rules other than those that are provided by civil legislation, the rules of the international treaty are applied." However, to this author's knowledge, Article 7(2) never has been invoked, at least successfully, by a defendant in a defamation case.

⁷⁶ Article 18 states in full:

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

Translation from Burnham *et al.*, *supra* note 12, 641.

⁷⁷ Article 17(1). *Translation from* Burnham *et al.*, *supra* note 12, 640-641.

⁷⁸ Postanovlenie No. 8 plenuma verkhovnogo suda Rossiiskoi Federatsii ot 31 oktiabria 1995 g. "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiiia" [Decree No. 8 of the Plenum of the Russian Federation Supreme Court dated October 31, 1995 "On Certain Questions of the Courts']

SC directed the courts to act as constitutional control bodies within the limits of their competency.

In defamation law, however, the external norms were passive: the ordinary courts did not recognize their applicability to disputes in which the Civil Code's protections of individual reputation and other personality rights were invoked. In the 1990s, the SC ignored or rejected efforts to make Article 29 active. Challenges to the private law structure, at least to some of its specific elements, began in the mid-1990s. These challenges were of two types, often expressed concurrently: a plurality principle argument, grounded in the free expression guarantees in Article 29 of the Constitution and directed toward invalidation of the Civil Code's defamation scheme,⁷⁹ and the use of narrow statutory constructions of the Civil Code to make it consistent with Article 29. A particular target of both was the practice of the Russian courts in treating similarly all communications -- -- assertions of fact and statements of opinion -- -- thereby rejecting recognition of a distinction, with different legal effects, between them.⁸⁰

However, the Supreme Court did not deviate from the autonomy principle in either its interpretive or adjudicative capacities. The 1992 Explanation, amended in 1993 and 1995 and in effect until adoption of the 2005 Explanation, adhered strictly to legislative and private law autonomy -- -- even in the 1995 amendments, which came after the 1993 Constitution and its provisions for direct applicability and direct effect of constitutional and international norms. The Explanation did not make any references to free expression interests or cite to any external norms in its interpretive analysis of the applicable legislation.⁸¹ As to adjudication, in its only

Application of the Russian Federation Constitution in the Administration of Justice"], in *BVS*, 1996, No. 1, p. 3 [hereafter, the "1995 Explanation"], available at http://www.supcourt.ru/vscourt_detale.php?id=3863 (last visited March 18, 2006). See also Krug Virginia article, *supra* note 17 at 754-756.

⁷⁹ A particularly illustrative expression of frustration with the autonomy principle came in a commentator's 1994 observation that a Moscow appellate court had been literally correct in its decision in favor of a defamation plaintiff, but at the same time had lacked "the least particle of civil responsibility." See Krug, Cardozo Part Two, *supra* note 13, at 300 (lawyer and human rights activist Kronid Lyubarsky, commenting on the outcome in *Zhirinovskii v. Gaidar*, in which defendants former Prime Minister Egor Gaidar and the newspaper *Izvestiia* were found guilty of defamation for publication of statements that the plaintiff, State Duma Deputy Vladimir Zhirinovskii, was "a fascist populist" and "the most popular fascist in Russia" -- -- statements that the defendants unsuccessfully had argued were expressions of opinion not susceptible to liability).

⁸⁰ See, for example, arguments advanced in S. Poliakov, *Svoboda mneniia i zashchita chesti* [Freedom of opinion and protection of honor], *Rossiiskaia Iustitsiia*, 1997, #4, 47; A. Erdelevskii, *Utverzhdenie o fakte i vyrazhenie mneniia -- -- poniatiiia raznogo roda* [Assertions of fact and expression of opinion -- -- two different concepts], *Rossiiskaia Iustitsiia*, 1997, #6, 17; and S. Potapenko, *Fakty i mneniia v delakh o zashchite chesti* [Facts and opinions in protection of reputation disputes], *Rossiiskaia Iustitsiia*, 2001, #7, 28.

The fact/opinion question has been a significant element in the defamation jurisprudence of the German Federal Constitutional Court. See Sabine Michalowski and Lorna Woods, *German Constitutional Law: The Protection of Civil Liberties* (1999), 200-206. See also Markesinis and Unberath, *supra* note 36, 380.

⁸¹ 1992 Explanation, *supra* note 23. In maintaining the 1992 Explanation intact, the SC declined to accept invitations from the CC and a conference of ordinary court judges and journalists to adopt the plurality principle. Regarding the former, issued in the CC's 1995 Kozyrev determination, *supra* note 20, see Potapenko 2005, *supra* note 28, at 4, and Krug Cardozo Two, *supra* note 13, at 303-307. The latter appeal was made in 1999 by a conference of judges and journalists in Krasnodar Krai. See Iurii Luchinskii, "Konferentsiia sudei i zhurnalistov" [Conference of judges and journalists], *Zakonodatel'stvo i praktika sredstv massovoi informatsii*, 1999, #5, <http://www.medialaw.ru/publications/zip/regional/krasnodar/krasnodar1.html#4>. To some extent, it may be said that the SC's 2005 Explanation in effect is a response to the questions raised in those appeals.

published adjudication of a concrete defamation case, the Supreme Court in 1997 expressly rejected adoption of the plurality concept.⁸²

IV.B.1. Foundations for New Directions: the 2002 Karelia Decision and other Lower Court Practice

Despite the apparent solidarity of the private law structure, a 2002 district court decision in the Republic of Karelia signaled the beginning of the movement toward plurality.⁸³ The court dismissed a civil defamation complaint brought by two republican legislative deputies against two local newspapers and two individuals. Citing what it called the “precedential law” of the ECtHR as expressed in Lingens v. Austria,⁸⁴ the court concluded that the communications in question, critical of the plaintiffs, were value judgments and therefore lacked a defamatory meaning.

This decision's implicit adoption of the plurality principle was noteworthy in itself. In addition, however, of significance for future developments was the succession of steps that were necessary for the court to arrive at its judgment.⁸⁵ These steps were:

1. The court's recognition of the availability and accessibility of the ECHR. However, in itself, a reading of the Article 10 text would not necessarily have resulted in dismissal of the suit, since the text does not address the specific questions presented. Indeed, if anything, a reasonable reading of the text could yield a conclusion that the inclusion of "protection of reputation" among the Article 10(2) exceptions would have excluded the application of the free expression provisions of Article 10(1).⁸⁶

⁸² In this case, the Vologda Provincial Court Civil Chamber and Presidium had applied the free expression protections of Article 29 of the Constitution to dismiss a defamation lawsuit. On supervisory review, the Supreme Court's Civil Chamber reversed these decisions on the grounds that false defamatory statements fall outside the zone of Article 29 protection. See Krug Virginia article, *supra* note 17, at 778.

⁸³ Karelia decision, March 12, 2002, <http://www.medialaw.ru/article10/7/2/08.htm>. The Republic of Karelia is one of the 89 Subjects of the Russian Federation. The Karelia decision is among a collection of lower court judgments in defamation cases posted at the website of the Moscow Media Law and Policy Institute, <http://www.medialaw.ru/article10/7/index.htm>. To this author's knowledge, the decisions have not otherwise been published. *Hereafter*, citations to cases found in this collection will be to the name of the Province in which they were rendered, and the date of the judgment.

Although cracks began to appear in the autonomy principle structure in 2002, and a significant departure occurred in 2005 with the SC's 2005 Explanation, manifestations of the autonomy principle remain, particularly in the practice of the *Arbitrazh* courts. A recent, highly visible illustration of such exclusion of external law is found in the multiple decisions of the *Arbitrazh* courts in the Al'fa Bank v. Kommersant litigation, *supra* note 16. The four court decisions in that case do not include recognition of the applicability (or potential applicability) of external norms. The defendant Kommersant in September, 2005 filed an application at the ECtHR, claiming violation of rights guaranteed under the ECHR, including Article 10. The ECtHR has not made an admissibility decision regarding the application at the time of this writing.

⁸⁴ See *supra* note 39 and accompanying text.

⁸⁵ The judgment did not state most of these explicitly, but the logical progression is evident from its text.

⁸⁶ Indeed, the explicit inclusion of "protection of the reputation or rights of others" among the legitimate aims that might justify a state's imposition of restrictions on the exercise of expressive rights should serve as support for continued reliance on the legislative base as the sole authority in adjudication of reputation disputes. Certainly, the Article 10 text does not provide any more protection for expressive interests than does the combination of Articles 29 and 55(3) of the Russian Constitution. Article 29 is set forth *supra* at note 72. Article 55(3) states in full:

2. The court's recognition of the relevance, in some sense, of ECtHR practice interpreting Article 10. In doing this, the Karelia decision appears to have been the first in the Russian courts to refer to ECtHR interpretations as a category for authoritative guidance on Article 10.

3. The court's recognition of Article 10's applicability, based on the ECtHR's recognition of an "interference" in an analogous case (Lingens v. Austria) involving subsequent punishment for an unlawful communication.

4. Having adopted the plurality principle, the Karelia court again identified the ECtHR's position, articulated in Lingens, that the fact/opinion distinction has legal consequences.

5. Having concluded that the ECtHR's Lingens position was applicable, the Karelia court did not apply Article 10 to declare application of Article 152 of the Civil Code unconstitutional or to refer the question of Article 152's constitutionality to the CC.⁸⁷ Instead, the court engaged in statutory construction to determine that a statement of opinion cannot have a "defamatory meaning" under Article 152. In doing this, the court arguably went beyond the dictates of the SC's definition of "defamatory meaning" in its 1992 Explanation.⁸⁸

Central to the Karelia court's approach, and that in similar subsequent lower court adjudicatory decisions, was recognition of the weight to be afforded to ECtHR interpretations of the ECHR. Thus began the gradual movement toward internalization of the Strasbourg Court's practice, which proceeded hand in hand with growing recognition of the plurality principle in defamation law.

IV.B.2. Internalization and the Plurality Principle as Uniform Mandates: Supreme Court Explanations and the "Take Into Account" Directive

IV.B.2.a. The October 10, 2003 Explanation

The approaches of the lower courts in the early sporadic decisions were not uniform: some appear to have been internalizing ECtHR practice and adopting the plurality

The rights freedoms of the individual and citizen may be restricted by federal statute only to the extent necessary to protect the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, or to ensure the defense of the country and the security of the state.

Translation from Burnham, et al, *supra* note 12, at 648. For analysis of the CC's interpretation and application of Article 55(3), see Peter Krug, *Assessing Legislative Restrictions on Constitutional Rights: the Russian Constitutional Court and Article 55(3)*, 56 OKLAHOMA LAW REVIEW 677 (2003).

⁸⁷ Article 101 of the CC Statute, *supra* note 18, provides for ordinary court referral to the CC upon the ordinary court's "arrival at the conclusion" that a legislative normative act normally applicable in a concrete dispute is inconsistent with the Constitution. For discussion about the referral mechanism, including the controversy over whether it is mandatory or discretionary, see Burnham, et al, *supra* note 12, 98-102, and Krug Virginia article, *supra* note 17, at 746-747, 748-750.

⁸⁸ 1992 Explanation, *supra* note 23. In Section 2, par. 2, the 1992 Explanation stated in full:

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

For further discussion, see Krug Cardozo Part One, *supra* note 13, at 854.

principle out of a sense of legal mandate,⁸⁹ while others apparently were doing so as a matter of discretion, treating the ECtHR's interpretation of the binding Article 10 as persuasive authority. In generally-applicable Explanations starting in October, 2003,⁹⁰ the Supreme Court began the process of establishing uniformity of practice in this area.

The October 10, 2003 Explanation⁹¹ addressed the internalization question as a general matter, without reference to Article 10 or defamation disputes. Having first established that international agreements to which Russia is a party, including the ECHR, are binding in the Russian legal system, the Explanation informed the lower courts that, in all cases where the ECHR is applicable, they must "take into account" the ECtHR's "practice" in order "to avoid violations of the ECHR".⁹²

IV.B.2.b. The 2005 Explanation

The broad scope of the October 10, 2003 Explanation implicitly required courts to take into account ECtHR practice in their interpretations of Article 10. However, this in itself did not resolve the question of whether, as a generally-applicable rule, defamation disputes should be subject to the plurality principle.⁹³ Meanwhile, in 2004, a growing number of courts continued to apply the plurality principle.⁹⁴

On December 23, 2004, the Supreme Court Plenum, with representatives of government agencies and other courts in attendance and participating, along with representatives of NGO's and journalists' organizations, met to consider the latest draft of an Explanation that would

⁸⁹ Karelia and its use of the term "precedential law" suggests that the court in that case considered itself bound to apply the ECtHR interpretation in question. *Supra* note -- -- .

⁹⁰ The 1995 Explanation, *supra* note 78, did not address judicial interpretations of treaty norms and of course was promulgated before Russia's 1998 accession to the ECHR.

⁹¹ *Supra* note 24.

⁹² October 10, 2003 Explanation, *supra* note 24, sec. 10, pars. 2-3, and sec. 11, par. 2. In some places, the Court uses the verb *uchityvat'* (see sec. 10, par. 2) -- -- in others, the phrase *osuchshestvliat'sia s uchetom* (see sec. 10, par. 3). Both may be rendered as "take into account". For detailed discussion as to the meaning of this "take into account" requirement, see *infra* section VI.A.

In another illustration of the growing importance of the ECtHR's practice, the SC in a December 19, 2003 Explanation directed the lower courts, as part of their requirement under the Civil Procedure Code to set forth a statement of reasons in their judgments, to make citations to specific ECtHR decisions whenever they were making use of ECtHR interpretations. *Postanovlenie No. 23 plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 19 dekabria 2003 g. "O sudebnom reshении"* [Decree No. 23 of the Plenum of the Russian Federation Supreme Court "Concerning the Judicial Decision"], sec. 4, *BVS*, 2004, #2, p. 3, *available at* http://www.supcourt.ru/vscourt_detale.php?id=1419 (last visited March 5, 2006). A noteworthy aspect of this judicial gloss on Article 198 of the Civil Code (which does not mention the ECtHR) is that section 4 included the ECtHR among the three courts for whom it must provide such citations, the other two being the SC itself and the CC. In other words, this leaves the implication that the ECtHR is to be viewed as another high court in the Russian legal system.

⁹³ The plurality principle includes applicability of Article 29 of the Constitution, as well as ECHR Article 10. However, in the ordinary courts' practice and in the 2005 Explanation, the use and influence of Article 10 far exceed those of Article 29. This undoubtedly is attributable to the wide availability and prestigious influence of the ECtHR interpretive practice.

⁹⁴ For example, at least two courts stated this expressly. In an October 14, 2004 decision, the Civil Chamber of the Sverdlovsk Provincial Court articulated recognition of the plurality of sources in civil defamation law [*Krug must supply cite from Sverdlovsk oblast court website*]. In a November 20, 2003 decision, <http://www.medialaw.ru/article10/7/2/14.htm>, a Sverdlovsk Province District Court set forth the plurality principle in detail, citing the applicable sources of law: norms of the ECHR; decisions of the ECtHR; the Constitution; decisions of the CC; the Civil Code (as interpreted by the SC); and the Mass Media Law.

replace the 1992 Explanation and in doing so address the question of the active sources in defamation law.⁹⁵

The timing of the Plenum was noteworthy, with increasing signals from Strasbourg that Russia's defamation scheme was undergoing growing scrutiny.⁹⁶ Two weeks earlier, the ECtHR had found four applications by defamation defendants against Russia admissible,⁹⁷ raising to seven the number of such applications found admissible in 2004.⁹⁸ The SC President, Judge V.M. Lebedev, was clearly supportive of the proposed Explanation, much of which had been drafted by Judge S.V. Potapenko, a long-time advocate of the fact/opinion distinction and ECHR activation.⁹⁹ Judge Potapenko served as the *rapporteur* [*dokladchik*] at the Plenum. Also adding to the atmosphere were expressions of concern from lower ordinary courts seeking resolution of defamation law questions. For example, the detailed August, 2004 study by Judge Pushkarev of Arkhangel'sk Province stated as one of its conclusions:

In each concrete civil case, it is necessary to strive to make certain that the claim for protection of honor and good name does not run counter to freedom of speech in a democratic society. This must be the judge's responsibility in hearing and deciding disputes for protection of honor, dignity, and business reputation.

To accomplish this, the report proposed that the courts continue to analyze the "unclear and controversial questions" that arise in reputational disputes.¹⁰⁰

The result of the Plenum was approval of a new Explanation on questions of civil defamation law, which after final editing was promulgated on February 24, 2005 (the 2005 Explanation).¹⁰¹ The 2005 Explanation replaced the 1992 Explanation.¹⁰² Its most fundamental departure from its predecessor was the express adoption of the plurality principle in civil defamation law.¹⁰³ In contrast to the 1992 Explanation's absence of references to sources of law

⁹⁵ A number of speakers at the Plenum were judges from the regional higher courts and representatives from the Procuracy and government agencies, as well as representatives of journalists' professional organizations. The official report on the Plenum is found in *BVS*, 2005, #4, p. 1, available at http://www.supcourt.ru/vscourt_detale.php?id=2536 (last visited March 18, 2006). Reports from the press include: Mikhail Fedotov, *Supreme Court Opens Door to Better Rules*. The Moscow Times: March 2, 2005 (page 10), available at <http://www.themoscowtimes.com/stories/2005/03/02/006.html> (last visited March 5, 2006) (access requires payment) [copy in possession of author: available upon request]; and Andrei Richter, *Chest' i dostoinstvo: shag k svobode slova* [Honor and dignity: a step toward freedom of speech], *Vedomosti*, No. 39 (1321) (March 5, 2005), available at <http://www.vedomosti.ru/newspaper/article.shtml?2005/03/05/88980> (last visited March 5, 2006: access requires payment) [copy in possession of author: available upon request].

⁹⁶ Richter, *Vedomosti*, *supra* note 95. The existence of a connection between these concerns and the ECtHR's reiteration of the "take into account" requirement and its "avoidance of violation" standard is plausible. See discussion *infra* notes 153-161 and accompanying text.

⁹⁷ See *supra* note 9 (Godlevskiy, Krasulya, Porubova, and Zakharov applications).

⁹⁸ See *supra* note 9 (Filatenko and Dyul'din and Kislov applications). In addition, the application in Grinberg v. Russia, decided on the merits on July 21, 2005, was found admissible on October 28, 2004 (<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=grinberg%20%7C%20russia&sessionId=6269301&skin=hudoc-en>). It is also possible that the judges were aware of the draft of the critical report that the PACE subsequently adopted on June 22, 2005. See *supra* note 7.

⁹⁹ For example, see his 2001 Rossiiskaia Iustitsiia article cited in note 80, *supra*.

¹⁰⁰ Arkhangel'sk Report, *supra* note 69.

¹⁰¹ *Supra* note 2.

¹⁰² The 2005 Explanation, *supra* note 2, section 19.

¹⁰³ Some of the speakers at the December 23, 2004 Plenum expressly endorsed this step. For example, the Deputy President of the Moscow City Court, V.V. Gorshkov, welcomed the draft Explanation's incorporation of ECtHR

outside the legislative base, the 2005 Explanation immediately in its Preamble cited the relevancy to defamation law of the freedom of speech and "mass information" guarantees in Article 29 of the Constitution and Article 10 of the ECHR,¹⁰⁴ and stated that Russia's accession to the ECHR gave rise to new questions in the courts' defamation practice.¹⁰⁵ In this regard, the SC reminded the courts to take into account earlier Explanations in which it addressed in general terms the domestic incorporation of international norms.¹⁰⁶ As a result, the SC instructed the courts in deciding defamation disputes to observe a balance between the right of citizens to protection of reputation and the freedoms of speech and mass information.¹⁰⁷ In conjunction with its adoption of plurality, the Explanation also specifically mandated adherence to the SC's "take into account" requirement in the defamation law context, directing the courts to internalize ECtHR interpretations of Article 10 in their adjudication of defamation disputes¹⁰⁸

The Explanation also is noteworthy as the first SC pronouncement recognizing, although in somewhat sporadic fashion, the rights and role of the mass information media. In addition to the references cited in the above paragraph, these suggestions of an incipient recognition of press freedoms include the rule regarding attention to concerns of the mass information media in section 15 of the Explanation.¹⁰⁹ In all, these references, as well as the general tenor of the Explanation, were warmly received by press freedom supporters.¹¹⁰ From the point of view of press freedom advocates, these were threshold steps of considerable significance. They represent the first significant judicial articulation in Russia of recognition of the incidental impact of generally applicable laws on the exercise of speech and press freedoms. While evidence of their active implementation must await future developments, their articulation alone stands in marked contrast to highly visible judicial decisions in recent years in which Russian courts did not voice recognition of such interests or take them into account.¹¹¹

Having adopted the multiplicity of sources in defamation law, along with the internalization of the ECtHR's practice interpreting Article 10, the SC's way was open to the reshaping of specific aspects of that body of law -- an exercise in which the lower courts had been pointing the way.

Interpretations, listing specifically the free expression of statements of opinion, the essential role of the mass media in democratic society, the lifting of the burden on defendants to prove the truth of value judgments, and the duty of journalists to verify assertions of fact prior to publication. Plenum report, *supra* note 95, at 2.

¹⁰⁴ 2005 Explanation, *supra* note 2, Preamble, pars. 1-2.

¹⁰⁵ *Id.*, Preamble, par. 5.

¹⁰⁶ *Id.*, Section 1, par. 4 (citing the 1995 Explanation, *supra* note 78, and October 10, 2003 Explanation, *supra* note 24).

¹⁰⁷ *Id.*, Sec. 1, par. 3, and sec. 1, par. 5.

¹⁰⁸ *Id.*, Sec. 1, par. 5.

¹⁰⁹ See *infra* note 142 and accompanying text.

¹¹⁰ Fedotov, *supra* note 95; Richter, *supra* note 95.

¹¹¹ These include the *Al'fa Bank v. Kommersant* litigation, *supra* note 22, and the controversies over the broadcast licenses of the companies NTV and TV-6. The latter disputes included protracted litigation in the *Arbitrazh* courts, as well as a subsequent Constitutional Court decision. Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 11 ianvaria 2002 g. N. 32/02 [http://arbitr.garant.ru/public/default.asp?ne1_676453]; CC Postanovlenie in No. 14-P (July 18, 2003), VKS, no. 5 (2003), p. 30. [*Krug must do additional citations*].

V. THE NEW DIRECTIONS: APPLICATION OF THE PLURALITY PRINCIPLE AND ECtHR INTERNALIZATION

The 2002 Karelia decision¹¹² was the forerunner of a number of lower ordinary court decisions in which ECHR and ECtHR interpretations were employed to fashion new approaches to defamation law.¹¹³ A number of the cases presented fact patterns similar to Karelia: public officials, usually elected, suing local journalists and mass media outlets for reports that in many cases alleged corruption or mismanagement of public assets.¹¹⁴

¹¹² *Supra* notes 83-88 and accompanying text.

¹¹³ For this article, I have examined eighteen lower court decisions that were chosen because of the detailed information available and the issues they presented. In most cases, the full judgments of the courts were examined. This list is not intended to be representative of lower court practice during the years in question. Among other things, I am not aware of any systematic compilation of lower court decisions. The cases examined for this article were located at some seven websites: the Moscow Media Law and Policy Institute, *supra* note 83; the Central-Chernozem Center for Defense of the Rights of the Mass Information Media [http://www.mmdc.narod.ru/analytics/analytic_1.html]; the Sutiashnik [Sutyajnik] organization [http://www.sutyajnik.ru/rus/echr/school/dom_judg.html]; the Sverdlovsk oblast' court [<http://www.femida.e-burg.ru>]; the Arkhangel'sk oblast' court [<http://www.arhcourt.ru/?Documents/Civ/Gen>], CJES, GDF. Some of these provide valuable reports and detailed summaries of court judgments, but others (MMLPC, esp., but also a number in Central-Chernozem, Sutiashnik, and Sverdlovsk oblast court) make available the judgments themselves -- a useful resource for viewing "law in action" in Russia's provincial courts. These are mostly district court decisions, with a few appellate judgments by the regional [Subject] higher courts. *Hereafter*, citations to cases found in these collections will be to the name of the Province in which they were rendered, and the date of the judgment.

Clearly, this research must be selective, not comprehensive. To my knowledge, there is not any way to gather information from all regional courts in the vast Russian system. Another limitation is that it is not possible in a systematic fashion to follow the outcome on further appeals in a number of the cases. In this regard, however, I have not found any cases that came under supervisory review at the SC.

One of the noteworthy aspects of these decisions is their style. Traditionally, ordinary courts did not cite other court decisions in their opinions. Maggs, 2002 article, *supra* note 28, at -- --. However, in its December 19, 2003 Explanation, the SC required the courts to cite decisions of the CC, SC, and ECtHR. See *supra* note 92. Meanwhile, even in decisions prior to that Explanation, courts in 2002-2003 were citing the ECtHR in their defamation case opinions. See, for example, the discussion concerning the March 12, 2002 Karelia decision, *supra* notes 83-88 and accompanying text.

¹¹⁴ A number of these decisions are referred to in section VI.B., *infra*. Of the eighteen decisions closely examined, plaintiffs in seven were elected deputies (four to local legislative bodies [Voronezh: June 1, 2005 (http://www.mmdc.narod.ru/caselaw/process_17/decision.doc); Sverdlovsk: January 28, 2004 (http://www.femida.e-burg.ru/show_doc.php?id=3184); Vladimir: December 9, 2003 (<http://www.medialaw.ru/article10/7/2/04.htm>); and Sverdlovsk: November 12, 2003 (<http://www.medialaw.ru/article10/7/2/13.htm>)] and three to the federal parliament [Arkhangel'sk: approximately September 20, 2004 (<http://www.cjes.ru/femida/?page=2&a=ci&w=o&id=10>); Saratov, January 21, 2004 (<http://www.medialaw.ru/article10/7/2/10.htm>); and Vladimir: November 28, 2003 (<http://www.medialaw.ru/article10/7/2/03.htm>)], plaintiffs in two were both local public administrators and the local administration itself (as a legal person) [Riazan': February 24, 2005 (http://www.mmdc.narod.ru/caselaw/process_18.html); Amur: April 15, 2004 (<http://www.medialaw.ru/article10/7/2/01.htm>)], the sole plaintiff in one was a local administration [Sverdlovsk: June 1, 2004 (http://www.sutyajnik.ru/rus/echr/rus_judgments/distr/beliaev_01_06_2004.htm)], and the sole plaintiff in another was a local police official [Belgorod: October 11, 2002 (<http://www.medialaw.ru/article10/7/2/02.htm>)]. In another case, the plaintiff was a faculty member at a local university who also served as a consultant to the regional governor [Voronezh: approximately February 17, 2004 (http://www.mmdc.narod.ru/caselaw/process_15.html)]. Plaintiffs in the other six disputes were private individuals. For discussion of the standing of state and local agencies, as legal persons, to invoke defamation law, see discussion *infra* at section VI.B.2.c. In seven of the disputes, the defendants also included third persons (private individuals or public officials) who made the allegedly defamatory statements (often in interview format) which then were disseminated by the defendant mass media outlet. For discussion of this "media dissemination of third party content" question, see discussion *infra* at section VI.B.2.a.

A noteworthy element in many of these disputes is the apparent impact of defense lawyers, often affiliated with NGOs, utilizing the ECHR and ECtHR to bolster their arguments. Russia's accession to the ECHR placed a potentially useful tool in the hands of press freedom advocates as they sought, often successfully, to persuade courts to dismiss complaints in their entirety, dismiss specific claims in complaints while imposing liability in regard to others, or to award moral damages far below the amounts sought by plaintiffs. Some of these cases provide vivid illustration of the decisive value and effectiveness of NGO advocacy.¹¹⁵

One other general observation may be made about the lower court decisions. At least until the SC's October 10, 2003 Explanation,¹¹⁶ the courts were not acting under any form of compulsion from within the judicial hierarchy in citing and applying ECtHR practice. The SC had not ordained anything, nor had the CC. Thus, in terms of the operation of the ordinary courts' hierarchy, it is evident that the lower courts were being allowed to act independently and were indeed doing so. Thus, the movement toward internalization was not a result of a "top-down" ordering from Moscow to the regions.

This period culminated in the 2005 Explanation. The increasing number of lower court decisions, while providing upward hydraulic pressure, had been piecemeal and scattered; the 2005 Explanation, on the other hand, consolidated the results of the lower courts' practice and made the reconstruction of defamation law generally applicable throughout the ordinary court system.¹¹⁷

As to the 2005 Explanation, the SC Plenum did not intend it to be a comprehensive analysis of the entire body of civil defamation law. Instead, it was selective. However, it did address quite a few of the most challenging issues. It was comprised of a Preamble and nineteen Sections which addressed a variety of defamation law questions. Its structure can be divided into two parts. The first part, comprising the Preamble and section one, is similar to a "general part" in civil law legislation: it sets forth the foundation ["Comprehensive Dimension"] for the document as a whole and general principles that apply to all the subsequent sections. The second part, sections 2-19, addresses specific selected issues in defamation law and seeks to clarify certain questions concerning them ["Specific Dimension"]. We now turn to particular questions addressed in the Explanation that reflect the influence of the ECtHR.

V.A. **The Fact/opinion Distinction**

For over a decade, the ordinary courts' treatment of all "communications" [*svedeniia*] as subject to Civil Code Article 152 had been the most controversial aspect of the defamation law scheme.¹¹⁸ Indeed, the question of whether the law should draw a legal distinction between

¹¹⁵ For example, the impact of NGO lawyering is suggested in litigation that resulted in a March 24, 2005 Voronezh decision, http://www.mmdc.narod.ru/caselaw/process_14.html. In the July 21, 2004 trial court decision, where the defendant newspaper and reporter were found guilty of defamation and ordered to pay 150,000 rubles in moral damages, they were not represented by legal counsel. At the appellate court, they were represented by lawyers from the Central-Chernozem Center, *supra* note 113, who included references to ECtHR practice in their arguments. The appellate court completely set aside the trial court decision and entered a new judgment.

¹¹⁶ *Supra* note 24.

¹¹⁷ The stated goal of the 2005 Explanation, *supra* note 2, was to advance the correct and uniform application of the law. Preamble, par. 6.

¹¹⁸ A detailed analysis, including discussion of a number of ordinary court decisions, is found in E.A. Chefranova, "Kommentarii", in Monika Makovei & E.A. Chefranova, *Evropeiskaia Konventsiiia o zashchite prav cheloveka i osnovnykh svobod: Stat'ia 10. Pravo na svobodu vyrazheniia svoego mneniia. Pretsedynty i kommentarii* (2001), 84-109, available at <http://www.sutyajnik.ru/rus/echr/school/books/art10.pdf> (last visited March 19, 2006).

statements of fact and opinion goes back to at least the 1970s.¹¹⁹ For example, in a series of articles in 1997-98, proposals for recognition of the distinction¹²⁰ drew a spirited response from defenders of the existing structure.¹²¹

Beginning with its 1986 Lingens decision, the ECtHR took a very different approach. In Lingens,¹²² a journalist was convicted under the defamation provisions of Austria's Criminal Code for publishing two articles sharply critical of the Austrian Chancellor. The Austrian courts ruled that the statements were defamatory and that, under the burden of persuasion stipulated in the Criminal Code, the defendant journalist had not established their truthfulness; as a result, he was found guilty of defamation and ordered to pay a monetary fine. In finding an Article 10 violation, the ECtHR, articulating principles that it has voiced many times since, determined that Article 10 requires that expression of "value judgments" must be distinguished from assertions of fact. Value judgments, the ECtHR declared, are not susceptible to evidentiary means of proof, and a defamation defendant cannot be required to prove their truth. Having determined that the journalist's communications were value judgments, the ECtHR assessed his conviction under the "necessary in a democratic society" requirement in Article 10(2) and found that Austria had failed to satisfy it.

The ordinary courts' internalization of ECtHR practice, particularly Lingens, has been decisive in the complete turnaround in Russia's approach to the fact/opinion question. This has been abundantly illustrated both in the lower courts' practice and in the 2005 Explanation.

Starting with the Karelia decision, a number of lower court decisions used various devices to implement the fact/opinion distinction. Some courts, following Lingens closely, declined to put burden of proving the truth on the defendant.¹²³ Others narrowly construed the terms "communications" or "defamatory meaning" in Article 152 to rule that the statements in questions did not qualify as one or the other. As a result, the plaintiffs failed to state actionable claims under Article 152.¹²⁴

In the 2005 Explanation, the fact/opinion question was one of the SC's primary concerns. The Court noted that Article 152(1) of the Civil Code requires the defendant to prove the truth of a defamatory communication in order to avoid liability.¹²⁵ However, citing to the "position" of the ECtHR in interpreting Article 10,¹²⁶ the SC set forth a rule that courts must distinguish between allegations of fact and statements of opinion. The latter, the SC declared:

¹¹⁹ [*Krug should add cites regarding jurists in the 1970s and 1980s*] The December 17, 1971 Explanation of the USSR Supreme Court did not address opinion, but the Court's March 2, 1989 Explanation did (last sentence of par. 2 of sec. 1 -- definition of "defamatory") [*Krug must do citations*]. This exception for opinion must have dismayed personality rights proponents, who must have viewed it as license to injure powerless victims. It was retained in the USSR SC's 3/29/91 Explanation, but deleted from the SC's 1992 Explanation.

¹²⁰ See the Poliakov and Erdelevskii articles cited *supra* note 80.

¹²¹ A. Cherdantsev, A. *Mozhno osporit' i mnenie* [Opinions also may be disputed], Rossiiskaia Iustitsiia, 1997, #11, p. 51; V. Kazantsev & N. Korshunov, *V kakikh sluchaiakh kompensiruetsia moral'nyi vred?* [In what circumstances should moral harm be compensated?], Rossiiskaia Iustitsiia, 1998, #2, p. 39; and L. Gros', *Eshche raz o svobode mneniia i zashchite chesti* [Once again about freedom of opinion and protection of honor], Rossiiskaia Iustitsiia, 1998, #9, p. 19.

¹²² *Supra* note 39 and accompanying text.

¹²³ Sverdlovsk (October 14, 2004), *supra* note 94; Amur (April 15, 2004), *supra* note 114.

¹²⁴ Sverdlovsk (June 1, 2004), *supra* note 114; Sverdlovsk (November 20, 2003), *supra* note 94; Sverdlovsk (November 12, 2003), *supra* note 114; Nizhnii Novgorod (December 20, 2002), http://www.sutyajnik.ru/rus/echr/rus_judgments/distr/sannikov_20_12_2002.html.

¹²⁵ 2005 Explanation, *supra* note 2, section 9, par. 1.

¹²⁶ Regarding the SC's emphasis on the notion of ECtHR "positions" (*pozitsiia*), see discussion *infra* at section VI.A.2.

Cannot be the basis for judicial protection of reputation under Article 152 of the Civil Code because, as a subjective expression of the opinion and views of the defendant, they cannot be made subject to a test for proof of their accuracy.¹²⁷

In effect, in taking this position, the SC created a categorical exclusion of statements of opinion from the scope of Article 152.

Of particular note is the fact that the SC did not establish any gradations in articulating this rule, such as might be established based on status of the plaintiff. However, in a further paragraph, the SC informed the courts that public officials, who seek to enlist public opinion, at the same time must be the object of political discussion and criticism in the mass media. Public officials, the court added, must be subject to criticism in the mass media in regard to the performance of their duties because this is necessary condition for the open and responsible performance of their powers.¹²⁸ The SC's purpose in making these statements is not clear. The Explanation does not state how they are to be applied in judicial practice, and by making some reference to the status of the plaintiff as a relevant consideration, they appear to contradict the categorical character of the rule set forth in paragraph three of section nine.

The SC did, however, point out an important exception that is outside the strict defamation context: the possibility that an expression of opinion might be subject to liability as an "insult". The SC stated:

If a subjective opinion was expressed in an insulting form, harming the plaintiff's honor, dignity, or business reputation, an obligation might be imposed on the defendant to pay compensation for the plaintiff's moral harm suffered as a result of the insult (Article 130 of the Criminal Code of the Russian Federation, Articles 150 and 151 of the Civil Code of the Russian Federation).¹²⁹

As this statement indicates, the SC's closing of the door to defamation actions based on Article 152 for statements of opinion may be expected to increase the number of lawsuits based on other statutory provisions. In this regard, the prospective value of the SC's statement is perhaps diminished by the references to honor and reputation, since this likely will serve to perpetuate an absence of distinction between defamation and insult, which have different elements and seek to advance different interests.¹³⁰

¹²⁷ Id., section 9, par. 3.

¹²⁸ Id., section 9, par. 4. The SC did not cite to ECtHR practice in citing these propositions, although they are closely related to principles articulated in the ECtHR's Lingens line of cases. However, the SC did base paragraph four on a "Declaration on freedom of political debate in the media", adopted by the Council of Europe's Committee of Ministers on February 12, 2004. The Declaration, found at [<https://wcd.coe.int/ViewDoc.jsp?id=118995&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>], incorporates a number of principles that the ECtHR has set forth in its practice.

¹²⁹ 2005 Explanation, *supra* note 2, section 9, par. 6. As stated *supra*, section IV.A.1.b., Articles 150-151 of the Civil Code do not refer to insult (*oskorblenie*). However, the courts have incorporated its definition and elements from Article 130 of the Criminal Code into Articles 150-151 to establish a civil cause of action for harm to individual dignity.

¹³⁰ See Potapenko 2005, *supra* note 28, at 8. In this regard, it should be noted that the Chemodurov application found admissible by the ECtHR on August 30, 2005 concerns insult. Among the applicant's arguments to the ECtHR is that the insult cause of action is not "prescribed by law", as required under Article 10(2), ECHR. The admissibility decision (Application no. 72683/01) is found at

Another important aspect of the Explanation is indirectly linked to the fact/opinion matter. For the first time, the SC determined that the defamation plaintiff bears the burden of showing that the communication in question was defamatory in meaning¹³¹ -- -- a matter of considerable importance in judicial practice.¹³² This appears to be related to fact/opinion because the SC's solution for instituting the fact/opinion distinction is to say that in practice statements of opinion are not "svedeniia" and cannot have a defamatory meaning.

V.B. Distinction between Defamation and Invasion of Privacy

The 2005 Explanation took an important step in clarifying the distinction, often lost in judicial practice, between the differing elements that distinguish defamation claims from those for invasion of privacy. Protection of privacy is, along with protection of reputation, a protected interest in Article 150 of the Civil Code.¹³³ In the Explanation, the SC pointed out that an individual may suffer an actionable injury for invasion of privacy, even if the communication was factually accurate, if the communication concerned that person's private life.¹³⁴ At the same time, the Explanation also added that a claim for invasion of privacy is not actionable if the communication in question was disseminated by a media outlet in order to protect public interests.¹³⁵

V.C. Monetary Compensation for Harm to Reputation

The 2005 Explanation placed two new requirements on the courts in their determinations of the quantum of monetary compensation for "moral" harm, which the Civil Code defines as "physical or mental suffering".¹³⁶ The new requirements are in addition to the Code's criteria of considering the victim's degree of physical and mental suffering (in light of the victim's individual characteristics) and the circumstances in which the harm was inflicted.¹³⁷ In addition, the Code requires the court to consider "the requirements of reasonableness and justice" in making the calculation¹³⁸ and to take into account "other circumstances worthy of attention".¹³⁹

[<http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=russia&sessionid=6052082&skin=hudoc-en>]. See further discussion regarding insult at section VI.B.2.d, *infra*.

¹³¹ 2005 Explanation, *supra* note 2, Section 9, par. 1. The Explanation also revised somewhat the definition of "defamatory meaning" from that found in its predecessor. *Id.*, Section 7, par. 5. However, it is not possible to determine if this was prompted by Plurality Principle concerns. Meanwhile, it should be noted that sec. 7, par. 5 says that "defamatory" are statements [svedeniia] containing assertions..." Thus, the use of *svedeniia* lends itself to the notion that the only communications that can be defamatory are assertions of fact.

¹³² See Potapenko 2005, *supra* note 28, at 7, and Dmitrii Golovanov, *Novaia redaktsiia Postanovleniia Plenuma Verkhovnogo Suda po delam o zashchite chestoi, dostoinstva i delovoi reputatsii: proryvy, udachi i nedorabotki* [cite: must supply translation], *Zakonodatel'stvo i praktika mass-media*, 2005, #3, <http://www.medialaw.ru/publications/zip/127/3.htm>. [Hereafter, "Golovanov 2005"].

¹³³ See discussion *supra*, section IV.A.1.b.

¹³⁴ 2005 Explanation, *supra* note 2, Section 8, par. 2.

¹³⁵ *Id.* In support of this proposition the SC cited the Mass Media Law, *supra* note 64, Article 49.5, and added, applying the plurality principle, that that this norm is consistent with Article 8 of the ECHR ["Right to Respect for Private and Family Life"]. This growing public/private orientation of personality rights protection in Russia is one of the clearest indicators of new directions in Russian "defamation" [in the broad sense] law.

¹³⁶ Civil Code, *supra* note 47, Article 151, par. 1.

¹³⁷ *Id.*, Articles 151, par. 2, and 1101(2). The Code also generally requires assessment of the violator's degree of fault; however, an exception is made for defamation cases, where consideration of fault is excluded from the calculation. Article 151, par. 2, and Article 1100. This exclusion is in keeping with the fact that in defamation liability is without consideration of fault.

¹³⁸ *Id.*, Article 1101(2).

From these Code provisions, the SC fashioned the new standards in section 15 of the 2005 Explanation.¹⁴⁰ First, Section 15 requires that the quantum of compensation for a non-economic harm must be proportionate [*“sorazmerna”*] to the harm -- -- a standard clearly adopted from the ECtHR's position on the proportionality of damages in defamation cases.¹⁴¹ Second, in recognition of concerns that high damages awards might unduly burden the mass media, Section 15 dictates that the quantum of damages must not result in “infringement [*“ushchemlenie”*] of the freedom of mass information.”¹⁴² This certainly is an indeterminate standard, but one which conveys recognition of free press interests in the assessment of damages. Both steps again illustrate the SC’s power to refine applicable legislative acts.

VI. PROSPECTS: THE SUPREME COURT’S “TAKE INTO ACCOUNT” DIRECTIVE AND FUTURE DIRECTIONS

Lower court practice and 2005 Explanation have re-shaped important aspects of Russian defamation law. However, the SC did not intend that the Explanation be a comprehensive review of all civil defamation law. Instead, the Explanation addressed certain pressing problems -- -- most of all, the fact/opinion question. It can be said that the Explanation for the most part settled the particular problems discussed above in section V.

Meanwhile, however, a number of other questions arising under the civil defamation system remain unresolved. The Explanation referred to some of these without resolving them, or did not address them at all.

The question therefore arises as to whether the new directions of the past several years have any relevance for these "unresolved" areas. Will the current trend of re-assessment, reflected in the 2005 Explanation's recognition of the plurality principle and internalization of ECtHR practice, continue? If so, will any of the unresolved areas be addressed through the perspective of the approaches developed in the development of new directions over the past several years?

One may expect that impetus will remain to address these questions, although the degree of its intensity must await further developments. However, certain considerations do suggest that attention will be given to further applications of the plurality principle and internalization of ECtHR practice. These include the continuing growth of the ECtHR's Article 10 practice, the continuing number of Russia-based applications to the ECtHR, the SC's "take into account" mandate, and the continued activity of NGO's.

If this set of assumptions is valid, before examining some of the unresolved questions, it is necessary to examine in detail the SC's "take into account" directive, as set forth in the October 10, 2003 Explanation and reiterated in the 2005 Explanation. It may be expected that much of the future direction of defamation law in Russia, as well as other areas of law implicating freedom of

¹³⁹ *Id.*, Article 151, par.2.

¹⁴⁰ Section 15 of the 2005 Explanation also expressly retained from the 1992 Explanation its controversial interpretation of Article 152, Civil Code, that makes legal persons eligible to recover compensation for non-economic harms to business reputation. For further consideration of this point, and its possible conflict with the SC's proportionality requirement, see discussion *infra* notes 208-209.

¹⁴¹ *Tolstoy Miloslavsky v. United Kingdom*, *supra* note 42; *Steel and Morris v. United Kingdom*, February 15, 2005, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=steel%20%7C%20united%20%7C%20kingdom&sessionid=6276506&skin=hudoc-en> (last visited March 19, 2006). See also discussion in Potapenko 2005, *supra* note 28, at 10 (citing *Tolstoy Miloslavsky*).

¹⁴² The 2005 Explanation, *supra* note 2, sec. 15, par. 2.

the press, will be decided under the general rubric of the "take into account" mandate. This is because, having recognized the major impact of the ECtHR's influence, the SC through its mandate has initiated a process where courts, practitioners, and scholars will seek to define further the legal effect in Russia's legal system, at least in those areas of the ordinary courts' competence, of the ECtHR's Article 10 practice.

VI.A. The "Take into Account" Directive

Although the text of the Constitution states that international agreements to which Russia is a party are binding internally in the Russian legal system,¹⁴³ it does not address the general question of the legal effect of external interpretations of binding treaty norms. The Russian Law on Treaties also is silent on the matter.¹⁴⁴ The Russian Parliament did, however, address the question to some extent in regard to the ECtHR in the March 30, 1998 ECHR Accession Act, which stated in relevant part that:

The Russian Federation, in accord with Article 46 of the Convention, recognizes *ipso facto* and without special agreement the mandatory jurisdiction of the European Court of Human Rights on questions concerning the interpretation and application of the Convention and its Protocols in connection with asserted violations by the Russian Federation of provisions of these agreements, when the asserted violation has taken place after their entry into force for the Russian Federation.¹⁴⁵

This text, however, is ambiguous. One reasonable reading would suggest that it addresses simply Russia's recognition of the ECtHR's competence to rule on the substantive merits of applications filed against the Russia, but states nothing explicit regarding the domestic legal effect of the ECtHR's substantive rulings. Therefore, in the absence of constitutional authority or a clear directive from the legislature, the question of the legal effect of ECtHR Reasons has been left up to Russia's courts.

The question of the nature of legal effect of external interpretations of binding treaty norms is one of increasing visibility and acuity in domestic legal systems.¹⁴⁶ In the United States, it has arisen in the context of litigation concerning the effect of ICJ decisions interpreting the Vienna Convention on Consular Relations.¹⁴⁷ As to ECtHR interpretations of the ECHR, it has

¹⁴³ Section 15(4). See discussion *supra* at note 75 and accompanying text.

¹⁴⁴ *Supra* note 33.

¹⁴⁵ ECHR Accession Act, *supra* note 72, Article 1. *Translation by P. Krug*. This language appears to have been taken from former Article 46(1) of the ECHR, before the most recent amendments.

¹⁴⁶ There are indications of growing attention to this question in the scholarly literature. However, not very much in the recent Hollis book, National Treaty Law and Practice (2005) [*Krug must get full cite*]. A detailed study of the problem in regard to Russia is found in Anna Valentinovna Demeneva, *Iuridicheskie posledstviia postanovlenii Evropeiskogo suda po pravam cheloveka dlia Rossiiskoi Federatsii* [*Legal consequences of European Human Rights Court judgments for the Russian Federation*], dissertation for the degree of Master of Laws, Urals State Legal Academy, Ekaterinburg, Russia: 2004. [*obtained via Sutyajnik website*(<http://www.sutyajnik.ru>)] in fall, 2005, but apparently unavailable online now. Copy in possession of the author, and available upon request].

¹⁴⁷ For a detailed study, see Heather Finstuen, *From the World Court to Oklahoma Court: The Significance of Torres v. State for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes* [Student Note forthcoming in Vol. 58, No.2 (Summer 2005) of the Oklahoma Law Review]. Regarding the International Court of Justice generally in the United States, see Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 Denver Journal of Int'l Law and Policy 787 (1998).

been addressed, for example, in the United Kingdom¹⁴⁸ and Germany.¹⁴⁹ In theory, in Russia, the possible answers would appear to range from treating such interpretations as binding precedent, to giving them some less intense legal effect,¹⁵⁰ to making their use totally permissive, to denying them recognition in any manner.

While signaling to the lower courts their expected posture toward Article 10 and the treatment of ECtHR practice, the SC's "take into account" directive in the October 10, 2003 and 2005 Explanations is indeterminate as to its scope and to the nature of the legal effect to be given to ECtHR practice or positions. For example, what does the phrase "take into account" mean? Does it treat ECtHR practice or positions as binding precedent, or something more akin to persuasive authority? Also, when an ECtHR position is applicable, what is the court to do? For example, if it determines that an applicable legislative act is inconsistent with the ECHR, how is the court to treat that legislative act? Should it refer the question to the CC, or declare the act unenforceable? Finally, what are ECtHR "positions" (to use the term employed in the 2005 Explanation)? Are they the operative parts of ECtHR judgments only, and perhaps only those in cases in which Russia was a party? Or, are "positions" broader to include the reasoning in the Strasbourg Court's case law?

VI.A.1. The "Take Into Account" Requirement and the Legal Effect of ECtHR Practice

As demonstrated by the SC's general pronouncements and the specifics of particular provisions in the Explanations, "take into account" appears to be comprised of two closely-related components: (1) a prescription to avoid violations of the ECHR; and (2) implementation of this precept, when a legislative act is in question, by means of statutory construction. The first of these focuses on anticipation of future ECtHR decisions involving Russia as a party, an exercise that must entail examination of the ECtHR's extensive practice. The second, while cognizant of the first, shifts its primary focus to proper judicial construction of the Russian statute that is applicable in the case before the court (e.g., Art. 152, Civil Code).¹⁵¹

VI.A.1.a. "Avoidance of Violation"

The SC's directives do not speak in terms of the binding nature of ECtHR practice, and there is nothing in the SC's practice to suggest that the Plenum had in mind such a mandatory

¹⁴⁸ See discussion *infra* at note 154 concerning the 1998 U.K. Human Rights Act. See also Sinclair, p. 742 of the 2005 Hollis book National Treaty Law and Practice [*Krug must get full cite*].

¹⁴⁹ See the discussion *infra* at note 154 concerning the German Constitutional Court's October 14, 2004 decision.

¹⁵⁰ Concerning the idea of "less than formally binding normative force", see Zenon Bankowski, D. Neil MacCormick, Lech Morawski, and Alfonso Ruiz Miguel, *Rationales for Precedent, in Interpreting Precedents: A Comparative Study* (D. Neil MacCormick and Robert S. Summers, eds.), 497-500 (1997). As to the notion of "bindingness as a continuum", see D. Neil MacCormick and Robert S. Summers, *Further General Reflections and Conclusions, in id.*, 545.

¹⁵¹ It is important to note, given Russia's complex system of judicial competencies, that this is not a matter of judicial review of the compatibility of legislative acts with constitutional norms, a matter which gave rise to controversy between the SC and the CC. See *supra* note 17. Instead, this is not judicial review at all, because it is not testing the compatibility of any act with a superior norm with an eye toward possible invalidation of the former. Rather, it is using judicial construction of legislative acts in order to insure that neither the legislative act nor judicial acts applying it are deemed by a potentially subsequent decision-maker -- -- the ECtHR -- -- to be incompatible with an international (not constitutional) norm.

The CC often confronts in its admissibility decisions the question of whether a purported constitutional infirmity is the result of a legislative act or judicial act. The answer determines whether or not the CC has competence. See *supra* notes 18-19 and accompanying text. An example is the CC's 2003 Shlafman decision. See *infra* at notes 202-203.

effect. On the other hand, the mandatory nature of the SC's prescriptions, including the susceptibility to reversal by a reviewing court,¹⁵² rules out the possibility of an open-ended grant to the ordinary courts of unreviewable discretion to consider ECtHR interpretations as purely a form of persuasive authority.

Instead, it is apparent that "take into account" envisions a mid-level degree of bindingness,¹⁵³ which can be characterized in this fashion: the courts are required to act preventively, to avoid an unreasonably high level of risk that their decisions ultimately will result in findings of violation by the ECtHR.¹⁵⁴ I will call this an "avoidance of violation" standard. My conclusion is based in part on the text of the October 10, 2003 Explanation, which states that the courts must take into account ECtHR practice in order to avoid violations of the ECHR".¹⁵⁵ The

¹⁵² October 10, 2003 Explanation, *supra* note 24, section 9. Section 9 states that an ordinary court's failure to apply correctly international norms will be subject to reversal by a reviewing court.

¹⁵³ See MacCormick and Summers, *Further General Reflections*, *supra* note 149, 545.

¹⁵⁴ A mandate for courts to "take into account" ECtHR practice is also found in at least two other domestic legal systems. The 1998 U.K. Human Rights Act [1998 Chapter 42], Article 2 ("Interpretation of Convention rights") states in relevant part:

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights...

Human Rights Act, 1998, c. 42 (Eng.), in 7 Halsbury's Statutes of England and Wales 528 (4th ed. 2001), *Reprinted in* 38 ILM 464 (1999), available at <http://www.opsi.gov.uk/acts/acts1998/80042--a.htm#2> (last visited March 21, 2006). The Act came into force on October 1, 2000. See also The Rt Hon Lord Justice Maurice Kay, "The Influence of the ECHR on English Law: Before and After the Human Rights Act," paper presented at International Conference on The Influence of the ECHR Case-Law on National Constitutional Jurisprudence, October, 2005 [*Venice Com'n -- Krug must provide citation*], at 3. Judge Kay added the following: "It is to be noted that the requirement is that the national court or tribunal "takes into account" such judgments, decisions, declarations and opinions, not that it is obliged to give effect to them." For extensive analysis of Article 2(1) of the Human Rights Act, see Roger Masterman, "Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act," 54 ICLQ 907, and R Masterman, "Section 2(1) of the Human Rights Act 1998: Binding domestic courts to Strasbourg?", [2004] Public Law 725, 731-5.

The German Federal Constitutional Court also has adopted "take into account" as the title for its standard for legal effect for ECtHR practice. In its 10-14-04 decision [BVerfG, 2 BvR 1481/04 (<http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?entscheidungen>)], par. 62, the CC stated:

"Take into account" means taking notice of the Convention provision as interpreted by the ECtHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the ECtHR must be taken into account in making a decision; the court must at least duly consider it. Where the facts have changed in the meantime or in the case of a different fact situation, the courts will need to determine what, in the view of the ECtHR, constituted the specific violation of the Convention and why a changed fact situation does not permit it to be applied to the case.

English translation in 25 *Human Rights Law Journal* 99 (2004, No. 1-4). In the German original, the word in par. 62 that is translated as "take into account" is "Berücksichtigen". See [<http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?entscheidungen>].]

Thus, it should be noted that both of these approaches (U.K. and Germany) acknowledge the binding nature of the applicable *ECHR provision*, but to some extent leave it up to the courts to decide whether or not to adopt the *ECtHR's interpretation* of that provision. The Russian SC's "avoidance of violation" standard appears to require more of the courts than this.

¹⁵⁵ See *supra* at note 92 and accompanying text. Citation to the October 10, 2003 Explanation: *supra* note 24.

SC cited both the ECHR Accession Act¹⁵⁶ and the Vienna Convention on the Law of Treaties,¹⁵⁷ to which Russia is a party, in articulating this standard. My conclusion also is based on other Supreme Court pronouncements and other indicators.¹⁵⁸ For example, while it did not recite the October 10, 2003 Explanation's "in order to avoid violations of the ECHR" language in the "take into account" requirement, the 2005 Explanation did generally incorporate the earlier Explanation in its entirety.¹⁵⁹ The SC's December 19, 2003 Explanation also suggested that findings of violation at Strasbourg were among the SC's highest concerns,¹⁶⁰ as did the general atmosphere of concern regarding the status of Russian-based applications at the ECtHR at the December 23, 2004 SC Plenum.¹⁶¹

In sum, the chief guide on the ECHR is the interpretive practice of the ECtHR. Thus, prior ECtHR decisions serve as modified "precedent", but more as guides for anticipation of future ECtHR acts, rather than binding precedent in themselves.

VI.A.1.b. Canon of Construction

As a practical matter then, what approach is a court to take in order to avoid conflict with the ECHR as interpreted by the ECtHR? In other words, in a given case, if the ordinary court chooses to recognize and apply the ECHR as an active source of law, as evidenced by elements of ECtHR interpretations, what exactly is the court to do with this finding in the event of a conflict between the applicable legislative act and the ECHR?

One option would be that dictated by the SC's October 31, 1995 Explanation: if the applicable legislation conflicts with the ECHR, a ruling of invalidity. However, the more recent "take into account" standard does not appear to require or endorse this approach. The SC in the October 10, 2003 and 2005 Explanations did not mandate the "judicial review" directive of the 1995 Explanation.¹⁶²

Instead of requiring the courts to act as bodies of constitutional control, invalidating legislative acts deemed inconsistent with the ECHR as interpreted by the ECtHR, it appears that the SC expects the ordinary courts to employ statutory construction to ward off future ECtHR findings of violation. While not explicitly expressing it as something resembling a canon of statutory construction, the SC itself demonstrated the use of this approach in its treatment of the fact/opinion question in the 2005 Explanation.¹⁶³ Under this approach, the courts need not, and

¹⁵⁶ October 10, 2003 Explanation, *supra* note 24, section 10, par. 3. For the relevant text of the ECHR Accession Act, *supra* note 72, see *supra* note 145 and accompanying text.

¹⁵⁷ October 10, 2003 Explanation, *supra* note 24, section 10, pars. 1-2. Article 31(3)(b) of the Vienna Convention on the Law of Treaties, to which the SC cited, states:

3. [*In the interpretation of a treaty*] [t]here shall be taken into account, together with the context:
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...

Adopted on May 22, 1969, the VCLT entered into force on January 27, 1980.

¹⁵⁸ For an earlier proposal for such an approach, see S.A. Gorshkova, *Rossia i iuridicheskie posledstviia reshenii Evropeiskogo suda po pravam cheloveka*, Zhurnal ross. prava, 2000, #5/6, 91, 100.

¹⁵⁹ 2005 Explanation, *supra* note 2, at section 1, par.4.

¹⁶⁰ See *supra* note 92.

¹⁶¹ See *supra* notes 96-98 and accompanying text.

¹⁶² Regarding the 1995 Explanation, see *supra* note 78 and accompanying text.

¹⁶³ See discussion *supra* at notes 125-127 and accompanying text.

should not, hold Article 152 of the Civil Code invalid; instead, they should construe it so as to make it unavailable to plaintiffs who seek recourse against statements of opinion. Thus, the SC is steering a path between the risks of future Russian violations at the ECtHR and the controversial step of invalidating legislative acts (here, the prestigious Civil Code).¹⁶⁴

This much seems clear. However, what the 2005 Explanation did not do is explore the implications of the "ECtHR Practice/Positions" component of the "take into account" directive. It is necessary to attempt to do this if we are to assess the further implications of the 2002-2005 new directions for defamation law questions unsettled after the 2005 Explanation.

VI.A.2. The nature of ECtHR "Practice" and/or "Positions"¹⁶⁵

ECtHR decisions, both judgments and admissibility determinations, are required to set forth not only operative parts, but also the Court's reasons.¹⁶⁶ With this in mind, one may speculate as to the intent of the SC in using the term "practice" in the October 10, 2003 Explanation: (1) to limit it to the operative parts of judgments in cases in which the Russia is a party, thereby excluding the ECtHR's reasons; (2) to require or encourage the courts to reason by analogy from ECtHR fact-intensive proportionality determinations, whether or not they involve Russia as a party; or (3) give some level of legal effect to the ECtHR's reasons, as reflected in its articulated "Positions" in all its decisions -- -- not just those in which Russia is or was a party.

It is evident that the SC intended the third of these options. Certainly, the courts are required to recognize and give binding effect to the operative parts of ECtHR judgments that find a Russian violation.¹⁶⁷ However, at least in regard to defamation, this never was an issue in the period in question, since the first ECtHR judgment against Russia in an Article 10 case was not rendered until July, 2005.¹⁶⁸ Instead, the issue leading up to and including the 2005 Explanation was whether the reasoning in the full range of the ECtHR's extensive Article 10 practice must be given some legal effect as a matter of domestic law.

The October 10, 2003 Explanation did not define what it meant by ECtHR "practice". However, it made clear that courts would be expected to do more than simply implement the specific requirements of operative parts of ECtHR judgments in which Russia was a defendant. In addition, the Explanation stated that Russia must:

¹⁶⁴ This latter observation is made in light of the controversy in the 1990s, now substantially diminished, between the SC and the CC over the latter's claims that the SC was intruding impermissibly into the CC's exclusive competence. See *supra* note 17.

¹⁶⁵ The October 10, 2003 Explanation, *supra* note 24, sec. 10, uses "practice" [*praktika*], but the 2005 Explanation uses the word "*pozitsiia*" [twice using "pravovye pozitsii"]. Because the latter was more recent and was devoted specifically to defamation, as well as the growing currency in Russian legal thought that the term is acquiring (see L.V. Lazarev, *Pravovye pozitsii Konstitutsionnogo Suda Rossii* (2003); N.S. Volkova, "Priemy formirovaniia pravovoi pozitsii Konstitutsionnogo Suda RF, *Zhurnal ross. Prava*, #9, 2005, 79; and Potapenko 2005, *supra* note 28, at ----), I will use the term "Positions". As demonstrated in the literature concerning CC jurisprudence, "pravovye pozitsii" is used to designate far more than just operative parts of judgments.

¹⁶⁶ ECHR Article 45(1) requires each ECtHR decision, including admissibility decisions, to set forth "Reasons" as well as an operative part. The operative part of an ECtHR judgment is that which states whether or not there's been a violation, and if there has, what the applicant's remedy is. Thus, this requires compliance, in a judgment finding an ECHR violation, with ECtHR's specific orders as to payment of compensation and other steps to remedy a past violation. Sometimes, the order might be more sweeping, beyond individual compensation.

¹⁶⁷ This is true both as a matter of Russia's international obligations, per ECHR Article 46(1), and its domestic law: Russian Constitution, Article 46(3) [every person has a right in accordance with international agreements of the Russian Federation to apply to international organs for protection of human rights and freedoms, if all available domestic means of such defense have been exhausted]; the 3/30/98 Accession Act, *supra* note 145.

¹⁶⁸ *Grinberg v. Russian Federation*, *supra* note 8.

"[T]ake steps of a general character, in order to prevent the repetition of similar violations. Courts within the limits of their competency therefore must insure compliance with a state's obligations that result from Russia's accession to the Convention on Human Rights and Fundamental freedoms."¹⁶⁹

Subsequent Explanations also demonstrate that the SC intended that the term "practice" include the ECtHR's reasons. This is demonstrated, for example, in the December 19, 2003 Explanation's requirement of explicit citations in ordinary court judgments to "decisions of the ECtHR, in which were rendered interpretations of the ECHR's provisions" applied by the Russian court.¹⁷⁰ Most significantly, the 2005 Explanation, addressing specifically civil defamation law, pronounced emphatically and in detail on this aspect of the "take into account" requirement. For example: (1) the courts must interpret the provisions of ECHR Article 10 in conformity with ECtHR Positions ["pozitsii"], articulated in its judgments;¹⁷¹ (2) in deciding reputation disputes, courts must follow not only Article 152 of the Civil Code, but also Article 1 of the 3/30/98 Accession Law to take into account the Positions of the ECtHR, articulated in its judgments, concerning interpretation and application of the ECHR (especially Article 10);¹⁷² and (3) in a concrete application of this approach, the SC addressed specific defamation law issues, in particular the application of the ECtHR's Position regarding the fact/opinion distinction.¹⁷³

In sum, "Positions", as employed in the 2005 Explanation (or "Practice", in the wording of the October 10, 2003 Explanation) should be read to mean "Reasons" in all ECtHR decisions (both judgments and admissibility decisions), and not just operative parts of judgments or "Reasons" in a specific judgment against Russia that the Russian courts are asked to recognize and enforce. However, this is not quite the end of the inquiry, because it is necessary also to determine with more precision the types of extractable elements that may be found in ECtHR "Positions". This is because the key focus of the "take into account" requirement is the necessity of anticipating future ECtHR determinations -- an exercise that will require, in addition to reasoning by analogy from the Strasbourg Court's fact-intensive decisions, close assessment of the prospective value of its Positions.

"Positions",¹⁷⁴ as the SC appears to employ the term, are a court's interpretations -- developed pursuant to textual, teleological, or some other methodology -- upon which its decisions are based.¹⁷⁵ "Positions" are deemed to be interpretations of prospective value, as distinct from the ECtHR's frequent fact-intensive determinations made pursuant to its proportionality analysis under provisions such as ECHR Article 10(2).¹⁷⁶

¹⁶⁹ October 10, 2003 Explanation, *supra* note 24, section 11, par. 2.

¹⁷⁰ December 19, 2003 Explanation, *supra* note 92.

¹⁷¹ 2005 Explanation, *supra* note 2, Preamble, par. 3.

¹⁷² 2005 Explanation, *supra* note 2, section 1, par. 5.

¹⁷³ 2005 Explanation, *supra* note 2, section 9, par. 3.

¹⁷⁴ "Positions" are an extractable element under "Practice". The SC here appears to be employing the notion of "Positions" in the CC's practice (see Lazarev, *supra* note 165), suggesting the prospective value of ECtHR "Reasons".

¹⁷⁵ Lazarev, *supra* note 165, 10.

¹⁷⁶ Not all ECtHR admissibility decisions and judgments yield clearly identifiable Positions. In this regard, it is necessary to note that the ECtHR often decides cases not so much on the basis of rules derived from interpretation of the ECHR, but on fact-intensive proportionality analysis under the "necessary in a democratic society" standard in Article 10(2) [*Krug must supply examples, such as ECtHR judgments in Oberschlick II and others*] By themselves,

For the purposes of this article, it is useful to view the ECtHR Positions as points on a continuum that ranges from sharp specificity on the one end (*e.g.*, no imposition of burden on a defendant to prove the truth of an opinion) to high levels of abstraction on the other (*e.g.* a free press is essential to democratic governance). Perhaps it might be posited that highly abstract principles are not the kinds of "Positions" that the SC had in mind in the 2005 Explanation. On the other hand, in this author's opinion, recognition of the relevance of such foundation principles is essential to application of the inherent nature of the SC's "take into account" directive and its "avoidance of violation" standard.¹⁷⁷

VI.A.3. The Practical Consequences of the "Take Into Account" Mandate

If observed and enforced with rigor in the first instance and higher ordinary courts, the "take into account" mandate has the potential to pose considerable demands and logistical challenges on the courts and parties in defamation litigation disputes. The ECtHR's Article 10 practice is voluminous, including a great many decisions on admissibility and inadmissibility of applications,¹⁷⁸ and is at times quite complex. This means that Russian courts and litigators will have to get well acquainted with ECtHR Positions, even those articulated in non-Russian judgments or other Russian cases unrelated to the case in which the judgment was rendered, and attempt to stay up to date on the Strasbourg Court's practice.¹⁷⁹ In addition, these demands will present logistical challenges, such as insuring the availability of translations of ECtHR decisions.¹⁸⁰

VI.B. Unresolved Questions Through the "Take Into Account" Prism

VI.B.1. Public Interest Justifications

Many of the ECtHR's Positions, particularly many Principles reiterated regularly in its Article 10 practice, are grounded in, or are extensions of, instrumentalist public interest theories [justifications] that the Strasbourg Court has identified as undergirding the freedom of expression guarantees in Article 10.¹⁸¹ Although the Court regularly cites to both individual self-

these proportionality determinations provide little prospective value, except for the opportunity to reason by analogy from the facts.

¹⁷⁷ The fact is that in many cases an explicit ECtHR Position might not be available, but more abstract Positions will still be applicable in resolving the particular problem.

¹⁷⁸ It is possible that the SC did not intend to include ECtHR admissibility decisions with its formulation of the "take into account" standard. The October 10, 2003 Explanation, *supra* note 24, sec. 10, does not limit "praktika" to "Postanovleniia" [Decrees, or Judgments], but Article 1 of the 2005 Explanation, *supra* note 2, does use this term. However, in this author's opinion, the inclusion of admissibility decisions would be more consistent with the SC's apparent concerns. Admissibility decisions can be very instructive as to the thinking of the ECtHR, and to ignore them would seem to blunt the force of the prospective, anticipatory value of the "avoidance of violation" approach.

¹⁷⁹ If this is the case, it does not of course necessarily mean that resolution of future questions will be resolved in favor of free expression interests. Instead, it means that courts (assisted by legal representatives) will need to probe the ECtHR's practice in seeking to comply with the determination under the "avoidance of violation" approach of whether a significant risk might be created that the ECtHR will find an ECHR violation.

¹⁸⁰ Golovanov and Potapenko, *supra* note 51, at 20-21, provide an interesting discussion about the practical problems of using ECtHR practice (*e.g.*, translations of judgments in cases not involving Russia). See also Danilenko, 1999 EJIL, *supra* note 6, at 69, and Golovanov 2005, *supra* note 132, at 2.

¹⁸¹ Analysis of the ECtHR case law indicates the heavy reliance which the Strasbourg Court has placed on public interest theory in the development of many of its Positions. Much of the ECtHR's practice in defamation cases is a cluster of assumptions concerning the role of free expression guarantees: for example, that the exercise of rights guaranteed under the ECHR not only enhances individual self-fulfillment, but also instrumentalist goals; that of

fulfillment and public interest justifications for freedom of expression guarantees, the latter generally receive far greater elaboration in cases involving the defamation context.¹⁸² This is logical, since without public interest theories, there exists little justification for giving greater weight to free expression interests at the expense of the interest in protecting against harm to reputation.¹⁸³

The SC and some lower courts have recognized as a general proposition the relevance of public interest considerations in the defamation context. This notion appears in the 2005 Explanation in several ways: as general foundation in the Preamble and Article 1 for adoption of the plurality principle; as a directly-applicable basis for the SC's positions on invasion of privacy and limits, in the case of mass media defendants, on monetary compensation for non-economic harms; and as a proposition (without specific applicability) relevant to the fact/opinion distinction.¹⁸⁴

Some lower court decisions have cited public interest justifications for protection of freedom of expression that the ECtHR has identified in its practice. For example, they have used them to limit the construction of "defamatory meaning", not only in regard to statements of opinion, but even as to assertions of fact.¹⁸⁵ They also have ruled that public officials must tolerate more criticism than private plaintiffs,¹⁸⁶ that the public official status of a plaintiff should be taken into account in the assessment of the quantum of non-economic damages,¹⁸⁷ and that public interest considerations are relevant to the question of the standing of public bodies to see recourse for harm to reputation.¹⁸⁸

In these early stages, however, this compilation of references does not point to development of a coherent, inter-connected body of principles for application in the practice of the ordinary courts.¹⁸⁹ The references in the 2005 Explanation, although seemingly not connected by a common thread, provide evidence that there is some movement among the SC judges toward consistent positions. At the same time, the dampening revision of "public interest" language from an earlier draft of the Explanation reveals what is perhaps considerable doctrinal

these institutional goals, primacy is accorded to the maintenance and promotion of democratic governance; that the press plays an essential role in the maintenance of effective democratic governance; and that the press must be free in order to perform that role. These assumptions, or principles, provide a rationale of considerable cumulative weight when matched in the ECtHR's commonly-used balancing methodology against other individual or public interests.

¹⁸² E.g., compare the extensive elaboration of public interest theory in Lingens to the brief reference to individual self-fulfillment in the same judgment. *Lingens v. Austria*, *supra* note 39, par. 41. See also *Grinberg v. Russia*, *supra* note 8, pars. 23-24.

¹⁸³ Excellent discussion of these two theories, including their respective benefits and limitations, is in Frederick Schauer, *The Role Of The People In First Amendment Theory*, 74 Calif. Law Rev. 761, 772 (1986) ["Even more significantly, self-expression theories do not provide a reason for protecting those self-expressive activities that can cause harm to others"].

¹⁸⁴ See discussion *supra*, section V.

¹⁸⁵ Karelia case (March 12, 2002), *supra* note 83; Saratov case (January 21, 2004), *supra* note 114; Amur case (April 15, 2004), *supra* note 114; and Sverdlovsk case (April 14, 2005) [*Krug must supply URL*]. See also discussion in Golovanov & Potapenko 2005, *supra* note 51, at 15.

¹⁸⁶ E.g., the November 28, 2003 Vladimir decision, *supra* note 114.

¹⁸⁷ Sverdlovsk decision (November 20, 2003), *supra* note 94.

¹⁸⁸ See discussion *infra* at section VI.B.2.c.

¹⁸⁹ For example, one notes that the absence of public interest considerations in section 9 of the 2005 Explanation, even though a series of such justifications served as the foundation for the ECtHR's Lingens decision.

ambivalence on these questions¹⁹⁰ Meanwhile, as will be discussed below, some lower courts have attempted to develop approaches, based on ECtHR public interest Principles, toward some of the remaining unsettled questions in defamation law.

It is evident that to meet the "take into account" standard, with its "avoidance of violation" component, the courts will need to continue to explore means of applying the ECtHR's emphasis on public interest justifications. For example, a particularly pressing question, reflected in certain lower court decisions, is whether those considerations are best met by focusing on the status of the plaintiff, opting instead on determination of whether the subject matter of the impugned communication was one of public significance, or choosing an approach that combines the two.¹⁹¹ This is a question that the U.S. Supreme Court struggled with in the early 1970's: whether to condition the intensity of external norm intervention into defamation disputes on case-by-case determinations of the presence or absence of public significance in the impugned communication, or on a more categorical rule based on the status of the plaintiff.¹⁹² The 2005 Explanation's enigmatic language regarding public officials in its discussion of the fact/opinion distinction¹⁹³ perhaps reflects some of these considerations, although there it appears that the choice is viewed as one between the adopted categorical rule barring availability of Article 152 of the Civil Code altogether, versus what might be an approach that would limit such access primarily to public officials.¹⁹⁴ As it stands, that discussion provides little concrete guidance to the lower courts.

In sum, two general questions are presented by the ECtHR's practice and the ordinary courts' growing attention to the public interest components in that practice. The first is whether the scope of public interest considerations will be extended to new questions, and the second is how the practical application of these justifications should be formulated.

VI.B.2. Specific Questions

In defamation, as a general matter, the question of "interference" is settled. The SC's positions in the 2005 Explanation are based on the SC's conclusion that defamation law implicates the exercise of freedom of expression.¹⁹⁵ Based on this, it is apparent that the SC

¹⁹⁰ Draft Explanation (October 19, 2004 version), sec. 18 [copy in possession of the author: available upon request]. In this version, section 18, the forerunner of the final version of section 15 in the 2005 Explanation, stated that when assessing damages for non-material injury, a court must consider not only the Civil Code's criteria in Articles 151, par. 2, and 1101, par. 2, but also the "public interest in the dissemination of information and good-faith commentary, and the necessity of promoting unfettered discussion of questions of public significance." This is a stronger statement of public interest considerations than those found in the somewhat nebulous formulation requiring courts in assessing monetary compensation to avoid "infringement of the freedom of mass information".

¹⁹¹ Regarding public officials, see S.V. Potapenko, *Diffamatsiia i rossiskaia sudebnaia praktika v kontekste opyta Evropeiskogo suda po pravam cheloveka* [Defamation and Russian judicial practice in the context of the experience of the European Court of Human Rights] (2004). Knizhnaia polka "Pravo i SMI", Item 43, <http://medialaw.ru/publications/books/echr2/index.html>.

¹⁹² A plurality of the Court adopted the matter of public significance approach in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). However, three years later, the Court abandoned this approach in favor of the rule that a plaintiff deemed "private" will confront a more relaxed constitutional standard than will a public official or public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁹³ See discussion *supra*, note 128 and accompanying text.

¹⁹⁴ On the other hand, perhaps the SC was suggesting that courts should, in the case of public official plaintiffs, be more expansive in their assessment of whether a particular communication is opinion. As it is, the statements do not appear to be of much prospective value.

¹⁹⁵ 2005 Explanation, *supra* note 2, Preamble and section 1. These speak of protection of reputation as a whole, without delineating specific aspects of it.

would require the ordinary courts, unless it undertakes a major reversal, to extend the plurality principle to defamation issues not addressed in the 2005 Explanation.

This section examines certain questions which the SC has not examined through the perspective of the plurality principle. In regard to some of these, certain lower courts have made some applications of the principle.

VI.B.2.a. Media Dissemination of Third Party Content

In a number of the lower court disputes examined in this study, journalists and mass media outlets were named as defendants along with, or in place of, third persons who were the originators of the impugned allegations or opinions subsequently disseminated by the media defendants.¹⁹⁶ For example, these arise in regard to liability for publication or broadcasting of an interview, or in regard to publication of a guest columnist. The cases do not suggest the possibility that distinctions between the originator and the disseminator might be legally significant, with the exception of certain exemptions in the Mass Media Law for dissemination of government information.¹⁹⁷

The ECtHR has addressed this question and adopted a Position, quite explicit, that the Russian courts should consider under the “take into account” requirement. In the case of Pedersen and Baadsgaard v. Denmark,¹⁹⁸ the ECtHR Grand Chamber found that Denmark did not violate Article 10 by convicting two journalists who were found to have made allegations of fact, on the basis of an interview with an eyewitness of the event in question, against a police official. In the judgment, the Grand Chamber articulated a Position on the general treatment under Article 10 of media dissemination of interviews and other statements by third parties:¹⁹⁹

In news reporting based on interviews, a distinction also needs to be made as to whether the statement emanates from the journalist or is a quotation of others, since punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (*citation omitted*). Moreover, a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas (*citation omitted*).

¹⁹⁶ Sverdlovsk (June 1, 2004), *supra* note 114; Amur (April 15, 2004), *supra* note 114; Voronezh (date not known (except sometime after February 17, 2004)), *supra* note 114; Sverdlovsk Presidium (January 28, 2004), *supra* note 114; Saratov [January 21, 2004], *supra* note 114; Vladimir (December 9, 2003) (allegedly defamatory statements made at a news conference), *supra* note 114; Sverdlovsk (November 12, 2003), *supra* note 114; and Karelia (March 12, 2002), *supra* note 83. Meanwhile, at least two of the pending cases before the ECtHR -- -- Filatenko and Dyuldin and Kislov, *supra* note 9, -- -- also fall into this category of cases.

¹⁹⁷ Journalists may not be held liable for information that originated in press releases of state authorities, organizations, agencies, companies or public associations or if such information is a verbatim reproduction of statements by officials of state authorities, organizations or public associations. Mass Media Law, *supra* note 64, Article 57(3) and (4).

¹⁹⁸ Pedersen and Baadsgaard v. Denmark, Eur. Ct. H.R., Dec. 17, 2004, *available at* http://www.echr.coe.int/eng/Lending/particular_weight_to_Pedersen_is_the_fact_that_it_was_decided_by_the_ECtHR_Grand_Chamber. For discussion of Pedersen, see Kozlowski, *supra* note 38, at 152-153.

¹⁹⁹ Pedersen and Baadsgaard, *supra* note 198, par. 77.

This Position provides a basis upon which the Russian ordinary courts could examine the facts of a dispute to apply a material distinction between circumstances in which a journalist or news media outlet is acting as repeater, and therefore should be insulated from liability, or has added its own factual assertions based on the third person's statements. Resolution of these questions perhaps could be pursued via interpretation of “communication” [*svedenie*] or “defamatory meaning” in Art. 152 of the Civil Code along the lines of the SC’s canon of construction under the “take into account” requirement.

VI.B.2.b. Monetary Compensation to Legal Persons for Non-economic Harm

The Civil Code is ambiguous on a question that has received considerable attention: whether a legal person has standing to recover monetary compensation for non-economic harm to its business reputation.²⁰⁰ Under one reading, Article 152(7) of the Civil Code states that the rules of Article 152 concerning business reputation of a “citizen” [*grazhdanin*] (physical person) apply to legal persons as well; under another, they are not eligible because it is not possible for a legal person to experience “moral harm”, which Article 151 of the Code defines as “physical and mental suffering”.²⁰¹

This question has been addressed in various ways in Russia’s three high courts. In the late 1990s, the Presidium of the Supreme *Arbitrazh* Court in three separate supervisory decisions ruled that legal persons were not eligible for the moral damages remedy, due to their lack of capacity to experience physical and mental suffering.²⁰² Meanwhile, however, in its 1992 Explanation, the SC directed the courts to permit legal persons to seek moral damages. A 2003 individual complaint by V.A. Shlafman to the CC claimed that Article 152, as construed by the ordinary courts, was unconstitutional,²⁰³ however, the CC denied admissibility, ruling that Article 45(2) of the Constitution guaranteed legal persons the right to pursue the moral damages remedy.²⁰⁴ After Shlafman, and replying heavily on it, the *Arbitrazh* courts granted moral damages to the plaintiff bank in the Al’fa-Bank v. Kommersant litigation.²⁰⁵ Meanwhile, in the 2005 Explanation, the SC maintained its position from the 1992 Explanation that legal persons have standing to seek moral damages.²⁰⁶

²⁰⁰ Krug, *Protection of Business Reputation*, *supra* note 16.

²⁰¹ Civil Code, *supra* note 47, Article 151(1).

²⁰² Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 5 avgusta 1997 g. N 1509/97 [http://arbitr.garant.ru/public/default.asp?no=12003127&body_context=%E4%E5%EB%EE%E2%EE%E9+%F0%E5%EF%F3%F2%E0%F6%E8%E8+#gprc00000001]; Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 24 Fevralia 1998 g. N 1785/97 [<http://arbitr.garant.ru/public/default.asp?no=12011373>]; Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 1 dekabria 1998 g. N 813/98 [http://arbitr.garant.ru/public/default.asp?no=12014265&body_context=%E4%E5%EB%EE%E2%EE%E9+%F0%E5%EF%F3%F2%E0%F6%E8%E8+#gprc00000001].

²⁰³ Complaint of V.A. Shlafman, VKS, no. 3 (2004), p. 55 [*Krug must supply SZ RF citation*]. The applicant did not include Article 29 of the Constitution among his grounds for the claim of unconstitutionality.

²⁰⁴ *Id.* The CC relied heavily on an ECtHR decision, Comingersoll S.A. v. Portugal (Judgment dated April 6, 2000), pars. 34-35 [<http://www.echr.coe.int/Eng/Judgments.htm>], in which the ECtHR ruled that a legal person has standing to a monetary remedy for non-economic harm sustained because of a civil process that exceeded permissible limits under Article 6 of the ECtHR.

²⁰⁵ See discussion *supra* note 16. The highest court to rule in the Al’fa Bank litigation was a three-judge panel of the Supreme *Arbitrazh* Court, which in supervisory review denied the defendant newspaper’s petition seeking the Supreme *Arbitrazh* Court Presidium’s review of the lower court decisions. [cite decision from 7/21/05 statutory standard].

²⁰⁶ 2005 Explanation, *supra* note 2, section 15. See discussion *supra* at note 140 and accompanying text.

In making these decisions, the various Russian courts did not examine the possible effect of Article 10 or ECtHR decisions interpreting it on the legal persons question. Perhaps the ECtHR's pending admissibility decision regarding the Kommersant application will provide some insight into the ECtHR's view on this matter.²⁰⁷ Meanwhile, however, under the "take into account" requirement the SC might wish to consider the application of a Position that it has articulated in two decisions regarding the conformity of domestic court damages awards in defamation cases. In Tolstoy Miloslavsky v. United Kingdom and Steel and Morris v. United Kingdom, the ECtHR stated that an award of damages for defamation must "bear a reasonable relationship of proportionality to the injury to reputation suffered."²⁰⁸

The ECtHR's Position provides a different perspective from which to view the legal person question. Rather than the pure statutory construction approach employed by the SC and the *Arbitrazh* courts, it interjects the ECtHR's proportionality principle based on "necessary in a democratic society" in ECHR Article 10(2). If the SC (or the Supreme *Arbitrazh* Court) were to internalize this Position, it would require the court to examine whether a legal person has the capacity to experience the kind of harm that would sustain a damages award consistent with the ECtHR's standard. This perspective also would serve as a further consideration in the statutory construction of Article 152.²⁰⁹

VI.B.2.c. State Agency as Plaintiff.

In a number of cases, the defamation plaintiffs include state or municipal bodies, which as legal persons are viewed as having standing to seek recourse against harm to their business reputations.²¹⁰ For example, in two cases, local government administration and their chief administrators were plaintiffs in disputes in which local newspapers were among the defendants for having published critical statements²¹¹ In another, a city administration (the city of Ekaterinburg) was the sole plaintiff in a suit against an interviewee and the newspaper in which his remarks critical of the administration were published.²¹²

The SC did not address this question in the 2005 Explanation. Meanwhile, at least one former defendant in the Russian courts has filed an application at the ECtHR, challenging the Russian courts' finding of liability against it in such circumstances was a violation of Article 10. The ECtHR found the application admissible on November 17, 2005.²¹³

Opposition to the standing of public bodies as defamation plaintiffs is based on public interest considerations -- that it provides an opportunity to exercise a chilling effect over criticism, particularly in the mass media, not even of individual public officials, but of

²⁰⁷ See *supra*, note 16.

²⁰⁸ Tolstoy Miloslavsky, *supra* note 42, section 49; Steel and Morris, *supra* note 141, section 96. Neither of these cases involved mass media defendants. However, it is doubtful that this is a material difference, given the overall tenor of the ECtHR's Article 10 jurisprudence.

²⁰⁹ It is conceivable that if the ordinary courts were to take such an approach, grounded in part on Article 10, that the CC would view this as running counter to its position in the Shlafman decision, which was based on the Constitution. See *supra*, notes 203-204 and accompanying text. This would raise a number of legal issues, including the competencies of the respective courts and the hierarchy of external norms.

²¹⁰ See discussion in Potapenko 2005, *supra* note 28, at 2, and Fedotov, *supra* note 94.

²¹¹ Riazan', February 24, 2005, *supra* note 114; Amur, April 15, 2004, *supra* note 114.

²¹² Sverdlovsk, June 1, 2004, *supra* note 114.

²¹³ Romanenko and Others v. Russia (application No. 11751/03). The admissibility decision is found at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=romanenko%20%7C%20russia&sessionid=6130814&skin=hudoc-en>. In the interest of full disclosure, it must be said that the author of this article served as a co-author of comments on admissibility that were filed with the ECtHR in July, 2006.

governmental institutions themselves. More specifically, as in the case of legal persons, the argument is made that governmental bodies cannot possess a "reputation" comparable to the reputational interests of individual physical and legal persons.²¹⁴

The matter of public bodies as defamation plaintiffs bears certain similarities to the legal persons question. In both cases, under the autonomy principle, they are solely matters of statutory interpretation. In fact, in this regard, the legal persons question is the more ambiguous of the two. The question then arises, under the plurality principle and the SC's "take into account" standard, whether these questions would be viewed any differently through the prism of Article 10 and ECtHR practice. In contrast to the legal persons question, where one quite explicit ECtHR Position might be relevant, it appears in regard to public bodies as plaintiffs that the potentially relevant ECtHR practice lies in a cluster of more abstract public interest considerations, many of which go back to their initial articulation in Lingens v. Austria. These center on the role in democratic governance of critical comment and reporting on public affairs and the proposition that public authorities must tolerate more criticism than private persons must do.

If they were to undertake this analysis and agree with it at least in part, the SC and lower courts would then face the question of what to do about it under the "avoidance of violation" approach. One of the lower courts already has addressed this question (while not explicitly citing Article 10 in this regard): in its April 15, 2004 decision, the Ivanovskii Raion Court of Amur Province dismissed the administration's complaint, holding that "a municipal organ is not a bearer of business reputation and does not have a right to demand its judicial protection." This was a narrow construction of the application statute -- -- Article 152 -- -- and was consistent with the canon of construction approach in the SC's "take into account" directive.

VI.B.2.d. Insult.

Strictly speaking, the civil offense of insult is not a matter of defamation law: it dictates liability for negative appraisals of an individual expressed in an "indecent" form, not for communications that harm reputation through dissemination of false factual allegations. Unlike defamation, where the truth of the communication is a complete defense, there are not any affirmative defenses to a claim of insult.²¹⁵

However, as the 2005 Explanation demonstrates, insult and defamation are closely related, with the former operating as an exception to the SC's exclusion of statements of opinion from liability if the impugned communication falls within the definition of insult in Article 130 of the Criminal Code.²¹⁶ In this regard, insult is a continuation of the debate over whether a legal distinction should be made between statements of fact and those of opinion. In Russia, opponents of such a distinction long have sought to make all defamatory communications liable unless proven to be true. Now this debate will shift away from defamation because of the ordinary

²¹⁴ See, for example, the report approved in June, 2005 in the PACE Resolution (*supra* note 7), paragraphs 392-393.

²¹⁵ An example of a court's finding of insult is found in the Russian first-instance court's 2000 determination in Chemodurov, *supra* note 9. The impugned communication was a statement in a newspaper article that a provincial governor's rendering of advice to his aides on a budgetary matter was "abnormal". The court, in a determination upheld on appeal, concluded that the use of the word "abnormal" referred to the governor's personality and not his conduct, and therefore was expressed in an insulting form. Chemodurov admissibility decision, *supra* note 9, section A.

²¹⁶ 2005 Explanation, *supra* note 2, at section 9, par. 6. See discussions *supra* at note 62 and accompanying text, and notes 128-129 and accompanying text.

courts' narrowing of "defamatory meaning" and the SC's general insulation of opinion statements from liability.

Viewed from the perspective of the "take into account" requirement, insult presents a number of questions. The first is the absence of clarity. In addition to the applicant's argument in the Chemodurov case before the ECtHR concerning the absence of definition in the Civil Code, the SC has blurred the distinctions between insult and defamation by citing the former's protection of reputational interests.²¹⁷ Particularly because plaintiffs often ground their complaints in both defamation and insult, the SC should take steps to clarify the nature of the insult offense and its application.

Beyond this is the question of the applicability of Article 10. It is difficult to determine whether the SC views application of the insult offense as an interference, triggering the plurality principle, or whether purportedly insulting communications are subject to the autonomy principle. Perhaps the applicability of Article 10 may be inferred from the SC's inclusion of its brief insult discussion within the general framework of Article 9 and the entire 2005 Explanation. Meanwhile, it also should be noted that in Chemodurov the ECtHR has found admissible an application directed against Russia's application of insult. In opposing the application, the Russian government nevertheless conceded that Russia's action was an Article 10 interference.²¹⁸

Therefore, there is good reason to assume that the SC would find that the plurality principle applies. However, the ECtHR's Positions in this area are somewhat inconclusive. It is clear that the ECtHR maintains its specific Position, first articulated in Lingens, against requiring the defendant to prove the truth of an opinion statement. In the area of insult, this is consistent with the proposition that the truth or falsity of such a statement is not at issue. However, the ECtHR's practice also frequently employs a Position apparently borrowed from the United Kingdom's "fair comment" doctrine: that under Article 10 the validity of an interference "may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."²¹⁹ The ECtHR takes this "sufficient factual basis" factor into account as part of its proportionality analysis,²²⁰ an exercise which in each discrete case is very fact-intensive. Thus, in this approach, the ECtHR strongly suggests that inquiry into the facts underlying the statement of opinion indeed can be relevant in deciding whether there has been a violation in insult cases.

Meanwhile, however, the ECtHR also has applied a public interest component into its general treatment of statements of opinion. In Grinberg v. Russia, for example, the Court noted that, in addition to the fact that "[T]he facts which gave rise to the criticism were not contested", the "contested statement was made in the context of an article concerning an issue of public interest" (that of freedom of the media in the region) and "criticized the conduct of the regional governor, elected by a popular vote - in other words, a professional politician in respect of whom the limits of acceptable criticism are wider than in the case of a private individual".²²¹ It must be noted, however, that the Strasbourg Court added to these considerations its conclusion that the

²¹⁷ See discussion *supra*, notes 129-130 and accompanying text.

²¹⁸ Chemodurov admissibility decision, *supra* note 9.

²¹⁹ Busuioc v. Moldova, December 21, 2004, par. 61, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=busuioc&sessionid=6276506&skin=hudoc-en> (last visited March 19, 2006).

²²⁰ *Id.*

²²¹ Grinberg v. Russia, *supra* note 8, par. 35.

applicant had "expressed his view in an inoffensive manner".²²² This suggests that the weight of the public interest considerations might have been reduced if the communication had been expressed in insulting form.²²³ Nevertheless, it is apparent that these should receive some consideration.

The SC has not introduced public interest considerations into the insult context. Here, due to the nature of the ECtHR's practice, it is unclear whether Russia would face a significant risk of violation in continuing to apply the insult offense in the way that it has. At the same time, however, the ordinary courts still should consider the introduction of public interest considerations in this area. Certainly, in light of the "take into account" standard, the courts should strongly consider the fundamental Positions articulated, for example, in the Lingens line of cases: that public officials must tolerate greater criticism than private individuals in regard to critical communications on matters of public interest. Such an approach in itself would lend more certainty to resolution of future disputes; in addition, perhaps the application of public interest notions would help to bridge the long-standing divide between the supporters and opponents of the fact/opinion distinction, by giving the latter some comfort that Article 10 and other external norms will not be used categorically to deny recourse to private individuals suffering perceived injury from insulting statements.

VII. CONCLUSION

As far back as 1999, the late Dr. Gennady Danilenko predicted that at some point Russia's courts might gradually transform the ECtHR's case law into Russian domestic jurisprudence.²²⁴ The study in this article shows that this prediction was remarkably prescient. Now, with the benefit of hindsight, we can see not only that this process has begun to take place, but how it is taking place.

This article is about developments in Russia's ordinary courts. While the ordinary court system encompasses the vast majority of Russia's courts, this leaves open the question of the potential radiating effect of the ordinary courts' practice to the *Arbitrazh* courts and the CC. Although the *Arbitrazh* courts hear a smaller number of defamation disputes than do the ordinary courts, the cases they do hear can be highly visible because of high awards of monetary compensation. At this point, the *Arbitrazh* courts have not directly addressed the sources of law question and have not considered the applicability of ECtHR practice in this area. It is quite possible that the ECtHR's handling of the Kommersant application, whatever the ECtHR decides, will be significant for assessing whether the *Arbitrazh* courts will continue with their present approach or consider revisions along the lines of those that the ordinary courts have undertaken.

The situation regarding the CC, meanwhile, is even more complex. The Court's Article 29 jurisprudence is not extensive, although a decision from October 2005 suggests that it might become more active. Without the CC's engagement, ECHR Article 10 has become a far more influential source of law in defamation than has Article 29, which has long lain dormant in this area. For the long term, this unbalance is not a good thing. Perhaps the initial steps taken by the

²²² *Id.*

²²³ The ECtHR never has taken a categorical position, for example, that Article 10 in all circumstances blocks a public official from pursuing legal recourse for purportedly insulting statements. This is why the cases are decided pursuant to fact-intensive proportionality analysis. See, generally, Kozlowski, *supra* note 38.

²²⁴ Danilenko, 1999 EJIL, *supra* note 6, at 68. See also Maggs, *supra* note 28, at -- [*Krug must obtain page number*].

ordinary courts will stimulate new assessment of the place of Article 29 in Russia's constitutional law.

Meanwhile, as to the ordinary courts, this study to some extent dispels the more extreme popular image of these courts as unreceptive to new ideas. Indeed, as some of the lower court decisions demonstrate, judges in the provinces can be quite receptive to new theories.

In this regard, it might be tempting to view the 2005 Explanation as a knee-jerk, panicked reaction to the ECtHR's pending Grinberg decision and the 2004 admissibility decisions. However, the steps examined in this article did not happen overnight. At the Supreme Court, they can be traced back at least as far as the adoption of the October 10, 2003 Explanation, and earlier in the case of some lower courts.

Because of the implications of the "take into account" directive, the 2005 Explanation might have significant impact on the nature of legal analysis and argument in Russia. While it certainly is too early to tell, perhaps some of this will have an impact on the broad political trends affecting press freedoms in Russia. It is ironic that, in contrast to the public outcry about restrictions on press freedoms, there has been little open discussion or debate within the Russian legal academy about this. Perhaps this is because press freedom in Russia is viewed not as a legal or constitutional issue, but as a purely political issue. Certainly much of this must be traced back to lack of confidence in the courts among many press freedom advocates. Perhaps the kind of development examined in this article will be an incipient step toward greater balance on these perceptions.

These thoughts certainly apply to Russia's external image as well. Russia joined the Council of Europe amid great skepticism, and criticism continues to this day, as reflected in recent Council of Europe actions such as the June, 2005 PACE report. However, perhaps in at least the narrow area of civil defamation, perhaps the in-bound aspect of the ECHR system is starting to take hold. In the end, these steps by the ordinary courts show that they have crossed the line from simple compliance with ECtHR judgments in cases where Russia is a party, to the far broader and more significant goal of compliance with the obligation to respect the ECHR's norms within its jurisdiction.²²⁵ In other words, the Russian ordinary courts, with the SC taking the lead, have determined that the policing of Russia's ECHR compliance will take place within Russia's legal system without sole reliance on the Strasbourg Court's supervision.

Despite the emphasis in this article on rules and positions, the developments examined here in the end are more about method -- -- examination of diverse means of viewing complex legal questions -- -- than about specific rules. In this author's view, this is a positive thing: the notion of strict adherence to explicit ECtHR Positions has its limits.²²⁶ For one thing, the scope of the questions that the ECtHR has addressed is limited by its function. Civil defamation, while it has been a particularly contentious field, is but one of many elements of the larger body of law that relates to freedom of speech and freedom of the press in Russia. Many, many other issues remain untouched by the type of analysis initiated by the ordinary courts in civil defamation -- -- broadcast ownership and control and licensing, freedom of information, and criminal defamation, to identify just several examples. Therefore, an over-emphasis on the ECtHR's perceived preeminent authority could serve as a disincentive to the Russian courts' development of the

²²⁵ Article 1, ECHR.

²²⁶ Regarding the risks of a "compatibility-only" approach to ECHR rights, see Roger Masterman, "Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' Under the Human Rights Act," 54 ICLQ 907, ?? [*Krug must obtain cite: between footnotes 60 and 61*] [*cite year*]

Russian Constitution,²²⁷ and in particular methodological inquiries into the free expression provisions of Article 29, which ultimately must be seen as relevant to these questions.²²⁸ Perhaps spurred by the evident normative similarities with Article 10, the provisions of Article 29 are being cited with more regularity than before in the Russian courts. These provisions are being cited with more regularity in the ordinary courts,²²⁹ but without the far greater attention paid to Article 10 and the ECtHR.²³⁰ At its best, at some point, the developing applications of Article 10 will begin to merge with increased analysis of what should be its normative counterpart in Article 29. Ultimately, this would be the fulfillment of the goals of domestic incorporation and implementation envisioned in Article 1 of the ECHR.

²²⁷ It is interesting that this runs counter to what Danilenko reported in his 1999 EJIL article, *supra* note 6, at 62 (regarding the courts' reliance in states of the former USSR on international law as an additional argument in support of their conclusions based on interpretation of constitutional provisions).

²²⁸ For discussion of Articles 10 and 29 (postulating that the latter should be broader) is found in Iu. Shul'zhenko, "Standarty Soveta Evropy v oblasti SMI i rossiiskaia deistvitel'nost'" [Standards of the Council of Europe in the sphere of mass information media and Russian reality], *Rossiiskaia Iustitsiia*, 1999, #5, 8.

²²⁹ It is noteworthy that the crucial Sec. 9 of the 2005 Explanation, *supra* notes 2 and 126, identifies both Arts. 10 and 29, but then goes on to cite and apply the "Position" of the ECtHR concerning the fact/opinion distinction.

²³⁰ For further discussion, see Golovanov and Potapenko 2005, *supra* note 51, at 5.