Regulation of Media in Russia in the context of the council of Europe standars

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REGULATION OF THE MEDIA IN RUSSIA IN THE CONTEXT OF THE COUNCIL OF EUROPE STANDARDS

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DECLARATION

All sentences or passages quoted in this dissertation from other people's work have been acknowledged with clear references to author, work, and page number(s). I understand that failure to do this amounts to plagiarism and will be considered grounds for failure of this dissertation and of the degree as a whole.

ABSTRACT

This dissertation examines Russian media policies with the purpose to identify, mainly from a legal viewpoint, the extent to which they have been influenced by the legal standards of the Council of Europe (CoE). In the first chapter, the dissertation traces the characteristics, principles, and standards of the Russian perspective on freedom of expression by studying the Russian and Soviet constitutional concepts on this right, the Russian national mass media legislation as well as judicial and regulatory media policies. It also assesses the perspectives of the main CoE institutions, such as the European Court of Human Rights and the Parliamentary Assembly, on Russia's progress in the implementation of the universal and European standards on media freedom. The second chapter compares the Russian legal standards and those of the CoE on defamation and extremism in the media as well as on online and audiovisual media.

The dissertation concludes that, during more than twenty years of Russia's membership, the CoE's standards have had only a superficial impact on Russian media policy, and that such policy is becoming increasingly reminiscent of Soviet practices of media regulation. Russian authorities have mostly moved from disregarding the CoE standards to interpreting them in favour of the Russian political establishment, under the pretext of protecting "national" interests. It is argued that governmental attempts to achieve a de-universalisation of the right of freedom of expression may become more frequent around the globe. Such attempts should not be justified because they considerably threaten the international system of human rights and the values it protects and seek to maintain governmental control over information in an era when such control is strongly challenged by the development of the Internet and new media technologies. It is suggested that international organisations have the potential to become the main social platforms for resisting the de-universalisation of the right of freedom of expression, and that new effective measures should be elaborated to support their work.

Keywords: media freedom, freedom of expression, freedom of speech, media law, media policies, Russian media policies, Internet regulation in Russia, Russian media law, Council of Europe, European Court on Human Rights, international standards.

ABSTRACT

Esta tesis examina las políticas de medios en Rusia con el objetivo de identificar, principalmente desde un punto de vista jurídico, hasta qué punto se han visto influidas por los estándares legales establecidos por el Consejo de Europa (CoE). En el primer capítulo, la tesis explora las características, principios y estándares de la libertad de expresión desde una perspectiva rusa sobre la base del estudio de las concepciones de dicha noción que se pueden identificar en el marco de los sistemas ruso y soviético, la legislación de medios rusa, así como la práctica judicial y regulatoria. También se analiza el punto de vista de las principales instituciones dentro del CoE, como el Tribunal Europeo de Derechos Humanos o la Asambles Parlamentaria, con relación al modo en el que Rusia ha implementado los estándares universales y europeos en materia de libertad de medios. El segundo capítulo compara los parámetros legales rusos con los estándares del CoE sobre difamación, extremismo en los medios, así como sobre medios audiovisuales e Internet.

La tesis concluye que más de veinte años después del ingreso de Rusia como miembro, los estándares del CoE han tenido solamente un impacto superficial en la política de medios de Rusia, y que esta política sigue teniendo reminiscencias con relación a la práctica soviética en materia de regulación de medios. Las autoridades rusas han evolucionado desde el rechazo hacia los estándares del CoE hasta su interpretación a favor del establishment político ruso, bajo el pretexto de la protección de los "intereses nacionales". Se sostiene además que los intentos gubernamentales de des-universalizar la noción del derecho a la libertad de expresión se convertirán en frecuentes a lo largo del mundo. Estos intentos no pueden ser justificados, dado que amenazan el sistema internacional de derechos humanos y los valores que éste protege, así como se orientan a mantener el control gubernamental sobre la información en una era en la que dicho control se encuentra seriamente en entredicho a causa del desarrollo de Internet y nuevas modalidades de tecnologías de medios. Se concluye que las organizaciones internacionales disponen del potencial para devenir las principales plataformas para resistir frente a la des-unviversalización del derecho a la libertad de expresión, así como la necesidad de que se establezcan nuevas medidas para apoyar su trabajo.

Palabras clave: libertad de medios, libertad de expresión, derecho de medios, políticas de

medios, políticas de medios en Rusia, regulación de Internet en Rusia, derecho de medios en Rusia, Consejo de Europa, Tribunal Europeo de Derechos Humanos, estándares internacionales.

ABSTRACT

Aquesta tesi examina les polítiques de mitjans a Rússia amb l'objectiu d'identificar, principalment des d'un punt de vista jurídic, fins a quin punt han estat objecte d'influència per part del estàndards legals establerts per part del Consell d'Europa (CoE). En el primer capítol, la tesi explora les caracteríqtiques, principis, i estàndards de la llibertat des d'una perspectiva russa, sobre la base de l'estudi de les concepcions que de l'esmentada noció es poden identificar en el marc dels sistemes rus i soviètic, la legislació de mitjans russa, així com la pràctica judicial i regulatòria. També s'analitza el punt de vista de les principals institucions del CoE com ara el Tribunal Europeu de Drets Humans o l'Assemblea Parlamentària, en relació amb la forma amb què Rússia ha implementat els estàndards internacionals i europeus en matèria de llibertat de mitjans. El segon cpaítol compara els paràmetres legals russos amb els estàndards del CoE sobre difamació, extremisme en els mitjans, aíxí com en matèria de mitjans audiovisuals i Internet.

La tesi conclou que un cop transcorreguts vint anys des de l'ingrés de Rússia com a membre, els estàndards del CoE han tingut només un impacte superficial en la política de mitjans a Rússia, i que aquesta política segueix tenint reminiscències de la pràctica soviètica en matèria de regulació de mitjans. Les autoritats russes han evolucionat des del refús dels estàndards del CoE fins a la seva interpretació en benefici del establishment polític rus, sota el pretext de la protecció dels "interessos nacionals". Se sosté a més que els intents governamentals de des-universalitzar la noció del dret a la llibertat d'expressió es convertiran en cada cop més freqüents al llarg del món. Aquests intents no poden ser justificats, atès que amenacen el sistema internacional de drets humans i els valors que protegeix, així com s'orienten a mantenir el control governamental sobre la informació en una era en què l'esmentat control es troba seriosament qüestionat a causa del desenvolupament d'Internet i les noves modalitats tecnològiques en el terreny dels mitjans. Es conclou que les organitzacions internacionals disposen del potencial per a esdevenir les principals plataformes de resistència front a la des-universalització del dret a la llibertat d'expressió, així com la necessitat que s'estableixin noves mesures per a donar suport a la seva tasca,

Paraules clau: llibertat de mitjans llibertat d'expressió, dret de mitjans, polítiques de mitjans, polítiques de mitjans a Rússia, regulació d'Internet a Rússia, dret de mitjans a

Rússia, Consell d'Europa, Tribunal Europeu de Drets Humans, estándards internacionals.

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INTRODUCTION

It is generally acknowledged that freedom of expression[1] is a fundamental human right and value. It is valued for its own sake and as an important prerequisite in achieving and maintaining other human rights, democracy, and the rule of law. Freedom of expression is proclaimed in the main international treaties of the United Nations (UN),[2] such as the 1948 Universal Declaration of Human Rights (UDHR)[3] and the 1966 International Covenant on Civil and Political Rights (ICCPR).[4] These documents define freedom of expression in similar ways: as enabling individuals to freely express opinions, to exchange information and ideas without any interference or fear of punishment, regardless of frontiers, and in any form, including the media.[5] Since the adoption of these treaties, freedom of expression has been enshrined in the legal systems of UN member-states and has become an universal right.

In Europe, the UN vision of freedom of expression was developed by the Council of Europe (CoE),[6] a continental intergovernmental organisation seeking to protect human rights, democracy, and the rule of law. Within the CoE, freedom of expression is guaranteed in the 1950 European Convention on Human Rights (ECHR),[7] a legally

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[1] This dissertation uses the terms "freedom of expression," "freedom of speech," "free speech" as synonymous and interchangeable.

[2] The United Nations is an international organisation founded in 1945. It has 193 member-states. It aims at supporting dialogue and cooperation between countries. The UN can initiate measures on issues of great concerns for humanity, including human rights issues. For more information on the UN and its activities, see: http://www.un.org/en/index.html

[3] The Universal Declaration of Human Rights (UDHR) was adopted on 10 December 1948 (A/RES/217(III)) at the 183rd plenary meeting of the General Assembly. Retrieved from: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

[4] International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Retrieved from: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

[5] Article UDHR in Article 19 states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."
ICCPR in Article 19 Parts 1-2 states:
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.

[6] The Council of Europe (CoE) is a continental intergovernmental organisation founded in 1949. Currently, it unites forty-seven members. For more information, see: http://www.coe.int/en/web/portal/home

[7] Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights, ECHR), adopted in Rome on 4 November 1950. Retrieved from: http://www.echr.coe.int/Documents/Convention_ENG.pdf

binding treaty for all of the CoE member-states. Article 10 Part 1 of the ECHR reads:

> 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.

Media freedom (or freedom of the press) is inferred from the conventional commitments. International law acknowledges that free and robust press plays a crucial role as a "public watchdog" in democracies by informing societies on issues of public interest and holding governments to accountability. Media freedom protects media publications, journalists as well as the media as institutions and serves as *lex specialis*[8] to freedom of expression (Oster, 2017).

None of the international treaties view freedom of expression as an absolute right. However, the universal nature of freedom of expression implies that governments have a negative obligation to refrain from undue interference with this right, as follows from the international standards including the 2014 joint declaration of three special rapporteurs on freedom of expression (those of the UN, the Organization of American States,[9] and the African Commission on Human and Peoples' Rights[10]) as well as of the Organization for Security and Co-operation in Europe (OSCE)[11] Representative on Freedom of the Media (see OSCE, 2014). This declaration specifically addresses the issue of universality of freedom of expression, which the states should recognise as a core human value "in all major cultural, philosophical and religious traditions around the world" (OSCE, 2014, p. 1). The declaration also reminds of the positive obligation of states to ensure that freedom

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[8] *Lex specialis* is "a principle according to which a rule of *lex specialis* is deemed to apply notwithstanding contrary general principles of international law. The priority given to *lex specialis* is considered justified by the fact that the *lex specialis* is intended to apply in specific circumstances regardless of the rules applicable more generally where those circumstances may be absent." See: http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1303

[9] The Organization of American States (OAS) is a continental intergovernmental organisation founded in 1949. Currently, it unites thirty-five members. It aims to promote democracy, peace, human rights, and development. For more information, see its website at: http://www.oas.org/en/about/who_we_are.asp

[10] The African Commission on Human and Peoples' Rights (ACHPR) is an international quasi-judicial body seeking to protect and promote human rights throughout the African continent. For more information about the organization and its activities, see: http://www.achpr.org/about/

[11] The Organization for Security and Co-operation in Europe (OSCE) is an intergovernmental organisation specializing in security-related concerns and uniting fifty-seven member-states. Unlike the UN and the CoE, it acts on a politically rather than legally binding basis. With regards to the freedom of speech, particularly important are the activities of the specific OSCE institution, the Representative on the freedom of the media, who observes media developments in the member-states and helps them comply with their commitments to freedom of expression and free media. For more information, see: http://www.osce.org/whatistheosce

of expression is implemented in a nondiscriminatory manner and that democratic systems of government rest on this right.

Nevertheless, states sometimes limit freedom of expression and media freedom under various pretexts and in ways that contradict international law, to the detriment of both humanity and democracy. The hopes that the development of information and communication technologies would bring about more freedom and greater respect for human rights have so far been illusory. In its 2016 report Amnesty International[12] stated that the inviolability of the values expressed in the UHDR "is in danger of dissolution" (p. 12). The report noted that the very notions of human family, human dignity, and equality have been challenged by "powerful narratives of blame, fear and scapegoating" (p. 13) promoted by the political establishment.

Russia is among the countries whose degree of freedom of expression and media freedom causes great concern to international organisations, scholars, and media experts. Renowned international organisations measuring press freedom have been assigning low rates to Russia in this area. In the 2016 Press Freedom Index prepared by Reporters Without Borders, Russia occupied 149th position out of 179 countries. Freedom House moved Russia down from the "partly free" (with press freedom score of 60) to the "non-free" countries (with press freedom score of 83) over the period from 2002 to 2016 (see Freedom House, 2002, 2016). The Committee to Protect Journalists (CPJ), another nongovernmental organisation promoting the rights of the press, placed Russia in seventh place in the list of the twenty "Deadliests Countries" with the largest number of murders of journalists in 2016 (see CPJ, 2016).

Adopted in the early 1990s, mass media legislation in the country played a crucial role in the formation and operation of independent media in Soviet and post-Soviet Russia, as has been observed in several legal studies (Richter, 2007, 1995; Elst 2005; Fedotov 2002, 1999; Ellis, 1999; Price, 1995; Androunas, 1993). At the same time, these studies have noted that Russian mass media legislation requires further development and proper institutional alignment with democratic principles. Already a member of the UN and the OSCE, Russia entered the CoE in 1996 and ratified the ECHR two years later. However, over the last two decades, Russian media freedom not only has not made any progress, but it has also dramatically declined, as many scholars have observed (Skillen, 2017; Jackson, 2016; Schönfeld, 2014; Y. Zassoursky, 2011; Fedotov, 2010; Lipman &

[12] Amnesty International is a world-known non-governmental organisation focusing on human rights protection. For more details, consult their website at: https://www.amnesty.org/en/

McFaul, 2010; Fedotov, 2010; Vartanova & Smirnov, 2010; Arutunyan, 2009; Sheftelevich, 2009; Mironov, 2008; Richter, 2008a, 2007; Kachkaeva, 2006; Koltsova, 2006; Dewhirst, 2002; Foster, 2002). Scholars and media experts have criticised particularly the two "waves" of legal restrictions to speech and media adopted after the crackdown of the 2011–2012 mass protests in the country as well as after the 2014 annexation of the Crimean peninsula.

The relationship between the Russian government and the CoE has significantly cooled down over the last few years. Because of disagreement over the legitimacy of the annexation of Crimea, the CoE's Parliamentary Assembly (PACE), one of the CoE's main governing institutions, suspended Russia's rights to vote in this body. In 2015 Russia passed a new statute authorising the Russian Constitutional Court, one of the highest courts in the country, to challenge any document of any international body, including the European Court of Human Rights (ECtHR), an international judicial institution established by the ECHR. The ECtHR rules on complaints received by CoE citizens, companies, or member-states on violations of rights and freedoms guaranteed by the ECHR, and its judgments have a binding force, according to Article 46 of ECHR. The attempt of the Russian government to defy the ECHR by challenging the ECtHR's authority may have far-reaching consequences for the international system of human rights, both inside and outside Russia.

Much uncertainty still exists about the impact of the CoE membership on Russian media policies. Only few studies address this issue and it is difficult to draw conclusions from them because they examine different areas and periods in media policy and some even arrive at contradicting results. A more comprehensive study by Shönfield (2014) found that the CoE's political pressure regarding media freedom in Russia is largely inefficient, although Shönfield assumed that the ECtHR jurisprudence could have an impact on Russia's media legislation and national court practice. At the same time, Shönfield's research mainly focused on an analysis of the current situation of Russian media and on the CoE's tools used to make an impact, rather than on Russian legal frameworks or court practice. Legal research into this issue has been undertaken by Fedotov (2001), Richter (2015; 2009), and Shugrina (2016). Fedotov found that Russian mass media law may be consistent with the CoE's perspective, unlike Russian judicial decisions; however, Fedotov's research has not been updated since 2001. Richter revealed that international standards have some positive influence on media reforms in Russia, although his conclusions concerned only nonbinding documents of the Russian Supreme

Court. Shugrina (2016) argued that Russian regulation of freedom of expression has been mainly consistent with the CoE standards, but her research is limited to a few provisions. In general, none of these studies have comprehensively examined the issue.

There is also a lack of recent studies providing in-depth analysis of Russian mass media legislation. They were undertaken more than a decade ago (Richter, 2007; Elst 2005; Fedotov 2002, 1999; Ellis, 1999; and an edited volume by Price, Richter, & Yu, 2002) and they have not been updated in view of the momentous changes that have occurred in the field both in Russia and globally. More recent studies either focus on specific areas of media regulation or cover short periods of time. Another limitation of most of the studies on Russian mass media legislation is in that they rarely provide analysis of the Russian judicial practice on media because the decisions of the Russian courts were hardly accessible before 1 July 2010 (when a statute obliging the courts to publish their rulings[13] took legal effect).

This dissertation seeks to overcome these limitations. It comprehensively studies the Russian perspective on media policies and investigates the transformation of such policies under the impact of the CoE standards. The main purpose of this study is to identify the extent to which Russian media policies are consistent with the universal vision on media freedom and the way it has been developed by the CoE. The study addresses several questions: What are the determining factors in Russia's governmental strategies on the implementation of the CoE standards on the media in the country? What are these strategies? How does the Russian government justify the restrictions to media freedom instituted in the country? Are insufficiencies in media freedom in Russia due to legislative problems or to a failure to implement media law? What are the main problems of Russian media policies in the context of the CoE standards, and why? Has the ECtHR jurisprudence against Russia impacted the media policies in the country? To what extent has the Soviet legacy affected such policies? What influence does Russian legal culture exert on media policies in the country?

This dissertation argues that Russia's media policies illustrate a recent global tendency towards what I call a *de-universalisation* of the right to freedom of expression and media freedom. By this notion I mean Russia's tendency to disregard the universal and the CoE's standards and to reinterpret such standards in line with the interests of political elites in the country, rather than in line with international law. The study argues

[13] Federal Statute of the Russian Federation "On Ensuring Access to Information on Activities of the Courts in the Russian Federation" of 22 December 2008 No. 262-FZ.

that Russian media policies were closer to the CoE standards in the early 1990s, but the CoE membership has had a superficial impact on Russian media regulation. Before 2010, when the Internet became a popular mass medium in Russia, the governmental strategy concerning the CoE standards on media can generally be characterised as ignorant of such standards. Subsequent Russian media policies have mostly reinterpreted the CoE standards to justify censoring regulations, which, to a certain extent, reflects the former Soviet perspective on the media. Paradoxically, the official version maintained by Russian authorities is that they do respect the international standards on freedom of expression (see, for instance, UN, 2015; Bazenkova, 2016; RT, 2016; Smith-Spark, 2013).

This dissertation addresses the issue from a legal perspective. While it focuses on the Russian national legislation, its original contribution is in providing a comparative perspective and in conducting an analysis of the Russian court practice. It examines the interpretations of the Russian highest courts and more than two hundred recent judicial decisions of the Russian general jurisdiction courts, which are still mainly available only to Russian-speaking scholars. This study also analyses the regulatory perspective of the Russian media regulating body Roskomnadzor. Additionally, the dissertation considers the comprehensive analyses of the ECtHR case law against Russia on violations of Article 10 of the ECHR and the PACE's resolution on Russia involving freedom of expression.

The main research method employed is a qualitative comparative analysis of the Russian and the CoE media policies. At the core of this method is the so-called three-tier test provided by Article 10 Part 2 of the ECHR.[14] The ECtHR applies this test to assess admissibility of restrictions to the right of freedom of expression by reviewing whether such restrictions: (i) are provided by law; (ii) pursue a legitimate aim; (iii) are necessary in a democratic society.[15] Similar criteria for assessing limitations of freedom of expression are established in Article 19 Part 3 of the ICCPR.[16] International law

[14] Article 10 of the ECHR in Part 2 states: "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 of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[15] See also section 1.4 for details.

[16] ICCPR in Article 19 of Part 3 says:
"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."

acknowledges that media freedom implies not only the granting of specific rights and privileges, but that it also entails duties and responsibilities, particularly with regards to respecting the reputation and rights of others. However, any limitation to media freedom should also meet the criteria of the abovementioned three-tier test. The ECtHR allows a certain "margin of appreciation" for member-states to impose limitations in some sensitive areas of media law (for instance, public morality), but national visions are strongly limited with regards to political expressions (McGonagle, 2016; Oster, 2017, 2015; Keller, 2011; Verpeaux 2010; Jakubowicz, 1998). A narrow margin of appreciation brings about a greater degree of harmonisation of domestic laws with international standards (Oster, 2017).

Undoubtedly, assessing media policies is an inherently subjective process. To avoid misinterpretations, this dissertation considers the Russian media policies with references to the ECtHR case law and the CoE's nonbinding (or) political standards. Particularly important for this study are the PACE's and the Committee of Ministers'[17] resolutions and declarations on media policies (see Council of Europe, 2016) as well as the opinions of the Venice Commission.[18] As used in this dissertation, the term "the CoE standards" encompasses the ECHR and other conventional rules, the ECtHR judgements, and nonbinding documents of the main CoE institutions.

In this study, legal aspects blend with other issues. According to Lessig (1999), apart from law, three other modalities regulate behaviour: social norms, the market, and nature (or "architecture"). With regards to media research, each modality is important (Oster, 2017). Therefore, this dissertation is also concerned with journalism's social role and refers to economic and other challenges facing media in Russia to the extent that they are interrelated with media law in the country. A general political and social background to some policies is also provided because media law cannot be studied without it. To this aim, the dissertation examines the documents of the debates on the drafts of the Russian constitutional provisions on free speech, programming documents on *Glasnost* policy as well as philosophical works on Marxist-Leninist theory. It also studies documents of the

[17] The Committee of Ministers is a CoE statutory decision-making body consisting of foreign ministers of each member country. The Committee has a meeting at ministerial level once a year, and it weekly meats at the Deputies' level (Permanent Representatives to the CoE). The meetings allow expressing national perspectives on the problems and challenges that the European societies face and facilitate mutual elaboration of responses to them.

[18] The Venice Commission (or the European Commission for Democracy through Law) is an advisory body of the CoE designed to improve operation of democratic institutions and the protection of human rights in the member-states.

Russian Ministry of Foreign Affairs addressing the Russia-CoE relationship, such as reports, speeches, and press releases.

The dissertation addresses the legal issues related to mass communication ("mass communication" is understood here as imparting and exchanging information at a distance and to an indefinite number of people through the mass media). The study acknowledges that mass communication today is carried out not only by "traditional" media, but also by new media, especially the Internet and mobile technologies, as McQuail (2010) notes. The dissertation outlines Russian Internet policies on mass communication with a focus on legal issues that relate to media and media-like services, and mostly omits policies relating to non-media services. It also mainly excludes issues relating to the Russian entertainment industry, such as cinema, music, theatre, et cetera. The regulation of private communications is also excluded from this study.

This dissertation examines media policies only in light of freedom of expression and largely excludes issues that go beyond Article 10 of the ECHR. Important issues of media law such as copyright, advertisement, and the protection of privacy are considered only to the extent to which they relate to freedom of expression. With the exception of issues on media editorial concern, contractual relationships are not part of the analysis presented in this study.

Because the dissertation focuses on the Russian perspective, a comprehensive study of the CoE standards would go beyond its scope, especially given that much thorough and recurrent research has been done on the subject. Particularly important for this thesis has been the work by Oster (2017, 2015), McGonagle (2016), H. Duffy (2015), Benedek and Kettemann (2014), Salinas de Frias (2012), Jakubowicz (2011), Keller (2011); Verpeaux (2010) as well as the collections of essays edited by Hennebel and Tigroudja (2011) and by Hare and Weinstein (2010). Several investigations of Russian media policies published by the European Audiovisual Observatory,[19] a CoE institution monitoring member-states' audiovisual policies, have significantly contributed to a better understanding of such policies (Richter & Richter, 2015; Richter, 2013; 2011b; 2010; Richter & Shevchenko, 2010). Many of the ECtHR rulings, especially recent ones, are accessible only in English and, therefore, may not have been examined by Russian legal scholars or practitioners. A considerable contribution on clarifying and promoting the

[19] The European Audiovisual Observatory collects and provides information about the European audiovisual industries to promote their transparency and a better understanding of how they function, from economic and legal perspective. See the organisation's official website at: http://www.obs.coe.int/en/about

ECtHR case law on freedom of expression in Russia has been made by the Russian Centre of Media Rights Defence (*Tsentr Zaschity Prav Smi*),[20] headed by Galina Arapova, a legal counsel and a human rights defender who often represents the interests of Russian applicants before the ECtHR. In general, the CoE standards are of secondary concern for this study and are considered mostly in a contrasting perspective to the Russian policies.

The dissertation excludes analysis of Russian media policies in the context of the UN and the OSCE standards because of its research focus on the CoE standards. Nevertheless, the term "international standards" used throughout the dissertation collectively refers to the documents of the UN, the OSCE as well as the CoE which have been accepted by Russia. With regards to media freedom, particularly important are the activities of the OSCE's Representative on freedom of the media, who observes media developments in member-states and helps them comply with their commitments to freedom of expression and free media. Unlike the UN and the CoE, the OSCE acts on a politically rather than legally binding basis. Despite any differences in the ICCPR's and the ECHR's conventional clauses and the tools used by the UN, the OSCE, and the CoE to apply pressure on member-states to comply, these organisations view freedom of expression as an universal right and principle, as noted above.

The trends towards de-universalisation (or re-nationalisation) of freedom of speech undermines the entire international system of human rights protection. Mälksoo (2014) suggests that the argument of Russia's "civilizational uniqueness" has been used by the government to legitimate its particular doctrine of "margins of the margin of appreciation" with regards to various CoE commitments (Mälksoo, 2014, pp. xii, 217). "It is not Russia in between East and West, it is East on the Russia's right and West on the Russia's left," as Russia's president Vladimir Putin stated during the 2013 Conference of the so-called All-Russia People's Front, the political movement headed by him (*Obscherossiiskiy Narodniy Front* or ONF). The conflict between universal human rights and diverse cultural identities has been long debated by scholars who suggest that a balance should be found (John-Stewart, 2015; Katiuzhinsky & Okech, 2014; Donders, 2010).

Although this dissertation focuses on Russian media freedom, it seeks to enhance our general understanding of national policies with regards to the incorporation of international standards and to provide suggestions for making such freedom more effective. Additionally, it may reveal the most and least problematic issues of media

[20] See the official website of the Centre at http://www.mmdc.ru

policies from an universal perspective. Some of these areas may apply to the Russian context only, but others may be common to other countries, particularly post-Soviet ones, whose media policies, as Richter has convincingly shown, have been considerably impacted by the Russian perspective (Richter, 2009; 2008a; 2007).

The dissertation consists of two chapters. The first chapter aims to comprehensively examine the Russian context. It begins with an analysis of the Soviet perspective on freedom of speech and the press by examining first how the Marxist-Leninist ideology and the Soviet constitutions have shaped these concepts, and then by examining *Glasnost*. The chapter then studies the 1990–1991 mass media Russian statutes, which is followed by an analysis of the more recent constitutional concept of free speech in the country. The chapter also examines the subsequent development of media legislation and compares the trends that can be observed in this development before and after Russia's accession to the CoE. Next, it discusses the connection between Russian legal culture as well as social attitudes and governmental media policies in the country. It then proceeds to analyse the interpretations of freedom of expression and media freedom in the practice of the highest Russian courts, the ECtHR case law against Russia, and the Russian media watchdog Roskomnadzor.

The second chapter compares the Russian and the CoE's media policies on four issues: defamation, extremism, audiovisual media, and online content and new media. These issues have been selected for anaylsis for several reasons. First, the CoE standards in these four areas are more solid and developed than many other issues regarding freedom of expression. Second, these areas strongly relate to the media and its function in a democratic society—which is the main focus of this dissertation. Third, various scholars have noted these issues among the most problematic ones in Russian media policy (see, for instance, the studies criticising the Russian legal concept of defamation by Arapova & Ledovskih, 2014 and Tikhomirov, 2014; the studies criticising the Russian legal concept of extremism by Richter, 2012 and Verhovskij, Ledovskih, and Sultanov, 2013; the critical studies on TV broadcasting policies by Lipman, Kachkaeva, and Poyker, 2017, Lipman & McFaul, 2010, Arutunyan, 2009, Kachkaeva, 2006, Koltsova, 2006; the studies criticising frameworks for audiovisual media services by Richter, 2013, 2011b, 2010; and for online policies by Richter and Richter, 2015, Price, 2015, N. Duffy, 2015). The second chapter examines the CoE standards, the Russian legislation, and the way these standards have been implemented in the practice of Russian general jurisdiction

courts. The study of judicial practice is based on the RosPravosudije database.[21] RosPravosudije is a Russian-language noncommercial system of legal information, which collects and publishes decisions posted on the official websites of the Russian courts. It offers a wide range of search options (by keywords, region, dates, et cetera), which makes it the ideal research tool for court decisions for this analysis.[22]

[21] See the official website of the RosPravosudie legal database at: https://rospravosudie.com.
[22] The criteria for the selection of decisions by general jurisdiction courts are explained in the relevant sections examining them.

CHAPTER 1

EVOLUTION OF THE RUSSIAN LEGAL CONCEPTS OF FREEDOM OF SPEECH AND MEDIA FREEDOM

1.1 The Soviet Perspective on Freedom of Speech and the Press

Marxism-Leninism is a key theory underpinning the Soviet perspective on speech and press policies. It was recognised as the party's leading ideology in the 1936 USSR Constitution and proclaimed as the country's official ideology in the next USSR Constitution of 1977. It should be noted, however, that Karl Marx was not a Russian author, he was not thinking of Russia when he elaborated his theories, and he did not even play a role in the Russian revolutions, unlike Vladimir Lenin. Marxism-Leninism was developed by Lenin himself to represent his understanding of Marx's ideas.

The Marxist-Leninist Perspective on Free Speech

Marx challenged the liberal approach to freedom of the press on the grounds that it leads to commercialisation. He suggested that freedom of the press was the highest human value. According to Marx, freedom of the press should not be a "privilege of particular persons" because it is a "privilege of people's spirit" (Marx, 1955, p. 55). Therefore, the press should not be grasped by the establishment or commercialised. Marx (1955, p. 76) claimed that "the main freedom of the press is not to be a business": a writer should make money in order to exist and continue to write, but not write and exist to make money. Marx valued press freedom per se and stressed its significance for human self-recognition as well as for intellectual development. For him, one could not realise other human freedoms without press freedom because all democratic freedoms are interconnected.

He rejected any censorial laws as mere punishment for opinions since no law could actually eliminate opinions. Furthermore, Marx (1955, p. 58) considered censorship as unnatural and harmful: a censored press, he said, a "deformity of non-freedom, is a civilizational monster." Marx refuted the argument that the press needs restrictions to prevent its abuses: any media can abuse its power; however, one cannot prevent humans

from using their mouths, legs, or arms even if some might use them to commit crimes, as Marx noted. He also questioned the competence of censors. As a journalist, Marx also defended authors' anonymity, which, he stated, facilitates greater freedom and impartiality of both author and audience because the personality of the author can impact the audience's judgments.

Marx believed that, being a separate branch of public control, the press should be absolutely free and independent from the authorities. He also claimed that in order to solve vital problems both governments and people needed a "certain third element," which is an independent press, "with a citizen's head and a civic heart" (Marx, 1955, p. 206). According to Marx, free press is beneficial for governments and people because it makes people's needs known to the state authorities, while censorship "kills governmental spirit" (Marx 1955, p. 69). He believed that censorship forces people to consider free (uncensored) works as illegal. Therefore, people become accustomed to thinking that "free" means illegal and that exercising freedom is showing disregard of the law.

For Marx, the only acceptable censorship was free criticism generated by the press itself. On equal rights, people and governments should criticise the principles and requirements of each other, as Marx suggested. Although rejecting the idea of censorial law, Marx proclaimed the need to adopt a press law nevertheless. According to him, a press law is a legal acknowledgment of free press, while the lack of such a law exempts the press from the legally acknowledged freedoms.

Lenin often called himself a journalist or a writer. Like Marx, he was initially a proponent of the idea of a fully free press and speech and countered bourgeois freedom with "real" proletarian freedom driven by the idea of socialism rather than by profit. For Lenin, "free" meant to be free of capitalist power, of "careerism," as well as of "bourgeois and anarchical individualism" (1968, p. 100). He argued that the freedom of the bourgeois intellectual is hypocritical because it is "dependent on moneybags" (1968, p. 104). The bourgeois concept of freedom of the press, from Lenin's viewpoint, purely meant the freedom to bribe newspapers, buy writers, and frame "public opinion" in favour of the bourgeois class.

The 1917 Revolution made Lenin reconsider his support of absolute press freedom. In 1921, he wrote that "we do not believe in 'absolutes'," and he questioned: "Which press freedom? For whom? For which class?" (Lenin, 1968, p. 78). Lenin justified restrictions on the press by the need to combat powerful bourgeois enemies who

"besieged" speech in Soviet Russia. Absolute press freedom could serve as a bourgeois weapon against communism. From Lenin's perspective, the Party's insufficiencies could be eliminated by "proletarian and Party measures" rather than by bourgeois freedoms, such as freedom of expression.

Unlike Marx, Lenin did not acknowledge the value of press freedom for its own sake. Lenin stated that the press had to serve as a tool for socialist construction and to be a collective propagandist, agitator, and organiser (McNair, 1991). The press, according to Lenin, had to follow several interconnected principles, among which the most important were *partiinost* (party affiliation), *ideinost* (ideology), *narodnost/ massovost* ("linkage with the masses"/ the people), *pravdivost/obyectivnost* (thuthfullnes/ objectivity), and *glasnost* (oppennes) (see McNair, 1991, pp. 14–15).

Partiinost meant that literature and the press should become part of the activities of the Bolshevik Party, a forerunner of the Communist Party of the Soviet Union (CPSU). Newspapers had to become the Party's organs and writers had to join the Party in order to create new literature promoting the Party's policies (Lenin, 1905). *Ideinost* was closely connected with *partiinost*, and that is possibly why McNair (1991, p. 15) considers them as one principle. According to the principle of *ideinost,* the press had to disseminate the ideas of the Bolshevik Party.

McNair notes that the Western reader might see *partiinost* as contradicting the principles of *pravdivost* and *obyectivnost* (truthfulness/objectivity) because *partiinost* implied the need to follow a party line rather than being impartial. However, McNair stresses that the Soviet terminology distinguished "objectivity" from "objectivism" (corresponding to impartiality). The Soviet principle of "objectivity" implied that journalists cover events "from the point of view of marxist–leninist doctrine, which they are convinced is scientific" (McNair, 1991, p. 17). According to this doctrine, journalists should not be impartial; therefore, the "objectivity" correlated with the Lenin's principle of *partiinost* and contrasted the bourgeois concept of journalistic objectivism.

Narodnost/massovost meant that the press must be created for the masses and by the masses. After the 1917 Revolution, Lenin (1918) wanted to ensure the "active participation" of the masses in the building of the national economy and, therefore, claimed that "the main task of the press during transition from capitalism to communism is to educate the masses especially on issues of national economy." Calling for the press to reveal defects in the economy and to report on best practices in all spheres of the new Soviet life, Lenin introduced the principle of *glasnost* (openness) and accountability in

production and distribution. From Lenin's perspective, *glasnost* primarily meant the "positive" role of the media in publicising and reporting on "positive phenomena in Soviet economic life," and it also implied criticism or self-criticism (McNair, 1991, p. 23), which meant criticism of ideologically harmful ideas disseminated within the country from the outside. Lenin wanted the press to interpret facts and events in light of the Party's policy and refrain from wide debates on political issues. Therefore, the principle of *partiinost* remained the main guiding principle for speech and press regulation.

Soviet Regulations of Speech and the Press in the Context of International Standards

While Marx was merely an observer and critic, Lenin illustrated his theories with pervasive action, sweeping and revolutionary in its impact. The first Soviet press law, the 1917 Decree on the Press (*Dekret o Pechati*)[23] of the Council of People's Commissars of the Soviet Russia (officially, since 1918, RSFSR, the Russian Soviet Federative Socialist Republic), banned any press body that advocated opposition or insubordination to authority, made havoc by perverting the truth, or encouraged any activities of a criminal nature. The decree caused the shutdown of ninety-two newspapers and triggered the "Bolshevisation" of the media in Soviet Russia (see McNair, 1991, p. 29–30). The decree was announced as a temporary measure with the promise to adopt a new "broadest and most progressive" law as soon as the new order stabilised. Although the decree was formally abolished in 1929, no new law was adopted until 1990.

At the same time, it is worth noting that legislation in the USSR mainly operated as a "façade for domestic and foreign spectators," and the real mechanisms functioned behind the law, as Nathans (2011, p. 166) notes. He argues that the law mainly fulfiled an ideological function. By realising Lenin's vision, the 1918 Constitution of the RSFSR, in Article 14, ostensibly guaranteed freedoms of speech and press and, in theory, only to the working class. It proclaimed the elimination of the press' dependency on capital "with the aim to ensure for working people the real freedom of expression" in the country, which "provides in the hands of working people and peasant's beggarhood all technical facilities and material supply to publish newspapers, brochures, books as well as other

[23] Decree on the Press (*Dekret o Pechati*), adopted by the Council of People's Commissars of the Soviet Russia on 9 November (27 October) 1917. Retrieved from http://constitution.garant.ru/history/act1600-1918/5305/

printed works and ensures their free circulation in the entire country."[24] The same guarantees were granted in Article 5 of the 1925 Constitution of the RSFSR—again, only to the working class, but these guarantees could be implemented only to the extent that they correlated with the Party's tasks and policies. Other social classes were deprived of the right to free speech and press.

According to the Soviet-communist normative theory of Siebert, Peterson, and Schramm (1956), the Party had full control over the press and, therefore, the limits of this freedom were strictly interpreted in light of the Party's expediency. The media performed a propagandistic function as a tool for both mass information and propaganda (*sredstva massovoj informacii i propagandy* or simply, *SMIP*), a kind of hybrid of "mouthpiece and printing-machine," and bureaucrats not only determined what people wrote, but also what they read by obliging people to subscribe to certain newspapers (Baturin & Fedotov, 2012, p. 21). Journalism was fully regulated by the Central Committee of the CPSU rulings as well as the resolutions of the USSR Council of Ministers.

The government and the Party's organs systematically controlled all facets of social and cultural life in the Soviet Union. They tried to reign in not only explicit criticism, but also any information or ideas that might negatively impact the Soviet government, the Party, or their ideology. Any ban could be implemented arbitrarily and selectively. Restrictions concerned many areas including economic or military secrets, pornography, the "yellow" press, as well as information on unrests or protests, life in the concentration camps, railroad crashes, suicides or mental derangement caused by famine or unemployment, to name a few. As Richter (2011b) notes, the Central Committee of the CPSU issued 185 rulings striving to cover almost every journalistic issue.

Soviet regulation, unlike that of the Russian Empire, never explicitly permitted censorship.[25] Nevertheless, the lack of explicit permission did not prevent the Soviet government from creating a comprehensive, severe, sophisticated, and effective censorship system (Reifman, 2010). It was formed and institutionalised in the period 1917–1930 (Goriaeva, 1997), and, with a few minor changes, continued to function until the dissolution of the USSR. Censorship was used as a tool to protect the Party's elite

[24] Constitution of the RSFSR, adopted by the 5th All-Russian Council of Soviets at the meeting on 10 July 1918. Retrieved from: http://www.hist.msu.ru/ER/Etext/cnst1918.htm

[25] In the Russian Empire, the mass media was regulated only by censoring legislation, and the state policy was directed purely towards the improvement of censoring mechanisms (Reifman, 2010; Baturin, Fedotov & Entin, 2004; Eriomin, 2011; Zhirkov, 2001). In nineteenth-century Russia, the press was regulated by the Statute on Censorship (*Ustav*, 1804, 1826, 1828) and by the Transitory Provisions on Censorship (*Vremennyje Pravila*, 1826, 1865, 1882).

from criticism and was in service of internal as well as external propaganda. It helped the Party to create and preserve an image of the country in which people voluntarily dedicated themselves to assist the Party in constructing the "bright future of communism for the good of all people," as one Soviet slogan proclaimed.

To control speech, the Soviet government created a multilayered system of regulatory agencies that were supervising, controling, and restricting the content in particular areas according to the Party's policies. The main censoring agency was Glavlit (the General Directorate for Affairs of Literature and Publishing).[26] It was officially in charge of controlling all publications and protecting state secretes. It formulated binding instructions and orders, which constituted the main source for policies regulating the press and speech in the USSR. Glavlit's head was appointed by the Central Committee of the CPSU on recommendations of the head of the Committee's Department of Press and Publishers. Its comprehensive control was maintained through a broad network of censors in the country. Before Glavlit, Gosizdat was in charge of supervising the Russian press. Goskino (the State Committee for Cinematography) controlled film content. Within Glavlit, Glavrepertcom (the State Committee for Control over Repertoire) oversaw public performances (including public lectures, concerts, and theatre plays). Gosteleradio (the USSR State Committee for Television and Radio Broadcasting) controlled TV and radio programmes. There were special bodies carried out military censorship. Additionally, before any work could be published, its authors had to get additional approval from the respective ministry that oversaw the area referenced in the work. Restrictive measures varied from direct interference (bans or destruction of publications, rejection of materials, jamming of foreign stations, et cetera) to indirect control (personnel and fee policies, for instance). Self-censorship also flourished.

Stalin's 1936 Constitution formally extended the guarantees of the freedoms of speech and press in the USSR. Its Article 125 granted these rights to all USSR citizens, not only to the working class. Yet these rights were provided "according to the interests of working people and with the aim to strengthen the socialist order," which, from a legal perspective, means that the interests of the working class and the state (in fact, the Party) still dominated over the interests of other individuals. Furthermore, the years between 1930 and 1953 have been described by Zhirkov (2001) as a period of total and harshest Party censorship. The Gulag was already in operation and, as Baturin and Fedotov

[26] Established by the Decree of the Council of People's Commissars of the RSFSR of 6 June 1922.

ironically note, "the freedom of expression was encouraged only during interrogations" (2012, p. 24).

The end of World War II did not lead to any changes in the area of human rights and freedoms in the USSR for political and ideological reasons, although such changes, led by international law, have been widely observed on a global level and in most of the Western European countries. On 24 October 1945, the UN was established to prevent new war conflicts. It united fifty-one members at the time of its founding. At the behest of the United States, the USSR played an active role in establishing the UN and became its charter member, but the USSR has mainly used the UN as a "propaganda forum and encouraged pro-Soviet positions among the nonaligned countries" (Nichol, 1991, p. 445).

The Soviet governement did not support the draft of the UDHR and it expressed disagreements with regards to some of the declaration's concepts including the right to freedom of expression. Article 19 of the UDHR guarantees this right in the following wording: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." USSR's views regarding UN policies were presented at the UN level by Andrey Vyshinsky, who was the head of the Soviet delegation to the UN, the then Minister of Foreign Affairs of the USSR (1949–1953) and the USSR's Ambassador to the UN (1953–1954), and who had actively participated in Stalin's repressions. During sessions, Vyshinsky justified USSR's non-acceptance of the perspective on freedom of expression adopted in the UDHR because it allowed dissemination of "any ideas." He argued that, with such wording, Article 19 would allow dissemination of *fascist* ideas as well as racial and national hatred, which would be unacceptable to the Soviet government. However, this reasonong was merely formal and misinterpreting because the UDHR's concept of freedom of expression have never implied the freedom to disseminate ideas inciting violence.

At the same time, some of Vyshinsky's statements might be of specific research interest because they demonstrated a huge gap between the universal and the Soviet understanding of freedom of speech. In the philosophy espoused by the USSR, freedom of speech and the press was considered a *positive* right, meaning *the freedom of the government to provide facilities for the press,* rather than *a negative freedom from governmental interference*. For instance, the Soviet delegation proposed that Article 19 be supplemented with the following provision (which the UN did not accept):

> With the aim to ensure the right to freedom of expression of a considerable stratum of the population as well as for its organisation, the government shall provide support and assistance through facilities (rooms, printing machines, paper, etc.) necessary for the publication of democratic media outlets. (Institute of Human Rights, 1999)

While the universal approach views media freedom as the freedom of every individual, the Soviet philosophy considered it a "collective freedom": the Party acknowledged the freedom of speech and press only if it serves the "collective good," which outweighs individual freedoms. Particularly, Vyshinsky claimed: "Our position cannot be shaken by demagogic outcries and weeping that limiting individual freedom and human rights in not allowed. Yes, it is allowed if such freedom is used to the detriment of the collective good and people's interests" (Institute of Human Rights, 1999).

Nevertheless, Nichol (1991) has noted that the USSR failed to gain much support of its policies at the UN level. The UDHR was supported at the General Assembly on 10 December 1948 by forty-eight votes (out of fifty-eight members at the time). The USSR and other countries, mainly from the communist bloc, abstained from voting.

During Stalin's regime, the USSR did not join the CoE, which was created on 5 May 1948, especially given that this organisation mostly united countries that often unambiguously criticised the Soviet regime.

The subsequent "Khrushchev thaw" was a period of relative relaxation of speech and press restrictions. It followed from the well-known 1956 critical report on Stalin's governance made by Nikita Khrushchev[27] at CPSU's 20th Congress. In the late 1960s, the first press statute was drafted in the USSR and began to be debated by the Politburo of CPSU's Central Committee[28] in the autumn of 1968, right after the end of the so-called Prague Spring. This short period of liberalisation in 1968 in Czechoslovakia was largely caused by an easing of censorship, and it was soon terminated by the USSR, which invaded the country in order to halt further reforms. The Prague Spring scared the Soviet government that by relaxing censorship the very regime in the USSR could be threatened, as it had happened in Czechoslovakia (see Fedotov, 2010). Consequently, the draft was rejected.

The "Khrushchev Thaw" was followed by the period of "Stagnation" (1966–1986), during which censorship mostly played a role in maintaining the Soviet regime. In the

[27] The First Secretary of the Central Committee of the CPSU (1953–1964).
[28] The main executive body of the CPSU in the periods between its plenums.

early 1970s, the USSR participated in the Conference on Security and Co-operation in Europe (CSCE, now OSCE), and it signed the 1975 Helsinki Final Act, in which the CSCE members made several commitments concerning the press and information.[29] In particular, they committed to increase cooperation among mass media organisations, to improve working conditions for journalists including granting visas for foreign journalists, and to facilitate communication with their sources, including organisations and official institutions for journalists. Yet at that time this Act had no consequences for the freedom of press in the Soviet Union.

In 1973, the USSR ratified[30] the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the key international treaties adopted by the UN General Assembly in 1966. Alongside the UNHR, they constitute the International Bill of Human Rights. The UDHR was a nonbinding declaration and the UN system of human rights protection lacked effective legal mechanisms, which the new treaties aimed to establish. For instance, most of the USSR citizens were completely unaware of the UDHR's existence (Pastukhov, 2014). By ratifying the ICCPR and the ICESCR, a state undertook both moral and legally binding commitments to protect and promote human rights and fundamental freedoms. Of specific importance for this dissertation is the legal mechanism of the ICCPR for respecting the civil and political rights of individuals, including the right to freedom of expression. Article 19 of the ICCPR states:

> 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 the respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order, public health, or morals.

[29] Final Act of the Conference on Security and Co-operation in Europe, adopted on 1 August 1975 in Helsinki. See OSCE (2013a).

[30] ICCPR and the International Covenant on Economic, Social and Cultural Rights were ratified by the Decree of the Presidium of the Supreme Soviet of the USSR on 18 September 1973.

In such a way, Article 19 of the ICCPR provides the criteria to assess admissibility of restrictions to freedom of expression and prevent arbitrary limitations of this right. Additionally, Article 28 [31] of the ICCPR established a Human Rights Committee consisting of eighteen nationals of the member-states to monitor the implementation of the ICCPR. The parties of the Covenant are obliged to report to the Committee every four years. After examining the country's report, the Committee expresses its concerns and recommendations (which it terms "concluding observations").

Both treaties have been in force in the USSR since 1976. The Party's bureaucrats no doubt knew that the Soviet government would apply the treaties selectively. The ratification of these documents was, however, important in creating on the international stage the image of the Soviet leadership as protector of human rights. It is interesting to note that in its application to join the treaties, the USSR specifically stated that some of the rules limiting the opportunity to ratify the covenants were discriminatory.[32]

The new 1977 Soviet Constitution to a certain extent reconsidered Lenin's vision of human rights as well as freedoms and his concept of "proletarian" free speech. It proclaimed freedoms of speech and press for all citizens echoing the formal ICCPR commitments reflected in Article 19. However, freedom of speech and the press was granted in the Constitution with the aim to develop socialism and was still understood as a *positive* freedom. In other words, it constituted the Party's (or the government's) right.

USSR's ratification of the ICCPR was in part the impetus for drafting a new press statute in 1976, which was not adopted either (Fedotov, 1999). The words "communist" and "Soviet" were abundant in the draft's text, as Fedotov (1999) notes. He states further

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[31] Article 28 of the ICCPR states:
1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

[32] The USSR viewed the following clauses as discriminatory:
Article 48 Part 1 of the ICCPR, which states: "1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant."
Article 26 Part 1 of the ICESCR, which states: "1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant."

that the draft was based on the 1966 Czechoslovak and the 1974 Romanian statutes on the press. These statutes were adopted under two socialist leaders, Antonin Novotny and Nicolae Ceausescu respectively, known for their harsh rule. The USSR draft proposed to ban censorship and granted some version of press freedom, but only to the extent that it did not contradict the aims of the socialist state. It followed Lenin's principles. No journalistic rights were provided.

In general, USSR's membership in international organisations and its ratification of main treaties had an unnoticeable effect on the regulation of speech and press within the country. The universal and the Soviet perspectives contrasted considerably in both ideology and practice. The Soviet regime was incompatible with any form of political freedom, as Baturin, Fedotov, and Entin (2004) note, and the USSR became part of international organisations purely in a gesture of external propaganda. That is why Fedotov (2010) suggests that if a press statute had been adopted in the USSR it would have been a statute on propaganda. He argues that there was no rationale to regulate propaganda by legal rules, but that "nothing could prevent framing unlawful decisions into the form of law in a totalitarian state." Fedotov assesses as positive the lack of press statute in the USSR because its very existence could have impeded the country's rapid democratisation since the mid–1980s: "The deeply rooted tradition in those days to create pseudo-legal acts in which general political norms-declarations predominated considerably, could have engendered such a press act that would have only handicapped the advent of Glasnost."

Against the background of continuing governmental control over speech and media, the Stagnation period was also marked by the drastic expansion of alternative, informal practices for communicating information and opinions (Nathans, 2011; Mickiewicz, 2008). *Samizdat* meant "self-publication," for instance by using typewriters, and *tamizdat* meant "over there publication," i.e. publishing works abroad. Nathans also describes the "smuggling [of] texts for publication abroad and/or transmission back to the USSR" (2011, p. 185) via the Voice of America, BBC, and other radio broadcasts. He argues that these programs had a considerable number of listeners in the USSR. Political dissent entered the USSR from abroad through alternative sources of information.

1.2 *Perestroika* and *Glasnost*: From Political Ideology to Legal Concepts

Scholars continue to dispute the facts surrounding the policy of *Perestroika* and *Glasnost* and its impact on the collapse of the Soviet Union. For this research, the period

from 1985 through 1991 presents a particular interest because the policy of *Perestroika* and *Glasnost* created the context in which free speech was formed in the USSR and then in Russia (Baturin, Fedotov, & Entin, 2004; Baturin & Fedotov, 2012; Brown, 2007; Ellis, 1999; McNair, 1991; Y. Zassoursky, 2011; Richter, 1995, 2007, 2011a). This period was extremely non-uniform, which will be shown in this section, whose main focus is on *Glasnost,* its sense and distinction from free speech, as well as its impact on the formation of news media legislation.

By the mid–1980s, the USSR economy was in crisis and the USSR's prestige inside as well as outside the country fell.[33] Fukuyama (1992) suggests that economic problems catalysed the "rejection of the belief system and expos[ed] the weakness of the underlying structure" (Fukuyama, 1992, p. 29). The Soviet elite of 1975–1985 consisted mainly of elderly and conservative people. Candidates for the party's apparatus were selected for their loyalty rather than their professionalism. Corruption flourished at all levels. While the media reported on the "successes of socialism" in the country, the Soviet ideology was in crisis. Many people did not believe the propaganda, some even began to idealise the Western lifestyle. One famous joke of that time stated that Soviet people had a triple personality: a person says one thing, thinks another, and then does something entirely different. The Party's policy increasingly differed from social expectations.

Although the needed reforms were largely economic, they resulted from an "internal crisis of confidence" of the Soviet elite of the preceding generation (Fukuyama, 1992, p. 30). The rapid change in leadership in the first half of the 1980s, due to the deaths of three aged Soviet leaders, shaped the strong social belief that the USSR needed a young leader who could comprehensively reform the country. In 1985, the Plenum of the Central Committee of the CPSU elected Mikhail Gorbachev, the youngest member of the Committee, as the General Secretary of CPSU. He began his rule with attempts to carry out reforms in order to consolidate his power. *Perestroika* and *Glasnost* became the key terms for his mandate; however, their meaning significantly changed during this time.

Although the term *Perestroika* (Russian for "reconstruction") was not widely used until 1987, it is commonly considered that the *Perestroika* period began on April 1985 at

[33] Since the 1970s, the USSR economic growth rates had decreased. The Soviet command and administrative economic system was ineffective, but the leadership of that time was reluctant to reform it fearing that a reform could undermine the regime. The USSR economy largely depended on the prices for energy, which had slumped in the mid-1980s. Additionally, the USSR had incurred great expenses to compete in the arms race. By the mid-1980s, it became fairly obvious the race was lost. The USSR invasion of Afghanistan in 1979 and the consequent war was costly and facilitated the fall of prestige of the Soviet Union.

the Central Committee Plenum of the CPSU (known as the April Plenum), when Gorbachev proclaimed a new course of "acceleration" towards progress, mainly implying economic development. In 1986, Gorbachev first used the term *Glasnost* during the February 27th Congress of the CPSU to underpin the economic reform facilitating the exposure of deficiencies in the management of the economy. He proposed to build a new socialism "with a human face." *Glasnost* was accompanied by the slogan "More democracy, more socialism!" thus strengthening the idea of some kind of ideological renewal. While Gorbachev soon started to shake up the Party's elite, at the initial stage of reforms *Perestroika* did not imply any drastic changes.

The new stage of *Perestroika* started with the 1987 January Central Committee Plenum of the CPSU when Gorbachev moved from the idea of "acceleration" towards socialism to the idea of "democratic socialism." He announced a comprehensive reform for the democratisation of the Soviet economy, international policy, as well as Soviet society. *Glasnost* became a major idea of the reform, and its limitations were extended. At the course of the 19th Conference of the CPSU, Gorbachev proclaimed a political reform, which resulted in the creation of the Congress of People's Deputies, the superior body with a great power, which existed from 1988 to 1991. For the first time, ordinary Soviet people got the opportunity to vote or be elected to this body and to watch congressional meetings on TV, which had vast consequences for free speech.

By 1989, when *Perestroika* had proceeded to its final stage, the whole situation was nearly beyond the control of the Soviet leadership. The political state was completely destabilised. In 1990, the position of the President of the USSR was approved, and the Soviet constitutional Article 6 on the Communist party's leading role was abolished. Private property and business initiatives were allowed and encouraged.

It aggravated the confrontation between new democratic and old conservative forces represented in the Congress of People's Deputies. Economic problems became enormous; the most visible were a commodity shortage and the growth of mass unemployment. The expectations for great changes were replaced by disappointment in *Perestroika* policy, in socialism, and in communism. People required more radical changes, for which they actively strived.

In June 1990, the USSR Statute "On the Press"[34] abolished censorship and proclaimed the right to free speech and press for the first time in Soviet history. On the same date, the Declaration on the State Sovereignty of the RSFSR was also adopted. Fedotov describes the coincidence of two these events as an "historical 'double jump' towards freedom and democracy" (2002, p. 33). Other Soviet republics also announced their sovereignty and left the USSR during the years 1990–1991. In December 1991, Gorbachev gave up his role as USSR president. This was followed by the adoption of the declaration of the dissolution of the Soviet Union, which heralded the end of *Perestroika*. In less than a month, Russia adopted a new press law, the Statute "On Mass Media."[35]

Glasnost Policy

Glasnost (or "openness") was a central idea of *Perestroika* and was considered a Soviet "achievement," although the term had been used during the Russian Empire and in the mid-nineteenth century referred to the weakening of press censorship as well as to the openness in state activities, particularly those of the courts (see, for details, McNair, 1991, pp. 23–24; 34–36). Lenin reinvented this term in line with the goals and tasks of a socialist state (see section 1.1 above).

Gorbachev's initial view on *Glasnost* largely relied on Lenin's. Like Lenin, Gorbachev originally promoted the idea of *Glasnost* to involve people in solving the problems related to the national economy. The core of *Glasnost* was to allow access to information, as Baturin (2006) notes, but that access was mainly to ensure a measure of control by working people over the execution of the Party's decisions. Gorbachev believed that access to information would make people more informed and more socially active, with the result that they would work more effectively. Criticism should draw people's attention to any shortcomings and deficiencies, so that these could be promptly overcome. At that period, Gorbachev's outlook was close to Marx's.

However, Gorbachev gradually reduced the limitations on access and criticism. In particular, at the 1987 January Central Committee Plenum of the CPSU, he supported the efforts of the media to reinforce criticism and self-criticism when he said: "In the Soviet society, there should not be any zones closed to criticism. This is entirely related to the

[34] Statute of the USSR "On the Press and Other Mass Media" No. 1552-1, adopted by the Supreme Soviet of the USSR on 12 June 1990. Retrieved from: http://pravo.gov.ru/proxy/ips/?docbody=&nd=102010233&rdk=&backlink=1

[35] Statute of the Russian Federation "On Mass Media" No. 2124-1 of 27 December 1991. Retrieved from: http://www.consultant.ru/document/cons_doc_LAW_1511/

media." Gorbachev then called for criticism of the past in order "to move forward." McNair (1991) argues that alongside access and criticism, *Glasnost* embodied socialist pluralism. The concept of socialist pluralism was based on Gorbachev's idea of restoring Lenin's vision of socialism, which meant pluralism of views and interests, although Lenin had never viewed socialism in such a democratic way.

Nevertheless, along with the Marxist-Leninist perspective, *Glasnost* contradicted the bourgeois concept of free speech. Gorbachev claimed that *Glasnost* was a broader concept than free speech and included not only "the right of citizens to express opinions openly on political and social issues," but also "the duties of the Party and state bodies to be open when making decisions, to respond to criticism and to pay attention to recommendations" (qtd. in Richter 2007, p. 40). From Gorbachev's position, *Glasnost* implied the concept that international law labels as freedom of information, or the public's right to know, which includes social awareness about governmental decisions and actions.

The most comprehensive document on this policy is the 1988 Resolution on *Glasnost*,[36] which proclaimed the need to create a constitutional basis for the right to information. Specifically, it asserted the right of citizens to receive information "on any issue of social life" and the right to conduct open and free discussion of "any issue of public importance," thus attempting to elaborate on the notion of "public interest," and largely developing the provisions of the 1976 draft press statute. The resolution also called for a reconsideration of the Soviet policy on the protection of state or military secrets.

The resolution also announced several requirements for governmental bodies. These included ensuring public accountability for government officials (including party leaders), improved access to libraries and archives, and making some important statistical information available to the people. It also proclaimed the need for the measures of liability for the impediment, concealment, distortion, or illegal use of information.

The resolution outlined the limitations of *Glasnost*, which, to a large extent, look similar to the limitations on freedom of expression established by the ICCPR. The document called for a ban on any use of *Glasnost* to the detriment of the interests of the state and the public or of human rights; its use for the advocacy of war, violence, racism, or national and religious intolerance; for the dissemination of pornography; for the violation of citizens' rights; and for the damage of public order, security, public health, or morality. It also called for a ban on any subversive manipulation of *Glasnost* itself.

[36] Adopted at the XIX All-Union Party's conference on 1 July 1988.

The resolution's perspective on press freedom might correspond to the universal vision of media freedom to a certain extent. Noting the major role of news media in *Glasnost*, the resolution established a number of core journalistic principles. It announced that *Glasnost* implied social, legal, and moral responsibility. Therefore, the document prescribed that news media be a tool of "public control" comprehensively highlighting the activities of the Party and state as well as those of non-governmental organisations. Among the basic ethical principles to be followed, the resolution announced objectiveness and morality. It proclaimed a ban on monopolising the truth or *Glasnost* itself. It also touched on some legal issues on defamation, and even attempted to establish the right to reply, as provided in international standards on defamation.

Glasnost's Impact on Speech and Media in the USSR

Glasnost triggered great democratic processes in Russian society, which were hard to control and restrain. Despite a tricky propaganda system, "the most fundamental failure of totalitarianism was its failure to control thought," as Fukuyama argues (1992, p. 30). In the early stages of *Perestroika,* journalists were guided mainly by the Party, and democratisation as well as criticism were spread from the top down. Soon after, however, journalism practiced during the *Perestroika* period became not only the tool to criticise bureaucracy and oppose the command-and-control (*komandno-administrativnaja*) system, but also a tool for social democratisation. The long-standing information shortage (*information deficit)* in the USSR had produced a palpable public demand for information (Ellis, 1999, pp. 3–64). When journalists moved on from "socialistic pluralism of opinions" to real free speech, public opinion "obediently followed journalists" (Baturin, Fedotov, & Entin, 2004, p. 14).

In 1987, free speech was nearly "unlimited," as Brown (2007) suggests. The press attempted to reveal long-concealed issues such as, among others themes, Stalin's repressions, Soviet bureaucracy, the Party's privileges, sexuality. In 1986–1989, many previously banned Russian works were published, including books by world-renowned writers A. Solzhenitsyn, M. Bulgakov, A. Platonov, V. Nabokov, and B. Pasternak. An official commission was created to rehabilitate victims of Stalin's repressions. Many forbidden films were released. Several "teleconference bridges" (televised live shows) between the USSR and the USA were broadcast, which helped to dispel common stereotypes about life in both courtiers. TV programs such as *The Fifth Wheel* (*Pyatoje Koleso*) and *Glance* (*Vzgliad*) discussed social and political issues. In the period between

1986 and 1988, the scope of live broadcasting increased nearly thirty times (Kachkaeva, 2006). The media provided opportunities to express diverse and competing opinions (Baturin & Fedotov, 2012), which had a momentous effect on Soviet people.

By 1989, the level of trust in journalism had significantly increased as evidenced by the general growth of the press circulation. The years 1989 and 1990 marked the peak of popularity for mass media in the period after the beginning of *Perestroika* (Richter, 1995). It is interesting to note that the majority of those elected as People's Deputies in 1989 were journalists (Baturin & Fedotov, 2012). Thus, *Glasnost* caused a new kind of journalism to emerge, which, to a great extent, grew beyond state control. Y. Zassoursky (2011) characterises this new journalism as a tool-making model (*instrumental'naja model'*) meaning that journalism became a tool for democratic changes.

Without diminishing *Glasnost*'s impact, it should also be noted that it remained a political concept rather than a legal one. It was a new ideological concept—close to international standards, but not legally formulated—which attempted to address the right to freedom of speech in Soviet Russia. *Glasnost* gave privileges rather than rights; furthermore, these privileges were personified and often limited to certain campaign, topic, or even just one article, as Fedotov (1999) argues. Gorbachev mostly initiated *Glasnost* to make his decisions more legitimate rather than to grant freedom of speech to individuals or to abolish the Party's control over speech and the press. Both criticism and access were tightly controlled and limited. For example, despite the proclamations of *Glasnost,* the Soviet people were not informed in a timely and proper manner about the tragic accident that caused the Chernobyl disaster.[37] The government tried to restrain the flows of information, and the lack of information led to numerous victims.

In 1987, Gorbachev proclaimed the need to draft new legislation guaranteeing *Glasnost,* and a draft of the statute "On *Glasnost*" was soon developed. It represented a brave initiative, similar to modern statutes on access to information. It proclaimed the right to information and ensured transparency, openness, and easy access to information created by the government. However, the Supreme Soviet of the USSR, the then-parliament mainly consisting of conservative communists, froze the statute in draft form, as Baturin & Fedotov note (2012, p. 62).

[37] The Chernobyl disaster (also known as Chernobyl accident) was a catastrophic nuclear accident, which happened on 26 April 1986 at the Chernobyl Nuclear Power Plant in Ukraine. At that time, Ukraine was part of the USSR.

In legal terms, the news media were powerless. There was no universal opportunity to establish a private news outlet, albeit a few such outlets were created, some under the 1988 Law "On Cooperation" (such as the promotional and informational newspapers *Vestnik Kooperatora* in Moscow or *Dlja Vas* in Riga) and others based on discrete political decisions (such as the information agency Interfax). As Richter (2011a) notes, having no assets or bank accounts, media businesses of that time were very vulnerable. All broadcasters were fully controlled by Gosteleradio (the State Committee for Television and Radio Broadcasting of the USSR Council of Ministers).

Baturin and Fedotov (2012, p. 54) note that various processes in the news media sphere transformed the demand for a press law into a central political slogan. Although political confrontation between old Soviet bureaucrats and new political forces increased, the press law seemed beneficial for both the adherents and the opponents of free press: the latter hoped that the legislation would reign in the press (Baturin & Fedotov, 2012, p. 54), while the former hoped to solidify and enshrine in law the freedoms they had achieved.

Another reason for a new press statute were USSR's commitments vis-à-vis the OSCE, as Fedotov (2002) notes. In a new political and social reality, international standards became increasingly important. A Soviet law on the press and information had been included into a plan for law-drafting activities after the country signed the 1986 Vienna Concluding Document, which would "allow individuals, institutions and organizations, while respecting intellectual property rights, including copyright, to obtain, possess, reproduce and distribute informational material of all kinds."[38]

There were several drafts of a press statute, but only two of them were considered at the top level. The first draft was developed by the Central Committee of the CPSU and, in 1988, was sent for consideration to governmental agencies and institutes as well as to organisations of the Union of Journalists and to some editorial offices. The draft aimed to formalise censorship and affirm the Party's monopoly over the means of news production. It made the creation of a media outlet a complex permissive procedure, while the closing of an outlet was a subject to a harsh, but simple order (Fedotov, 2010). The draft proposed that journalists receive information only regarding the subject matter of specialisation of the media outlet they were affiliated with. No guarantees of information

[38] Concluding Document of the Vienna Meeting of the Conference on Security and Co-operation in Europe. Third follow-up Meeting to the Helsinki Conference. Adopted on 15 January 1989, Vienna. See OSCE (2013a).

pluralism or editorial independence were provided. The draft was even more conservative than the 1976 draft, and was not adopted. It could not become the symbol of *Perestroika* and *Glasnost*, as Fedotov (2010) concludes.

Another draft, the so-called "authorial initiative," was prepared by three legal scholars, Yurii Baturin,[39] Vladimir Entin, and Mikhail Fedotov.[40] It was based on some of the *Glasnost* ideas. It proposed to ban censorship and proclaimed free speech and free press. This draft became the basis for the 1990 statute "On the Press." Nevertheless, the Party attempted to impact the adoption of this draft on numerous occasions and by various means. The authors could not publish the draft in Russia and therefore had it translated into Estonian for publication in *Spordileht*, a small Estonian sports newspaper of the Union of Journalists of the Estonian Soviet Socialist Republic.[41] The draft was soon republished by another Estonian newspaper, *Molodezh Estonii*, this time in Russian. Public interest in the draft was great; however, no other newspapers took the risk of publishing it. The authors printed it as a pocket-sized booklet in order to carry the text through security service to the First Congress of the People's Deputies of the USSR in 1989, where the draft officially became a legal initiative. However, the Party still attempted to control its discussion by providing the Supreme Soviet with a falsified version of the draft. The forgery was uncovered, but further readings of the law were accompanied by hot debates (for details, see Baturin & Fedotov, 2012), which resulted in its adoption on 12 June 1990. These historical details provide evidence that the freedoms of speech and media were gained through a struggle, in spite of the persisting influence of old bureaucratic elites.

Perestroika marked the tipping point of the entire Soviet system, which was undergoing fundamental and comprehensive changes of the USSR's regime and all aspects of social life. In less than five years, Soviet media policies rose through the ranks—from the political ideology of *Glasnost*, based on Marxist-Leninist ideas, to legislation adhering to a universal perspective on speech and press freedoms. Journalistic privileges were transformed into rights.

The USSR Statute "On the Press"

[39] Baturin also participated in the drafting of the law "On *Glasnost*."
[40] "Authorial initiative" is a term coined by Baturin, Entin, and Fedotov to denote: a scholarly-based approach to the law, the process of popularisation of legislation through comments to the draft of the law, and the law's practical meaning, openness, and independence (Baturin & Fedotov, 2012, p. 64).
[41] Interestingly, this draft (in Estonian) later became the Estonian Press Law (with few amendments).

Scholars emphasise the tremendous importance of the USSR Statute "On the Press" for journalism and for press freedom in the country. McNair (1991) notes that the statute became an "accelerator" of *Glasnost*. It legitimised many of the processes that had arisen from *Glasnost,* such as the creation of private media and the destruction of the Party's media monopoly. Fedotov (2002) describes it as a "killer hook for the totalitarian system."

"On the Press" attempted to lay down the legal foundations for protecting the press from interference in a way similar to that provided in the main international conventions (including the ICCPR, which was legally binding for the USSR at that time). Article 1 of "On the Press" guaranteed free speech and press without any political connotations or clauses, contrary to other legal acts of the Soviet period. It also banned censorship of mass information. Article 2 defined mass information as any "printing, audio, or audiovisual information or materials." Thus, "On the Press" broke the Communist Party's total control over the production and distribution of media as well as cultural goods and products by prohibiting not only censorship of the press, but also of films, music, books, et cetera.

"On the Press" catalysed the shift from state-owned to privately owned news media, which is "one of the most difficult aspects of any transition," as Price notes (1995, p. 802). Particularly significant were the consequences for Soviet journalism of Article 7 granting the right to establish media outlets to any organisation, political party, creative and religious association, as well as to any adult citizen. The statute also formulated the concept of a "founder" or "establisher" (i.e. a publisher), the person starting a media outlet and owning it.

Article 4 allowed media editorial offices to become legal entities, while previously journalistic collectives had no legal capacities because they had existed only as units of state-run organisations. The old Soviet "permission principle" to establish outlets was replaced by a new "registration principle." As McNair (1991) explains, the registration principle proposed that anyone granted the right to found a mass media outlet would only need to apply to the appropriate state body, register the outlet, and get started. At that time, registration was conducted by the Ministry of the Press and Mass Information of the RSFSR.

The statute initiated a redistribution of ownership of media outlets. Journalists were often given ownership of previously state-run outlets merely by registering them with the ministry. Redistribution of media ownership intensified after the Party was

banned in August 1991, which initiated a process of nationalisation of its property and put an end to the Party's press (Richter, 1995). As the new owners, journalists significantly liberalised the editorial policies of the previously state-owned outlets. When applying for registration, they often changed the names of the outlets to remove words such as "communist" or "Soviet" (*sovetsky*) from their titles.

Many new outlets emerged as a result of the statute, including some truly independent media, for instance the newspaper *Nezavisimaja* (*Independent*) and the radio station *Ekho Moskvy* (Moscow's Echo). According to statistics of the USSR's Goskompechat', the Soviet version of the Ministry of the Press, as of 15 March 1991, Russia officially had established 1,800 print media, among which 850 were new outlets. Among all print media, one third were privately owned (RIA Novosti, 2013).

The media law granted greater journalistic rights, which Richter (2007) has classified into two groups: information rights and workplace rights. Information rights meant that journalists could seek, receive, and disseminate information; visit public officials with the intention to get information; take notes; have access to the scene when accidents or disasters happened; attend rallies and other mass actions; and contact any specialists when checking facts (Article 30). Media editorial offices could send information request to state bodies and other organisations (Article 24). They also could protect their information sources, which the ECtHR views as "one of the basic conditions for press freedom."[42] Editorial offices were obliged to disclose the names of the sources only upon a court's request (Article 28).

Workplace rights comprised the right of journalists to refuse working on a report or a story if it contradicted the journalist's views; to remove their name from material they have created if the meaning of this material had been distorted in the course of editing; and to publish anonymously (Article 30). The rights protecting editorial independence from media founders (i.e. owners) were even greater than is usually provided by typical Western media laws, as Price (1995) argues. For instance, journalistic collectives could adopt the so-called charter of their editorial office (Article 16); this would happen at a general meeting by majority vote when no less than two thirds of the members of the journalistic collective were present. The charter would then be approved by the media outlet's founder. Such charter represented a basic contract regulating the relationships between the founder, the editor-in-chief, and the editorial office. It could regulate various issues, for instance, whether an editor would be appointed by the journalists or by the

[42] See the ECtHR judgment on *Goodwin v. UK* of 27 March 1996.

founder. In other words, the statute provided journalists with the opportunity to "lobby" the charter that would require their acceptance of any owner's decisions that could affect editorial policy.

Like international standards, "On the Press" did not consider freedom of speech as an absolute right. Article 5 of the statute banned "abuses of free speech." Its Part 1 prohibited the use of media for the disclosure of state secrets or other classified information; incitement or calls for overthrowing or changing the state or social system; the distribution of pornography; the propagation of war, violence, or cruelty; the incitement of racial, national or religious hatred; and any use of media for committing crimes. Part 2 protected individuals from media intrusion into privacy and from the dissemination of defamatory information.

These limitations correlated with the provisions of the ICCPR's Articles 19 Part 3,[43] Article 17,[44] and Article 20.[45] However, it was not very properly from a legal perspective to ban concrete violations instead of providing more flexible criteria for their assessment, as enshrined in ICCPR's Article 19 and ECHR's Article 10.

"On the Press" established specific mechanisms protecting citizens from defamation in the media. In such cases, citizens were granted the right to publish a reply or correction in the same media outlet that had disseminated the defamatory information. Editorial offices and authors of publications could be exempted from liability for publishing inaccurate information if they had reproduced such information from the speeches or press releases of public officials or from information agencies, or if it was disseminated at parliamentary sessions or on live programs.

In some areas, the statute's principles and mechanisms followed international standards, for instance, in the protection from interference by public authorities, in editorial independence, in the right to reply and correction, and in the protection of

[43] Article 19 part 3 of the ICPPR states:
"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, or of public health or morals."
[44] Article 17 of the ICPPR states:
"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks."
[45] Article 20 of the ICCPR states:
"1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

journalistic sources. It is unlikely that the drafters of the statute were guided by the CoE standards, but the influence of the main UN conventions and other UN and OSCE documents to the "On the Press" is noticeable.

Being a transitional law, "On the Press" was conceptualised as a unique blend of libertarian and Soviet perspectives. In this sense, the statute largely represented a compromise. While it attempted to eliminate interference to the press, these attempts were to a certain degree faint or idealistic. Although Article 36 sought to specifically protect the news media from state interference, even recognising such interference as a criminal offence, this provision was largely a declaration. While the statute adopted some rudiments of the universal perspective, it largely lacked concrete mechanisms for implementing them, such as the ban on censorship or media monopolisation.

The statute conformed to the Soviet-communist media theory in many respects. Registration is one of the main examples. Article 37 banned production or dissemination of news media content by non-registered outlets, and consequently the statute authorised the registering ministry to supervise all media outlets in the country. Thus, this body was authorised to deny registration, sometimes on vaguely formulated grounds for denial (Article 11). Furthermore, the registering body could shut down outlets if they repeatedly violated Article 5 Part 1 within a year. Thus, the provisions on free speech "abuses" laid the basis for governmental abuses.

Furthermore, some vaguely worded clauses impeded the implementation of journalistic rights and freedoms. Article 31 ambiguously stated that journalists could receive accreditation only "in consultation with" accrediting bodies. Article 32 obliged owners to establish a "programme of the outlet's activities," which journalists had to follow. This automatically pitted editors and founders against one another, rendering provisions on editorial independence on founders largely ineffective.

The statute was not without conceptual deficiencies. One of the main deficiencies is that "On the Press" conceptualised both freedom of speech and freedom of the press in one definition, which resulted in a confusing interpretation of these freedoms in light of international standards. Article 1 defined both freedom of speech and freedom of the press as "the right to express opinions and views, and to seek, select, receive, and impart information and ideas in any form including in print or through any other media." This definition has many similarities with the provisions of Article 19 of the ICCPR outlining the freedom of expression, rather than the freedom of the press.

Therefore, the definition of the statute "On the Press" could have led to incorrect interpretations. It might imply that freedom of speech and freedom of the press should be understood as interchangeable rights, while international standards define press freedom as an element of freedom of speech. Furthermore, the definition of the Soviet law might also imply that free speech would only be a journalist's right, rather than a human right.

Such improper interpretation could be very possible because, for instance, the statute guaranteed the citizens' right to receive information only through media outlets (Article 24), although international standards understand the right to access information as an individual right. According to international standards, journalistic rights, freedoms, or privileges are granted not for their own sake, but insofar as to oblige journalists to perform their duties to disseminate information and ideas on issues of public interests so that the audience could receive such information and ideas. Therefore, violations of journalistic rights and freedoms primarily violated the audience's freedom of information that constitutes a "fundamental human right" and "a touchstone of all the freedoms to which the United Nations is consecrated" as is declared in Resolution 59 (I)[46] of the UN General Assembly adopted in its first section in 1946. It might seem that "On the Press" overlooked this understanding. At the same time, because of its scope, the press statute could not grant freedom of information to any individual in the USSR.

Nevertheless, the statute gave journalists legal power. Mass media outlets established by the CPSU were handed over to independent journalists. Russian journalism experienced its "golden age" and was no longer merely a tool of democratisation. "Journalists considered themselves the Fourth Estate," as Y. Zassoursky (2011) argues. Journalism's impact on Soviet society, its great role in the democratisation process, and the public's trust and respect of journalism also contributed to the founding of the Fourth Estate. It seems that the statutory understanding of freedom of expression as a journalistic right to publish whatever they believed would be necessary for the public to know was implemented in practice.

Being the Fourth Estate is an ideal for most journalists, but in reality it has been often compromised by political interests and increasing media concentration in many countries (Schultz, 1998). The power of the Soviet press at that time was mostly ensured through mutually beneficial collaboration between democratic journalists and Boris

[46] Resolution A/RES/59 (I) of the UN General Assembly, adopted on 14 December 1946. Retrieved from https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement

Yeltsin, the then-president of the RSFSR (Colton, 2008). Journalists and Yeltsin's team combined forces to fight against the Party and the Soviet government elites.

In the course of the "putsch" in August 1991, several CPSU members established the State Committee for State Emergency in order to grab control over the country and to prevent the collapse of the USSR. The Committee attempted to shut down media outlets by issuing two resolutions, which were subsequently abolished by Yeltsin's decree.[47] Yeltsin's next decree on the press[48] closed all news media outlets of the CPSU. While the Committee's resolutions were condemned as censorship by both democratic journalists and Yeltsin, Yeltsin's decree was welcomed as a step towards protecting free press in the USSR, although the legitimacy of this decree is arguable.

Richter (2007) suggests that the hegemony of the Fourth Estate may be a threat to freedom of expression because journalists' claim that they represent public opinion can often lead to manipulations. Therefore, when the powerful Soviet media outlets faced financial challenges caused by the transition to a market economy, they soon started to abuse their power. By the time of the USSR's collapse in the end of 1991, the mass media had been transformed from the Fourth Estate into a tool of manipulation and propaganda that gave rise to a new mode of journalism, which Y. Zassoursky defines as "neoauthoritarian-corporatist" (2011).

1.3. The Russian Statute "On Mass Media"

"On Mass Media" was adopted on 27 December 1991. In two months, it replaced "On the Press" in Russia and it remains in force to this day. "On Mass Media" represented "the first effort throughout all of the transition societies to enact a modern framework for communications policy" (Price, 1995, p. 798). This statute should be considered as an honest endeavour to formulate universal-style rules for the media, which had been severely censored for more than seven decades and, in the beginning of the 1990s, were only starting to get wise to their new role and importance.

The statute was developed by the same authors as for the "On the Press." This time, Baturin, Fedotov, and Entin sought not only to reaffirm the main principles of Soviet statute (the ban on censorship, the right to establish outlets, editorial independence,

[47] Decree of the President of the RSFSR, "On Mass Media in the RSFSR" No. 69 of August 21, 1991.
[48] Decree of the President of the RSFSR, "On Measures On Protection of the Free Press in the RSFSR" No. 111 of 11 September 1991.

journalistic rights and freedoms, et cetera), but also to transform its declarations into efficient legal mechanisms. As Fedotov himself later noted:

> While the Soviet statute was a document of democratic romanticism, on the one hand, and filled with inevitable compromises with protection of old totalitarian orders, on the other, the Russian statute became the result of a search for effective technologies of legal regulation of media management and media activities [which was] almost free of political confrontation. (2002, pp. 35–36)

Since its adoption, the statute "On Mass Media" has been amended more than thirty times—mostly in the 2000s. This section primarily studies the initial version of "On Mass Media" in order to retrace its development of the early 1990s. The subsequent changes are considered in section 1.5.

"Media Constitution" and Its Main Concepts

The Statute "On Mass Media" established a new branch of law in Russia, the mass information law, as it was later argued by one of its authors, Fedotov (2002). He himself considered the statute as a "mini-constitution" in the media sector (2002, p. 37). The statute defined the most important notions, such as mass media, programme, mass media products, editorial office, editor-in-chief, et cetera. Article 5 stipulated that any legal act to regulate the mass media in Russia must comply with this statute; thus, this clause guaranteed that other acts would be consistent with the main principles of the statute. Article 5 also proclaimed the supreme power of international treaties over Russian national media regulations. It was a noticeable step towards their correlation with international standards.

"On Mass Media" reaffirmed the ban on censorship and, for the first time, defined this notion. According to its Article 3, censorship meant two actions: 1) requesting editorial offices to allow pre-approval of information or materials (except in cases when the requesting person is the author or an interviewee); or 2) banning the dissemination of all or any parts of any information or materials. Thus, the statute prohibited both preliminary and punitive media censorship. Article 3 also prohibited the creation or funding of censoring bodies. Article 58 required them to immediately stop their activities when they are noticed. These provisions became new legal guarantees preventing governmental interference in the media, in the way in which it had existed in Soviet times.

The statute opens with a specific legal concept, freedom of mass information, which has no equivalents at international or national level anywhere else except in a few post-Soviet states. It is defined as the set of the following rights (Article 1):

- the right to seek, receive, produce, and disseminate mass information;
- the right to establish mass media outlets, to own, to use, and to dispose of them;
- the right to produce, acquire, store, and employ technical facilities and raw and other materials meant for the production and distribution of mass media products.

The statute implied that these rights must be executed without censorship, but did not say this explicitly.

This freedom is differently understood by scholars. Fedotov (2002), one of its authors, saw it as the main principle guiding media activities. Similarly, Elst (2005) viewed it as media freedom. It can be argued, however, that the freedom of mass information *goes beyond* media freedom; Richter, for example, understands it in a broader sense:

> with the technical facilities to do so, individuals can circulate their thoughts and opinions among a sufficiently large number of people to satisfy their desire to take part in public dialogue and have a say in politics and decisions on matters of public interest. (2007, p. 13)

While media freedom (or freedom of the press) concerns rights of journalists, media founders, media editorial offices, or their employees, the freedom of mass information also absorbs non-media rights. Freedom of mass information might be applied to promote freedom of speech for individuals when they participate in mass communication activities, for instance, through blogging or the production of other user-generated content. In general, Article 1 comprises the rights necessary to ensure the mass communication process, which includes transmission, response, sharing, and interaction between users, as McQuail (2010) suggests.

This freedom seems to be even broader than suggested by Richter. It covers freedom to produce and disseminate entertaining content, rather than information of public interest only. For instance, the right to seek, receive, produce, and disseminate "mass information" can be realised through films, books, music, public performances, museums, et cetera. Freedom of mass information also protects producers of mass content

and of technical equipment used for the production and distribution of mass content (printing machines, video and photo cameras, or other devices).

However, "On Mass Media" was the only Russian legal act respecting the freedom of mass information. Therefore, it could be applied only to the mass media because of the scope of the statute. This also concerned the concept of censorship of mass information.

Establishment of Media Outlets

Article 7 of the "On Mass Media" reaffirmed that outlets in Russia could be established by any adult citizen, company, association, organisation, institute, or state body. Foreigners and stateless persons, who did not permanently live in Russia, were deprived of the right to set up media. They could create media organisations in Russia by establishing legal entities. Individuals serving time in prison or those mentally incapacitated, in addition to illegal organisations, were not allowed to create outlets either.

The statute helped accelerate the emergence of private media in Russia. It guaranteed the right to editorial offices in any form of any group of individuals, including a legal entity (Article 19). Editorial offices or publishers were legally entitled to own the news media property, a principal guarantee for the implementation of the freedom of mass information. Editorial offices received tax waivers during their first year of operation.

Registration remained a compulsory procedure[49] after which the editorial rights and obligations of owners were established (Article 17). Article 14 set up a registration fee, which was higher for mass media specialising in adversting as well as erotic content and lower for outlets specialising in education or culture as well as outlets for children, adolescents, or disabled people.

The registration procedure may have some advantages for the media in Russia, but it encouraged bureaucracy and hindered media independence. Article 10 stated that the application for registration must provide comprehensive information on the owners, the proposed specialisation of the media outlet, its territory of service, language(s), financial sources, et cetera. Any change in ownership, title, language, territory, or means of dissemination required the same procedure of registration (Article 11). A change in

[49] Article 12 of the statute "On Mass Media" exempted from registration only: (i) outlets created by public authorities for publishing their official decisions or messages, (ii) outlets with a circulation less than 1,000 copies, or (iii) radio and TV programmes disseminated within one organisation or having no more than ten subscribers; audio and video programmes with a circulation of less than 10,000 copies.

address of the media editorial offices as well as the outlets' schedule or maximum volume required notifying the registering body.

Article 13 provided a long list of grounds for refusal to register an outlet.[50] On the one hand, it prohibited illegal organisations from setting up a media outlet, and provided rules protecting the rights to an outlet's title. On the other, it gave the Russian Ministry of the Press and Information (responsible for registration at that time) the power to interpret outlets' names and specialisation and to determine the accuracy of information provided by the applicants.

For the first time in Russia, "On Mass Media" provided basic regulations for broadcast media. These were mainly ensured through licensing procedures, similarly to Article 10 Part 1 of the ECHR. However, broadcast media were also obliged to register. While licences for terrestrial broadcasting have to be issued through a competitive process, no competitions are required for other types of licenses. The statute introduced a new state body, the Federal Commission on TV and Radio Broadcasting, to oversee licensing procedures. Article 30 stated that a specific statute would have to be adopted to govern this body's organisation and activities.

Journalistic Rights and Duties

For the first time in Russian legislation, journalists were recognised as professionals serving the public's interests. Having stated that, Article 49 guaranteed the protection by the state of journalistic honour, health, life, and property. In turn, the article obliged journalists to respect the rights, legal interests, honour, dignity, and reputation of individuals as well as companies. Journalistic guarantees were also granted to freelancers (Article 52).

This legal perspective on journalism was consistent with the CoE standards, which value journalism because it functions as a watchdog of democracy and safeguards the interests of the public. The ECtHR has stressed that the press plays a "pre-eminent role" in states governed by the rule of law. Particularly, the Court has noted that

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the

[50] Article 13 provided the following grounds for refusal of an outlet's registration: (i) if applicants had no right to establish media according to "On Mass Media;" (ii) if the data in the application was incorrect; (iii) if its title or specialisation contradicted Article 4 Part 1; (iv) if this type of the outlet had been already registered under the same title.

> preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[51]

The ECtHR provided the highest level of protection to expressions that concern issues of public interest, and political expressions in particular because they are crucial for the functioning of a democracy.[52]

To ensure that journalists would better fulfil their watchdog function, "On Mass Media" extended journalists' information and workplace rights. The rights provided by "On the Press" were reaffirmed in Article 47 of "On Mass Media." Additionally, "On Mass Media" allowed journalists to express their personal opinions and views. Similarly, the ECtHR protects, with Article 10 of ECHR, the right of journalists to express opinions (including critical ones) in their publications or broadcasts.[53] Furthermore, the Court suggests that journalists are free to choose the style and language of publication, and accepts a certain degree of exaggeration in media content.[54]

"On Mass Media" gave journalists the possibility to "veto" the publication of materials if they had been considerably distorted by editors. Journalists also have the choice to discuss this issue with the editors. Verification of information was enshrined in "On Mass Media" as both a journalist's duty and right, while "On the Press" considered it a duty only. These rights have the potential to foster high ethical standards in the journalistic profession.

The statute advanced mechanisms of editorial independence from media owners. It abolished the journalistic duty to follow the "founder's programme" of media activities. The statute acknowledged the authority of an editor-in-chief by obliging an editorial office to get permission from the editor-in-chief before the first publication of an issue.

"On Mass Media" provided editorial offices with ideas on how to use an editorial charter[55] to ensure their independence. For instance, an editorial charter can establish

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[51] See the ECtHR judgements on *Lingens v. Austria* of 8 July 1986; *Castells v. Spain* of 23 April 1992.

[52] As the ECtHR stated in *Sunday Times v. UK (No.2)* of 26 November 1991: "Whilst it [the press] must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary," it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas, the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog."

[53] See the ECtHR judgements on *De Haes and Gijsels v. Belgium* of 24 February 1997; *Dalban v. Romania* of 28 September 1999.

[54] *De Haes and Gijsels v. Belgium*.

[55] According to Article 20 of the statute "On Mass Media," an editorial charter must define: (i) mutual rights and obligations of owners, editorial office and editor-in-chief; (ii) authorities of journalists permanently working for the outlets; (iii) order of appointment of editor-in-chief and other managing

whether the owner has the right to shut down the media company. The statute obliged owners to get permission from the editorial office before assigning their rights in the media company to a third party. These provisions are largely idealistic and utopian. Nevertheless, given the romanticism of that time, they could have been applied. If an editorial office had less than ten people, the statute offered to substitute the charter by an agreement between the owner and the office (Article 20).

Article 47 also granted new information rights to journalists. They were entitled to access classified materials (where excerpts containing secrets would be redacted). Journalists obtained the right to visit any state agency, public official, company, or organisation. They could copy and publish any document or material in compliance with copyright requirements. Article 41 on the protection of journalistic sources confirmed that media editorial offices had the obligation to disclose a source only upon a court's request and only insofar such disclosure is needed for the court's consideration.

While journalists' information rights were only given a lip service in "On the Press," "On Mass Media" provided the special mechanism of information request to implement them. Editorial offices obtained the right to request information in oral or written form from any government body, company, organisation, or public official (Article 39). The statute acknowledged that timely information was important for fulfilling the media's watchdog function and established that information should be provided within seven days from the date of the request. This approach was in line with the ECtHR's position that journalists must receive information promptly because the news is a short-lived product.[56]

The statute specified appropriate grounds for refusals and delays in providing access to information (Article 40). Editorial offices must be notified on refusals or delays within three days from the request. The notification must include the date, outline the reason for the refusal or delay, and mention the name of the public official who made the decision. Notifications of delay must also set up the date when the requested information would be provided. These provisions simplified the appeals of illegal refusals and delays. However, the statute lacked frameworks for the transparent and timely procedures for appeal.

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boards; (iv) grounds for termination or suspension of media activities; (v) the rights to the title, and legal consequences of the change in owners, outlet's termination, liquidation or reorganization of editorial office, or change of its legal form; and (vi) procedures for the change or approval of a charter and other provisions as set up in the legislation.

[56] See the ECtHR judgement on *Sunday Times v. UK* of 26 April 1979.

"On Mass Media" abolished ambiguous wording, saying, as previously mentioned, that journalists could be accredited "in consultation with" accrediting bodies. Article 48 granted journalists with the right to get accreditation with any state body, organisation, company, or NGO upon editorial request. Like "On the Press," the statute "On Mass Media" obliged accrediting bodies or organisations to inform journalists of meetings and discussions and to provide them with reports and other materials. Additionally, "On Mass Media" obliged accrediting organisations to create favourable conditions for journalists to record or take photos during meetings or events. "On Mass Media" provided only two grounds for a revocation of accreditation. The first involved making defamatory statements about a body or organisation, and which had to be confirmed by a court judgment. The second was the violation of accreditation rules established by the body or organisation granting the accreditation.

Nevertheless, the accreditation mechanism was underdeveloped. For example, the statute provided no criteria for accreditation rules. This lack could not only cause arbitrary revocations of accreditation, but could also encourage discrimination in refusals because accrediting bodies or organisations could refuse accreditation if journalists failed to comply with their accreditation rules. The statute also failed to elaborate criteria for closed meetings. Consequently, accrediting organisations could simply hold closed meetings if they intended to conceal information from journalists and the public . No mechanism for timely and independent appeals of refusals or revocations was provided.

The statute noticeably reconsidered the duties of journalists mostly to balance them with journalistic rights so that journalists would have enough rights and freedoms to perform their duties in service of society, as international standards demand.

Article 49 obliged journalists to inform their interviewees about recording audio and video or taking photos. Journalists were obliged to carry their press cards and to show them if requested. The statute enshrined several journalistic obligations vis-à-vis their editors-in-chief, such as to inform them about possible lawsuits and to refuse carrying out editorial tasks if they are against the law.

Many new provisions of "On Mass Media" reflected the main standpoint of the ECtHR: although the press "must not overstep various bounds," it is "nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest."[57] "On Mass Media" obliged journalists to get permission to

[57] See the ECtHR judgements on *Sunday Times v. UK*; *Observer and Guardian v. UK* of 26 November 1991; *Castells v. Spain* of 23 April 1992.

publish information concerning an individual's private life unless such information serves the public interest. Article 50 granted journalists the right to disseminate information of public interest obtained by covert recording "if measures against possible identification of third persons are taken."

The statute kept open the lists of journalistic rights and duties, as it had been provided in the Soviet statute. Consequently, journalists might be granted additional rights or duties by other Russian laws, in consistence with the "mini-constitution" governing the media.

Media Distribution and Transmission

The statute proclaimed several guarantees concerning media distribution. These guarantees were vital for the implementation of the freedom of mass information. Article 25 banned any interference with legal media distribution. Article 28 allowed seizures of printed press copies only upon a relevant court decision. Article 33 banned jamming of radio and TV programmes. Article 54 stated that TV broadcasting could be restricted only in cases specifically determined in interstate treaties signed by Russia. These guarantees required further elaboration in Russian criminal and administrative legislation to set up the relevant mechanisms and sanctions.

Unlike "On the Press," "On Mass Media" did not ban pornography, but established special legal regime for the distribution of erotic media (Article 37). They were defined as "outlets or programmes systematically exploiting the interest in sex." The statute suggested that erotic programmes would be disseminated only from 11 pm to 4 am, but local authorities were free to establish their own schedule reflecting regional specifics. Erotic printed publications must be sold in sealed transparent packages in places specified by local authorities. These measures sought to protect children from information that might cause harm to their moral development.

In general, Article 27 required that each printed press copy contains the main information about an outlet, such as its title, the names of its editor-in-chief and owners, issue number, date of release, and other details necessary to identify the outlet and the address of its editorial office. Similar requirements were provided for broadcast programmes. Article 35 obliged the outlets to publish court rulings that concern the outlet if the ruling required such mention. In general, these provisions were aimed at facilitating responsible journalism in Russia.

With the aim to secure evidence in case of court disputes, Article 34 obliged editorial offices to store copies of radio and TV programmes for a year since their airing. It also prescribed that editorial offices would register them in a special journal specifying the dates and time of release as well as the names of the authors, hosts, and participants. The journal must be archived for a year since the last record.

The statute obliged editorial offices to respect copyright when publishing readers' letters (Article 42), although the statute also included other provisions on copyright that were too ambiguous. Article 25 stated that a court might terminate the media outlet's distribution if the outlet had violated the moral rights of its authors or "in other cases provided by other legal acts." Insofar as the ban on media distribution is a form of censorship, the statute should either elaborate the general criteria for imposing the ban or provide an exhaustive list for its application.

Like "On the Press," the statute "On Mass Media" contained several Soviet-era holdovers tightening freedom of mass information. Apart from the obligation to send a copy of each issue to the main libraries, Article 29 required sending a copy to the registering body and the Ministry of the Press and Information. Additionally, Article 35 obliged the outlets to publish the messages of the registering body concerning the outlet. If the outlet was state-run, as most of the media of that time were, it was obliged to publish the decisions made by the state bodies.

Foreign Journalism

The statute maintained to a certain degree the Soviet "permissive" stance on foreign media organisations and made their operation in Russia dependent on the will of the government. Stateless persons, legal entities, and foreigners could have the same media rights and freedoms as Russian citizens only "if otherwise explicitly stated," as the statute provided. It established several extra requirements for foreign media companies and journalists. Foreign journalists could enjoy rights and freedoms only after receiving accreditation from the ministry or after registering their outlets with the ministry. The ministry was also empowered to allow foreign media to open overseas offices in Russia (Article 55).

Article 54 established the duty to obtain permission from the Ministry of the Press and Information to distribute foreign printing outlets in Russia unless interstate treaties established the order of their distribution. The treaties very rarely govern such details. No criteria or guarantees for transparent consideration were provided. Additionally, Article

55 allowed the Russian government to establish "responsive" limitations for foreign correspondents if their countries had introduced specific limitations for journalists representing Russian media organisations.

Abuses of the Freedom of Mass Information

Like "On the Press", "On Mass Media" used an improper way to establish limitations to the freedom of mass information. The new statute also failed to establish criteria for assessing the restrictions in a way used in Article 10 of ECHR. Instead, Article 1 of the statute "On Mass Media" stated that the freedom of mass information is not subject to limitations "except for those provided by the media legislation of the Russian Federation." Not surprisingly, since the statute's adoption Russia has introduced many limitations to the freedom of mass information (see section 1.5).

In its initial version, Article 4 was almost identical to Article 5 Part 1 of the "On the Press" ("Free Speech Abuses"). Therefore, the legal mechanisms in "On Mass Media" to impose liability for abuses of the freedom of mass information retained the drawbacks of its predecessor and provided the possibility of governmental interference with this freedom. In Part 1, Article 4 stated:

> It is inadmissible to use mass media to commit crimes, or to disclose state secrets or other classified information, to call for overthrowing power or violent change of the constitutional order and integrity of the state, or to excite national, class, social or religious hatred, or to propagate a war.

The statute authorised the registering state body to issue warning notices (*preduprezhdenije*) to the outlets' editorial offices for the violation of Article 4 Part 1. Repeat violations would lead to the closing of the media outlet. For that, the registering body would have to file a lawsuit with a court, which would hold a final decision. While judicial power might save the media outlet ("On the Press" did not require a court's decision at all), a warning notification per se from a governmental body poses a threat to independent journalism in Russia and might cause a "chilling effect" on the freedom of mass information in the country. Apart from warnings and shutdowns, abusing the freedom of mass information also caused criminal, disciplinary, or other liability (Article 59), which would have to be later also addressed in the relevant Russian codes.

The ban to use the media to commit crimes might have extensive interpretations, and Fedotov (1999) has suggested its interpretation strictly in light of international and constitutional norms. Another vague limitation of Article 4 Part 1 is the prohibition to

excite *class* or *social hatred*. This has no equivalent in international law. The ban was removed from the statute in the 2000s; however, in 1993, it became part of the constitutional concept of free speech (see section 1.4).

Apart from closure of media outlets, the statute, in Article 15,[58] provided a procedure of revocation of the registering certificate upon a court decision (which also meant the outlets' shutdown).

Article 4 Part 2 banned the use of surreptitious insertions in audiovisual programmes and films that may affect the viewers' subconsciousness, but "On Mass Media" did not provide sanctions for that.

Right of Reply and Correction in the Mass Media

The Russian statute developed the individuals' rights to publish replies (comments) or correction in an outlet that had disseminated inaccurate or defamatory information about them (see section 2.1 for details on regulating defamation). The statute provided a detailed guidance for the editorial offices on publishing replies or corrections to guarantee to individuals that such replies or corrections would be satisfactory to them, but also that they would not violate the freedom of mass information (Articles 43 and 45).

Media editorial offices could refuse to publish anonymous replies or corrections, if they contradicted court decisions, abused the freedom of mass information, or if the editorial offices could provide evidence that the information disseminated in their outlets had a factual basis. Article 44 obliged the editorial offices to inform individuals about refusals or about the date when replies or corrections would be published.

Unlike "On the Press," the statute "On Mass Media" did not offer individuals the opportunity to file a lawsuit on publishing replies (comments) or corrections. It implied that individuals and editorial offices could mediate these issues independently. Illegal refusals could be appealed in courts, as Article 45 stated. The new statute tried to distinguish replies from correction, but failed to do so. The difference between them remained unclear, as it was in the statute "On the Press."

Exemption from Liability

[58] Article 15 set up four grounds for revocation: (i) if a certificate was received by deception; (ii) break in outlet's release was more than a year; (iii) it had not adopted an editorial charter within three months since outlet's release; or (iv) it had been repeatedly registered.

While "On the Press" exempted journalists and editors from liability only for publishing inaccurate information and, therefore, this provision of the statute was applicable mostly to defamation in the media, "On Mass Media" considerably extended the "exemption" clauses (Article 57). It provided that editors and authors of publications could be exempt from liability for the violation of freedom of mass information or other human rights (including defamation) if the violating information or statements: (i) had been part of the so-called "obligatory messages," that is the statements that the media outlets have to publish by law or under a court order; (ii) had been taken from information agencies or had literally reproduced the statements of other media outlets; (iii) had been taken in response to information requests made by state and local self-government bodies, municipal organisations, institutions, public associations, or their press offices; (iv) had been stated in the course of parliamentary sessions or during formal addresses of public officials, and which then outlets then literally reproduced; (v) had been stated during live programmes, and, therefore, could not have been edited. The statute determined that in all these cases journalists and editors, although violating the law, have acted in good faith and professionally when disseminating information. Therefore, the statute proposed that the source that had released first the violating information or statements be brought to liability and not the journalists or editors who merely republished this information or statements because they considered the source sufficiently reliable.

In its case law, the ECtHR has also elaborated several grounds on which journalists should not be held liable, for instance, if a media outlet reiterates defamatory statements from another media outlet,[59] from parliamentary debates,[60] or in the course of judicial proceedings.[61] In *Bladet Tromsø and Stensaas v. Norway*, the ECtHR found violation of the applicants' freedom of expression because the applicants acted *bona fide* when they referred to an official report. It was unnecessary for journalists to additionally check the facts if journalists had referred to reliable sources, as the ECtHR clarified.[62]

Other Violations in the Media

Apart from abuses of the freedom of mass information, "On Mass Media" also identified such violations in the media as "derogations of the freedom of mass

[59] See the ECtHR judgment on *Thoma v. Luxembourg* of 29 March 2001.
[60] See the ECtHR judgments on *A. v. the United Kingdom* of 17 December 2002 and *Jerusalem v. Austria* of 27 February 2001.
[61] See the ECtHR judgment on *Nikula v. Finland* of 21 March 2002.
[62] *Bladet Tromsø and Stensaas v. Norway* of 20 May 1999.

information"[63] (Article 58), "journalistic rights abuses"[64] (Articles 51, 59), and "other violations of mass media legislation"[65] (Article 60).

"On Mass Media" could neither establish mechanisms for imposing liability nor determine sanctions because of the Russian legal tradition to regulate these issues by civic, criminal, and administrative codes. Therefore, the statute sought to outline conceptual violations so that the relevant provisions would be later provided in the civic, criminal, and administrative codes. As a result, the statute failed to consider each violation in relation to the degree of danger that it poses to the public and to impose sanctions accordingly. The statute overlooked the criteria for qualifying restrictions in accordance with the principle of proportionality of sanctions for violations concerning the media.

Therefore, no mechanism to bring to liability for censorship or other illegal interference with the freedom of mass information was created as such. While "journalistic rights abuses" undermine the trust in journalism, the statute's clauses regulating them were too vague from a legal perspective as they mostly concerned ethical issues. These clauses may lead to excessive interpretations and threaten independent journalism. Clauses on "other" violations were also confusing. To illustrate, the failure to register or re-register outlets might occur as a result of a violation committed by a media organisation or because of governmental interference. The statute did not clarify that these violations must have different consequences.

Unlike "On the Press," "On Mass Media" did not ban media monopolisation. Article 10 required the outlet founders to indicate on their application for registration if they owned or distributed other media or if they were publishers or editors in other media. However, such notice had no legal consequences.

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[63] Article 58 of "On Mass Media" enumerated the following "derogating the freedom of mass information": (i) censorship, (ii) interference to editorial independence or editorial activities, (iii) illegal closure or suspension of media activities, (iv) violation of the right to information request and receipt, (v) illegal seizure or destruction of media production, (vi) restrictions on communication with journalists or preventing from imparting information to journalists if only it did not concern state, commercial or other secrets (vii) violation of journalistic rights.

[64] Article 51 of "On Mass Media" prohibited for journalists to disseminate information aimed to discredit persons because of their race, sex, age, nationality, language, religion, political views, profession, place of living or job place. It also banned to conceal or falsify information of public importance, to present rumours as facts, or to collect information for third parties other than the mass media.

[65] Among "other" violations of mass media legislation, Article 60 identified the following: (i) violations concerning outlets' establishment, such as their establishment by strew persons, or illegal assignment of license to their parties, or illegal receipt of subsidies; (ii) failure to register or re-register outlets; (iii) failure to stop media activities after the decision on outlets' closure, (iv) broadcasting without licenses or in violation of licensing conditions; (v) violation of the rules for distribution of programmes, advertising, erotic media, etc., (vi) violation of requirements to set up the title and other data when releasing programmes or issues; (vii) violation of requirements to provide compulsory copies, to store programmes; (viii) interference to media production, (ix) establishing of illegal restrictions to retail sales of media products; (x) jamming.

The statute empowered the Russian courts to be guarantors of freedom of mass information against excessive governmental interference, but allowed the appeal only of actions set up in Article 61,[66] rather than of any governmental actions or decisions. Therefore, the statute diminished the opportunities to protect this freedom in the courts.

Overall, it is clear that "On Mass Media" was an emblematic document of the transitional period. Its achievements and drawbacks were inevitable. On the one hand, it reflected the country's intentions to move away from the Soviet principles of media regulation towards international standards. On the other hand, "On Mass Media" contained inadequate provisions to protect the media from interference by major economic players, such as the emerging oligarchs, most likely because such a problem had not existed in Soviet times nor in the early 1990s when Russian journalism is sometimes said to have experienced its "golden age." Additionally, the statute retained the procedures of state outlet registration and media closure established by the Soviet press statute as a result of a compromise between new and old political forces.

Price expresses his hopes that the imperfections of "On Mass Media" could be ironed out in future applications, but he acknowledges that this would require appropriate institutions to interpret and adjust the statute to "pluralistic goals" (1995, p. 806). As seen from the analysis, the statute assigned the courts a primary role in protecting the freedom of mass information. Independent judiciary, together with other relevant institutions, could ensure the proper realisation of the Russian "mini-constitution" for the media. However, the onset of media institutionalisation coincided with new bitter political conflicts and economic challenges in Russia, which also formed the background for the adoption of the Russian Constitution.

1.4. The Formation of the Russian Constitutional Provisions on Free Speech

Russian legal scholars have debated the origin of Russian constitutional principles and institutions. Some argue that they were imported from Western constitutions, others suggest that they are unique and deeply rooted in Russia's historical reality. Both perspectives seem extreme. I adhere to a different approach developed by some Russian legal scholars (Medushevsky, 1998; Kravets, 2005) who argue that Russian

[66] Article 61 of "On Mass Media" allowed appealing: (i) refusals in registration or any other illegal actions of the registering body, (ii) decisions on revocation of broadcasting licenses, (iii) refusals or delays in providing information upon information requests, (iv) refusals in accreditation or violations of the rights of accredited journalists. The statute stated that if courts found these actions to be illegal their also had to justify complaints, to require that defaults would be cure and to award compensation of losses to owners, editor-in-chief, as well as license holders.

constitutionalism integrates universal and unique rules, principles, and institutions. I suggest that this perspective is also valid with respect to the concept of Russian constitutional free speech, which reflects a specific synthesis of universal and post-Soviet visions.

This section clarifies and interprets the Russian constitutional concept of free speech and its elements through an analysis of the constitutional clauses on free speech. General advances of the Constitution towards democracy and the rule of law are also explained.

Following Balkin's (2011) method of "text and principle," which argues that the motives of those who draft the constitution in selecting certain wording are crucial for interpretations of constitutional concepts, I also compare provisions of the constitutional drafts and study the documents concerning their discussion. These documents have never been published in English, nor have they been previously considered by scholars in the context of free speech in Russia.

Background

The Russian Constitution[67] was adopted in 1993, after a three-year process, which is still debated in Russia. The initial confrontation between the old communist and the pro-democratic forces gave way to a growing and outright confrontation between the pro-democratic Russian president Boris Yeltsin and the more conservative members of the Supreme Soviet, the parliament at that time. The opposing political forces differed on fundamental issues, such as government regulations and the separation of powers. The political context obstructed the speedy adoption of the Constitution and eventually triggered the "constitutional crisis" of 1993.[68]

Despite the political confrontation in early 1993, there was a common understanding that the need for a new Constitution was absolutely urgent. Still valid at that time, the 1978 Constitution of the RSFSR failed to respond to new state policies. It was constantly being revised and was full of loopholes and contradictions. In particular, the constitutional provisions on free speech and the press contradicted the absolute ban

[67] Constitution of the Russian Federation, adopted at National Voting on 12 December 1993. Retrieved from http://www.constitution.ru/en/10003000-01.htm

[68] Historically, constitutionalism in Russia was largely developed in complicated "transitional" periods. As Baturin notes, the only Constitution adopted in a stable time (the Constitution of the RSFSR) had little impact on the development of Russian constitutionalism (2008, p. 46).

on censorship. In the adoption of a new constitution the oppositional political forces saw a tool to smooth or even solve the bitter political conflict (Baturin, 2008).

There were several drafts of the modern Constitution, but only two of them are considered by scholars as the main drafts, often referred to as the draft of the Constitutional Commission (debated between 1990 and 1993) and the Presidential draft (debated in 1993). These drafts reflected the political disagreement on the separation of powers. The Commission's draft gave more power to the Supreme Soviet, while the Presidential draft sought to accrue and coalesce power in the presidency. The draft of the Constitutional Commission had a high degree of legitimacy, but it was not adopted mainly because Yeltsin impeded it.[69] The Presidential draft, prepared by the lawyers Sergei Alekseev and Sergei Shakhraj, was presented on 29 April 1993, and became the basis for the current Russian Constitution.

On 5 June 1993, Yeltsin convened the new deliberative body, the Constitutional Conference, to legitimise the adoption of his draft. The draft was simultaneously discussed at plenary meetings and in five sections, and was approved in just one month. On the one hand, the Constitutional Conference was established "to prevent creating a weak federal presidency with a strong parliament" and to expedite the drafting process (Trochev, 2008, p. 73). On the other, a wide range of various professionals participated in open and pluralistic debates (Baturin, 2008). The Conference consisted of representatives of state and local government bodies and of NGOs (including those in opposition to Yeltsin).

In September 1993, Yeltsin created the Working Group of the Constitutional Conference consisting of jurists to develop a unified constitutional draft. There was also the Constitutional Arbitrage, a special commission, which considered the most significant issues and included scholars as well as judges of the Constitutional, Supreme, and the Supreme Arbitration courts. Despite the sophisticated structure of the process, these bodies largely lacked time and sometimes, probably, political independence to make deliberate decisions.

[69] On 12 December 1992, the 7th Congress of People's Deputies announced the referendum on the provisions of the draft on 11 April 1993, but abolished this decision a month earlier. Yeltsin took the occasion to get the jump on his opponents. In his televised speech of 20 March 1993, he announced that the current Constitution was suspended and introduced "emergency rule" in the country until the political crisis was overcome. Three days later, the Constitutional Court found Yeltsin's speech unconstitutional which gave grounds for his impeachment. However, the Ninth Congress of People's Deputies did not support the impeachment. On 25 April 1993, there was a referendum on the confidence in the President. Although there are still many questions surrounding this referendum, its results strengthened the presidential influence. Yeltsin took advantage of the referendum to scrap the draft of the Presidential Commission that could have diminished his power.

A bitter political confrontation accompanied the debates of the Constitution. The Russian parliament created obstacles for the adoption of the Presidential draft. To continue the comprehensive reforms in the country, Yeltsin made some decisions whose legality could be arguable. Particularly, he suspended the activities of the Congress of People's Deputies and the Supreme Soviet and announced new parliamentary elections.[70] Soon, he announced the referendum on the new constitution.[71] The final version of the Presidential draft was officially published on 10 November 1993. The referendum on the Constitution[72] was conducted on 12 December 1993, simultaneously with the elections for a new parliament. The Constitution entered into force on 25 December 1993. It lays down the country's foundations for governmental power, the legal system, and regulatory policies including on human rights protection.

The Russian Constitution on Democracy, the Rule of Law, and Human Rights

The Constitution mirrored Russia's hopes and intentions to construct a democratic, rule-of-law state and to considerably expand its human rights policies. In its 1994 Opinion, the Venice Commission concluded that the Russian Constitution "does not give rise to any serious question as to its conformity with the principles of a democratic State governed by the rule of law and respectful of human rights."[73] Article 1 of the Constitution proclaims that Russia is a democratic, federal, rule-of-law state with a republican form of government. People are declared to be the only source of power in Russia and the bearer of its sovereignty (Article 3). Article 2 states that "an individual, his/her rights and freedoms have the supreme value" and that protection of human rights and freedoms constitutes a governmental duty.

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[70] In September 1993, Yeltsin signed the decree No. 1400 "On Gradual Constitutional Reform in the Russian Federation" suspended the activities of the Congress of People's Deputies and the Supreme Soviet and assigned the elections to a new Russian parliament. The next day, Yeltsin's activities were characterized as a take-over. The Constitutional Court found Yeltsin's decree № 1400 unconstitutional, but Yeltsin went on to execute his power anyway. In October 1993, when the political conflict reached its apogee, the Working group was still considering the draft. During October 3–4, the Supreme Soviet's adherents attempted to occupy the parliamentary building (the House of the Soviets) and of the Ostankino TV centre. Yeltsin shelled the parliamentary building resulting in casualties. Leaders and adherents of the Supreme Soviet were detained and imprisoned. By the decree "On legal regulation in the period of the gradual constitutional reform" of 7 October 1993, Yeltsin usurped the legislative powers. Very soon, he announced new parliamentary elections.

[71] Yeltsin's decree No. 1633 "On the conduct of a nationwide referendum of the draft of the Constitution of the Russian Federation" announced the referendum, although it fully contradicted the law on referendums valid at that time.

[72] The majority (58.43 %) supported the draft; 41.57 % were against it.

[73] European Commission for Democracy through Law. Opinion on the Constitution of the Russian Federation as Adopted by Popular Vote on 12 December 1993. Followed by comments from: Prof. N.V. Vitruk. DL(1994)011e-restr, Strasbourg, 24 March 1994. Retrieved from http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1994)011-e

The Constitution represents a logical outcome for Russia in a process of moving towards a civilised form of government, as Kravets (2005) notes. It enshrines the separation of powers of the highest state bodies. The president is assigned to rule the country. The Constitution empowers the Federal Assembly of the Russian Federation to be the main representative and legislative body. It consists of two chambers: the upper is the Council of Federation, and the lower is the State Duma. The government performs the executive power. The Constitution establishes the foundations of the judicial branch with the highest courts.[74] It also lays down the principles of local governance.

The core of the Russian Constitution is the concept of universal rights and freedoms, in line with the UN and the CoE conventions. According to Article 17 Part 2 of the Russian Constitution, these rights and freedoms are "inalienable and shall be enjoyed by everyone from the day of birth." This approach contradicts strict positivist theories, which view human rights as originating within a certain legal system; those theories were favoured by legal scholars of the Soviet period (Lukyanova, 2015).

The Russian Constitution comprises all the rights and freedoms enshrined in the UDHR, the ICCPR, and the ECHR, including the right to life, privacy, vote, freedom of consciousness and religion, freedom of speech, freedom of assembly, et cetera. At the same time, the Constitution paid particular attention to some issues associated with the non-democratic Soviet past. For instance, it specifically proclaimed political and ideological pluralism in Article 14.[75]

Article 18 guarantees that human rights "shall operate directly" in Russia, meaning that no preconditions or additional legal acts are needed to exercise such rights. This article also proclaims that they "determine aims, meaning and implementation" of laws, activities of governmental bodies and the courts.

Article 15 in Part 1 proclaimed that the Constitution has the supreme legal force in Russia but, in Part 4 it states that "[i]f an international treaty of the Russian Federation enshrines other rules than those provided by a [Russian] law, the rules of the international agreement shall be applied." Part 4 also proclaimed that that "[t]he universally-recognised principles and rules of international law *as well as* international treaties and agreements of the Russian Federation shall constitute a component part of its legal system" (emphasis

[74] Until 2014, the Constitutional, Supreme and Highest *Arbitrazh* courts fulfiled the highest judicial power in Russia. In 2014, the Highest *Arbitrazh* court was liquidated.
[75] Article 14 of the Russian Constitution in Parts 1–3 states:
1. Russian Federation recognizes ideological pluralism.
2. No ideology may be established as governmental or binding.
3. Russian Federation recognises political pluralism and multi-party system.

added). This may be interpreted that even if Russia did not join some of the international treaties that contain "universally-recognised principles and rules," it must follow them. Particularly, this clause could be read as obliging Russia to comply with recommendations and declarations of the CoE institutions developing Article 10 of the ECHR on freedom of expression.

The Constitution has a "direct application" in the entire country, which means that the courts as well as governmential bodies may directly refer to its clauses when holding decisions. The Constitution and other Russian legal acts were declared to be binding for national and local governmental bodies, public officials, citizens, and organisations. Any proposed change to the Constitution, especially in human rights provisions, has to go through a series of complex procedures, and that ensures its authority.[76]

The Constitution enshrines several main principles governing the legal status of individuals, such as the rule of law. If a legal act has not been published, it cannot be enforced, Article 15 prescribes.

Everyone is guaranteed governmental and judicial protection of human rights in Article 45 Part 1, Article 46 Part 1. The Constitution allows individuals to apply any possible legal means to protect such rights (Article 45 Part 2). Article 46 allows appeals of governmental decisions in national courts as well as international bodies for the protection of human rights and freedoms, if existing national legal protections have been exhausted.

The Constitution provides several principles for consideration of lawsuits.[77] In Article 17 Part 3, it proclaims that the "exercise of rights and freedoms of man and citizen shall not violate rights and freedoms of other people," thus inviting the Russian courts to search for a balance when they consider cases in which constitutional rights may conflict. Additionally, Article 55 in Part 1 states that the constitutional rights and freedoms "shall not be interpreted as destruction or derogation of other universally recognized human

[76] The Constitution has been amended several times, but these amendments did not explicitly concern human rights.

[77] Particularly, the Constitutional Article 48 guarantees the right to legal representation and Article 49 proclaimed the presumption of innocence.

rights and freedoms." This provision closely echoes the provisions of Article 5 of the ICCPR[78] and Article 17 of the ECHR.[79]

Comparison of Freedom of Speech Concepts in the Two Constitutional Drafts

Article 29 of the Russian Constitution guaranteeing free speech, has compiled clauses from the draft of the Constitutional Commission (on free speech and mass information) and from the Presidential draft. They were combined during the Constitutional Conference and, afterwards, were supplemented by the clause enshrined in Part 2.

Article 29 of the Russian Constitution guarantees free speech in the following way:

1. Everyone is guaranteed the freedom of thought and speech.

2. Propaganda or agitation exciting social, racial, national or religious hatred and strife is not permitted. Propaganda of social, racial, national, religious or linguistic superiority is banned.

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

4. Everyone has the right freely to seek, receive, impart, produce and disseminate information by any lawful means. A list of information comprising state secrets is determined by federal law.

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

Table 1.1 compares the free speech clauses of two initial versions of the constitutional drafts. Although the Presidential draft (the version of 3 June 1993) was far more concise and had a clearer structure with regards to free speech than the draft of the Constitutional Commission, both texts initially had many similarities (those are noted in the table). The drafts guaranteed freedom of speech and the right to information. Both

[78] Article 5 of the ICCPR states:
1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

[79] Article 17 of the ECHR states: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

established the ban on censorship next to the guarantee of freedom of mass information (or "press freedom" as it is termed in the Presidential draft).

The free speech clauses in the two drafts differed in structure and wording, but provided a similar view on free speech. As the table shows, Article 29 of the current Constitution has more similarities with free speech provisions from the Commission draft than it does with Article 15 of the Presidential draft. Such integration occurred at the Conference's meetings and may have political connotations—the drafts were prepared by opposing political forces. When the group of federal bodies of state power supported the integration (on 7 June 1993), the chairman, Yakovlev, solemnly requested the participants to record for posterity their unanimous support of the free speech provisions developed by the Constitutional Commission.[80]

Table 1.1

Comparison of the articles on free speech of two constitutional drafts

The draft of the Constitutional Commission, 16 June 1990	The Presidential draft, 3 June 1993	The Constitution of the Russian Federation of 12 December 1993
Article 25 1. Everyone shall have the right to the freedom of thought, speech, and to unimpeded expression of opinions and convictions. No one may be compelled to express his or her opinions and convictions or to renounce them. 2. Everyone has the right to freely seek, receive, impart, produce, and disseminate information by any lawful means. 3. The limitations of these rights may be set up only by federal law for the purposes of protection of privacy, personal, family, professional, commercial, or state secrets, as well as of public morality. The list of information comprising state secrets is determined by federal law. Article 73 1. The freedom of mass information is guaranteed. Censorship is banned. 2. Mass media can be established by citizens, NGOs, companies (predprijatija, uchrezhdenija), municipal governments, and state bodies.	Article 15 Everyone is guaranteed the right to free speech, free dissemination of one's thought and ideas, and the right freely to seek, receive, impart, and disseminate information. The freedom of press is guaranteed. Censorship is banned.	Article 29 1. Everyone is guaranteed the freedom of thought and speech. 2. Propaganda or agitation exciting social, racial, national or religious hatred and enmity is not permitted. Propaganda of social, racial, national, religious or linguistic supremacy is banned. 3. No one may be compelled to express his or her opinions and convictions or to renounce them. 4. Everyone has the right to freely seek, receive, impart, produce, and disseminate information by any lawful means. The list of information comprising state secrets is determined by federal law. 5. The freedom of mass information is guaranteed. Censorship is banned.

[80] Constitutional Conference (Konstitucionnoje soveschanije), 29 April 29 – 10 November 1993, Vol. 2. 5–7 June 1993.

3. Measures against the abuse of the freedom of mass information, and monopolization of the mass media shall be stipulated by the Constitution and a federal law.		

The provisions on free speech were scarcely debated. In the twenty volumes of the Constitutional Conference documents (some of which remain unpublished), the transcriptions of the debates on free speech take no more than thirty pages and are not systematic. There were lively debates on other human rights, on the separation of powers, the authority of state bodies, federal structure, et cetera, while the discussion on free speech took a back seat. The creators of the Constitution did not debate the meaning of the notions included in the free speech concept and had only little concern for "the problems of implementation and interpretation" (Baturin, 2008, p. 91). This lack of deliberation does not necessarily mean that free speech was considered unimportant for the discussants. On the contrary, the general nature of the debates brought evidence that free speech was perceived as an essential element of the new Russian democracy. Under serious time pressure, the participants had to arrive at consensus on many complex political and other issues and enshrine solutions in the new Constitution. Participants at the Conference had no substantial disagreements of opinion on the free speech clauses and therefore they did not consider them in detail. In general, the discussion on freedom of speech reflected the romantic spirit of that time.

The drafters and discussants mainly focused on incorporating the universal vision of freedom of expression in order to smooth the adoption process of the new Constitution and to signal a resolute break with the authoritarian past. This freedom was generally viewed as a universal value and a prerequisite for any democratic state. During the debates, the participants attempted to rely upon international documents, particularly the ICCPR, to show their adherence to Western democratic values. The need to guarantee the freedom of opinions as well as the right to information were not challenged. International documents were seen as guiding texts in the formulation of free speech provisions—this was a welcome approach, because of the lack of time and the need to elaborate a Constitution that would satisfy various political forces as well as the Russian people.

However, the discussants sometimes lacked knowledge of international standards. For instance, the chairman Yakovlev reacted to the proposal guaranteeing free speech "regardless of frontiers" with the facetious question: "Does this mean banning the installation of jammers?" The provision reiterated a formula from Article 10 of the ECHR

and was not meant to be about jammers, but the remark may have instigated rejection of the proposal of the group of federal bodies of state power.[81]

Freedom of thought was deemed as a guarantee of free speech,[82] although it underpins freedom of conscience and religion in the main international conventions. This inaccuracy might explain why Article 29 proclaims freedom of thought and freedom of speech together.

The total ban on all censorship reflected the specifics of Russian national history. When considering the proposal to exclude the ban on censorship from the draft, the participants unanimously and with no debates rejected such a proposal. Censorship had become a taboo topic. International conventions did not explicitly enshrine such a ban and qualified what constitutes limitations to the freedom of expression, but the ban on censorship can be clearly interpreted and derived from such provisions. While the Russian Constitution also established such limitations (see section 1.4), it also explicitly prohibited censorship to ensure that this Soviet practice would not find a place again in Russia.

Existing legal concepts of mass media also impacted the discussion on the constitutional drafts, and provoked Yeltsin's interference. He personally promised to the authors of the media statutes, Fedotov and Baturin, to strengthen the protection of the media and to confirm in the constitution the freedom of mass information (Colton, 2008). The concept for this freedom was largely unclear for the discussants and was, therefore, excluded from the draft.[83] Yeltsin specifically appealed to the Commission of the Constitutional arbitrage[84] on this issue. He described the term "freedom of mass information" as having "proved its value." Although the Commission resolved to use the term "media freedom,"[85] this decision was ignored. "Freedom of mass information" substituted "media freedom" in the draft and reflected the Russian national perspective on freedom of expression.

The draft of the Constitutional Commission sought to govern the freedom of mass information in detail (see Article 73 in the table above), in contrast to the Presidential

[81] Constitutional Conference (Konstitucionnoje soveschanije), 29 April–10 November 1993, Vol. 2. 5–7 June 1993.
[82] Constitutional Conference (Konstitucionnoje soveschanije), debates durung 7 June 1993 session.
[83] The proposal to include the freedom of mass information was again brought by Fedotov in 14 June 1993.
[84] The appeal of the President of the Russian Federation to the Commission of the Constitutional arbitrage of 25 June 1993. See the copy of the document in Baturin (2008).
[85] Resolution of the Commission of the Constitutional Arbitrage No. 4 of 25 June 1993. See the copy of the document in Baturin (2008).

draft. While some of these provisions were unnecessary because they had already been enshrined in the mass media legislation, others were vague. However, the draft of the Constitutional Commission had the benefit of trying to establish the ban on media monopolisation, which had been excluded from the mass media legislation.

The Presidential draft did not explicitly ban media monopolisation. The proposal to establish such a ban was submitted by the *Glasnost* Defence Foundation, the International Association of Intellectuals, the Union of Filmmakers, and the Guild of Scriptwriters.[86] However, this proposal caused broader social debates about the legitimacy of state-run media in Russia. It seems from the debates that the issue was vulnerable, and there was not a consensus that state-owned media had to be eliminated in the new democratic Russia. The ban on monopolisation and on state interference in media freedom was first approved and then, for unknown reasons, omitted from the draft.

While neither draft considered the freedom of speech as an absolute, they organised limitations on free speech in different ways. The draft of the Constitutional Commission limited freedom of speech by the same article that guaranteed this freedom. The Presidential draft established general limitations for all human rights in a separate article. The current Constitution absorbed both approaches, which may not be very practical in terms of application. Both drafts had different viewpoints on admissible purposes of free speech limitations, but the approach of the Presidential draft prevailed. As to free speech limitations, it was almost identical to the approach used in the ICCPR and the ECHR.

No draft contained a ban on propaganda exciting social, racial, national, or religious hatred as established in Article 29 paragraph 2 of the current Constitution. A proposal to include similar bans in the Constitution was first brought up by a retiree[87] and the Russian Ministry of Foreign Affairs[88] without reasoning. Fedotov tried to stop this proposal, reminding the discussants that Russia had banned racial abuse and similar actions by virtue of international law. He cautioned against encumbering the constitution. His arguments persuaded the Conference to reject the proposal. But after the revision of

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[86] Constitutional Conference (Konstitucionnoje soveschanije), 29 April–10 November 1993, Vol. 5. 10 June 1993.

[87] A retiree Zhuravljeva proposed the banning of the dissemination of information that excites, stirs up national hatred, calls for the overthrow of the existing form of government, or military actions. See Constitutional Conference (Konstitucionnoje soveschanije), 29 April–10 November 1993, Vol. 1. 29 April–4 June 1993.

[88] The Russian Ministry of Foreign Affairs proposed a ban on the propaganda of violence, nationalism, and chauvinism. See Constitutional Conference (Konstitucionnoje soveschanije), 29 April–10 November 1993, Vol. 2. 5–7 June 1993.

the draft by the Ministry of Foreign Affairs, the ban on propaganda exciting social, racial, national, or religious hatred was put back in the constitutional article on free speech.

The mere fact that free speech provisions were enshrined at the constitutional level had significant importance for Russia and reflected the country's new democratic ambitions. The Constitution became the first legislative act to enshrine freedom of expression without any additional provisos, thus formally destroying the dependence of free speech on political will. The Constitution also outlined the concept of freedom of speech and established its main elements, which were put forth in the *Perestroika* period, reaffirming their importance at the highest level.

Russian Constitutional Concept of Free Speech

Scholars usually identify several elements (or specific rights) of free speech from Article 29 of the Russian Constitution, but sometimes the number of elements and their interpretations differ. In general, Article 29 contains the following elements: freedom of speech, freedom of thought, right to information, freedom of mass information. These elements may be found in the definitions of freedom of expression provided by the main international conventions such as the UDHR,[89] the ICCPR,[90] and the ECHR.[91]

The Russian notion of free speech is often considered akin to such notions embodied in all democratic constitutions (Baglay, 2004). However, it is not exactly so. It is true that the Russian constitutional notion of free speech was drafted in a way similar to the one applied when forming other Western constitutional concepts, which, as Verpeaux (2010) notes, usually represent an interplay of national and international visions. At the same time, it also reflected some national peculiarities, which should be interpreted in light of international norms without losing sight on the national meaning that these elements may have.

Article 29 mentions freedom of speech together with freedom of thought, which may be seen unusual from the point of view of international law. Furthermore, Verpeaux (2010, p. 11) argues that freedom of thought relates to freedom of conscience and freedom

[89] Article 19 of the UDHR defines the right to freedom of expression as including "the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

[90] Article 19 of the ICCPR provides that the right to freedom of expression: "shall include the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other chosen media."

[91] Article 10 of the ECHR states that the right to freedom of expression includes "freedom to hold opinion and to receive and impart information and ideas without interference by a public authority and regardless of frontiers."

of religion, rather than to freedom of expression. In Russia, freedom of conscience and freedom of religion are safeguarded separately from freedom of thought, in Article 28 of the Constitution.

Russian scholars usually see no contradiction in the "constitutional neighbourhood" of freedom of speech and freedom of thought. While Chetvernin (1997) finds it largely misleading because it may mean *freedom to say what you think*, he confesses that such an interpretation would be incorrect and contrasting to the universal perspective.

Most scholars suggest that freedom of thought only underpins freedom of speech and does not constitute an autonomous right. They consider freedom of thought as protecting the opportunity for people to form and have viewpoints and opinions (Richter, 2007; Sheverdiajev, 2002). They argue that these cognitive processes occur in the human brain and cannot be controlled by laws unless viewpoints or opinions result in expressions protected by free speech.

Therefore, Richter (2007) believes that freedom of thought and speech can be defined together as *the right to communicate*, which can be exerted independently and without coercion, and it includes the right to submit applications, proposals, and complaints to state bodies as well as the freedom to vote. Similarly, Avakyan (2015) argues that the Russian concept of freedom of thought and speech *allows individuals to participate in communication processes*. It exposes the connection between individual freedom and public affairs and sociopolitical life, as he suggests. People form opinions and views in their homes to then publicly communicate on different issues. Therefore, freedom of thought may represent a guarantee from the use of psychotropic and other substances that may affects brain functioning (Avakyan, 2015), or even in a broader sense, as excluding any brain control (Richter, 2007) as well as pressure on individuals' personality, consciousness, and way of life.

These interpretations seem to be relevant not only because they may correlate with the international standards, but also because they pay attention to the possible Soviet origin of the "neighbourhood" of free speech and free thought, noted by Chetvernin (1997). In Soviet times, the Party and the government actively persecuted dissidents (*inakomysliaschije*) because of their activities. Dissidents represented a subcultural movement of resistance to the Soviet system and ideology (most of them belonged to the *intelligentsia* and were well-educated). In the Russian language, the word "dissident" consists of two words: "another" and "thinking," which together are considered to mean

"thinking in a way different from the Party's ideology," but in fact, it also meant having different opinions, interests, and way of life. Thus, freedom of thought, as freedom from brain control, may represent a specific guarantee for freedom of political expression, and be underpinned by the constitutional principle of ideological pluralism, guaranteed in Article 13 part 2 of the Russian Constitution.

Avakyan also notes that freedom of thought and speech implies *broadmindedness*. Therefore, it can be also argued that freedom of thought means freedom of ideas in the Russian Constitution. Indeed, an intention to express thought may be particularly strong if it represents an idea. The right to communicate ideas was not specified in the Russian Constitution, but it is an inherent part of the universal concept of freedom of expression.

The ECtHR has stated that demands for such pluralism, tolerance, and broadmindedness are natural for a democratic society. That is why freedom of expression, according to the Court, "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[92] The Russian Constitutional freedom of thought and speech should be similarly interpreted as protecting any expressions or ideas, including those that are offensive, shocking, or disturbing. Therefore, Article 29 Part 2 of the Constitution should be understood as allowing propaganda or agitation of expressions or ideas unless they excite social, racial, national, or religious hatred and enmity or propagate social, racial, national, religious, or linguistic supremacy.

Nevertheless, the 1994 opinion of the Venice Commission stated that this ban was too vague and could be misleading. Therefore, it recommended its removal or "to reduce the limits imposed on the freedom of communication to those contemplated by international law."[93] In principle, this ban can be interpreted or even reconsidered strictly in light of corresponding international provisions, particularly those provided in Article 10 Part 2 and Article 20 of the ICCPR and in Article 14 of the ECHR.[94]

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[92] See the ECtHR judgment on *Handyside v. the UK* of 7 December 1976.

[93] European Commission for Democracy through Law. Opinion on the Constitution of the Russian Federation as Adopted by Popular Vote on 12 December 1993. Followed by comments from: Prof. N.V. Vitruk. DL(1994)011e-restr. Strasbourg, 24 March 1994. Retrieved from: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1994)011-e

[94] Article 14 of the ECHR states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status."

However, these articles do not mention the concepts of "class" and "social" hatred. These are nationally specific and in the Russian context most likely emerged to ban some of the ideological postulates of Marxist-Leninist theory. While the Russian Constitution proclaimed ideological pluralism, it might seek to limit the circulation of some ideas considered threatening to democracy and human rights in the past. The implementation of the ban on propaganda or agitation exciting hatred or enmity is considered in section 2.2.

The constitutional provision of Article 29 Part 3 provides specific guarantees for the implementation of the right to express opinions. Among these guarantees is the right to silence, which is also encompassed in the universal notion of freedom of expression.[95] The Constitution also bans any exercise of pressure on individuals obliging them to renounce opinions and views. From a universal perspective, such a pressure may be considered as an interference in the right to freedom of expression, and, therefore, it is also not allowed.

Russian legal scholars have interpreted in different ways the meaning of the constitutional right to information, which is defined in Part 4 of the article on free speech as "the right to freely seek, receive, pass on, produce, and disseminate any information by any lawful means" (see Sheverdiajev, 2002 for the scholarly debates on this issue). Some scholars have contemplated this right in the context of *Glasnost*, as the right to access governmental information. Others have viewed it in a broad sense as embracing the rights to freedom of speech. Despite these differences, almost all Russian studies suggest that the right to information refers to the universal concept of freedom of information. Most likely, confusion in the meanings of the Russian constitutional right to information has been a result of misunderstanding of the universal concept of freedom of information.

Freedom of information was declared at the first session of the UN General Assembly in 1946. Its Resolution 59(I)[96] proclaimed that freedom of information is a "fundamental human right" and "a touchstone of all the freedoms to which the United Nations is consecrated." Freedom of information is defined in the resolution as "the right to gather, transmit and publish news anywhere and everywhere without fetters."[97] Later,

[95] See the ECtHR judgments on *Heaney & McGuinness v. Ireland* and *Quinn v. Ireland* of 21 December 2000; *Goodwin v. UK* of 27 March 1996.
[96] Resolution A/RES/59 (I) of the General Assembly of the UN, adopted on 14 December 1946. Retrieved from https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement
[97] Resolution A/RES/59 (I) of the General Assembly of the UN, adopted on 14 December 1946.

it was included in Article 19 of the UNHR and in Article 19 of the ICCPR as the right "to seek, receive and impart information and ideas through any media and regardless of frontiers." In its 1998 Annual Report, the UN Special Rapporteur to the Human Rights Council and the General Assembly,[98] Abid Hussain, addressed the issue of the right to information, explicitly defining it as relating to access to information held by the government. He stated that "there must be a general right of access to certain types of information related to what may be called 'State activity,' for example, meetings and decision-making forums should be open to the public wherever possible."[99] It should be noted, however, that the right to access to information has its own specific principles and development trends (although it relates directly to freedom of expression). It was developed by a number of important international documents dedicated to this right specifically.[100] These documents stressed that the right to information should be implemented in specific national legislation (the so-called "freedom of information laws").

Previously, the ECtHR had not always acknowledged that freedom of expression includes the right to access information.[101] In 2009, however, the Court held an important ruling on the case of *Társaság a Szabadságjogokért v. Hungary*[102] in which it unambiguously stated that a refusal of access to official documents is a violation of the right to freedom of expression. First, the Court clarified that information issued by governmental bodies is needed for public debates and, second, it observed that, a government's refusal to provide such information demonstrates "censorial power of an information monopoly" preventing the media or civil society organisations from performing their watchdog function (see also Voorhoof, 2009a, 2009b).

Thus, from the perspective of international standards, the Russian constitutional right to information should be interpreted as the right to access official information. This

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[98] Annual Report of the UN Special Rapporteur to the Human Rights Council (HRC) and the General Assembly of 28 January 1998, E/CN.4/1998/40. Retrieved from https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/103/12/PDF/G9810312.pdf?OpenElement

[99] Annual Report of the UN Special Rapporteur to the Human Rights Council (HRC) and the General Assembly of 28 January 1998, E/CN.4/1998/40.

[100] See, for instance, OSCE (2006b); the document of the UN Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "The Public's Right to Know: Principles on Freedom of Information Legislation," Annex II Report E/CN.4/2000/63.; Council of Europe Convention on Access to Official Documents of 18 June 2009, Tromsø; Recommendation Rec (2002) 2 of the Committee of Ministers, "Access to Official Documents," adopted by the Committee of Ministers of the Council of Europe on 21 February 2002.

[101] See the ECtHR judgment on *Leander v. Sweden* of 27 May 1987. See also, *Gaskin v. the UK* of 7 July 1989, and *Guerra and Others v. Italy* of 19 February 1998.

[102] *Társaság a Szabadságjogokért v. Hungary* of 14 April 2009.

right is often decoded as the right to know (see the principles on freedom of information legislation prepared by Article 19, 1999). The ECtHR has consistently emphasised that Article 10 of the ECHR[103] guarantees not only the right to impart information, but also the right of the public to receive it. Any other national interpretations would contradict the universal position on freedom of information and freedom of expression. Therefore, by proclaiming this right, Russia made the obligation to implement it through a specific legislation on freedom of information.

As a specific guarantee for the right to access information, the Russian Constitution, in Article 24 Part 2, provides that: "National and local governmental bodies as well as their officials shall ensure for everyone the possibility to be acquainted with the documents and materials directly touching his or her rights and freedoms, unless otherwise provided for by law." This means that if statutory laws do not explicitly prohibit access to such documents and materials they must be provided.

Several other constitutional provisions also develop the freedom of information in Russia. Article 42 grants the right to "reliable information" on environmental conditions to everyone. Article 15 Part 3 requires that all laws be officially published, otherwise they are inapplicable.[104] Consequently, general access to laws is ensured through their official publication. Article 100 guarantees open access to parliamentary hearings, and Article 123—to court hearings.

Part 4 of Article 29 states that that the list of information comprising state secrets must be determined in national legislation. This provision does not allow the authorities to abuse of the regime of secrecy.

This part also states that individuals should use only "lawful" means to implement their right to information. This may mean that illegal means cannot be used to access information and to further disseminate it. Particularly, freedom of information is limited

[103] See the ECtHR judgments on *Observer and Guardian v. the UK* of 26 November 1991; *Guerra and Others v. Italy* of 19 February 1998; *Ahmet Yildirim v. Turkey* of 18 December 2012.
[104] Article 15 part 3 of the of the Constitution states: "Laws shall be officially published. Unpublished laws shall not be used. Any normative legal acts concerning human rights, freedoms and duties of man and citizen shall not be used, if they have not been officially published for general access."

by Article 23[105] and Article 24 Part 1[106] of the Constitution guaranteeing the right to privacy and secrecy of private communication.

Another possible interpretation is to decode "by lawful means" as a universal formula "in any form," although Avakyan (2015) argues that the opportunity to choose various means of expression is implied in the concept of freedom of thought. He notes that, although thought is mostly expressed in words, they can also be expressed in other form, for instance, as art.

The ECtHR broadly interprets "freedom of expression" to cover not only oral or written expressions, but also information or ideas expressed in the media, in art,[107] films,[108] as well as posters[109] (and even protests[110] if they represent a form of expression). Technical means to disseminate information or ideas are also shielded by Article 10 of the ECHR.

The Russian Constitution, in Article 29 Part 5, reaffirmed freedom of mass information and the ban on censorship. This has had great implications for the Russian legal system of human rights protection: "On Mass Media," as a statute governing the media, allowed the interpretations of these concepts only in the context of Russian media regulation, as discussed in section 1.3.

The Constitution transformed them into the basic constitutional principles, thus stressing their enormous importance for Russian democracy. By proclaiming freedom of mass information, the Constitution recognised that this freedom is a precondition for proper debates on publicly important issues with the participation of various social and political actors and that this freedom is necessary for the implementation of public control over governmental activities (Kulikova, 2015).

Although the Russian Constitution proclaims freedom of mass information and the ban on censorship in one provision, this does not mean that it bans only media censorship (Ekshtain, 2004; Kulikova, 2015; Zorkin & Lazarev, 2010). Ekshtain argues that the Russian ban on censorship constitutes a guarantee for ensuring any

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[105] Article 23 of the Russian Constitution states:
1. Everyone shall have the right to privacy, personal and family secrets, the protection of honour and good name.
2. Everyone shall have the right to privacy of correspondence, of telephone conversations, postal, telegraph and other messages. Limitations of this right shall be allowed only upon court decision.

[106] Article 24 Part 1 of the Russian Constitution states: "Collection, storage, usage and dissemination of information about private life of a person shall not be allowed without his or her consent."

[107] See the ECtHR judgment on *Muller and Others v. Switzerland* of 24 May 1988.

[108] See the ECtHR judgment on *Otto Preminger Institute v. Austria* of 20 September 1994.

[109] See the ECtHR judgment on *Bowman v. UK* of 19 February 1998.

[110] See the ECtHR judgment on *Steel and Others v. the UK*, of 23 September 1998.

communication right through any means. Such understanding would correlate with the universal perspective. Particularly, the ECtHR held a number of rulings concerning censorship of books,[111] films,[112] et cetera. Because the Constitution does not provide any additional clauses when establishing the ban on censorship it should be interpreted as total and absolute, as Kulikova (2015) argues. It should be treated as prohibiting any preliminary or punitive interference with speech regardless of the way of dissemination. In other words, the Russian constitutional ban on censorship is the broadest possible. It can be argued that it is even broader than that provided by Article 10 of the ECHR. Once again, this approach may be explained by the will to ensure that the multifaceted Soviet censoring system would not be repeated in the future.

Article 10 of the ECHR bans only governmental interference with the right to freedom of expression. It is defined as any "formalities, conditions, restrictions or penalties," which may be imposed preliminarily or *post factum*. The ECtHR finds the complaints on this issue to be inadmissible and does not consider them at all if no governmental interference with freedom of expression has been observed. The ECtHR does not assess interference if it was executed by individuals or private companies, rather than by governments.[113]

One cannot accept the viewpoint of Vdovin (1994) who has argued that, unlike the main universal treaties, the Russian constitutional concept of free speech lacks provisions on the protection from state interference. This viewpoint overlooked the fact that the constitutional ban on censorship implies the prohibition of governmental interference. Moreover, the proclamation of freedom of expression in the Russian Constitution directly refers to the lack of state interference, and most of the democratic constitutions are drafted in a similar way. Additionally, since Russia's ratification of the UDHR and the ICCPR (and, later, of the ECHR), its free speech concept had to immediately encompass the ban on state interference, in particular by virtue of Part 4 Article 15 of the Constitution. Yet the concern is that, to implement this ban, Russia needed reliable mechanisms that would take into account its authoritarian past.

For a proper implementation of a total and absolute ban, further elaboration in the Russian legislation is needed. While banning *any* form of punitive censorship, "On Mass Media" prohibits *only censorship concerning activities of editorial offices* with regards

[111] See the ECtHR judgment on *Sunday Times v. the UK*.
[112] See the ECtHR judgment on *Otto Preminger Institute v. Austria*.
[113] That is why, for instance, the ECHR does not safeguard the right of individuals to address the audience through the media.

to *preliminary* interference, as Kulikova (2015) notes. This is to say that the notion of preliminary censorship may be understood as limited to mass media censorship (which must be officially registered in Russia), despite its proclamation in the Constitution. Such narrow interpretations have been provided by some Russian scholars (Barkhatova, 2010; Dmitriev, 2009), but they do not correlate with the universal perspective and considerably limit the opportunities provided by the Constitution for free speech protection.

Proper implementation of the provisions of the constitutional Article 29 is important not only for protecting free speech, but also for executing many other constitutional rights in Russia. For instance, the right to freedom of speech is crucial for enduring the freedom of conscience and freedom of religion,[114] freedom of associations,[115] freedom of assembly,[116] the right to vote and to be elected,[117] the right to appeal to governmental bodies,[118] to name a few. It also correlates with the freedom of creativity and of the right of access to cultural values.[119] All these rights and freedoms are equally important as free speech, but without this right their implementation is nearly impossible.

Like international standards, the Russian Constitution does not consider free speech as an absolute right. According to Article 55 Part 3 of the Constitution, it can be limited

> by federal law and to such an extent as is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and

[114] Article 28 of the Russian Constitution states: "Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to practice any religion individually or together with other individuals or not to practice religion at all, to freely choose, have, and disseminate religious or other views, and to act according to them."

[115] Article 30 of the Russian Constitution states:
1. Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. Freedom of activities of public association shall be guaranteed.
2. No one may be compelled to join any association and to participate in it.

[116] Article 31 of the Russian Constitution states: "Citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets."

[117] Article 32 in parts 1 and 2 of the Russian Constitution guarantees:
1. Citizens of the Russian Federation shall have the right to participate in governing public affairs both directly and through their representatives.
2. Citizens of the Russian Federation shall have the right to elect and be elected to state bodies of national government and local self-government bodies, and they may also to participate in referendum.

[118] Article 33 of the Russian Constitution states: "Citizens of the Russian Federation shall have the right to personally address and to submit individual and collective appeals to governmental bodies as well as to local self-government bodies."

[119] Article 44 in parts 1 and 2 of the Russian Constitution states:
1. Everyone shall be guaranteed the freedom of literary, artistic, scientific, technical and other types of creativity as well as of teaching. Intellectual property shall be protected by law.
2. Everyone shall have the right to participate in cultural life and use cultural establishments and to an access to cultural values.

lawful interests of other people, for ensuring defence of the country, and security of the State.

Such an approach is similar to the so-called three-part test in Article 19 Part 3 of the ICCPR and Article 10 Part 2 of the ECHR. As described in the Introduction, this test states that: (i) limitations must be provided by law;[120] (ii) there must be a legitimate aim for limitations; (iii) limitations must meet the criterion of necessity. This test is applied by international courts to assess whether governmental interference with the right to freedom of expression is admissible or not.

For the ECtHR, the criterion of *necessity in a democratic society* is often the main one. Through its application, the Court determines if there is a *pressing social need* justifying a limitation to freedom of expression. If there is no strong need, such limitation must not be imposed. The ECtHR has repeatedly noted that, although member-states have a certain *margin of appreciation* in assessing what is considered pressing social need, this "goes hand in hand with a European supervision," and the ECtHR is authorised to have a final rule on whether governmental interference was compatible with freedom of expression or not.[121] Particularly, the Court evaluates whether such interference was proportionate to protect the legitimate aim.

Like the ICCPR[122] and unlike the ECHR, the Russian Constitution does not say that limitations of free speech are *necessary in a democratic society*. The 1994 opinion of the Venice Commission stated as to Article 55 Part 3 that, probably, "it would be desirable to highlight the exceptional nature of this provision, for instance by replacing the word 'needed' with 'absolutely necessary'." [123] By suggesting this, the opinion wanted Russia to incorporate the ECtHR concept of a pressing social need for limitations. However, it can be argued that this is more an issue of interpretation than legislation. Nonetheless, Russia agreed to apply the ECtHR's concept of a pressing social need by ratifying the ECHR.

Additionally, the Russian Constitution allows limiting freedom of speech in a state of emergency (Article 56), which may correlate with the universal perspective to this

[120] For the ECtHR, the expression "prescribed by law" includes several requirements. First, "the law must be adequately accessible" and second, "the law must be formulated with sufficient precision to enable the citizen to regulate his conduct," so that citizens would be able to foresee the consequences of their actions (see, for instance, *Sunday Times v. the UK* of 26 April 1979).
[121] See the ECtHR judgment on *Lingens v. Austria*.
[122] Article 19 of the ICCPR states that the limitations of the right to freedom of expression must be necessary for protection legitimate aims.
[123] European Commission for Democracy through Law. Opinion on the Constitution of the Russian Federation as Adopted by Popular Vote on 12 December 1993. Followed by comments from: Prof. N.V. Vitruk. DL(1994)011e-restr. Strasbourg, 24 March 1994.

right, particularly with Article 15 Part 1 of the ECHR, "Derogation in Time of Emergency."[124]

The Russian Constitution has often been criticised for reflecting "Western" analogies and thus becoming a kind of "universal cloak" (Pastukhov, 2008, p. 5) that could be "successfully accepted" in any country of the world. The constitutional provisions on free speech have also been criticised for being abstract and for their "indeterminacy" (Foster, 2002). At the same time, the opinion of the Venice Commission stated that the Russian Constitution was not so much abstract as it reflected "an attempt to provide for everything."[125]

The Constitution seems to have a number of features that need further development. However, the opinion of the Venice Commission noted that there has been an age-old debate of two schools of thought on how to draft constitutional acts. While one argues that the basic laws should be detailed and suggests that they include as much information as possible, the other school of thought postulates that constitutions should only enshrine key principles and largely rely on the subsequent natural evolution of the constitution once it enters into force. The opinion stressed that there are no standards on the best way to proceed: "each country chooses its own style of drafting for its Constitution."[126]

Certain "universality" and abstraction is a natural characteristic of constitutional acts, in particular with regards to human rights provisions because they grant universal rights. Yet, Article 29 has its national specifics, which seems to be sufficient to distinguish the Russian constitutional free speech concept from other constitutional or international legal formulas guaranteeing free speech.

Balkin argues that "when the constitution uses vague standards or abstract principles, we must apply them to our own circumstances in our own time" (2011, p. 3). Similarly, the opinion of the Venice Commission stated as to the Russian Constitution that "interpretation of a constitution is just as important as its wording." Therefore, the Venice Commission raised concerns on the authority of the Russian President to appoint

[124] Article 15 part 1 of the ECHR states: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".
[125] Article 15 part 1 of the ECHR.
[126] Article 15 part 1 of the ECHR.

the "constitutional" judges. "One of the mainstays of democracy is an independent judiciary," the opinion stated.[127]

As previously said, ambiguities and lacunas of Russian legislation concerning the media and speech may be eliminated during its application and interpretation, but it requires relevant institutions, including independent judiciary. After the adoption of the Constitution and media legislation, the main task (and challenge) for Russia, was the creation of such institutions and of legal culture. This was particularly important in sowing the seeds for the proper and effective realisation of human rights and freedoms in the country, including free speech.

In less than five years, the Soviet legal traditions were almost fully transformed, at least from a formal perspective. The framers of the Constitution managed to create appropriate foundations for the new Russian constitutional order in the shortest amount of time, and this may be likened to a heroic act. The Russian Constitution not only formalised some universally recognised ideas in the Russian legal form, but it also inevitably impacted Russian society by providing certain system of values and narratives that differed completely from those in Soviet times.

Without doubt, however, the constitutional institutions, ideas, and traditions show some continuity. Russia broke with the previous tradition, but it could not immediately create a new constitutional identity or democracy, by virtue of the law only. Legal democratic traditions develop through consistency in actions of government and society, which adhere to the constitutional principles, including the rule of law. Legal recognition of freedom of speech and mass information became only a starting point for their implementation in the new Russia.

1.5. The Evolution of Mass Media Legislation in Russia in the Context of the CoE Standards

Since the adoption of the Soviet and Russian media statutes, the Russian media sector has been transformed into a powerful business with profits in the billions of euro, "boasting new technologies, state-of-art formats and a broad range of broadcasts and publications to meet a variety of tastes." Lipman, Kachkaeva, and Poyker (2017) argue that modernisation has become the main trend in the development of the Russian media

[127] European Commission for Democracy through Law. Opinion on the Constitution of the Russian Federation as Adopted by Popular Vote on 12 December 1993.

sector since 2000. The TV advertising market volume has increased almost twenty-fold between 2000 and 2011—from 6,6 to 131 billion rubles.[128]

Figure 1.1, showing the change in numbers of registered outlets in the period 1990–2015, demonstrates the expansion of the Russian media industry with the creation of many new outlets during those years.[129] In 2016, Russia had more than 80,000 officially registered media organisations,[130] around two thirds of which were newspapers and magazines (MediaDigger, 2016). According to the data, there were more than 95,000 media owners in the country, with an average of 1.2 owners for each outlet (MediaDigger, 2016). Russian media are published in 102 languages, most popular of which is Russian, followed by English (for 22% of the outlets).

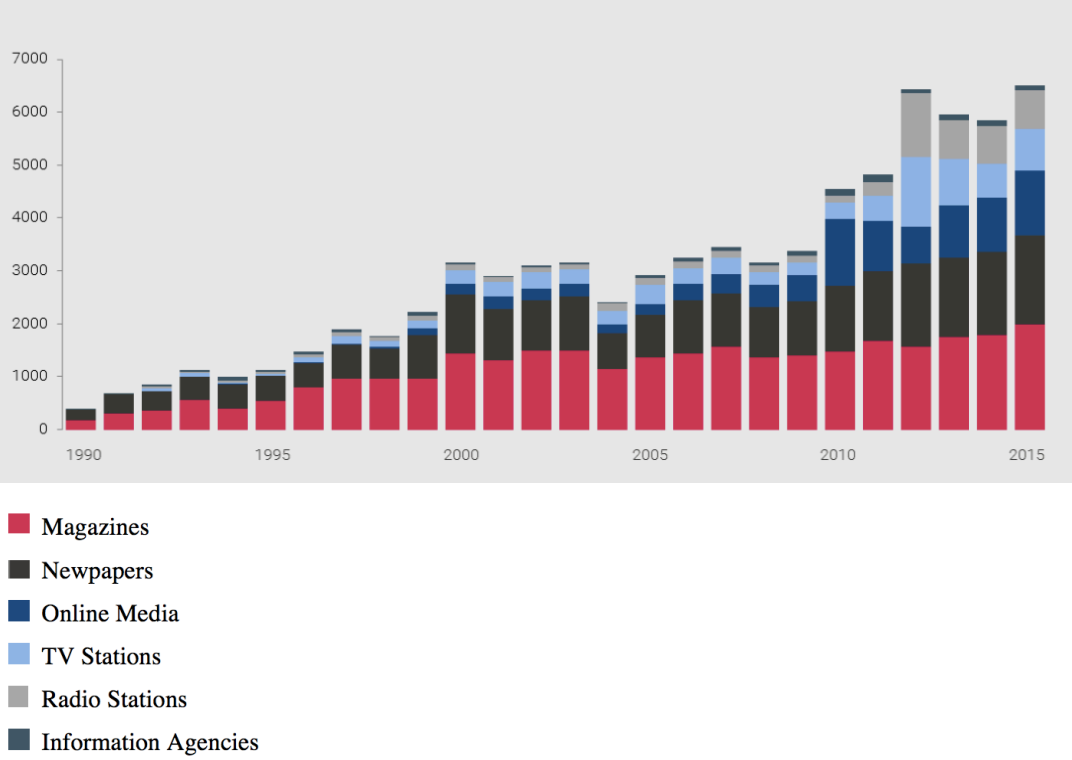

Figure 1.1. Number of registered media outlets in Russia, between 1990 and 2015. *Source: MediaDigger (2016).*

However, variety does not necessarily mean media pluralism, which is something lacking in Russia. Many scholars have recognised that political factors are the main

[128] See the official website of the AKAR, an association of communication agencies of Russia. Retrieved from http://www.akarussia.ru/node/2085

[129] The rapid growth in numbers in 2012 is mostly determined by the change in legislation concerning new media that is considered in the section on new media.

[130] As of 13 December 2016; see Roskomnadzor's Register of Registered Media Outlets at https://rkn.gov.ru/mass-communications/reestr/media/

reason for the lack of media independence and pluralism in the country (Richter, 2007; Kackaeva, 2006; Eriomin, 2011; Smaele, 2010). It has also been shown that almost all influential Russian media outlets are directly owned or indirectly controlled by the state through affiliated individuals or companies (Lipman, Kachkaeva, & Poyker, 2017; Lipman & McFaul, 2010; Arutunyan, 2009; Koltsova, 2006).

Scholars have used various approaches to track the evolution of media regulation in Russia. Richter (2007) looks at the development of journalism and marks five main stages in the evolution of Russian media regulation: (1) 1986–1990, when journalism was freed from state control; (2) 1990–1991, the "golden period" of Russian journalism, when it represented the Fourth Estate; (3) 1992–1995, the period of media institutionalisation and decentralisation of the old broadcast system; (4) 1995–1999, when wealthy oligarchs entered the sector and monopolised the media market; (5) 2000 to the present, when state control over mass media was re-established. To this chronology could be added one more period outlining the development of new media in Russia.

Many persuasive arguments can be put forward in support of Richter's theory. The most important one is that his periodisation shows the interconnections between the law and its object. Based on Richter's analysis, I have compiled a table showing the correlation of mass media legislation with the main challenges for Russian journalism during the same period. Table 1.2 demonstrates that Russian media policy was more or less balanced from 1990 to 1995, and the state even tried to curb challenges facing the media industry by adopting relevant legal acts. However, political controversies hampered the institutionalisation of the media starting in 1992, and in 1996, the state had stopped shielding the media industry. Since 2000, it has re-established a near-absolute control over the media, and since 2011, at the time when new media gained popularity among Russians, the state has actively adopted mass media legislation to neutralise online threats to its regime and to consolidate state media control.

Table 1.2

The interconnection between the evolution of journalism and media regulation in Russia

Years	Trends in journalism	Main challenges for journalism	Trends in media regulation
1986-1900	Journalism became free from the control of the CPSU. Weakening of censorship. The limits of criticism and self-criticism were curtailed.	Economic dependence of journalism on governmental resources.	Regulation of the media by political decrees, such as the speeches of the Party's top echelon. The first legal initiatives established. The

	Mass media outlets extended the audience.		main document of the period is the 1988 Resolution of the 19th All-Union Party's Conference "On *Glasnost*."
1990-1991	The "Golden Age" of journalism. The CPSU lost control over the media. Censorship abolished. Journalists got economic independence. Private media outlets appeared.	The state retained a monopoly over the means of media production, but journalism was almost free from ideological control and largely independent economically.	Formation of the basic legislation to regulate the media. The 1990 USSR Statute "On the Press." The 1991 Statute of the Russian Federation "On Mass Media."
1992-1995	The period of media institutionalisation. The media, becoming an important social institution, was the main opponent of the government. Decentralisation of broadcast media.	Political confrontation between the pro-Yeltsin and oppositional forces increased. Economic conditions of the media worsened.	The state tried to adopt frameworks to make the media market more developed and to gain support from the media. Regional authorities formed their own media legislation. Various legal acts were adopted, among which was the Constitution of the Russian Federation.
1996-1999	Big capital entered the media sector. Media got involved in political games. The notion of "informational wars" came into common use. The blossoming of the yellow press and TV entertainment journalism.	The media became dependent on wealthy oligarchs. The 1998 economy crisis deteriorated economic conditions. Audience interest decreased while prices for media production increased.	The state used administrative levers to reign in the media. The formation of the media legislation was frozen (including a statute for broadcasting). Some regions adopted legislation to protect the public's morals.
2000 – 2003	The state strengthened control over the media and displaced disloyal oligarchs from the media realm. Private media was weakened.	The media market became dependent on the state. The private media industry became very vulnerable.	The state became actively involved in the media market gradually expanding the limitations of media freedom. Regional media regulation abolished. The system of the state support was abolished.
2004-2010	The state retains and strengthens control over the media. Entertainment remains dominant. State propaganda on TV is intensified. The ICT development brings challenges and opportunities. New digital media is the main source for alternative information.	Independent political journalism largely disappeared and was mainly replaced by entertainment (particularly on TV). The media depends on the state. Challenges for the market caused by ICT development.	The formation of anti-extremist and anti-terrorist legislation. Laws on access to information and on the protection of morals.
2011-present	Digital media competes with traditional media. The state strengthens control over traditional media and tries to establish control over the	The media market is over-regulated. Law enforcement is arbitrary and depends on political loyalty.	The formation of the legal frameworks for new media. The strengthening of extremist and anti-terrorist legislation, and on the protection of

	new media. Self-censorship and state propaganda are strengthened. Digitisation of broadcast media.		morals. The policy on the digital shift of broadcast media is formed.

Similar approach is used by Fedotov (2001) who notes three main stages in the evolution of Russian media policy. He characterises the period of the early 1990s as a time of "democratic romanticism," which indicates the creation of guarantees of media rights and freedoms and extension of the freedom of mass information. The middle years of the 1990s were in his view the period when the relationship between the media and the state was increasingly becoming a form of "governmental paternalism," that is, a total dependence, including financial, of the media on the state. Fedotov notes that such paternalism created the legal opportunities for the privatisation of media assets. Since the late 1990s, media law reforms have restricted free speech and restored censorship, he argues.

Other scholars classify only two periods: 1990–1995 and the post-1995 period (Koltsova, 2006; I. Zassoursky, 2004). Y. Zassoursky (2011) notes that 1995 was the year when Russian media lost its independence after media assets were distributed among the main powerful business groups and corporations in the country. Many scholars have observed the important role of the 1996 presidential elections in this process (Richter, 2007; Y. Zassoursky, 2011; Belin, 2002); Zassoursky, for instance, considers the 1996 elections as a distinct period on its own and argues that the distribution of media companies among powerful businessmen started in the early 1990s.

Similarly, Jackson (2016) believes that after the 1991 passage of the statute "On Mass Media," Russian media legislation could in general be qualified as restrictive. She specifies that, if during Yeltsin's presidency, media legislation was "sporadically restrictive," it became "more consistently controlled" under the next two Russian presidents, Vladimir Putin (2000–2008 and 2012–to the present) and Dmitriy Medvedev (2008–2012). From a legal standpoint, this means that "On Mass Media" marked not only the beginning, but also the end of the development of a liberal media legislation in Russia, despite the fact that the first half of the 1990s was the period of "unconstrained press," as Lipman and MacFaul (2010) describe it.

Research on Russian media legislation has revealed several problems. Richter (2007) notes that the formation of media laws in the country has never been systematic. Until the late 2000s, there was a persistent absence of legislation on access to information,

despite the constitutional guarantee for this right (Richter, 2008a; Lysova, 2004; Fedotov, 2002). Russia still lacks a separate broadcasting statute as well as legal frameworks limiting media concentration. At the same time, there have been numerous legal acts regulating the mass media, among which is a plethora of documents developed by the executive branch (Jackson, 2016; Efimova, 2000). Some of these legal acts contain significant contradictions, which makes mass media legislation difficult to both examine and apply (Richter, 2007, 2011a, 2012; Lysova, 2004).

Furthermore, no studies have considered the development of Russian mass media legislation in the context of the CoE perspective regarding Russian policies on the media and on democratisation more generally. This section seeks to fill this gap. It studies what role has Russia's accession to the CoE played in the formation of Russian media legislation. It tracks the evolution of the main problems of Russian media regulation from the CoE's perspective and examines Russia's efforts to solve those problems in its media legislation. However, this section goes beyond the issue of implementation of the CoE standards and presents a broader picture of the evolution of Russian mass media legislation. It also tracks the changes in the country's attitude to the CoE's recommendations pertaining to Russia. For the purposes of this dissertation, the development of Russian media legislation is considered here throughout two consecutive periods: before Russia's accession (1992–1995) and the period of Russia's membership in the CoE (1996–to the present).

The CoE perspective is represented here by the PACE's resolutions addressing Russia. PACE regularly monitors the fulfilment of Russia's obligations, including through the Committee on the Honouring of Obligations and Commitments by Member States of the CoE (the Monitoring Committee).[131] In total, the Assembly adopted more than sixty resolutions concerning Russia in various degrees. I have studied all of them to reveal the change in the CoE perspective regarding Russian media policies. The PACE's official website does not contain Russia's responses to these resolutions. The conclusions on compliance have been based on my analysis of Russian media legislation, on scholarly studies, data from NGO websites, as well as from the documents published by the Russian Ministry of Foreign Affairs.

The PACE[132] is an essential institution in the system of the CoE governance. It is composed of members of the national parliaments of the member-states, including

[131] Established in April 1997.
[132] See the PACE's official website at: http://assembly.coe.int/nw/Home-EN.asp

governmental and opposition parties. The body holds its plenary sessions four times a year. PACE's mandate includes examining human rights violations in member-states and demanding actions from their governments. It also monitors elections and assists in democratic reforms, alongside the Venice Commission. PACE may make suggestions on the adoption or improvement of national laws, and request their evaluation. Additionally, it is empowered to impose sanctions on member-states, including the exclusion or suspension of their membership.[133]

1992–1995: Russian Media Legislation before Accession to Membership in the CoE

Russia's way to the CoE membership was relatively rapid and smooth (Schönfeld, 2014). The icy relationships between the Russian government and the CoE were softened by Gorbachev as early as 1989 when he visited the CoE headquarters and proclaimed before PACE that "Europe is our common home." Similarly, Yeltsin (2008) saw the transformation of the Russian people into Europeans as a "global goal," and he actively advocated for Russia to join international organisations. In less than a month after the USSR's breakup, the Supreme Soviet of Russia was granted a special guest status at the PACE, and on 7 May 1992 Russia applied for membership in the CoE.

The early post-Soviet years were turbulent. Apart from political conflict, Russia also faced significant economic challenges. The 1992 "liberalisation of prices" caused a harsh inflation. Soviet law was not adequate to address most of the pressing issues at that time and such issues were either unregulated or improperly regulated. Against this backdrop, the situation of the mass media could be seen as relatively positive. Despite the economic challenges, the number of private media outlets grew and the media sector continued to develop (Koltsova, 2006; Mickiewicz 1997). "On Mass Media" gave rights and freedoms to Russian journalists. And for a while, it was hoped that this statute would ensure media independence, which was generally desirable at that time in Russia.

Yeltsin understood that an independent and critical press was a precondition for the modernisation of post-communist Russia, as Colton (2008) observes. However, in harsh economic conditions, Yeltsin encouraged the involvement of wealthy businessmen in the media market so that it would evolve further (Kachkaeva, 2014). The process was tricky. A new state company, Ostankino, replaced Gosteleradio, after it was renamed as All-

[133] Additionally, the PACE has an authority to elect judges of the ECtHR and the CoE's Secretary General, who heads the CoE's Secretariat and the Commissioner for Human Rights, an independent non-judicial institution aiming to promote and respect human rights in the member states. The PACE also appoints rapporteurs to provide reports on certain issues within the CoE's authorities.

Union State Television and Radio Broadcasting Company. Ostankino launched broadcasting on the basis of the former First TV Channel of the USSR's Central TV. In 1994, Ostankino became a co-owner of 51% of shares in capital stock of a new company, ORT, which began broadcasting in place of Ostankino. ORT in Russian stands for "Russian public service television" (*Obschestvennoje Rossiiskoje Televidenije*), but it was partly privately owned and mostly state-run. Kachkaeva notes that the creation of this "centaur" (which was only formally controlled by the state, but in fact was under the control of a new media tycoon, Boris Berezovsky, who never owned ORT) became a symbol of that period (2006, p. 300). This process was governed by Yeltsin's decrees.

NTV, a new private station, owned by the Russian billionaire Vladimir Gusinsky, received six hours of airtime on the former Fourth Channel of Soviet TV under a presidential decree. Neither governmental interference nor the fact of Gusinsky's ownership prevented NTV from becoming a flagship of independent journalism in post-Soviet Russia (Kachkaeva, 2006). Yeltsin also facilitated the process of creating a new private company, TV-6, a joint venture with the Turner Broadcasting System.

The private media market mostly survived because of the emergence of new powerful businessmen and corporations who tried to use the mass media as either a "commercial or a propaganda resource" (Koltsova, 2006, p. 36). Facing financial difficulties, journalists lost their ability to function as a watchdog of democracy (Pasti, 2005). Journalists were not used to having freedoms. In a free media and political environment, they felt more like activists in their treatment of the news. They were not impartial or objective, and felt like they were almost doing politics rather than journalism.

While Kachkaeva suggests that between 1990 and 1994 the state nearly lost financial and ideological control over the private media sector, supported by the president, media freedom could be more accurately described as chaos (2006). The media lacked funding and content. Tabloid journalism appeared and started to flourish. Authors' rights were not respected despite the 1993 statute "On Protection of Authors' and Related Rights." Russian producers used barter schemes to exchange their TV content for advertising slots, which they sold at their own discretion (Kachkaeva, 2006). In such a way, the new production companies VID, ATV, and Ren TV, and the advertising agencies Video International and Premier SV made great fortunes. Even before assuming the presidency, Yeltsin knew that media, particularly TV, has a considerable power in forming public support (Jackson, 2016). Therefore, political rationales also affected the media policy of those days.

After the putsch of August 1991, Yeltsin managed to establish control over All-Russia State Television and Radio Broadcasting Company (*Vserossiyskaya Gosudarstvennaya Televizionnaya i Radioveshchatelnaya Kompaniya* or VGTRK). It was a huge state-run company established in 1990 by the Supreme Soviet of the RSFSR.[134] The head of the VGRTK was dismissed. A new VGTRK's TV station, RTR (later renamed *Rossija-1* or Russia-1), was created on the basis of the Soviet Second Channel of the USSR's Central TV. It supported Yeltsin's policies. Thus, Soviet TV assets were redistributed among new companies that were state-run or owned by wealthy businessmen.

At that time, Yeltsin issued more acts to govern the media per year than either Putin or Medvedev, as Jackson notes (2016). Yeltsin created a system for state support and supervision of the mass media, and provided electoral candidates with the basic guarantees on equal access to free airtime. Apart from regulating the decentralisation of the broadcasting system, the presidential acts also determined the measures to ensure freedom of mass information and of access to information. Several governmental regulations were introduced to clarify the issues of publishing and distribution of the press, including the privatisation of publishing companies. They also determined the process for obtaining broadcasting licences. Yelstin also approved the members of an inter-departmental commission determining state secrets upon proposals by the authorities and presidential approval.[135] Parliament was removed from participating in forming Russian media legislation.

While the presidential media policy may look as "authoritarian" (Efimova, 2000), it was, to a greater extent, democratic in spirit. For instance, the 1993 Presidential Decree "On Guarantees of Information Stability and Requirements for TV and Radio Broadcasting" prescribed the development of a set of laws on broadcasting. It proposed the reorganisation of the broadcasting system and its financing in order to establish a "competitive system of state, public service and private TV and radio broadcasting." It also provided the minimum requirements for Russian state broadcasters directly referring to PACE's documents.[136] It obliged state-owned broadcasters to follow these

[134] Decision of the Presidium of the Supreme Soviet of the RSFSR (No. 107-1).
[135] According to the Statute of the Russian Federation of 21 July 1993 No. 5485-1 "On State Secret."
[136] Recommendation 748 (1975) of the CoE's Parliamentary Assembly "Role and Management of National Broadcasting," adopted on 23 January 1975 (18th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14782&lang=en; Resolution 428 (1970) of the CoE's Parliamentary Assembly "Declaration on Mass Communication Media and Human Rights," adopted on 23 January 1970 (18th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15842&lang=en; Resolution 820

documents—for instance, it obliged them to support all political groups regardless of their own political views, to avoid political control, to ensure professional responsibility, and to be impartial.

The decree authorised the then-Ministry of the Press and Information to create special boards of guardians in state-run broadcasting companies to settle disputes on freedom of expression. In Yeltsin's view, these boards would help resist such freedom. In the 1990s, experts believed that "a system of strict supervision of state-run broadcasters by independent boards" could be effective and would be a "fast way to introduce a specific Russian model of public broadcasting" (Richter, 2010, p. 36).

Political opponents used this opportunity to create the Congress's own state supervisory boards, which would appoint and dismiss managers of the state TV stations. In less than two weeks after Yeltsin's decree, the Russian Congress of People's Deputies, being in opposition to the president, adopted Resolution No. 4686-i "On Measures to Ensure the Freedom of Speech in State TV and Radio Broadcasting and in Informational Services." The Russian Constitutional Court found it unconstitutional[137] although on technical grounds—the resolution had been improperly adopted and published. Nevertheless, neither presidential nor congressional boards were established.

The Federal Statute "On Television and Radio Broadcasting" was introduced, but was frozen in 1994. While it developed the provisions of the statute "On Mass Media" in many respects, it also contained ambiguous provisions that allowed the Russian government to make decisions at its discretion (Price, 1995). The draft also reflected the ambivalent pro-democratic media policy of that time.

Another problematic issue is the formation of regional media policies. The Constitution does not explicitly determine whether (and to what extent) local authorities have the right to establish their own media policies. Article 71(i) of the Constitution states that "federal transport, railway, information and communication" exclusively fall under national jurisdiction, but it says nothing on regional decisions on issues of information and communication. The Constitution establishes that cultural issues, as well as administrative law (Article 72(e) and (k)), are governed on both national and regional

(1984) of the CoE's Parliamentary Assembly "Relations of national parliaments with the media," adopted on 7 May 1984 (1st Sitting). Retrieved from https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16231&lang=en

[137] Resolution of the Constitutional Court of the Russian Federation in connection to the consideration of the case on the constitutional compliance of the Resolution of the Congress of People's Deputies of the Russian Federation of 29 March 1993, "On Measures to ensure the freedom of speech on state TV and radio broadcasting and in informational services."

level. At the same time, Article 71(v) states that issues pertaining to human rights fall exclusively under national jurisdiction. Fedotov (2002) notes that, consequently, local authorities can pass legislation only if it complies with the statute "On Mass Media" and excludes issues related to freedom of mass information. However, in the 1990s several regions adopted their own legislation, which mainly reiterated the national statute or contradicted the Constitution. For example, the Code of Bashkortostan Republic failed to even mention the statute "On Mass Media" and provided loopholes for introducing censoring organs, as Fedotov notes. Tatarstan adopted a statute allowing monetary sanctions and the seizing of media production as a retribution for insulting the president of the republic. Fedotov suggests that this approach has contributed to unbalance media legislation in Russia. In the 2000s, regional media laws were abolished, which marked another radical approach.

The main controversial issue for Russia's accession to the CoE was the first Chechen war (1994–1996), a military conflict between the Russian national authorities and the Chechen Republic of Ichkeria, which caused the interruption of Russia's application in 1995.[138] The application process was renewed after reports that Russia had begun to manage the conflict by peaceful means.[139] In 1995, Russia adopted the national statute on international treaties [140] clarifying their ratification procedures and the consequences of ratification, according to the Constitution.

With regards to the CoE, Russia had to undertake a number of commitments in order to be accepted, but the commitments did not explicitly concern media freedom. In the early 1990s, neither freedom of expression nor media freedom in Russia was high on the CoE's agenda (they would become of greater concern after the turn of the new century). Rather, the CoE paid a great deal of attention to the Chechen war. Furthermore, it expressed concerns about general legal reforms in Russia. The country was obliged to reform its penitentiary system by, for example, improving conditions in prisons and abolishing capital punishment. It also had to reform the prosecutor's office, to consolidate human rights organisations, and to adopt a statute on the Commissioner for Human Rights

[138] Resolution 1055 (1995) of the CoE's Parliamentary Assembly "Russia's request for membership in the light of the situation in Chechnya," adopted by the Assembly on 2 February 1995 (7th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16466&lang=en

[139] Resolution 1065 (1995) of the CoE's Parliamentary Assembly "Procedure for an opinion on Russia's request for membership of the Council of Europe," adopted by the Assembly on 26 September 1995 (27th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16476&lang=en

[140] Federal Statute of the Russian Federation "On International Treaties of the Russian federation" No. 101-FZ, of 15 July 1995.

in Russia. Furthermore, legislation reforms were required in the areas of national minorities, political freedoms, and freedom of religion. On the one hand, the CoE's approach can be explained by the fact that as a new democracy Russia had to show improvement in a number of sectors, and moreover, it seemed that the country offered a relatively favourable environment for ensuring freedom of expression and media freedom, given the character of its Constitution and the statute "On Mass Media." On the other hand, the CoE should have noted the problems in these areas that Russia had already faced or would likely face again in the future. Insofar as freedom of expression is a precondition for democracy and for the implementation of other human rights, the CoE should pay considerable attention to free speech issues in Russia.

The year 1995 was a rapid burst of parliamentary acts. While Kovalev (2013) notes that Russia began to intensively improve its national legislation in order to join the CoE, Bowring (1998) argues that the CoE membership per se was needed because of the upcoming 1996 presidential elections. Therefore, the elections became the primary rationale for reforms.

Yeltsin's popularity among Russians was decreasing, mostly because of the lack of economic stability. The leader of the opposition, the communist Gennady Zyuganov, had real chances to win the elections (Colton, 2008). Russia's acceptance to the CoE could be seen by the electorate as evidence of international approval for Yeltsin's political course. Bowring (1998) argues that Yeltsin desired to gain international support and respect for his policies, which were not always democratic at that time.

In 1995, several statutes concerning the media were adopted, among which were the basic statutes on information and on communications. The 1995 Civil Code of the Russian Federation established a base for civil defamation claims, which will be examined in section 2.1. A ban on the dissemination of TV programs advocating pornography, violence, and crime was added to the list of limitations to the freedom of mass information in 1995. The 1995 Statute "On Advertising" sought to provide essential rules for commercials and was designed to protect citizens from overabundance of commercial messages, including in the media. Relevant laws on elections were introduced. Codes for Criminal and Administrative Offences were supplemented with regulations establishing liability for violations of the pre-election canvassing rules. Two statutes on state support for media outlets were adopted, including statutes supporting the local press.

While the "burst" of legal acts helped developing the hybrid half-private, half-state media system, the coverage of the first Chechen war prompted Yeltsin to reconsider his media policies on the eve of the elections (Jackson, 2016). Critical media reports on the war, particularly from NTV, made the war unpopular among the Russian population, which affected Yeltsin's ratings. Jackson argues that this triggered the adoption of the 1995 federal statute "On the Order of Covering Activities of Government Bodies in State Media."[141] The statute obliged state-owned national TV broadcasters to provide full reports on the activities of government officials and to disseminate their official statements. The updated version of the statute is considered in section 2.4.

Furthermore, the year 1995 marked a new stage in the redistribution of TV assets in favour of the Russian tycoons. Because of the 1996 presidential campaign, Gusinsky got full control over the former Fourth TV Channel for his NTV. Berezovsky and Mikhail Lesin, the owner of the big TV production company VID, were given positions in governmental bodies. In 1996, when Russia joined the CoE, it became clear that no further broadcast media democratisation would be possible (Kachkaeva, 2010).

The debates on the issue of Russia's membership in the CoE in the State Duma on the eve of the accession were extremely polarised and animated (Bowring, 1998; Shugrina, 2016). Some deputies considered this membership as a way to solve all problems of Russian democracy. In particular, it was expected that the CoE membership would smooth and facilitate the transition to real democracy (just as it existed in Western European countries). It was also assumed that the CoE's membership would be the precondition for legitimate elections, political opposition, parliamentary control, and human rights protections in Russia. However, some sceptical voices were also heard in the Russian parliament. Most of them observed that huge and nearly impossible obligations would follow from this membership. Some conservative deputies were particularly concerned about the requirement for comprehensive legal and political reforms, which they said, might be unnecessary or even harmful because of Russia's "unique traditions" and its "own distinct way" of development (see Shugrina, 2016). Nevertheless, obligations to the CoE were mainly considered as recommendations, to be enacted or ignored at Russia's discretion (Bowring, 1998). My own analysis of these debates has shown that the Russian deputies mainly misunderstood the mechanisms of the CoE and underestimated the consequences from a membership in the Council.

[141] Federal Statute of the Russian Federation "On the Order of Covering Activities of the Governmental Bodies in the State Media," No. 7-FZ of January 1995.

To accept Russia as a member was not an easy choice for the CoE, but, as some scholars have noted, it was probably the only possible solution (Schönfeld, 2014; Jordan, 2003). The Russian government seemed to adhere to pro-democratic policies, and the CoE could not reject applications from new democracies whose people were hopeful to live in a free and democratic society, as Jordan argues. She notes that the CoE membership was considered the most proper way to integrate new democracies into "political" Europe and its legal regime of human rights. At the same time, Russia's membership was a challenge for the CoE's values and principles, particularly regarding the criteria and commitments of membership.

For instance, the ECtHR's then-President Rolv Ryssdal noted that with Russia's and Ukraine's membership in the CoE, the united ECHR community would be challenged by new factors and traditions and that the new members' legal systems did not satisfy the ECHR requirements (Bowring, 1998). Nevertheless, the majority of the CoE's officials supported Russia's accession. They noted that there could not be a full representation of Europe in the CoE without Russia. Leni Fisher, the then-Chair of the Parliamentary Assembly, stressed that Russia's acceptance would consolidate peace and stability on the European continent (Shugrina, 2016). And Daniel Tarshis, General Secretary of the CoE at the time, noted that Russia's integration was essential for uniting efforts to protect the common values of the CoE member-states (Shugrina, 2016). While Russia's size and geopolitical position were important for the CoE, the impact of this organisation on the countries of the post-Soviet bloc was also significant for both Russia and the CoE. Before Russia's accession, the CoE had accepted almost all Slavic countries,[142] including several former USSR states, such as Lithuania, Estonia, Latvia, Moldova, and Ukraine. In 1999–2001, several other former Soviet republics joined, among them Azerbaijan, Armenia, and Georgia, despite the latter's arguably democratic status.

1996–present: Russian Media Legislation during the CoE Membership

Russia entered the CoE on 28 February 1996 and ratified the ECHR two years later, thus also accepting the jurisdiction of the ECtHR.[143] Since its entrance, Russia has participated in the main CoE institutions, including the Committee of Ministers and the Parliamentary Assembly.

[142] Hungary in 1990, Poland in 1991, Bulgaria in 1992, Lithuania, Estonia, Romania, and Slovakia, Slovenia in 1993; Latvia in 1995; Moldova and the Ukraine in 1995.
[143] Federal Statute of the Russian Federation of 30 March 1998 No. 1998 No. 54-FZ "On Ratification of the Convention on Protection of Human Rights and Fundamental Freedoms as well as Protocols to It."

Kovalev (2013) suggests that, in the area of human rights, the main consequences of Russia's accession to the CoE were the following:

- access to the ECtHR for Russian citizens as an extra guarantee for fair trial;
- Russia's integration to the European community as a country, which is in the process of transit to democracy;
- the ECHR's ratification[144] established the Convention as a part of the Russian legal system having a supreme force, by virtue of Article 15 part 4 of the Russian Constitution;
- accession to the ECHR's high standards by Russian law enforcement bodies;
- subsequent progress of Russian democracy through the upholding of its commitments to the CoE.

However, these democratising instruments could not be properly implemented in Russia on the background of the so-called "information wars" (1996–1999) and of one of the hardest economic crises of 1998. After Yeltsin's victory in the 1996 elections, the oligarchs struggled for power using the media as a weapon. The media market became very politicised, and politics became very "mediatised" (Kachkaeva, 2006). The media were independent from the government, but dependent on big capital, just as Marx and Lenin had predicted.

Propaganda came roaring back and political journalism gradually transformed into "PR-nalism." Journalism had neglected its duties, a trend that Korkonosenko characterises as a "syndrome of mass media asociality" (1997). New notions such as "*kompromat*" (discreditation) and political "*zakazuha*" (dirt-mongering) came into a common use. Having only recently gained a respectful reputation as a profession, journalism's prestige was severely undermined. The media became more dependent on their political donors than on public opinion. All this shaped a social demand for censorship. In 1996, Russia adopted the Criminal Code criminalising dissemination of libel, slander, and insults. The idea of democracy in general became less and less popular.

The formation of national media legislation was virtually frozen (Richter, 2007). Legal rules did not often work and they became, to a greater extent, unnecessary during this period. Efimova acknowledges (2000) that the "ultra-naïve" and "ortho-liberal" approach of pure free speech was not very appropriate for regulating the media. She argues that the liberal workplace rights failed to ensure editorial independence in practice.

[144] Federal Statute of the Russian Federation of 30 March 1998 No. 1998 No. 54-FZ "On Ratification of the Convention on Protection of Human Rights and Fundamental Freedoms as well as Protocols to It."

The main form of control over the media was through administrative manoeuvres, which assumed wide discretion from the authorities (Richter, 2007). Particularly, the government applied several measures in 1999–2000 to control the news coverage of the second Chechen war, among which were the warnings and telegrams sent by the Ministry of Communications to media editorial offices (Jackson, 2016; Richter, 2011a, 2007).

Nevertheless, there were some important signs of media independence from the government. Probably the most illustrative was NTV's popular weekly show *Kukly* (*Dolls*), depicting harsh parodies of the Russian political establishment. Its main character was the pudgy doll Boriska representing Yeltsin in an unfavourable way. Yeltsin was not only tolerant to such satirical criticism, but he also resisted attempts to shut down this programme (Colton, 2008). It was closed under Putin, after it compared him to the little Zaches, a Hoffman's character. In the context of authoritarian media policy, such a programme would be impossible. Therefore, the model of journalism prevailing at the time has been termed "authoritarian-corporatist" (Y. Zassoursky, 2011).

At the last stage of this period, however, the state tried to take back control over the media from the oligarchs. According to Belin, the end of Yeltsin's term had a lot to do with this—for "an acceptable successor" to be elected it was necessary to have support from the media outlets that were "hostile to the government during President Yeltsin's last term" (2002, p. 32). Lipman, Kachkaeva, and Poyker (2017) argue that the consolidation of state broadcasting properties was connected to the 1999 parliamentary elections.

The 1998 Presidential Decree consolidated broadcasting assets into the VGTRK media holding. Thus, the government recaptured control from the regional governors over the eighty-nine regional broadcasting subsidiaries of the VGTRK. The subsidiaries were deprived of legal, financial, economic, and editorial autonomy. In 1999, Berezovsky had to sell his 49% share in ORT to companies affiliated with state structures. The governmental regulations introduced new rules for obtaining broadcasting licenses. The state bodies governing mass media were also consolidated.

Since 2000, when Putin won the presidential elections, the state has considerably and deliberately strengthened its control over the media in Russia, as scholars note (Lipman, Kachkaeva, & Poyker, 2017; Jackson, 2016; Strukov, 2011; Lipman & McFaul, 2010; Arutunyan, 2009; Koltsova, 2006). The subsequent development of mass media legislation continued in two trajectories: it countered threats to the personal interests of Russian authorities, which they "usually represented as being national" interests (Richter,

2007, p. 512) or consolidated dependence of the media on the state by deteriorating the industry's economic conditions.

On 9 September 2000, Putin approved the Doctrine of Information Security of the Russian Federation (ITU, 2008), which established the first trajectory for legal developments on freedom of speech. Reminiscent of Lenin's argument against unlimited free speech in order to counter internal and external enemies of the Soviet ideology, the doctrine states that Russian "national interests" require protection from "internal and external informational threats." According to the doctrine, various foreign and international organisations, including criminal and terrorist groups, act against Russian "national interests" with the aim to intentionally weaken the state's influence on Russian society and to reinforce Russia's "dependence" on foreign sources of information for the "spiritual, economic, and political spheres of a social life."

The doctrine gave rise to anti-extremist legislation, which emerged under the pretext of combating terrorism (see section 2.2).

Fedotov (2001) argues that private media, rather than hackers or terrorists, were, according to the doctrine, the prime threat to the safety of information in Russia. The doctrine explicitly stated that the media posed a particular threat by "restricting freedom of thought" in Russia and propagating moral values alien to Russian society. This document is intended to protect the new official ideology and the rhetoric it uses significantly resembles that of Lenin.

Several amendments to Article 4 of "On Mass Media" created new bounds for freedom of mass information. Alongside the ban on disseminating information through mass media on how to develop, produce, and use drugs, the amendments passed in 2000 prohibited the dissemination of illegal information banned by any national legal act. This means that repeated defamation or the dissemination of misleading commercials (prohibited by national laws) may result in the media outlet's closure. In 2001, Russia adopted a new Code of Administrative Offences, which established a mechanism for a media shutdown in cases when editorial offices violate the freedom of mass information.[145]

In 2002, Russia adopted new anti-extremist and anti-terrorist policies and reconsidered Article 4. Bans on threats for a violent overthrow of the regime, on advocacy of war, and on calls for intolerance or hatred were substituted by a broader ban on any

[145] Code of the Russian Federation of Administrative Offences of 30 December 2001 No. 195-FZ 30.12.2001 N 195-ФЗ. See Article 13.15.

"extremist materials" in the media. They also restricted the opportunities for journalists to cover issues concerning terrorism (see section 2.2).

In 2003, "On Mass Media" was supplemented by Article 16.1 allowing the suspension of outlets during elections or referendum campaigns.[146] The courts may suspend the activities of mass media outlets for the entire duration of election or referendum campaigns, which means prohibiting such outlets from informing the people about these events.

The second trajectory was outlined in the 2002 speech that the president gave at the meeting with delegates of the All-Russia Conference entitled "The media industry: Directions for reforms." The speech promoted a business-oriented approach to mass media. This created a narrative that journalism's role is to gain profits, rather than to serve as a watchdog. However, in Russia "the worlds of politics and business are merged" (Smaele, 2010, p. 58) and political motives are dominated by commercial interests (Lipman, Kachkaeva, & Poyker, 2017). Eriomin (2011) interprets Putin's speech as a directive to further develop a "paternalistic" model. A year ahead of his speech, Putin's decree established a national monopoly in the dissemination of terrestrial signals, the state broadcasting communication network Russian TV and Radio Broadcasting Network (*Rossijskaja Televizionnaja i Radioveshhatel'naja Set'* or RTRS).

In 2001–2006, the whole system of legislation guaranteeing a balanced state support for the press was gradually abolished. Without the relevant legislation, the government could create discrete "favourable" conditions for accepting its paternalist model by journalists because the media were gradually deprived of various sources of funding. Sub-sovereign entities were virtually deprived of the opportunity to pass their own mass media legislation due to changes in the statute "On Mass Media." The changes constrained the establishment of TV and radio programming by foreign companies and by Russian companies with foreign stakeholders.

The media empire of the oligarchs was destroyed in 2000–2003. Gusinsky, owner of the Media Most holding company, was charged with criminal offence in 2000. He was

[146] Article 16.1 stated that if an editor or editorial office of an outlet repeatedly violated the Russian Code of Administrative Offences during elections or referendum campaign, the Central Election Commission[146] of the Russian Federation or of a certain region has the right to appeal to the registering body to suspend the activities of this media outlet. The Central Election Commission of the Russian Federation a collegial governmental body organizing elections or referendum and acting independently from other governmental bodies. Under the law, the registering body promptly checks the facts and rejects the Commissions appeal or issues a warning, or files a lawsuit on suspension. It must file a lawsuit on suspension if courts ruled on violations of the Russian Code of Administrative Offences more than twice. According to Article 16.1,

pushed to surrender his main media asset, NTV, to Gazprom, which suddenly required from Gusinsky a repayment of the enormous loan that it had given him to develop his media empire. A landmark case against NTV and its seizure resulted in a new owner, new general manager, and a new editor-in-chief along with a complete change in policy. The end of NTV was interpreted as the end of independent TV journalism or as "a cautionary tale" for the whole media industry in Russia (Belin, 2002, p. 41).

After the change in policy, many journalists moved from NTV to TV-6, owned by the Moscow Independent Broadcasting Corporation (*Mosckovskaja Nezavisimaja Veschatel'naja Korporatsija* or MNVK), which in turn was owned by Berezovsky. However, it too was soon shut down because of a lawsuit allegedly about company debt. A new channel, TVS, created in place of TV-6, also had financial difficulties, so MNVK granted the state-owned Sport TV station the right to broadcast on their sixth channel. In 2003, Berezovsky was forced to sell MNVK to unknown buyers and had to renounce control over ORT (now *Pervyi Kanal* or First TV Channel). After the change in ownership, ORT also changed its programming policy and was renamed First TV Channel in 2003. Formally, all these disputes were presented as purely a "conflict of economic entities" rather than disputes involving free speech issues. They led to a significant decline of private media, depoliticisation of journalism, and a return of state propaganda, mainly on TV.

Since the 2000s, there has been "an unannounced moratorium" on the drafting of a statute on broadcasting in Russia (Richter, 2010). In 2000, such a draft proposed the creation of public service broadcasting, but it was defeated. In 2003, the State Duma rejected a statute on public service broadcasting prepared by the Foundation for the Development of Public Broadcasting, a lobbying and research centre supported by the Russian Union of Journalists. In 2006, the Foundation undertook its last attempt to assist in the creation of a public service broadcaster. The idea was to transform a local state-run broadcaster into a public service media organisation or to fund a new company with money from the regional budget. However, local authorities rejected these initiatives on the formal grounds that the broadcasting sector should be governed exclusively by federal regulations.

The state of media freedom in Russia has been criticised in PACE's resolutions many times since 2002. In the first half of the 2000s, PACE outlined obstacles for media freedom such as Russia's improper regulation of secret services, harassment of

journalists, cases of abusive application of defamation, and lack of media pluralism.[147] However, since the mid–2000s, PACE has gradually extended the list of changes necessary to improve media freedom in Russia, which some Russian scholars have interpreted as attempts to interfere in the country's national political life (Shugrina, 2016). Since that time, Russian authorities' negative reaction to the CoE's attempts to force the country to perform its commitments has become more pronounced. The Russian government often stressed that it was among the main contributors to the CoE budget (TASS, 2016), which may imply that it expected that some of its obligations would be lessened or, probably, ignored.

In 2005, the PACE noted that the lack of political pluralism was strengthening "vertical" power in Russia.[148] It also noted the worsening situation of human rights. From the PACE's perspective, Russia's political problems posed "a threat to the political stability, economic progress and the normal functioning of democratic institutions in the country," and it condemned the reform of electoral legislation, calling for its revision.

The PACE specifically addressed the lack of independence in Russian broadcasting media. It urged the country to create

> conditions for pluralist and impartial broadcasting media by:
>
> a. establishing an independent public service broadcaster and an independent regulatory authority for the broadcasting sector in line with Council of Europe standards;
>
> b. improving the conditions for the normal functioning of private nation-wide broadcasting media, which must be free of state interference.[149]

By contrast, the Russian government has significantly extended and improved state media assets. In 2005, it created Russia Today, a TV station promoting the Russian governmental perspective abroad. Russia Today is owned by TV-Novosti founded by the Russian state-run news agency RIA Novosti. In 2008, the government included TV-Novosti on the list of organisations of national "strategic importance."

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[147] Resolution 1277 (2002) of the CoE's Parliamentary Assembly, "Honouring of obligations and commitments by the Russian Federation," adopted on 23 April 2002 (11th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16991&lang=en; Resolution 1455 (2005) of the CoE's Parliamentary Assembly "Honouring of obligations and commitments by the Russian Federation," adopted on 22 June 2005 (21st Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17354&lang=en

[148] Resolution 1455 (2005) of the CoE's Parliamentary Assembly "Honouring of obligations and commitments by the Russian Federation," adopted on 22 June 2005 (21st Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17354&lang=en

[149] Resolution 1455 (2005) of the CoE's Parliamentary Assembly "Honouring of obligations and commitments by the Russian Federation," adopted on 22 June 2005 (21st Sitting).

Despite the constitutional ban on censorship, censoring practices have been brought back in an obfuscated or "soft" form. Richter (2008a) outlines several types of soft censorship practiced in the post-Soviet countries at that time: among them is the so-called "telephone censorship" when the authorities "informally" dispense guidance to media editorial offices; abuse of regulatory or supervisory powers; and abuse of state subsidies or monopolisation. The Kremlin began the practice of delivering its programming directives to media executives of national channels at informal meetings or by speaking to them on special phone lines (Lipman, Kachkaeva, & Poyker, 2017). Nevertheless, as scholars suggest, such co-optation has not been coerced, it functions under no pressure. Pasti's empirical study has shown that Russian journalism accepts its "political function" of "a propaganda machine" and that "the former political agitators have been 'modernized' into contemporary PR workers" (2005, p. 110).

Due to the Chechen wars, Russia was among the leading nations in the number of murdered journalists (CPJ, 2016), but the 2006 assassination of Anna Politkovskaya, a famous journalist from *Novaya Gazeta*, stirred the world. She had fiercely criticised the Russian national authorities, and especially the president, for the policies in Chechnya. She had blamed Russian security forces for abuse of human rights. The CoE, the OSCE, and the EU sent letters of appeal to the Russian government calling for investigation into her assassination and reminding Russia of its commitments regarding the right to freedom of expression. The reaction of the Russian authorities was ambivalent, however (Goldfarb, 2014). Putin stated, on the one hand, that it had been a "hideous crime" and promised to investigate it. On the other, he alleged that the degree of Politkovskaya's influence in political life in Russia had been "very insignificant" because she was mainly known outside the country. Therefore, he said, her murder was by far more harmful to the Russian leadership than her publications. Only in 2014 were her killers tried and convicted, but who hired them remains unknown. This murder signalled that independent journalism was at risk in Russia, even in peaceful times.

Schönfeld (2014) notes a change in Russia's attitude to its commitments to the CoE since 2005. My analysis of official materials and documents of the Russian Foreign Ministry pertaining to Russia's membership to the CoE[150] has also confirmed this trend. It has shown that since 2005 Russia's interests as a CoE member-state have been mostly

[150] See the section "Council of Europe" on the official web site of the Ministry of Foreign Affairs of the Russian Federation. Retrieved from http://www.mid.ru/en/foreign_policy/rso/coe?currentpage=main-country

limited to the issue of "information safety" and the promotion of Russia's specific political perspective on this issue at the CoE level, and particularly among other post-Soviet countries.[151]

In 2005–2010, several media assets fell into possession of the media empire of Yurii Kovalchuk, a Russian businessman and "a friend of the Russian President," as BBC (2014) notes. In 2005, he obtained a number of regional stations and became the main owner of the Fifth Channel, which during Soviet times had been Leningrad's TV Channel of the Central TV. It then was Saint-Petersburg's local station, but after becoming Kovalchuk's property, the channel received the status of a national station. In 2008, Kovalchuk purchased REN TV, which had been a private TV station with an independent editorial policy. In 2010, he became the owner of VI (Video International), now the biggest seller of TV advertisement in Eastern Europe (through Rossija bank). As Lipman, Kachkaeva, and Poyker argue in a forthcoming publication, political and economic motives "smoothly fit together" in this situation.

Commercial interests may explain why some of Russia's legal initiatives of that period can be seen to reflect "Western-style" legal rules. In 2006, Russia adopted a new copyright law, the Fourth Part of the Civil Code, providing more opportunities to commercialise copyright; however, the level of piracy in Russia remained very high. The Soviet practice of disregard of copyright continued, and was largely unquestioned by the government (Kiriya & Sherstoboeva, 2015). The new 2006 statute on advertisement was more progressive, but it increased limitations on the use of advertisement in the news media.

Only in 2006–2009 Russia started to form legislation to implement the constitutional guarantee on freedom of information. The 2006 Federal Statute "On Information, Information Technologies, and Protection of Information" (or "On Information," for short) proclaimed the free access to information about governmental activities and provided several principles—for example, openness and transparency—underlying such access. New statutes on access to governmental and court information were ultimately adopted in 2008–2009. Most notably, they established a mechanism for citizens to request information, obliged state bodies and courts to create and update public websites, and gave citizens the right to visit open meetings. Such advantages

[151] See, for instance, http://www.mid.ru/ru/foreign_policy/rso/coe/-/asset_publisher/uUbe64ZnDJso/content/id/253246; http://www.mid.ru/ru/foreign_policy/rso/coe/-/asset_publisher/uUbe64ZnDJso/content/id/253246;

notwithstanding, these legislative measures are imperfect—they have many loopholes that can be used to circumvent the statutes' prescriptions and that allow state bodies to either provide or withhold information at their discretion. For instance, governmental bodies can arbitrarily close their meetings to the public and choose which information to omit from their public websites.

The 2008 Presidential Decree reorganised the system of state agencies regulating the media. The Ministry of Communications and Mass Communications (*Minkomsvjiaz*) replaced the Ministries of Culture and Mass Communications and of Communications and IT. For Eriomin (2011, p. 120) technological changes are the impetus for this reorganisation, but he recognises that, as a result, the state got new "administrative factors to shape the state policy on mass media." Furthermore, the new legislation considerably extended the power of one of the subordinated federal bodies, Roskomnadzor (the Federal Agency on Supervision in the sphere of Communication and Mass Communications), transforming it into an institution resembling the Soviet official organs of censorship (see section 1.10).

In 2010, Russia adopted a basic statute for the protection of the public's morals. The Federal Statute of the Russian Federation "On Protection of Children from Information Causing Harm to Their Health and Development" seeks to prevent children from being exposed to content that contains violence, obscene material or words, and that encourages them to smoke or to drink alcohol. The statute determines what pornography is and provides criteria for rating all media information. While the Russian Constitution allows limitations on the freedom of expression in order to protect morals, the criteria outlined in the statute are fairly confusing and the main supervisor of the statute's implementation is Roskomnadzor, rather than parents.

In 2009–2010, the PACE reacted to the growing restrictions. It found that the Russian government had ignored the PACE's previous objections, and it made its criticism more specific.[152] The 2009 resolution exposed the progressive decline in Russian media pluralism and the increase in self-censorship throughout different media. It urged the Russian government to revise the legislation on countering extremist activities. The Assembly also stated that it welcomed the drafting of a new media law, which would

[152] Resolution 1676 (2009) of the CoE's Parliamentary Assembly, "State of human rights in Europe and the progress of the Assembly's monitoring procedure," adopted on 24 June 2009 (23rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17757&lang=en; Resolution 1747 (2010) of the CoE's Parliamentary Assembly, "State of democracy in Europe and the progress of the Assembly's monitoring procedure," adopted on 23 June 2010 (24th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17886&lang=en;

provide "for a clear list of the rights of journalists."[153] However, it is not clear which draft was the PACE referring to, because no new draft media law had been discussed in Russia since the mid–2000s. The 2010 resolution further condemned the fact that assassinations of Russian journalists had not stopped in the country. It also purposely addressed the problem of excessive media ownership concentration or oligarchic control of media outlets.

Despite this, Russia introduced new limitations to media regulation in 2011. The shift to a new phase was caused by the rapid development of new information communication technology (ICT). The increase in Internet users in Russia reached an enormous 1,826% from 2000 to 2010 (RIA Novosti, 2010). In 2009, Russia pulled ahead of all other countries in terms of number of users of social networks (RIA Novosti, 2010), which made this form of new media particularly powerful and capable of shaping public opinion.

Prior to the 2011 considerable amendments of the statute "On Mass Media," new media in Russia had developed comparatively free of state control over its content and activities. The amendments, however, consolidated government control over the broadcasting media (see section 2.4) and provided specific restrictions to the freedom of new media (see section 2.3). The powers of Roskomnadzor were extended.

The active role of the Internet in the Russian mass protests of 2011–2012 encouraged the rapid increase of state control over online speech. Since then, the Russian regime has considered the Internet as one of the main threats to its "national interests" or, as Asmolov (2015) has observed, the Internet plays the role, alongside the United States, of Russia's external enemy, which may explain attempts by the Russian state to establish a national intranet. Because the Internet has helped to disseminate political dissent coming from within Russia as well as from abroad, Russian legislation abounds with regulation controlling the online activities of global companies and users, although commercial interests also drive these limitations.

Parliamentary acts have become the main legal source for media regulation. The president has formally distanced himself from forming media law. The Russian parliament has often adopted such statutes, but without proper public debate.

Russia has adopted numerous amendments curtailing the freedom of expression and freedom of mass information and "undermining the country's democratic ambitions"

[153] Resolution 1676 (2009) of the CoE's Parliamentary Assembly, "State of human rights in Europe and the progress of the Assembly's monitoring procedure."

(Heuvel, 2012, p. 5). For example, it re-criminalised "defamation" (see section 2.1), strengthened surveillance of online users, online content, bloggers, social media, messengers, and news aggregators (see section 2.3). It introduced blacklists of websites, banned peaceful protests, and limited the rights of NGOs in Russia (the so-called "law on foreign agents"). It also extended anti-terrorist and anti-extremist rules (see section 2.2). The PACE's Resolution 1896 (2012)[154] condemned these laws. It critically stated that "[t]hese texts illustrate how full of contradictions the political situation in the Russian Federation is and can only call the authorities' real intentions into question."[155]

In general, the PACE proclaimed the need for comprehensive political reforms in Russia.[156] It criticised the significant shortcomings of the parliamentary and presidential elections in 2011–2012.[157] It expressed support for peaceful mass protests in Russia and condemned the detention of demonstrators.[158] The PACE also condemned the suppression and harassment of civil society in Russia.[159] It noted that "harassment, beatings and murder of engaged citizens" are not uncommon in the country, and called attention to the fact that the murders of journalists and human right defenders Politkovskaya and Natalia Estemirova had remained unpunished. It also urged the country to stop attacks on religious communities through its "extremist" legislation.[160]

The PACE condemned the undue governmental control over social media and the Internet in Russia blaming the country for online filtering and cyberattacks on opposition websites.[161] Despite these warnings, the Russian government has applied extensive administrative measures, such as blocking of specific content or of entire websites. As of

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[154] Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation," adopted on 2 October 2012 (31st Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19116&lang=en

[155] Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation," adopted on 2 October 2012 (31st Sitting).

[156] Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation," adopted on 2 October 2012 (31st Sitting).

[157] Resolution 1895 (2012) of the CoE's Parliamentary Assembly, "The progress of the Assembly's monitoring procedure (June 2011-May 2012)," adopted on 29 June 2012 (27th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18964&lang=en

[158] Resolution 1895 (2012) of the CoE's Parliamentary Assembly, "The progress of the Assembly's monitoring procedure (June 2011-May 2012)"; Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation," adopted on 2 October 2012 (31st Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19116&lang=en

[159] Resolution 1895 (2012) of the CoE's Parliamentary Assembly, "The progress of the Assembly's monitoring procedure (June 2011-May 2012)."

[160] Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation."

[161] Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation."

January 2017, almost 1,3 million websites have been unlawfully blocked in Russia, according to the statistical data of the Russian NGO Roskomsvoboda.[162]

The resolution 1896 (2012)[163] also criticised new regional laws that limit freedom of speech and assembly with regards to homosexuality and Russia's intention to adopt similar measures on a federal level. It also called the Russian government to immediately release the members of the protest punk rock music band Pussy Riot who had been sentenced to two-year imprisonment.

A critical case against the three members of Pussy Riot—Maria Alyokhina, Yekaterina Samutsevich, and Nadezhda Tolokonnikova—followed after their public performance in the Cathedral of the Christ the Saviour located in the centre of Moscow. Wearing colourful balaclavas, the band members gathered at the altar[164] of the cathedral and tried to sing the song "Mothers of God, put Putin away" while dancing and moving around. In less than a minute, they were stopped by security guards and accompanied outside (Pussy Riot, 2012). Several weeks later, Alyokhina, Samutsevich, and Tolokonnikova were arrested and charged with "hooliganism motivated by religious hatred" (BBC, 2013a). From their side, the band members explained that their performance was an act of protest against the support of the Orthodox Church leaders for Putin during his election campaign at the time.

The Khamovniki District Court found them guilty and sentenced them to two years in a penal colony in August 2012. The conviction of the band captured international attention. Amnesty International (2012) declared them prisoners of conscience and urged the state to release them. Calls for their release and criticism of their conviction were also expressed by many other international non-governmental organisations, such as Article 19 (2012), Freedom House (2012), and Human Rights Watch (2012). Famous performers like Madonna, Sting, Paul McCartney, and Bjork called for their release (BBC, 2013a). Protest actions in support of Pussy Riot were held in several countries around the world. The colourful balaclavas became a symbol of protest (BBC, 2013a). In Russia, the reaction to this trial was controversial, but most people neither sympathised with the band nor believed that the trial was politically motivated, and assumed that the trial was fair (Newsru.com, 2012).

[162] See the official website of Roskomsvoboda at: https://reestr.rublacklist.net/visual
[163] Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation."
[164] It is an elevated place in a church, at which religious ceremonial acts are performed and which is considered to be sacred.

Despite the PACE's resolution issued in October 2012, the Moscow City Court, which considered the appeal of the case that month, upheld the previous ruling with regards to Tolokonnikova and Alyokhina. Samutsevich was freed on probation because she in fact had not participated in the protest, having been stopped by security guards before reaching the altar (RAPSI, 2012). Commenting on this trial to an NTV journalist, Putin said that the sentence was "right" because Pussy Riot's performance undermined Russia's "moral foundations" ("Putin deems," 2012). Less than a month later, the Zamoskvoretsky District Court qualified as extremist several of Pussy Riot's videos, including the video of their performance in the cathedral, and ordered the ban of the videos' dissemination offline and online (RAPSI, 2012). In June 2013, Russia amended the Criminal Code to criminalise acts that could be perceived as insulting the religious feelings of others (see section 2.2). In December 2013, the Supreme Court found mistakes in the lower courts' considerations in this case and sent the case back for re-consideration, which resulted in a reduction in the defendants' sentences. That month, Tolokonnikova and Alyokhina were released on amnesty for non-violent offenders and mothers of minors.

Since 2012, the government has been intervening in the private life of Russian people: the rhetoric on protection of national interests often engages ideas of "spiritual renewal" and "patriotism." Russia passed a federal ban on propaganda for "untraditional" sexual relationships. In 2013, obscene language was included on the list of "freedom of mass information abuses" in Article 4 of "On Mass Media," and could be used, therefore, as a justification for a media outlet's closure. Additionally, the article also banned the disclosure of any personal information about minors injured or harmed by illegal actions.

Nevertheless, the PACE suggested that Russian authorities open "a window of opportunity" by declaring their readiness to reform the system.[165] The 2012 resolution noted some progress as to the decrease in the number of cases of violence against journalists and the establishment of a public media service. However, it soon became clear that a public media service would be in fact a new state-owned outlet. Since 2013, Russia has also intensified the state propaganda of its "national interests" within the country and abroad. In 2013, a presidential decree substituted the main news agency RIA Novosti, which was state-run but known for its liberal views, by a new international news agency entitled Russia Today. Indeed, there have been less incidents of violence against

[165] Resolution 1896 (2012) of the CoE's Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation."

journalists, but, overall, Russian society has become very hostile to independent journalism, something that was acknowledged by the PACE. In its Resolution 1920 (2013), "The State of Media Freedom in Europe,"[166] it welcomed the convictions of the murderers of Anastasia Baburova, a Russian journalist from *Novaja Gazeta,* and Stanislav Markelov, a human rights defender, but urged Russia "to further investigate the personal environment of these murderers in order to find possible collaborators and to combat effectively those environments which are hostile to media freedom." The resolution called on the Investigative Committee of the Russian Federation[167] to further investigate several murders of and physical attacks against journalists in Russia. Additionally, the Assembly criticised the prosecution, detention, and imprisonment of Internet users for political criticism of the government in several countries, including Russia. The document repeated the key role of media freedom before and during elections, and called on Russia as well as on other members to correct deficiencies found in election observation reports.

In this resolution, the PACE for the first time specifically addressed investigative journalism and the case of Sergei Magnitsky. In the West, this case became "a symbol of the fight against corruption in Russia" (see BBC, 2013b). Being a legal adviser for London-based Hermitage Capital Management (HCM), Magnitsky exposed an enormous theft by Russian tax officials and police officers. After reporting to the authorities about the fraud, he was detained in 2008 on allegations of tax evasion. At the age of 37, Magnistky died in Russian custody in November 2009 allegedly after he was severely beaten. His colleagues at HCM claimed the case against him was fabricated to freeze his investigations. In 2009, Russia started the official investigation of this case, but it was largely ineffective. In 2013, the Russian Investigative Committee stopped the investigation, claiming that the arrest of Magnitsky was legal and that he had not been beaten. Despite his death, he and his former boss, US-born investment fund manager Bill Browder, were found guilty of tax fraud by a Moscow court on 11 July 2013.

It seems that the PACE's suggested "window of opportunity" to force the Russian government to make changes closed in 2014 with the PACE's resolution on Magnitsky's

[166] Resolution 1920 (2013) of the CoE's Parliamentary Assembly, "The state of media freedom in Europe," adopted on 24 January 2013 (8th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19474&lang=en

[167] Established in 2011 under the Russian president.

case[168] and Crimea's annexation.[169] These issues remain very sensitive for the Russian government. The PACE urged the Russian authorities to fully investigate the circumstances and background surrounding Magnitsky's death and to hold all officials involved in this case under possible criminal responsibility. If the Russian government fails to do so, the PACE stated in the amendments to its resolution, it would recommend that other CoE members introduce sanctions against Russia, following the example of the United States.[170] The Russian Ministry of Foreign Affairs criticised the resolution and claimed that the CoE's approach was counterproductive (Newsru.com, 2014). The Magnitsky case has not been properly investigated so far. A subsequent PACE resolution stated that Crimea's annexation had violated international law, including UN and OSCE standards.[171] Russia's military actions in Ukraine were assessed as a threat to Ukraine's sovereignty and to European stability and peace.

Since 2014, almost all problems concerning Russian media policies have been mentioned by the PACE in the context of the Ukrainian conflict. The most worrisome issue was the "crackdown on the independent media, including online media and journalists" in Russia.[172] In particular, the PACE noted that Russian media had provided a "biased coverage of the events in Ukraine" [173] and had used manipulations instigating interethnic instability in the neighbouring country. The state-run TV station Russia Today has often been criticised for disseminating disinformation and ideological bias. Ofcom, the British broadcasting regulator, found that Russia Today had violated ethical standards when reporting on the Ukrainian conflict (Ofcom, 2015).

Against the backdrop of the 2014 economic sanctions and decline of the Russian national currency, funding of state media has become increasingly costly, also because the Russian advertising market was experiencing a crisis. The Russian government had

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[168] Resolution 1966 (2014) of the CoE's Parliamentary Assembly, "Refusing impunity for the killers of Sergei Magnitsky," adopted on 28 January 2014 (3rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20409&lang=en; See also Recommendation 2031 (2014).

[169] Resolution 1990 (2014) of the CoE's Parliamentary Assembly, "Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation," adopted on 10 April 2014 (16th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20882&lang=en

[170] The Magnitsky's case damaged relations between Russia and the United States and instigated the adoption of the Magnitsky Act in the United States in 2012 imposing sanctions on a group of Russian officials. A few days after, Russia reacted by prohibiting Americans from adopting Russian orphans.

[171] Resolution 1990 (2014) of the CoE's Parliamentary Assembly, "Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation."

[172] Resolution 1990 (2014) of the CoE's Parliamentary Assembly, "Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation."

[173] Resolution 1990 (2014) of the CoE's Parliamentary Assembly, "Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation."

to reduce its funding of the state-run media, which nevertheless remained substantial. In 2016, the national budget allocated 94,6 billion rubles (more than 1,5 billion euro) in media funding, of which Russia Today received the largest portion (26,4%) (Bryzgalova, 2016a).

In order to keep control over public opinion, the government had to provide new privileges in the broadcasting sector to loyal business circles and to state-run companies, and legislation, which is not immune to governmental interference, is one of the ways to ensure such privileges (Lipman, Kachkaeva, & Poyker, 2017). The most recent redistribution of media assets was instigated by the legislation tightening foreign media ownership in Russia since 2001. The 2014 amendments to "On Mass Media" limited such ownership to 20% (restrictions for foreigners are examined in section 2.4). Although this law came into force in 2016, it has already significantly changed the Russian media market. Some experts say that these amendments have inevitably led the Russian media sector to a catastrophe (Milosh, 2015).

Several alternative private news outlets came under pressure. Fearing the loss of their non-media businesses, some wealthy media owners had to force the top management of their outlets to either comply with the Kremlin's policies or lose their jobs (Lipman, Kachkaeva, & Poyker, 2017). In 2014, Aleksandr Mamut, a tycoon owning several media companies in Russia, fired the editor-in-chief of the independent and extremely popular information agency Lenta.ru (Luhn, 2014). The general director of the liberal radio station Ekho Moskvy was replaced by the senior editor of the state-run radio station Golos Rossii (Luhn, 2014). In 2016, RBC, the biggest independent news company in Russia dismissed its three top editors (Meduza, 2016).

Administrative methods of pressure were also applied. The independent private TV station Dozhd, which demonstrated sympathy with the Russian opposition, was dropped by the main cable operators and its contract for renting offices in a building in the Moscow city centre was not renewed.

In 2011–2016, the Russian authorities significantly interfered with the activities of twelve newsrooms, as the independent news media Meduza (2016) argues. Meduza was created by the former journalists from Lenta.ru in Latvia, which was labelled a "political Website in exile" by Lipman, Kachkaeva, and Poyker (2017).

It seems, however, that censorship garners the support of Russians. A 2010 questionnaire on the mass media, conducted by the Russian sociological company VTSIOM, showed that more than half of the population (58%) supports the need for

censorship because mass media is "oversaturated" by violence, vulgarity, and misinformation (Fedorov, 2010). In 2015, research of the Internet Policy Observatory indicated that nearly half of Russians support online censorship (Center for Global Communication Studies, the University of Pennsylvania and the Russian Public Opinion Research Center, 2015).

Several PACE resolutions of 2014–2016 have observed the suppression of voices critical of Russia's annexation of Crimea.[174] The PACE condemned threats and actions against independent and critical media outlets. It called for a reversal of the closure of the Crimean Tatar television channel ATR, and urged the Russian government to discontinue pressure on Tatar media by means of extremist legislation. [175] In general, the PACE noted that the Russian government tended to use speech and media regulation as a tool of repression. It stated: "Through the setting-up and the application of a repressive legal framework, Russian authorities have placed restrictions on opposition movements, independent media and civil society, thus hindering the freedoms of expression and of assembly." [176] However, Russian authorities have not properly addressed this criticism so far. The new *de facto* Crimean government not only has closed almost all independent Crimean Tatar news organisations, it also launched in 2016 a new TV channel in the Crimean Tatar language with the aim to counter "anti-Russian propaganda," as one Crimean deputy prime minister said ("Pro-Russian Crimean Tatar TV channel," 2016).

[174] Resolution 1990 (2014) of the CoE's Parliamentary Assembly "Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation;" Resolution 2034 (2015) of the CoE's Parliamentary Assembly "Challenge, on substantive grounds, of the still unratified credentials of the delegation of the Russian Federation," adopted on 28 January 2015 (6th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21538&lang=en; Resolution 2063 (2015) of the CoE's Parliamentary Assembly "Consideration of the annulment of the previously ratified credentials of the delegation of the Russian Federation (follow-up to paragraph 16 of Resolution 2034 (2015))," adopted on 24 June 2015 (24th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21956&lang=en; Resolution 2132 (2016) of the CoE's Parliamentary Assembly "Political consequences of the Russian aggression in Ukraine," adopted on 12 October 2016 (33rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23166&lang=en

[175] Resolution 2133 (2016) of the CoE's Parliamentary Assembly Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities, adopted on 12 October 2016 (33rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23167&lang=en

[176] Resolution 2063 (2015) of the CoE's Parliamentary Assembly "Consideration of the annulment of the previously ratified credentials of the delegation of the Russian Federation (follow-up to paragraph 16 of Resolution 2034 (2015))," adopted on 24 June 2015 (24th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21956&lang=en

In 2014, the PACE suspended the Russian delegation's rights to vote and to be represented in the Assembly's publications.[177] This was, most likely, a difficult decision for the PACE to make. It had previously warned many times the Russian delegation about limiting or suspending its authorities in the Assembly, but had not acted upon these warnings. As Jackson (2004) notes, this decision was neither in the interests of the CoE nor of its other main members who wanted to influence Russian policies. One could interpret this suspension of rights as the PACE's acknowledgment that political pressure is ineffective in addressing Russia's problems. The suspension had no effect in Russia, apart from criticism of the PACE by some officials. The Russian Foreign Ministry claimed that the PACE had become "a generator of biased and politically motivated resolutions."[178] After the sanctions were renewed, the Russian delegation decided not to patriciate in upcoming sessions, but to retain participation in other CoE institutions, including the Committee of Ministers (TASS, 2016).

Nevertheless, the PACE kept on monitoring the situation in Russia. In 2015–2016, it addressed issues with the rule of law and "spy mania" cases in the context of the Ukrainian conflict.[179] The Assembly expressed regret that the Ukrainian conflict in general and Russia's actions in particular had "undermined the overall stability and security on our continent as well as the advancement towards a strategic partnership with the Russian Federation over the last few decades."[180] The PACE acknowledged that there was a deep conflict between Russia and the CoE.

In general, Russia joined 60 of the 219 CoE conventions.[181] Alexei Meshkov, Vice-Minister of Foreign Affairs justified this selective approach by claiming in 2016 that Russia had joined only those acts that were of real interest to the country (TASS, 2016).

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[177] Resolution 1990 (2014) of the CoE's Parliamentary Assembly "Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation of the CoE's Parliamentary Assembly."

[178] Reply by Foreign Ministry Spokesman Alexander Lukashevich to a media question about the situation following the stripping of the Russian delegation of its right to vote in the Parliamentary Assembly of the Council of Europe. 30 January 2015. Retrieved from http://www.mid.ru/en/foreign_policy/rso/coe/-/asset_publisher/uUbe64ZnDJso/content/id/917167

[179] Resolution 2095 (2016) of the CoE's Parliamentary "Strengthening the protection and role of human rights defenders in Council of Europe member States," adopted on 28 January 2016 (8th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22500&lang=en; Resolution 2028 (2015) of the CoE's Parliamentary "The humanitarian situation of Ukrainian refugees and displaced persons," adopted on 27 January 2015 (4th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21480&lang=en;

[180] Resolution 2132 (2016) of the CoE's Parliamentary "Political consequences of the Russian aggression in Ukraine," adopted on 12 October 2016 (33rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23166&lang=en

[181] As of March 2016.

In 2016, the so-called "Yarovaya Law" introduced in Russia new policing and counterterrorism measures, which "directly echo the sweeping powers wielded by the KGB to stifle dissent and repress opposition activists throughout the Soviet era," as the RFL/RL argues (Eckel, 2016). Edward Snowden, a whistleblower responsible for the largest leak in modern US history and who was granted asylum in Russia, labelled the date of the statute's adoption a "black day" for Russia. He also likened the effect of the statute to the imposition of an "Internet tax" since compliance with this new law would cost Russian online businesses an estimated more than 33 billion dollars (nearly 31 billion euro).[182]

On 6 December 2016, Putin's decree approved a new Doctrine of Information Security of the Russian Federation,[183] which develops the main provisions of the doctrine from 2000, but the rhetoric of the new doctrine seems to get even closer to Lenin's stances and Soviet rhetoric in the period of the Cold War. The doctrine points out the attempts of "several countries" to destabilise the political and social situation in Russia in order to undermine the country's national sovereignty "in military purposes." This is one of the main threats to Russia, the doctrine observes. It states that these countries use information technologies and involve in their undermining activities "religious, ethnic, and other human rights organizations" as well as individuals. Their methods also include discrimination of Russian media abroad, interference with the professional activities of Russian journalists as well as general "information influence" over Russia's population to "blur traditional Russian spiritual and moral values." Other threats come from terrorist, extremist, and foreign hackers, as the document says. The doctrine proclaims the task to neutralise these threats by various measures including better national militarisation and protection of state secrets, national regulation of the Internet, spiritual education for the people, and promotion of Russia's perspective on the international stage.

Overall, scholarly theories, which argue that the mid-1990s were a turning point in the development of media legislation in Russia, are also applicable when considering the development of such legislation in light of the CoE standards. In those years, Yeltsin focused his policies on the grip on power and, therefore, set the wheels in motion to promote his political image of a pro-democratic politician. Both media regulation and the CoE accession were among the main tools to reach the personal goals of the political

[182] See Edward Snowden's Twitter account at: https://twitter.com/snowden?lang=ru
[183] Doctrine on Information Safety. Adopted by the Decree of the President of the Russian Federation on 5 December 2016 No 646. Retrieved from https://rg.ru/2016/12/06/doktrina-infobezobasnost-site-dok.html

establishment. This approach dominated in Russia, although personal goals and strategies differed.

Three main strategies of the Russian government towards the CoE standards concerning media freedom can be delineated: formal acceptance, ignorance, and rejection (or abruption). The first is represented in several legal acts, such as Yeltsin's decree providing minimal requirements for Russian broadcasters, Putin's decree establishing public service broadcasting, and the statutes on access to information. However, Russian media legislation has mostly ignored or rejected the CoE standards. Rejection (or abruption) can be observed during Yeltsin's years in power, but it was mostly not intentional, as it has become since 2000. All these strategies may coexist and be used together during certain periods and in specific legal acts.

Freedom of mass information in Russia can be represented in the form of a tapered funnel, with freedom narrowing in proportion to the ever-increasing legal restrictions, which is possible due to the exceptive clause in Article 1 of "On Mass Media." Currently, as Article 4 of "On Mass Media" has been incredibly extended, any interpretations of freedom of mass information as going beyond media freedom may threaten freedom of mass information itself. "On Mass Media" has been transformed from a statute with a great potential to implement the universal vision of media freedom in Russia to a restrictive legislation contradicting the CoE standards.

The development of media regulation in Russia can be outlined in contrast to the Western one. Van Cuilenburg and McQuail (2003) delineate three consecutive phases in the development of media and communication policy of the United States and Western European countries: (1) emerging policy (up to the World War II); (2) public service media policy (from 1945 to 1980/1990); and (3) the current phase of searching for a new policy paradigm. While it seems questionable whether the evolution of Russian media policy could reasonably be compared with the development of media policy in Western countries, interesting similarities can be found.

At its early stage of development (up to 1992), post-Soviet media policy had many features in common with Western media's second phase of policy development. In Russia as well as in the West, the shift towards new policy derived from the sad "lessons of the misuse of mass media for propaganda" and of monopolistic control (van Cuilenburg & McQuail, 2003, p. 191). This phase was characterised by a new sociopolitical factor, the "collectivist spirit," and by recognition of the major role that mass media can play in the democratic process.

However, Russia's attempts of the 1990s to transit to democracy occured against the background of immaturity of democratic institutions and harsh and unstable economic conditions. Therefore, emerging socially responsible journalism soon fell under the control of big capital and lost the public's trust. Yeltsin's "pro-democratic" policies and methods were also ambivalent and caused disappointment to both opponents and proponents of democratisation.

The immaturity of Russia's democracy affected its membership in the CoE, as the legal consequences of such membership were misunderstood by Russia. Particularly, it overlooked the fact that the ratification per se of the ECHR implied huge commitments concerning media freedom and respect of the convention's universal vision. However, both democracy and media freedom were understood as political concepts in Russia, because they have traditionally been used there for political purposes, regardless of the aims of the political establishment.

Although Russia and Western countries had similar motivations in the shift towards the phase of public service media policy, the outcomes were very different. In the Western world, this phase meant reconstructing the media system "along more democratic lines," which was not the case in Russia. While the Western world shaped the concept of public service media in this period, Russia neither created public service media nor dismantled the state-own broadcast media system. In the Western world, the central idea for media policy of that period was media independence, which received no legal clarification in Russia.

The shift to a so-called "new policy" during the new phase was driven by information and technological factors both in Russia and in the West. Media policy of this phase was more pragmatic and less political or cultural in character. While in the Western world, media policy is based on the ideas of an open and dynamic media market, in Russia, due to the merging of business and state, media policy has become oriented towards protection of state interests. Using the typology of Hallin and Manchini (2004), Smaele argues that the Russian media model has a lot in common with that of Southern European countries in which this "polarized pluralism" is highly relevant. In post-communist Russia, the media "act as advocates of political ideologies" and have been used as a tool to solve political conflicts (Smaele, 2010, p. 56). At the same time, it has to be acknowledged that the Russian model is specific.

The strategy of the Russian government of rejection of the CoE standards implies not only a non-acceptance of the universal vision of media freedom, but also a

reconsideration of that notion. Russia's information safety doctrines and the subsequent laws create new rhetoric that argues that the universal concepts of democracy (and freedom of expression as part of it) have failed to respond to the country's vision of its own national identity and to protect society from current informational and other threats. This is to say that, by rejecting the universal vision, Russian speech and media regulation became "ideologisied," as it had been in the USSR. However, unlike the Soviet position, the Russian approach to media regulation implies the idea of media profitability, which is almost meaningless because in practice Russian media legislation lacks guarantees to implement this idea.

1.6. Russian Legal Culture and Its Impact on Public Attitudes to Media Freedom and Censorship

Jackson (2016) notes that failure to impose the rule of law and high levels of corruption in Russian society are additional factors impacting media legislation under Putin. Both factors date back to the Soviet and tsarist periods. They are deeply rooted in Russian legal culture—and this is an important characteristic particularly when it comes to the implementation of constitutional concepts in the country because it affects Russians' understanding of the Constitution and of how it can be applied. According to a 2016 survey of the Levada Centre, 51% of Russians claimed that state bureaucracy is significantly corrupted and a quarter stated that it is corrupted from top to bottom. Almost half of the respondents believed that the level of corruption had remained the same since the early 2000s, and a third claimed that it had grown. As the survey shows, the prevailing belief among Russians about corruption is that while Putin has pledged to combat it, he would not succeed because in Russia corruption is an ineradicable problem.

Krastev (2016) argues that the core explanation for the Kremlin's reluctance to conduct anti-corruption campaigns is not the fact that the Kremlin itself is corrupt, as most experts claim. Rather, the main reason is that any anti-corruption campaign would inspire the public to demand change, Krastev argues. His viewpoint may be justified by Russia's past: Gorbachev's encouragement of criticism at the early stage of *Glasnost* led to free speech and independent media. However, sociologists from Levada (2015c) note that most Russians have managed to "settle into the aggressive rules and limit communication with the state."

High levels of corruption and public attitudes to law in Russia are interrelated. Scholars, the Russian and Western media, as well as the Russian political establishment

often portray Russia as a country of "legal nihilism."[184] However, this notion is unclear—it invites various interpretations and even challenges the very vision of Russia as a country of legal nihilism. While Hendley's survey (2012) has shown a strong correlation between support for the core policies of Putin's "power vertical," hostility to democratic principles, and legal nihilism in Russia, it has also shown that only a minority of Russians are ready to circumvent the law when it is inconvenient.

I suggest that the disregard of the rule of law, the so-called legal nihilism, should be interpreted as a broader notion in Russia, which is most likely determined by a "legal illiteracy," rather than by deliberate readiness to circumvent the law. While the 2014 survey by the Russian sociological service FOM has also observed that most Russians do not support circumventing the law, almost three-fourths of Russian respondents claimed that they are prepared to follow *any statute* even if it is inadequate. Only 16% of respondents stated that they would not comply with the rules of bad laws. This may mean that Russia's vision of the universal concept of the rule of law does not comprise ideas of fairness, the common good, and the need for institutions to protect individuals from aggression and violence (see also Levada Centre, 2013).

Therefore, the roots of Russian legal nihilism could be found in Russia's "distorted" understanding of the rule of law and other legal institutions. Lukyanova (2015) and Chetvernin (2013) argue that law in Russia is often understood merely as formal rules of conduct authorised by the state. They may be consistent with the letter of the law, but they may undermine its spirit (Sakwa, 2008). Therefore, Chetvernin labels the Russian approach as pure formalism or legalism, which contrasts to the modern liberal institutional concept of the law. This attitude seems to derive from Soviet legal culture. Understood as both an ideology and fiction, the law in the USSR was applied selectively and extensively to serve deterrence and self-censorship. This might explain why Russians still believe that it would be better to follow national laws even if they are inadequate.

Scholars consider old legal traditions as the main obstacle to accepting and implementing the rule of law in Russia. Elst (2005) notes that in both tsarist and communist Russia the only source of law was the *diktat* of the political elite formalised as the law. Chetvernin argues that Russia has a culture of "*protestarian*" or "forceful" (*silovoj*) type traditionally focused on examining and enforcing governmental orders.

[184] In his 2008 campaign speech, Medvedev labelled Russia "a country of legal nihilism." He stated that no other European country can "boast of such a level of disregard for law." See Medvedev (2008) for the full text of the speech.

Matuzov (1994) argues that Russia has inherited the Marxist-Leninist postulates on the secondary role of law, in comparison to the economy, politics, and ideology. He suggests that Russia still practices *utilitarian* and *pragmatic* attitude to the law, which is often understood in Russia as the means to legitimise political will, rather than as having an independent historical, social, and cultural value.

The dominance of the strict positivist school for more than a century in Russia may explain why Russians have a specific hierarchy of human rights, which largely resembles the Marxist-Leninist vision. One cannot disagree with Kravets (2005) who suggests that openness to foreign constitutional principles and institutions is possible in theory, but only if they do not contradict Russia's traditions. The 2015 Levada survey (2015a) has demonstrated that *positive* freedoms, such as the rights to work and access to free health care or free education, were cited among the most important rights for Russians. A negative right such as freedom of speech was ranked at tenth place.

Despite the increasing prestige of the legal profession after the dissolution of the USSR, Russian lawmakers and practitioners faced a challenge in understanding and using alien legal concepts and techniques (Lukyanova, 2015; Elst, 2005). Particularly, Lukyanova and Chetvernin pay attention to problems of translation: in the Russian language, "law" means both "a statute" (*zakon*) and "a right" (*pravo*), and "the rule of law" has been interpreted in Russia as the supremacy of statutes (or formal rules).[185] This interpretation, however, fits with the Russian administrative regime of governance and serves para-constitutionalism (Sakwa, 2008), which may only strengthen people's distrust in formal institutions and, consequently, disregard of the law. It is worth noting that law schools in Russia still do not offer courses on mass media law or freedom of speech.

Forms of legal nihilism in Russia vary, and many of them are instigated by the political power. According to Matuzov (1994), these forms go beyond the deliberate violation or circumvention of laws. He puts forward the notion of "war of laws" caused by the adoption of explicitly contradicting legislation and fuelled by political and information wars. Matuzov notes that another form is the substitution of genuine legal aims by political, ideological, or pragmatic rationales, i.e. by "grabbing" rules. He argues that the personal ambitions of people in the political establishment also play an important role in furthering the sense of legal nihilism in Russia. Violation or disrespect of human

[185] Report on the Rule of Law, Venice Commission, 86th Session, 2011.

rights and freedoms and weak legal safety guarantees considerably undermine the Russians' trust in the rule of law, from Matuzov's perspective.

Matuzov (1994) also suggests that legal nihilism and legal idealism are two different sides of the same coin. Russian media policy clearly illustrates this. On one hand, some issues lack regulation or some laws are ignored and disrespected, on the other, one can say that on the whole, the media sector is overregulated. It can be argued that legal idealism, alongside legal nihilism, promotes an obedient acceptance of any media law even if it contracts the spirit of media freedom, and transforms such laws into government-authored rhetorical patterns that the population and the media sector have to digest and comply with. For instance, a survey by the Levada Centre (2015b) has shown that Russians' tolerance towards homosexuality dropped after the adoption of legislation against homosexual propaganda. Legal nihilism and legal idealism create obstacles to Russia's transition to the rule of law, Matuzov notes. This may also explain why censorship laws per se enjoy the support of the Russian population. Overall, the specifically Russian understanding of the rule of law (strengthened during the time of the USSR) is a precondition for the rejection of the universal vision of media freedom and for the Russian public's attitudes towards censorship.

Low level of legal culture is another factor that creates favourable grounds for underestimating the importance of freedom of speech and independent media for each individual and for society in general. It may be argued, for instance, that most Russians do not see a direct link between these values and the high level of corruption in the country, which is socially condemned. Furthermore, Russians tend not to see the interdependence between the implementation of the freedoms of speech and media with other freedoms that they find more important.

While Beketova (2005) argues that independent media could significantly contribute to combat legal illiteracy in Russia, it is hard for such media to function in the conditions of legal nihilism or legal idealism (even if one can assume the existence of other, satisfactory, conditions). All this forms a vicious circle, which seems almost impossible to break without the necessary political will, which in turn can hardly be put in practice in a short period of time. Its implementation requires relevant institutions as well as methodical efforts to educate and enlighten Russian lawyers and the Russian society in general.

1.7. The European Court of Human Rights' Jurisprudence on Article 10 of the

ECHR against Russia

Recent studies argue that among existing CoE levers, legally binding mechanisms, such as the ECtHR jurisprudence, have been the most effective way to force Russia to perform its commitments (Shugrina, 2016; Burkov, 2014; Schönfeld, 2014). One possible explanation for that is Russia's own specific, "forceful," type of legal culture.

The ECtHR represents one of the most important CoE mechanisms that guarantee human rights protection in member-states. Any individual or legal entity in any member country may file a complaint with the ECtHR if they believe that local courts have ruled on their cases in contradiction to the ECHR. It should be stressed that the ECtHR does not aim to substitute national justice, but to provide additional guarantees for human rights protection in the CoE member-states. The Court scrutinises the national court decisions and holds judgements on violation or non-violation of the ECHR by the member-state. As a reminder, each government must ensure the implementation of the ECtHR case law, even if the Court's decision concerns another government (the so called "indirect impact"), according to Article 46 Part 1 of the ECHR.[186] The implementation of the ECtHR rulings is supervised by the CoE's Committee of Ministers, according to Article 46 of the ECHR. The Committee monitors the implementation unless the government reports on measures taken to implement the case. However, there is no mechanism to impose sanctions on those members failing to implement the ECtHR judgments.

For the Russian applicants, the possibility to file complaints with the ECtHR was one of the main consequences of Russia's ratification of the ECHR. The ECtHR case law is an official source of law in Russia, and it gives grounds for the revision of any case by the national courts if the case has been considered before the ECtHR.[187] As of March 2016, Russia occupied third place among the CoE's member-states in total number of cases (9,26%) considered in the ECtHR (European Court of Human Rights, 2016). According to the 2015 report of the CoE's Committee of Ministers,[188] among all ECHR's

[186] Article 46 Part 1 of the ECHR states: "The members undertake to abide by the final judgment of the Court in any case to which they are parties."

[187] In accordance with Article 413 of the Russian Criminal Procedure Code, Article 350 of the Russian Administrative Procedure Code, Article 392 of the Russian Civic Procedure Code, Article 311 of the Russian Arbitration Procedure Code, the ECtHR or Russian Constitutional Court rulings on the cases give grounds for reconsideration of such cases.

[188] 9th Annual Report of the CoE's Committee of Ministers. Supervision of the execution of judgments and decisions of the European Court of Human Rights (2015). Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fe2d

parties, Russia had the most cases under "enhanced supervision"[189] (16% of a total number of such cases). While in the 2000s Russia was in first place in number of complaints to the ECtHR on ECHR violations, it ceded that place to Ukraine in 2016, as Guido Raimondi, the ECtHR's President, noted (Lenta.ru, 2016). However, this does not necessarily mean that the number of violations of human rights in Russia has decreased. Most probably, this in fact means a decrease in the effectiveness of the ECtHR for Russian applicants.

It is important to mention here the confrontation between the Russian Constitutional Court and the ECtHR, which took place in 2010, in the case of *Markin v. Russia*.[190] In its ruling on this case, the ECtHR openly criticised the decision of the Russian Constitutional Court. This instigated a large-scale scandal in Russia and led Valerii Zorkin (2010), the Chairman of the Russian Constitutional Court, to write a critical piece in *Rossijskaja Gazeta*, one of the government's official newspapers. Particularly, he claimed that Russia should have the right to develop a mechanism protecting its "national interests" from the ECtHR's impact when the ECtHR's rulings threaten the Russian Constitution. He reinterpreted the constitutional provision on supremacy of international treaties (Article 15 Part 4) by arguing that, while they have a superior power over Russian laws, the Constitution is not included into the notion of "law," but stands higher than laws. Therefore, it has a supremacy over international law. His justification is an example of how Russian legal formalism works.

In *Rossijskaja Gazeta,* Zorkin expressed his personal opinion, but his perspective was legitimated in 2015, after the ECtHR ruling on Yukos, the defunct oil corporation.[191] The ECtHR ruled that Russia must pay the enormous sum of 1.9 billion euros in compensation and legal expenses to the Yukos's former shareholders, among them, Mikhail Khodorkovsky, an exiled Russian former oligarch (see, for instance, Walker, 2016). The case concerned both political and economic interests.

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[189] As the document "Judgments of the European Court of Human Rights: First meeting of the Committee of Ministers of the Council of Europe to supervise their execution," Ref. 195(2011), states: "'Enhanced supervision' applies to cases meriting priority attention by the Committee of Ministers as a result of their nature or the types of questions raised: judgments requiring urgent individual measures; pilot judgments; judgments raising major structural and/or complex problems as identified by the [European] Court or by the Committee of Ministers; interstate cases; other judgments which for special reasons require such supervision." Retrieved from https://wcd.coe.int/ViewDoc.jsp?p=&Ref=PR195(2011)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true

[190] See the ECtHR's judgment on *Markin v. Russia* of 7 October 2010. Markin was military officer and a divorced father of three minors. His case concerned rejection of parental leave to take care of his children.

[191] *OAO Neftyanaya Kompanya Yukos v. Russia* of 15 December 2014.

A newly adopted Russian law[192] authorised the Russian Constitutional Court with the power to challenge any document of any international body and to declare them "unenforceable" in Russia. The Constitutional Court's assessment should be based on the inconsistency of these documents with the "fundamentals of the Russian constitutional system" and the constitutional "human rights regime."

The Venice Commission's Opinion[193] proclaimed these measures incompatible with Russia's obligations under international law. It stated that the Constitutional Court might declare the ECtHR rulings "unenforceable," but Russia nevertheless would have to enforce them because it is bound by articles 26–27 of the Vienna Convention on the Law on Treaties.[194] Therefore, the Opinion urged for the removal of the amendments. It also noted that member-states had to "remove possible tensions and contradictions" between the ECtHR and their national systems, "including—if possible—via means of dialogue." However, so far Russia has neither made attempts to initiate dialogue nor to abolish the new provisions, and such attempts are hardly foreseeable in the near future, which would have a negative impact on Russian justice.

The ECtHR's decisions on several other Russian cases might threaten the interests of the Russian political establishment. The cases of Alexey Navalnyy are of particular interest. Navalnyy is a political activist, a lawyer, and "the most prominent face of Russian opposition to president Vladimir Putin," as the BBC (2017) states. He became well-known for his investigative reports on corruption among high-profile Russian officials and criticism of Putin's policies. In December 2016, Navalnyy announced his candidacy for the 2018 presidential elections (Oliphant & Krol, 2016).

Navalnyy was first arrested a day after the general parliamentary elections of 2011, in the aftermath of the first mass protest action, and was imprisoned for fifteen days. The ECtHR found that the arrest and detention of Navalnyy and Ilya Yashin, another

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[192] Federal Statute of the Russian Federation no. 7-KFZ of 4 December 2015 introduced amendments to the Federal Constitutional Law No. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation.

[193] Final Opinion of the Venice Commission (2016). On the Amendments to the Federal Constitutional Law on the Constitutional Court. Adopted by the Venice Commission at its 107th Plenary Session, Venice, 10–11 June. Retrieved from http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e

[194] UN's Vienna Convention on the law of treaties (with annex), concluded in Vienna on 23 May 1969, No. 18232. Registered ex officio on 27 January 1980. Retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf
Article 26 states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
Article 27 states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

opposition activist, were unlawful and arbitrary[195] and ordered that each applicant be paid 26,000 euro in non-pecuniary damages.[196] As Lipman, Kachkaeva, and Poyker (2017) argue, instead of denying Navalnyy's allegatations of corruption, the Russian authorities tried to "discredit" his image as a lawyer and political activist. In 2013, Navalnyy was sentenced to five years in a corrective labour colony for embezzlement at the Kirovles timber company, alongside his accomplice, the businessmen Petr Ofitserov. Amnesty International (2013) called the trial a parody. A day after the trial, Navalnyy was released and placed under house arrest pending another criminal case against him. He was banned from using the Internet and making public statements or comments to the media, but was allowed to run at the 2013 Moscow elections for mayor, during which he obtained 27% of votes and came second.

In its ruling on the case of *Navalnyy and Ofitserov v. Russia*,[197] the ECtHR stated that the applicants were found guilty of actions indistinguishable from the ordinary course of business and that "the only purpose of prosecution and conviction was to curb public and political activity." The Supreme Court subsequently overturned the Kirovles case for reconsideration. In 2017, the ECtHR considered five other complaints by Navalnyy and found that his several detentions and arrests were illegal. The ECtHR ordered that he be awarded around 50,000 euro in non-pecuniary damages.[198] A few days after the ECtHR's judgment, Navalnyyy and Ofitserov were again found guilty of embezzlement in the Kirovles case (Oliphant, 2017).

While the decisions of the Russian courts have been widely criticised in the foreign media, the debates in Russian media have been more controversial. Some claim that the ECtHR's ruling "encourages mass disorders" in the country (Remeslo, 2017) and that the ECtHR is "politically biased and provocatively politicized" (Kolomiyets, 2017). In 2017, the Russian NGO Centre of Actual Politics, published a study arguing that the ECtHR replaces justice with political bias. The study calls the Court a "champion of ultra-western values" imposed on Russia by the ECtHR with the help of Russian pro-Western activists. This perspective is in line with the development of the most recent Russian concept of information safety (see section 1.5).

It should be noted that Russia has no special legal mechanisms for implementing

[195] The ECtHR found a violation of Articles 11, 6, 5, 3, and 13 of the ECHR in respect of both applicants, Navalnyy and Yashin.
[196] See the ECtHR judgment *Navalnyyy and Yashin v. Russia* of 4 December 2014.
[197] See the ECtHR judgment on *Navalnyyy and Ofitserov v. Russia* of 23 February 2016.
[198] See the ECtHR judgment on *Navalnyyy v. Russia* of 2 February 2017.

the ECtHR's rulings, unlike some other CoE members (Shugrina, 2016). In 2013, the PACE urged Russia to enhance its efforts to implement the ECtHR's judgments.[199] The 2015 report of the CoE's Committee of Ministers[200] has shown that Russia was in first place among the CoE members that missed deadlines for paying compensations. In 2014, it was in first place on the number of cases awaiting confirmation of payment, and in 2015 it became second after Ukraine. Among the CoE members awarded the highest amounts of compensation, Russia was in first place in 2014 and in second in 2015.

Violations of Article 10 of the ECHR are neither among the most popular types of complaints to the European Court against Russia nor does the country lead in number of rulings on this issue. In total, the ECtHR rulings against Russia concerning freedom of expression made up less than 7% of all cases (European Court of Human Rights, 2016). Therefore, a more specific investigation is needed to explain why Russian applicants do not often complain about violations of their right to freedom of expression to the ECtHR. Such investigation lies beyond the scope of this study. This study attempts to provide a comprehensive review of the ECtHR case law on freedom of expression in Russia with a strong focus on media issues. My analysis of the ECtHR rulings on Article 10 of ECHR against Russia is based on the data published in the HUDOC database.[201] For practical purposes, this study does not engage with those complaints that the Court found inadmissible.

The reader should bear in mind that my analysis of the ECtHR jurisprudence against Russia on freedom of expression can neither render the ECtHR's full perspective on media freedom in general (because this research is limited by case law to Russia) nor give a full picture of the differences and similarities between the Russian and the ECtHR's perspectives on media regulation. This statistical information should not be interpreted as creating the perspective that the most frequent types of violations represent the main

[199] See also Resolution 1914 (2013) of the CoE's Parliamentary Assembly. "Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties," adopted by the Assembly on 22 January 2013 (4th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19396&lang=en

[200] 9th Annual Report of the CoE's Committee of Ministers, "Supervision of the execution of judgments and decisions of the European Court of Human Rights" (2015). Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fe2d

[201] The HUDOC is the ECtHR's official database and contains all the Court's judgments, information on communicated cases, consultative opinions, press releases, legal summaries, and decisions and reports of the Commission. This database has also been used for examining the ECtHR case law in other sections of this study. Retrieved from http://hudoc.echr.coe.int

problem of media freedom in Russia. By contrast, it can be assumed that this issue may be less problematic because of the impact of the ECtHR rulings.

The cases are divided into two groups: media and non-media. The distinction is needed because this dissertation focuses on the media and because the ECtHR's standards to consider these two types of cases often differ in some fundamental aspects, as shown below.

In this section, "media cases" are those in which the ECtHR qualified the applicants as journalists, editors, editorial offices, or publishers even if journalism was not their main occupation. To illustrate, the case of *Andrushko v. Russia*[202] has been labelled as a media case. While the applicant was a candidate in the regional elections, the ECtHR recognised her as a publisher because proceedings against her were brought for the publication of a leaflet calling on people not to vote for her competitor. The ECtHR considered the case in light of their specific role under Article 10 of the ECHR noting that publishers, "irrespective of whether they associate themselves with the content of their publications, play a full part in the exercise of freedom of expression by providing authors with a medium."[203]

Other cases are considered here as "non-media" even if they concern media publications, but the applicants did not act as media practitioners when expressing opinions or facts. In many cases, the applicants used the media as a platform for disseminating their personal opinions. For instance, judge Kudeshkina[204] criticised the Russian judicial system on the radio, and the President of the Moscow City Bar Reznik[205] expressed his critical opinion on investigating authorities on TV—however, neither of them acted as a media professional. In another case, while Pasko was a professional journalist, the ECtHR noted that he had violated freedom of expression as a military employee. [206] "Non-media" cases also include issues of private and public communications, and while both have been used to provide general statistical information, the detailed examination of the ECtHR rulings on private communications is beyond the scope of this dissertation.

As of 1 January 2017, the ECtHR has held forty judgments engaging Article 10 of the ECHR against Russia since the first ruling was held in 2005 on the case of *Grinberg*

[202] *Andrushko v. Russia* of 14 October 2010.
[203] *Andrushko v. Russia* of 14 October 2010.
[204] *Kudeshkina v. Russia* of 26 February 2009.
[205] *Reznik v. Russia* of 4 April 2013.
[206] *Pasko v. Russia* of 22 October 2009.

v. *Russia*. Figure 1.2 shows that the Court has passed at least one ruling per year on issues related to free speech in Russia, which may attest to the Court's continued interest in free expression in Russia. During one intensive period, in 2009–2010, the Court delivered more than one third of its rulings on free expression in Russia. However, it is difficult to interpret this fact because the complaints referred to situations from various periods.

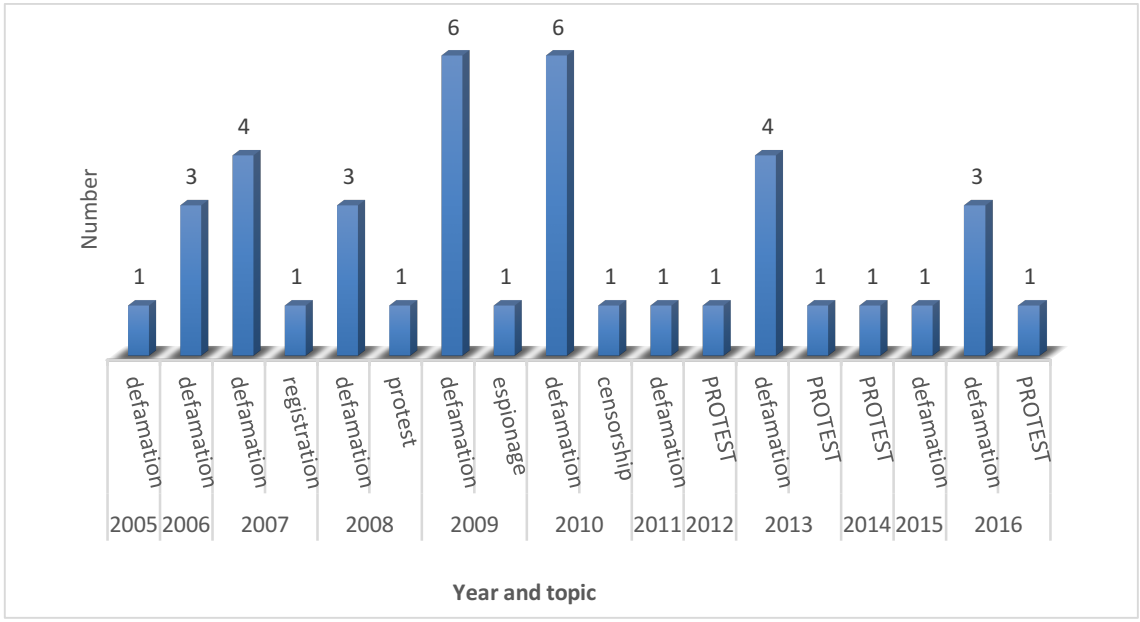


Figure 1.2. The dynamics in numbers and topics of the ECtHR case law on Article 10 of the ECHR against Russia (2005–2016).

Media cases constitute more than half of Russian cases (65%) on Article 10 of the ECHR, as depicted in Figure 1.3 and Figure 1.4.[207] However, the figures show that since 2011 non-media cases have become more frequent in the ECtHR practice concerning Russia. In the period 2011–2012, Russians started to use more actively non-media forms for communicating opinions and views to a wide public, including the form of protest. It can be argued that, like the PACE, the ECtHR has noted the importance of these trends

[207] *Grinberg v*. *Russia* of 21 July 2005; *Karman v*. *Russia* of 14 December 2006; *Shabanov and Tren v*. *Russia* of 14 December 2006; *Krasulya v*. *Russia* of 22 February 2007; *Dyuldin and Kislov v*. *Russia* of 31 July 2007; *Chemodurov v*. *Russia* of 31 July 2007; *Dzhavadov v*. *Russia* of 27 September 2007; *Filatenko v*. *Russia* of 6 December 2007; *Dyudin v*. *Russia* of 14 October 2008; *Godlevskiy v*. *Russia* of 23 October 2008; *Obukhova v*. *Russia* of 8 January 2009; *Romanenko and Others v*. *Russia* of 8 October 2009; *Porubova v*. *Russia* of 8 October 2009; *Aleksandr Krutov v*. *Russia* of 3 December 2009; *Fedchenko v*. *Russia* (No. 1 and 2) of 11 February 2010; *Andrushko v*. *Russia* of 14 October 2010; *Saliyev v*. *Russia* of 21 October 2010; *Aleksey Ovchinnikov v*. *Russia* of 16 December 2010; *Novaya Gazeta v Voronezhe* v. Russia of 21 December 2010; *Ivpress and Others v*. *Russia* of 22 January 2013; *Novaya Gazeta and Borodyanskiy* v. Russia of 28 March 2013; *OOO "Vesti" and Ukhov v*. *Russia* of 30 May 2013; *Nadtoka v*. *Russia* of 31 May 2016; *Grebneva and Alisimchik v*. *Russia* of 22 November 2016; *Kunitsyna v*. *Russia* of 13 December 2016.

for implementing Article 10 of the ECHR in Russia by increasing the number of non-media cases for the Court's scrutiny.

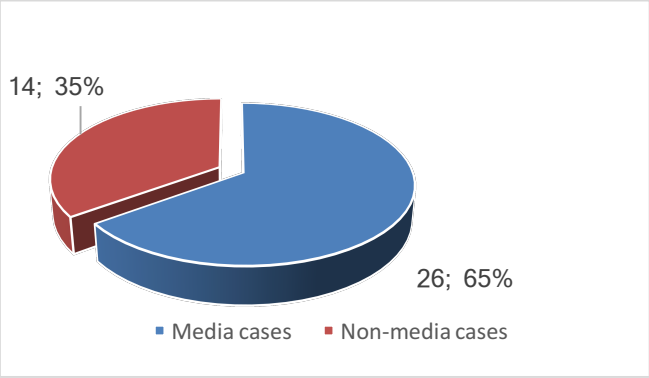
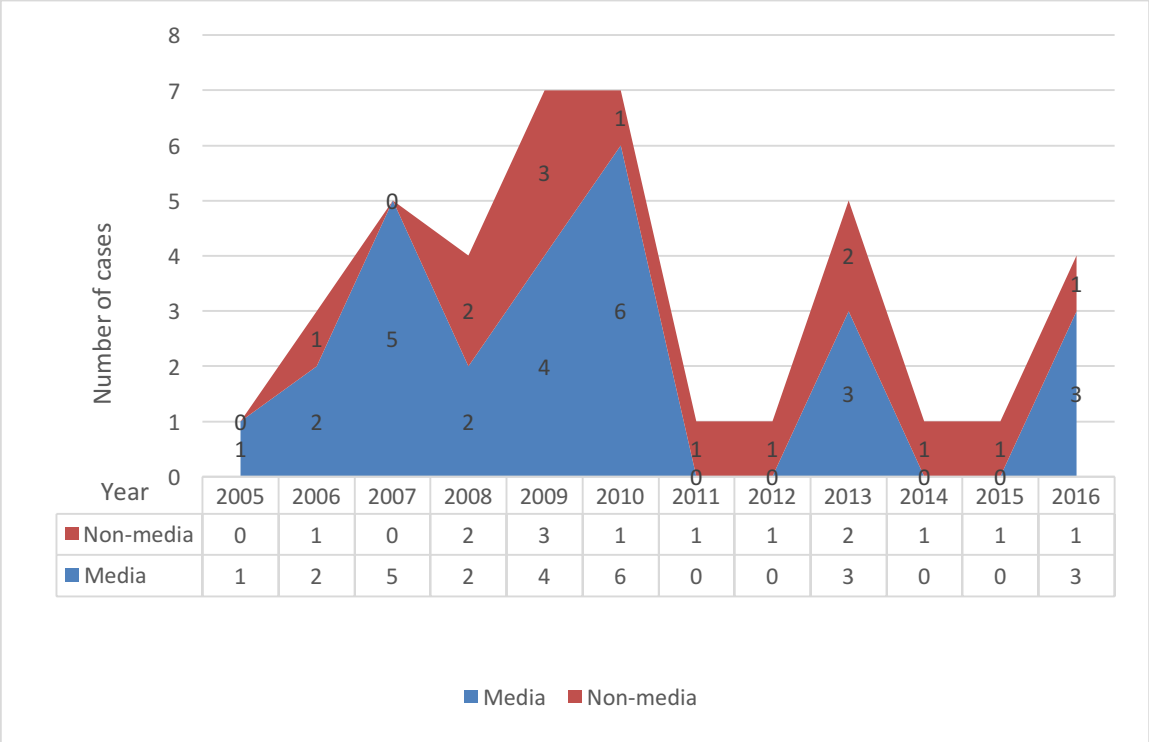


Figure 1.3. Proportions of media and non-media cases in the ECtHR practice on Article 10 of the ECHR against Russia (2005–2016).



Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Non-media	0	1	0	2	3	1	1	1	2	1	1	1
Media	1	2	5	2	4	6	0	0	3	0	0	3

Figure 1.4. The dynamics of media and non-media cases in the ECtHR practice on Article 10 of the ECHR against Russia (2005–2016).

Rulings on defamation constitute the largest group of decisions—80% (32 judgments)—as depicted in Figure 1.5. Of these, the overwhelming majority of rulings were held on media cases (75% of cases, 24 rulings). Slightly more than 15% of all cases on defamation concerned elections (5 rulings). Decisions concerning protests in Russia have been the second most frequent type of the ECtHR judgments on Article 10 of the

ECHR (12,5%, 5 judgments). Apart from decisions on protests and defamation, the ECtHR delivered three judgments on various other issues: espionage, media registration, and media censorship.

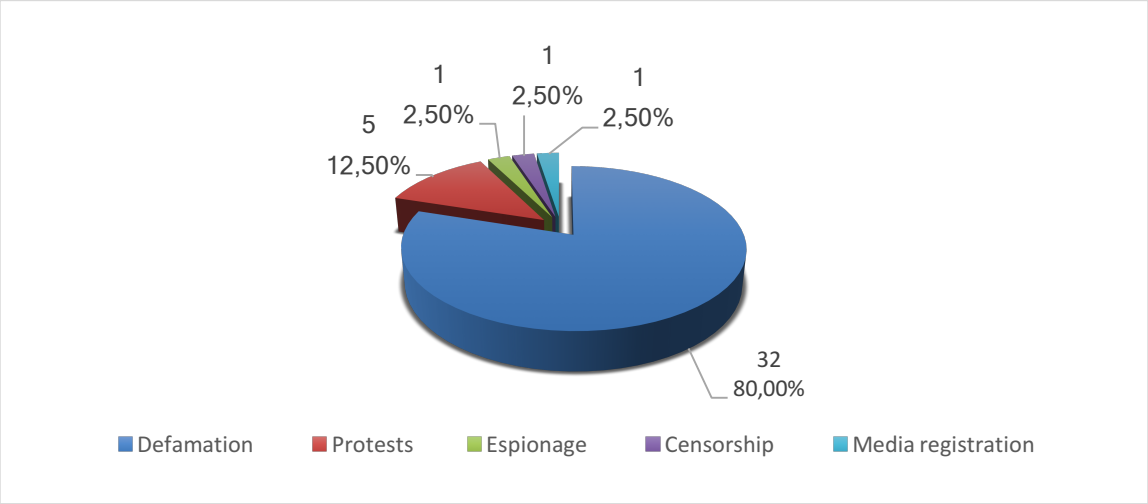


Figure 1.5. Topics of the cases considered by the ECtHR on Article 10 of the ECHR against Russia (2005–2016).

Figure 1.6 shows that the ECtHR found violations of Article 10 in the vast majority of cases against Russia (85%). This means that, in most cases, the national courts failed to properly apply the CoE standards when making decisions. As to media cases, the index is even higher.

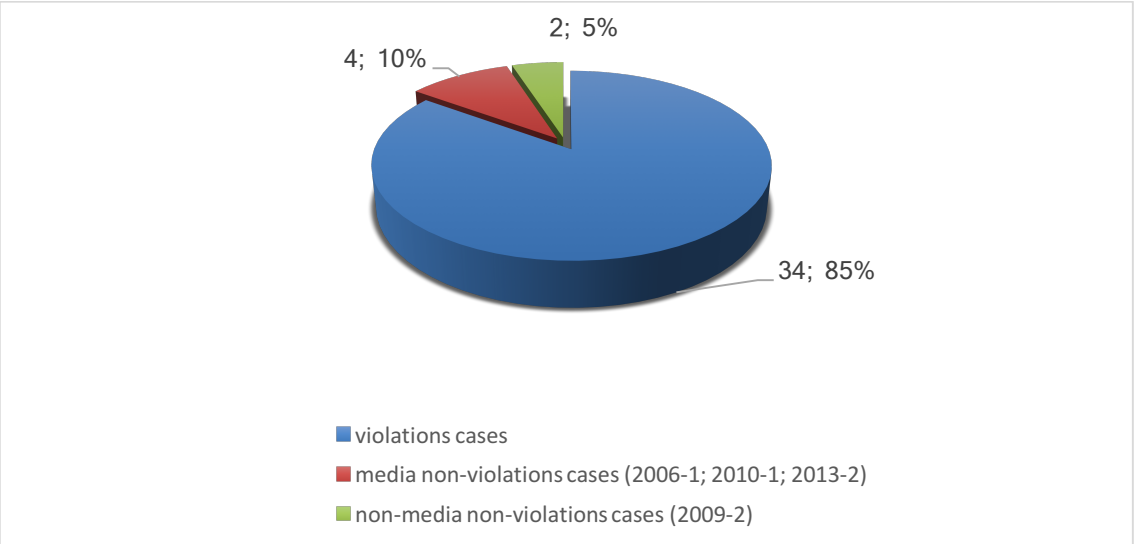


Figure 1.6. Proportions of media and non-media cases in the ECtHR practice on Article 10 of the ECHR against Russia (2005–2016).

In order to check the admissibility of governmental interference, the ECtHR applied its three-part test. My analysis of the ECtHR jurisprudence against Russia on freedom of expression has shown that, from the ECtHR perspective, the Russian national courts mostly have *problems with applying the criteria of "necessity" of interference*. The ECtHR ruled on this in 33 out of 34 judgments on violation. As the ECtHR repeatedly noted in these rulings, the authorities may have a certain "margin of appreciation" in establishing the "necessity" of interference, but it is supervised by the ECtHR and should be consistent with international standards on free expression.[208]

The ECtHR has also pointed to the *formalist approach* adopted by Russia in considering cases on freedom of expression as one of the main problems on this issue. The Court has repeatedly noted that the criteria of "necessity" is a complex one: it requires determining whether the interference corresponds to a "pressing social need," whether the reasons set by the authorities to justify interference are "relevant and sufficient," and whether the measure taken is "proportionate to the legitimate aim pursued." In most Russian cases, however, the national courts had failed to examine these questions, the ECtHR determined.

In several decisions on defamation in the media, the national courts had only established the harm without attempting to find a proper balance between the protection of freedom of expression and other rights, the ECtHR observed.[209] This trend can be illustrated by the 2008 case of Dyundin, which is a typical case on the ECHR's Article 10 against Russia in terms of the inefficiencies of the Russian perspective.

The applicant Dyundin was a journalist. He published an article about an investigation into the theft of the property of a private company. The article condemned the unresponsive attitude of supervising prosecutors who failed to open a criminal case against the company's director, G. In a police office, G. tortured one of his former employees because G. suspected him of the theft. Together with police officers, G. also beat his friend. The article quoted from a relevant medical report. Denying that he had ever used violence, G. sued Dyundin for defamation and sought compensation for non-pecuniary damage and legal costs. National courts satisfied his demands.

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[208] See, for instance, *Grebneva v. Russia*.

[209] *Dyudin v. Russia* of 14 October 2008; *Romanenko and Others v. Russia* of 8 October 2009; *Porubova v. Russia* of 8 October 2009; *Aleksandr Krutov v. Russia* of 3 December 2009; *Fedchenko v. Russia* (No. 1 and 2) of 11 February 2010; *Andrushko v. Russia* of 14 October 2010; *Saliyev v. Russia* of 21 October 2010; *Novaya Gazeta v Voronezhe* v. Russia of 21 December 2010; *Ivpress and Others v. Russia* of 22 January 2013; *Reznik v. Russia* of 4 April 2013; *Nadtoka v. Russia* of 31 May 2016; *Grebneva and Alisimchik v. Russia* of 22 November 2016.

The ECtHR found a violation of Article 10 of the ECHR in this case. It noted that claims of police brutality were of public interest and that the applicant was entitled to make them public through the media. It observed the lack of evidence saying that the national courts

> performed a balancing exercise between the need to protect the policemen's reputation and journalists' right to divulge information on issues of general interest. They confined their analysis to the discussion of the damage to the plaintiff's reputation without giving any consideration to the applicant's journalistic freedom or to the fact that the plaintiff was a civil servant acting in an official capacity and was accordingly subject to wider limits of acceptable criticism than private individuals.[210]

In general, this study has revealed that in 25 out of 34 ECtHR judgments (73%), the violation of freedom of expression caused *unnecessary restrictions to the dissemination of information of public interest, including political expressions*,[211] which receive the strongest protection under Article 10. However, Russian national authorities either *failed to recognise public interest* in the impugned information *or such recognition made no effect* on making decisions in the cases.

Particularly, the ECtHR noted that the Russian national courts have largely *disregarded the importance of freedom of expression during elections*. There have been several Russian cases[212] involving this issue, and in all of them the ECtHR found a violation of Article 10. The most detailed interpretation of the international standards on elections and freedom of expression was provided in the Court's ruling on Andrushko's case. The ECtHR noted that

> free elections and freedom of expression together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each

[210] *Dyudin v. Russia* of 14 October 2008.
[211] *Grinberg v. Russia* of 21 July 2005; *Karman v. Russia* of 14 December 2006; *Krasulya v. Russia* of 22 February 2007; *Dyuldin and Kislov* v. Russia of 31 July 2007; *Chemodurov v. Russia* of 31 July 2007; *Filatenko v. Russia* of 6 December 2007; *Dyudin v. Russia* of 14 October 2008; *Sergey Kuznetsov v. Russia* of 23 October 2008; *Godlevskiy v. Russia* of 23 October 2008; *Obukhova v. Russia* of 8 January 2009; *Kudeshkina v. Russia* of 26 February 2009; *Romanenko and Others v. Russia* of 8 October 2009; *Porubova v. Russia* of 8 October 2009; *Aleksandr Krutov v. Russia* of 3 December 2009; *Makarenko v. Russia* of 22 December 2009; *Fedchenko v. Russia* (No.1 and 2) of 11 February 2010; *Andrushko v. Russia* of 14 October 2010; *Saliyev v. Russia* of 21 October 2010; *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; *Ivpress and Others v. Russia* of 22 January 2013; *Reznik v. Russia* of 4 April 2013; *Kharlamov v. Russia* of 8 October 2015; *Nadtoka v. Russia* of 31 May 2016; *Grebneva and Alisimchik v. Russia* of 22 November 2016.
[212] *Filatenko v. Russia* of 6 December 2007; *Kudeshkina v. Russia* of 26 February 2009; *Fedchenko v. Russia* (No.1 and 2) of 11 February 2010; *Andrushko v. Russia* of 14 October 2010; and *Grebneva and Alisimchik v. Russia* of 22 November 2016.

other, as freedom of expression is one of the 'conditions' necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature.' [213]

Consequently, the ECtHR stressed the crucial importance of free circulation of opinions and information of all kinds in the period preceding national and local elections.[214]

Andrushko, the applicant, was a candidate in local elections. She was not a professional journalist, but the case did relate to media freedom. Andrushko published a leaflet calling on people not to vote for her competitor, K. The leaflet critically assessed K.'s moral character and sought to cast doubt on his suitability as a candidate to the local legislative assembly. The ECtHR reiterated that

> any opinions and information pertinent to elections which are disseminated during the electoral campaign should be considered as forming part of a debate on questions of public interest.[215]

Therefore, very strong motives are required to justify interference with freedom of expression of the applicant, as the ECtHR observed. Furthermore, the ECtHR noted that K.'s position as a candidate requires a greater degree of tolerance. K. "inevitably and knowingly laid himself open to close scrutiny of his every word and deed by both journalists and the public at large," the Court ruled. Having examined the other important elements of this case, the ECtHR found violation of Article 10 of the ECHR.

My analysis has shown that the Russian national courts tend to *provide stronger protection to governmental authorities,*[216] *pro-governmental candidates or parties,*[217] *and representatives of the police*[218] *and other law enforcement bodies*[219] *than to private individuals*. By contrast, the CoE's standards maintain the opposite stance. This trend in the Russian court practice has been repeatedly criticised in the ECtHR's rulings against Russia, but that seems to have an almost unnoticeable effect.

While the ECtHR tends to protect the reputation of judges to maintain the authority and impartiality of the judiciary, it did not uphold the positions of the Russian

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[213] *Andrushko v. Russia*.
[214] See also *Kwiecień v. Poland* of 9 January 2007 and *Bowman v. the UK* of 19 February 1998.
[215] *Andrushko v. Russia* of 14 October 2010. See also *Filatenko v. Russia* of 6 December 2007.
[216] See, for instance, *Grinberg v. Russia* of 21 July 2005; *Krasulya v. Russia* of 22 February 2007; *Dyuldin and Kislov v. Russia* of 31 July 2007; *Chemodurov v. Russia* of 31 July 2007; *Porubova v. Russia* of 8 October 2009; *Aleksandr Krutov v. Russia* of 3 December 2009; *Fedchenko v. Russia* (No. 1 and 2) of 11 February 2010; *Saliyev v. Russia* of 21 October 2010; *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; *Ivpress and Others v. Russia* of 22 January 2013; *Nadtoka v. Russia* of 31 May 2016; *Grebneva and Alisimchik v. Russia* of 22 November 2016.
[217] See, for instance, *Filatenko v. Russia* of 6 December 2007; *Andrushko v. Russia* of 14 October 2010.
[218] See, for instance, *Dyudin v. Russia* of 14 October 2008; *Godlevskiy v. Russia* of 23 October 2008.
[219] See, for instance, *Makarenko v. Russia* of 22 December 2009; *Reznik v. Russia* of 4 April 2013.

government in three judgments on this issue.[220] The ECtHR stated that the Russian courts had failed to give a sufficient justification that interference with freedom of expression was needed to protect the authority of the judiciary in these cases.

In the 2009 ruling on Obukhova[221] case, the ECtHR noted that the injunction on further publications regarding a traffic accident that involved a judge was an irrelevant measure in maintaining the authority of the judiciary. The applicant, a journalist in the local newspaper *Zolotoye Koltso*, wrote the article "A year later they impounded the car." It opens with a quotation from the letter of the citizen P., in which she writes that a judge of the Yaroslavl regional court, Galina Baskova, had crashed into her husband's car. P. claimed that the traffic police officers did not find the husband responsible, but the following year Baskova had requested compensation. P. and her husband had also received an order for a charge on their property and the car. P. assumed that Baskova might take advantage of her position as a judge. The article provided the versions of the accident by Baskova, traffic police officers, and eyewitnesses. In conclusion, Obukhova stated that the spouses were waiting for a hearing and would defend themselves to the very end, although the judge had threatened them after the accident that they would buy her a new car anyway.

Judge Baskova sued P., the applicant, and the newspaper for defamation, and requested correction of untrue information, which she claimed was contained in the assertion that "Baskova is taking advantage of her office and connections in the judiciary." She instantly requested the court to order an injunction on the newspaper to prevent the publication of any other materials on the accident. The District Court satisfied the request immediately. Later, the Yaroslavl Regional Court dismissed the appeal against the injunction. It ruled that the defendant's constitutional right to impart information "cannot be taken into account" because the ban related to the publication of materials on one specific accident, and that such publication would contradict "the interests of the justice." The defamation claim was considered by Kirovskiy District Court, which ruled in favour of Baskova because the defendants had failed to prove the truthfulness of that statement. The court ordered the newspaper to publish a correction. Another court of a higher instance upheld the judgment.

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[220] See, for instance, *Sergey Kuznetsov v. Russia* of 23 October 2008; *Obukhova v. Russia* of 8 January 2009. *Kudeshkina v. Russia* of 26 February 2009; *Romanenko and Others v. Russia* of 8 October 2009.
[221] *Obukhova v. Russia*.

The ECtHR found a violation of Article 10 of the ECHR in this case. It stated that the injunction was excessively broad and disproportionate to the aim to protect judicial authority. Furthermore, the Court agreed with the applicant that the injunction was

> a disservice to the authority of the judiciary because it reduced transparency of the proceedings and may have given rise to doubts about the court's impartiality, for "justice must not only be done; it must also be seen to be done."[222]

The ECtHR was particularly concerned with the fact that the injunction had among its purposes to prevent the newspaper from publishing materials "stating the opposite view." It reiterated "that the possibility of expressing different views is the very essence of pluralism, without which there is no 'democratic society'."[223]

Another fundamental problem of the Russian perspective on free speech cases is that national authorities *failed to examine interference in light of the importance of the press in a democratic society*, as the ECtHR observed in the media cases. This may explain the high percentage of violations in Russia of freedom of expression in such cases.

Unlike the national authorities, the ECtHR stressed in its judgments that the press fulfils an essential function of "public watchdog" in a democratic society (see also section 1.3). From the ECtHR's standpoint, the press has specific "duties and responsibilities" in a society—to disseminate various kinds of information or ideas of public importance and to discuss or even challenge them.[224] Because of these special journalistic "duties and responsibilities," the CoE standards provide greater rights and freedoms to journalistic speech. For instance, "journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation,"[225] as the ECtHR has often noted. These "duties and responsibilities" distinguish media applicants from others and, therefore, the need for interference in media cases must be assessed in light of the press' role in a democracy, according to the ECtHR. Particularly, "the national authorities' margin of appreciation was thus circumscribed by the interest of a democratic society in enabling the press to

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[222] *Obukhova v. Russia*. See also *De Cubber v. Belgium* of 26 October 1984.
[223] *Obukhova v. Russia*.
[224] See, for instance, *Karman v. Russia* of 14 December 2006.
[225] See for instance, *Grinberg v. Russia* of 21 July 2005; *Karman v. Russia* of 14 December 2006; *Krasulya v. Russia* of 22 February 2007; *Dyuldin and Kislov* v. Russia of 31 July 2007; *Chemodurov v. Russia* of 31 July 2007; *Filatenko v. Russia* of 6 December 2007; *Dyudin v. Russia* of 14 October 2008; *Godlevskiy v. Russia* of 23 October 2008; *Romanenko and Others v. Russia* of 8 October 2009; *Porubova v. Russia* of 8 October 2009; *Aleksandr Krutov v. Russia* of 3 December 2009; *Makarenko v. Russia* of 22 December 2009; *Fedchenko v. Russia* (No. 1 and 2) of 11 February 2010; *Saliyev v. Russia* of 21 October 2010; *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; *Ivpress and Others v. Russia* of 22 January 2013; *Nadtoka v. Russia* of 31 May 2016; *Grebneva and Alisimchik v. Russia* of 22 November 2016.

play its vital role of 'public watchdog'," as the ECtHR noted in almost all judgments on Russian media cases.[226]

In all cases, the Court carefully inspects possible risks of a "chilling effect" by interference with the journalists' right to freedom of expression. For instance, in the ruling on the case of *Novaya Gazeta v. Voronezhe*, the Court observed that the applicant was sued in its capacity as the editorial board of the newspaper. It stated, therefore

> that the most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.[227]

At the same time, the ECtHR often observed that *the Russian courts had predominantly failed to properly assess the cases from the principles of journalistic responsibility*. The ECHR's Article 10 does not provide an unlimited freedom to the press even if their publications concern issues of public interests. In the Court's opinion, journalists are bound by the principles of journalistic responsibility. Therefore, the ECtHR's rulings on media cases also incorporate ethical issues. It checks, in particular, whether journalists acted in "good faith," in other words, whether they have checked information, used reliable sources, presented opposing views on the subject of their reports, or if they have merely fed the rumour mill or sensationalised the issue.

In four media cases[228] (around 15% of the media cases) against Russia, the ECtHR found that the press had "overstepped its bounds" and established non-violations of Article 10 of the ECHR. In the rulings on the cases of *Shabanov and Tren* and of *Aleksey Ovchinnikov*, the Court noted that journalists had abused their ethical responsibility by providing unnecessary details of private life. For instance, the ECtHR noted in the ruling on the case of Aleksey Ovchinnikov:[229]

> in cases of publications relating the details of an individual's private life with the sole purpose of satisfying the curiosity of a particular readership, the individual's

[226] *Kunitsyna v. Russia* of 13 December 2016.
[227] *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; see also *Jersild v. Denmark* of 23 September 1994.
[228] *Shabanov and Tren v. Russia* of 14 December 2006; *Aleksey Ovchinnikov v. Russia* of 16 December 2010; *Novaya Gazeta and Borodyanskiy v. Russia* of 28 March 2013; *OOO "Vesti" and Ukhov v. Russia* of 30 May 2013.
[229] This case will be specifically considered in the section on new media.

> right to the effective protection of his or her private life prevails over the journalist's freedom of expression.[230]

In the cases of *Novaya Gazeta and Borodyanskiy* and *OOO Vesti and Ukhov*, the press lacked factual basis for their allegations, from the ECtHR's perspective. Uhkov published his article "The Chief Federal Inspector has brought the media to its knees. But not the businessmen" in the regional newspaper *Gubernskie Vesti*, owned by OOO Vesti. The article unfavourably assessed the cultural value of a governmental regional cultural project and quoted P., the Chief Federal Inspector for the region, who complained about the insufficient funds to finance the project and criticised local businessmen for their reluctance to sponsor the project. Uhkov wrote about the reasons that "some businessmen" had expressed to him for their unwillingness to support the project:

> Some say that [P.] is too deeply involved in political games, of which they want no part. Others are, for some reason, concerned that their money might be wasted on the lovers of the collector of funds rather than spent on cultural events.

The ECtHR found in its ruling that the applicants went beyond the limits of responsible journalism. It reiterated its standpoint that the ECHR's Article 10 protects journalists' right to divulge information on issues of general interest, provided that "they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism."

Additionally, the Court noted that

> special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations.[231]

The ECtHR reiterated that public figures also deserved a legitimate protection against the spread of groundless rumours relating to their private life.[232] The ECtHR observed that the applicants had failed to present appropriate and verified evidence in support of the impugned assertions. The Court agreed with the Russian courts' assessment that the

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[230] *Aleksey Ovchinnikov v. Russia* of 16 December 2010. See also *Shabanov and Tren v. Russia* of 14 December 2006; *Von Hannover v. Germany*; *Campmany y Diez de Revenga and López Galiacho Perona v. Spain*; *Société Prisma Presse v. France* of 1 July 2003; and *Bou Gibert and El Hogar y La Moda J.A. v. Spain* of 13 May 2003.

[231] See also *Lindon, Otchakovsky-Laurens and July v. France* of 22 October 2007, and *Pedersen and Baadsgaard v. Denmark* of 17 December 2004.

[232] See also *Standard Verlags GmbH v. Austria* of 4 June 2009.

statements were "of such a nature and gravity as to be capable of causing considerable harm" to P.'s reputation. Nevertheless, the ECtHR found regrettable the fact that the Russian national courts had failed to examine whether the contested statements were factual allegations or value judgments before concluding that the applicants had failed to prove their truthfulness.

From the ECtHR perspective, *the failure to make a clear distinction between facts and opinions* was the most common problem of Russian justice concerning reputational disputes, present in more than half of all Russian cases on defamation.[233] The Russian courts either demanded that the applicants proved their opinions[234] or failed to check if the applicants' opinions have any factual basis.[235] The ECtHR repeatedly stated that this problem derived from deficiency in the Russian law on defamation, which "made no distinction between value judgments and statements of fact, referring uniformly to 'information' (*svedeniya*), and proceeded on the assumption that any such 'information' was susceptible to proof in civil proceedings."[236]

When studying the circumstances of a case, the Court pays attention to the significant elements: the standpoints of the applicants and the plaintiffs, the subject matter of publications, the qualification of impugned statements by the national courts, the wording used by applicants, and the penalty imposed on them.[237] The ECtHR noted that Russian national authorities had often overlooked these details, totally or in part, which reflects their formalist approach.

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[233] See, for instance, *Grinberg v. Russia* of 21 July 2005; *Karman v. Russia* of 14 December 2006; *Krasulya v. Russia* of 22 February 2007; *Dyuldin and Kislov v. Russia* of 31 July 2007; *Chemodurov v. Russia* of 31 July 2007; *Filatenko v. Russia* of 6 December 2007; *Dyudin v. Russia* of 14 October 2008; *Godlevskiy v. Russia* of 23 October 2008; *Kudeshkina v. Russia* of 26 February 2009; *Romanenko and Others v. Russia* of 8 October 2009; *Aleksandr Krutov v. Russia* of 3 December 2009; *Fedchenko v. Russia* (No.1 and 2) of 11 February 2010; *Andrushko v. Russia* of 14 October 2010; *Saliyev v. Russia* of 21 October 2010; *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; *Ivpress and Others v. Russia* of 22 January 2013; *OOO "Vesti" and Ukhov v. Russia* of 30 May 2013 (although the ECtHR found no violation of Article 10 of the ECHR); *Nadtoka v. Russia* of 31 May 2016; *Kunitsyna v. Russia* of 13 December 2016.

[234] See, for instance, *Dyudin v. Russia* of 14 October 2008; *Romanenko and Others v. Russia* of 8 October 2009; *Aleksandr Krutov v. Russia* of 3 December 2009; *Makarenko v. Russia* of 22 December 2009; *Fedchenko v. Russia* (No.1 and 2) of 11 February 2010; *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; *Ivpress and Others v. Russia* of 22 January 2013.

[235] See, particularly, *Grebneva and Alisimchik v. Russia* of 22 November 2016; *Kunitsyna v. Russia* of 13 December 2016.

[236] *Kunitsyna v. Russia* of 13 December 2016. See also *Grinberg v. Russia* of 21 July 2005; *Zakharov v. Russia* of 5 October 2006; *Karman v. Russia* of 14 December 2006; *Dyuldin and Kislov v. Russia* of 31 July 2007; *Fedchenko v. Russia* (No.1 and 2) of 11 February 2010; *Andrushko v. Russia* of 14 October 2010; *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; and *OOO Ivpress and Others v. Russia* of 22 January 2013.

[237] *Krasulya v. Russia* of 22 February 2007, *Chemodurov v. Russia* of 31 July 2007.

From the ECtHR's perspective, the other most common deficiencies of the Russian judicial practice on defamation are the attempts to *bring journalists to liability for the speech of their interviewees*[238] or for general *statements that do not explicitly refer to the individuals* who had filed defamatory lawsuits.[239] The ECtHR also revealed the following problems in Russian national decisions on defamation in the media: the *failure to examine the background and the context* of publications;[240] the *lack of assessment of evidence* to confirm the truthfulness of contested allegations or their factual basis;[241] and the *failure to request such evidence*.[242]

The 2016 judgment on Kunitsyna's case is probably the most critical of all the ECtHR rulings on defamation in the Russian media. As of the date of this research, it is the most recent claim from Russian applicants on violation of freedom of expression considered by the ECtHR. The critical tone that the Court used in its ruling could most likely be accounted for by Russia's lack of progress in implementing the Court's perspective on numerous previous rulings. In this ruling, the ECtHR found again most of the problems that it had previously addressed in its decisions against Russia. It observed that in the ruling on Kunitsyna's case there is a virtually absolute inconsistency between the Russian perspective on defamation in the media and the ECtHR standards.

The applicant was a freelance journalist working for the regional newspaper *Tomskaya Nedelya*, which published her article with the headline "[S.'s] mother was dying here." The article described daily life in a state-owned care home for the elderly and revealed some of its difficulties. It mentioned the mother of S., a former deputy in the Russian parliament, who was running in the elections at that time. In the article, the applicant wrote that "quite a few respectable people bring their ill relatives to the care home in an attempt to escape unnecessary troubles." The article also included a photograph of the room, in which the deputy's mother had died, stating that the room is named after her son. The article also quoted M., the care home's chief medical officer, who stated:

> It is for lack of mercy for their next of kin that their relatives bring them here, in order to avoid troubles, as if they themselves are not within God's power.

[238] *Dyudin v. Russia* of 14 October 2008; *Romanenko and Others v. Russia* of 8 October 2009; *Godlevskiy v. Russia* of 23 October 2008.
[239] *Dyuldin and Kislov v. Russia* of 31 July 2007; *Filatenko v. Russia* of 6 December 2007; *Godlevskiy v. Russia* of 23 October 2008; *Reznik v. Russia* of 4 April 2013; *Nadtoka v. Russia* of 31 May 2016.
[240] *Grebneva and Alisimchik v. Russia* of 22 November 2016; *Filatenko v. Russia* of 6 December 2007.
[241] *Filatenko v. Russia* of 6 December 2007.
[242] *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010.

> Sometimes ordinary nurses happen to be more merciful than people in authority ...

S.'s father, brother, and sister brought a defamation suit against the applicant. They alleged that the above-mentioned extracts were untrue and intended to discredit the S. family and to impact the upcoming elections. They sought compensation in respect of non-pecuniary damage. They also claimed the violation of privacy.

The proceedings against the applicant were lengthy. A district court found no violation: the right to privacy was not breached because the relatives placed S.'s mother in a state-owned medical institution thus stepping out of the private sphere. The court also noted that M.'s statements had no explicit link to the members of the S. family. The two higher courts upheld the judgment. The Supreme Court of Russia sent the case back to the district court for re-examination, but the district court dismissed the claims under the same reasoning.

This time, however, the regional court found violation of the right to private life and to honour and dignity. An appellate court upheld the decision noting that Kunitsyna did not provide any evidence for her assertion that the reason the relatives had placed S.'s mother in the care home was their lack of mercy. The court ruled that Kunitsyna had disseminated untrue information, and ordered her to pay compensation for non-pecuniary damage. It did not consider the case in light of private life. The highest instance upheld the judgment. The applicant was ordered to pay 4,000 roubles (approximately 110 euros) to each of the three claimants.

The ECtHR agreed with Russia's courts that the interference was "prescribed by law" and "pursued a legitimate aim," that is, "the protection of the reputation or rights of others," with an attention on whether it was "necessary in a democratic society." The Court reminded that the margin of appreciation of national authorities was limited "by the interest of a democratic society in enabling the press to play its vital role of 'public watchdog'." The ECtHR noted that it would limit the case to the issue of protection of reputation because the national courts had addressed only this part of the claim.

The Court reiterated that an objective link between the statement and the person suing in defamation was a "requisite element." It criticised the Russian regional courts which had based their decisions on perceptions of two witnesses claiming that the impugned extracts related to S's relatives. The ECtHR noted that:

> Mere personal conjecture or subjective perception of a publication as defamatory does not suffice to establish that the person in question was directly affected by

> the publication. There must be something in the circumstances of a particular case to make the ordinary reader feel that the statement reflected directly on the individual claimant, or that he was targeted by the criticism.[243]

The Court noted the lack of objective link in the impugned extracts that either designated S. or referred to "the people in authority." Therefore, the Court stated, "the statements can therefore hardly be regarded as directly relevant to the claimants, or detrimental to their reputation." S. himself never participated in the defamation proceedings in question, which meant that he was not discredited, from the ECtHR's standpoint.

The ECtHR repeated the need for a careful distinction between facts and value judgments. In the Court's opinion, it was obvious that the impugned expressions were value judgments because they represented the "applicant's interpretation" of the situation and were concerned "with moral criticism." While the ECtHR reiterated that a value judgment may be excessive, the statements at issue did not go beyond the limits of responsible journalism. The Court agreed with the applicant's opinion that the article aimed to address the issue of the lack of care facilities for elderly people in the region. Consequently, the Court failed to see why it was relevant to disclose the name and make suggestions of morally wrong behaviour in the article. In other words, the Court implied that the applicant could violate the right to private life guaranteed in Article 8 of the ECHR. However, the Court limited the scope of its analysis to the assessment of the "necessity" of the measure to protect the claimants' reputation because the domestic courts failed to examine the breach of the privacy in this case.

In general, the ECtHR severely criticised the failure of Russian national courts to examine the elements necessary for establishing whether the applicant complied with her journalistic "duties and responsibilities." The Court observed that the Russian courts had failed to differentiate value judgments from factual statements. The ECtHR noted that it was incorrect for the national courts to limit the analysis of this case to two aspects only: they merely found that the information had been "disseminated" by the applicant and that she lacked evidence to prove its truthfulness. The ECtHR held that the Russian courts failed to examine other important issues, such as the applicant's good faith, the aim of the publication, whether the article addressed public interest or general concern, or "the relevance of information regarding the claimants' next of kin in the context of that topic."

The ECtHR concluded by pointing out the inconsistency between the standards

[243] See also, for example, *Reznik v. Russia*.

applied by the national authorities and the principles of the ECHR's Article 10. It stated that:

> it is the failure by the domestic courts to base their decisions "on an acceptable assessment of the relevant facts" and to adduce "relevant and sufficient" reasons that brings the Court to the conclusion that the interference complained of was not "necessary in a democratic society."[244]

The 2010 ruling of Saliyev[245] also concerns the issue of the protection of reputation, but it engages the ECtHR's analysis with another key problematic aspect of Russian media regulation such as censorship in the state-run media. The applicant Saliyev, president of an NGO, published in the municipally owned newspaper *Vecherniy Magadan* his own article entitled "Shares for the Moor of Moscow." It labelled the purchase of shares in a local energy-producing company by a group of Moscow-based firms as a "crooked deal" and claimed that a high-ranking official from Moscow, one of the leaders of the pro-government political party, was behind it.

After the newspaper was distributed, many copies were removed from the newsstands and destroyed, allegedly upon the request of Svistunov, the newspaper's editor-in-chief. Soon afterwards, he asked Magadan's mayor to release him from the position of editor-in-chief. Later, he claimed that because of the applicant's article he was forced to sign a backdated order for the withdrawal of the copies.

Saliyev filed a complaint with the regional prosecutor's office. He suggested that the withdrawal of the copies represented an unlawful interference with press freedom, which is a criminal offense under Article 144 of the Russian Criminal Code. The investigator dismissed Saliyev's complaint stating that the withdrawal was initiated by the editor-in-chief and, consequently, was permissible. The applicant challenged that decision before the court, but the investigator used the same rationale to conclude that there was no case to investigate. The courts confirmed the decision.

Then, Saliyev brought a new suit seeking that 2,000 copies of the issue with his article would be reprinted and sold. The national courts dismissed the action noting that there had been no contractual relationship between the applicant and the newspaper obliging the publication to distribute the issue. Additionally, the courts noted that, being the owner of the copies, a newspaper had a sole right to make decisions on their

[244] See also, for a similar finding, *Godlevskiy v. Russia* of 23 October 2008 and *OOO Ivpress and Others v. Russia*.
[245] *Saliyev v. Russia* of 21 October 2010.

distribution.

The ECtHR provided a detailed explanation why there had been an "interference" with the applicant's freedom of speech. From the perspective of the "right of access to the press," the editor-in-chief was entitled to decline the applicant's article for publication, as the ECtHR stated. It noted that "privately owned newspapers must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists." This approach might be inapplicable if only the press is, *de jure* or *de facto*, in the hands of a monopoly, specifically a government monopoly,[246] but *Vecherniy Magadan* functioned in a quite competitive sector, as the ECtHR noted.

Yet, it would be incorrect to interpret this case in light of the "right of access to the press," the Court explained. First, the copies were withdrawn and destroyed after the editor had accepted the article, and after it had been made public. Second, the reason for the removal of the copies was the content of Saliyev's article. Therefore, the removal constituted "interference" under ECHR's Article 10, and, furthermore, it was a "governmental" interference rather than a private one. The Court stated that: "the independence of the newspaper was severely limited by the existence of strong institutional and economic links with the municipality and by the constraints attached to the use of its assets and property."

The Court stated that the general context of the case and the editor-in-chief's "dual role" predetermined Svistunov's decision. He was a professional journalist, but had to ensure loyalty to the municipality and to adhere to the relevant policy line because of the newspaper's owner, the Magadan municipality. The Court saw no difference between municipal or other governmental authority in Russia and qualified his decision as "an act of policy-driven censorship."

The ECtHR noted that the interference was "prescribed by law." Although article 28 of the statute "On Mass Media" banned the "confiscation or destruction" of a print run or parts of it without a court order, it also provided, in Article 2 Part 10, that editors-in-chief head the editorial board and could make final decisions as to the production and distribution of the outlet. The withdrawal might be in service of the protection of a legitimate aim, in this case, the protection of the reputation or the rights of others, the Court noted, but the government's interference went beyond this aim.

The ECtHR criticised severely the Russian national courts, which failed to

[246] *Saliyev v. Russia*. See also *Manole and Others v. Moldova* of 17 September 2009.

examine the important details of the case and *provided no justification* for their judgments in the context of Article 10 of the ECHR. The main insufficiency of the Russian authorities' approach, in the ECtHR's view, was that they *interpreted the situation as just "another purely business case"* justifying the withdrawal merely by the lack of contractual relationship between the newspaper and the author. The ECtHR emphasised that "the relationship between a journalist and an editor-in-chief (or publisher, producer, director of programmes, and so on) is not only or always a business relationship." Grounding their decisions on a "mistaken assumption," the Russian courts did not examine the situation in the context of the right to freedom of expression, the ECtHR ruled, and *the entire decision-making process in this case had been irrelevant*.

The Court also stated that the article presented an issue of public interest, that is, the acquisition of shares in a large state-controlled energy company and the role of some public officials in that process. Furthermore, Saliyev did not exceed the limits of permissible criticism because his value judgments were based on facts. Additionally, the national courts overlooked the important role of *Vecherniy Magadan* in the region: according to its charter, the newspaper aimed to inform the audience about the "social, political and cultural life" of the town. Therefore, the Court ruled, it was not a merely "profit-making business," but a "forum" for information and opinions.

It remained unclear to the Court whether the Russian courts' "formalist" approach to media disputes was due to a lack of diligence or to problems in the national legislative framework. However, it is important to remember that the statute "On Mass Media" recognised the specific nature of relationships, characterising the media industry as well as the important role of journalists. Furthermore, it contained many rules that could be applied to protect media freedom, and the ECtHR demonstrated this in its ruling on Saliyev's case. Therefore, in this case, the formalist approach was mainly a result of *the failure to properly implement media regulations*.

The examination of another judgment of the ECtHR concerning media regulation, in the case of Dzhavadov,[247] also reveals this problem as it concerns the *misinterpretation of media law in favour of governmental agencies*.

Dzhavadov sought to establish a newspaper called *Letters to the President*. He applied for registration with the Ministry of the Press, Television and Radio Broadcasting and Mass Communications, which oversaw the registering process at that time. In its official refusal of Dzhavadov's application, the ministry quoted Article 13 of the statute

[247] *Dzhavadov v. Russia* of 27 September 2007.

"On Mass Media," which requires that all information in the application be consistent with "the real state of affairs," or, in simple words, requires it to be true. The ministry stated that Dzhavadov's proposed title of his new publication implied that the newspaper is published by the Administration of the Russian President, which is not true. It also alleged that a newspaper is supposed to cover a wider range of subjects than its title would suggest. Dzhavadov tried to challenge the decision in court. The court of the first instance agreed with the ministry that the publication is incompatible with the current legislation since its title, *Letters to the President*, suggests a very narrow scope of its publishing mandate. Additionally, it stated that the applicant had failed to comply with the three-month deadline for bringing a lawsuit, as provided by the Russian law on civil procedures.[248] The Moscow City Court upheld the judgment.

Ruling on this case, the ECtHR referred to its judgement on the case of *Gaweda v. Poland*[249] in which it stated that requiring a magazine's title to contain truthful information miscorrelated with press freedom. The aim of an outlet's title it to give identification rather than to claim a statement, the ECtHR observed. In its opinion, the Russian courts treated the legal wording "the real state of affairs" at their "discretion in favour of the registering authority to refuse registration." The ECtHR ruled that such misinterpretation was not based on legal rules and the applicant could not reasonably foresee it. Therefore, the impugned "formalities" for registration were not "prescribed by law."

With regards to the case law on protest in Russia, the ECtHR noted many of the abovementioned problems when scrutinising Russia's practice. In determining the acceptability of governmental interference under the ECHR's provisions in the case of Russia, the Court applied three main approaches. It considered these cases in light of:

(i) freedom of association and/or on other rights without engaging Article 10 issues;[250]

(ii) freedom of association in light of Article 10;[251]

(iii) freedom of expression.[252]

[248] The deadline was established by Article 256 Part 2 of the Russian Code of Civil Procedure.
[249] *Gaweda v. Poland* of 14 March 2002.
[250] For instance, *Frumkin v. Russia* of 5 January 2016; *Mikhaylova v. Russia* of 19 November 2015; and *Kasparov v. Russia* of 3 October 2013.
[251] *Sergey Kuznetsov v. Russia* of 23 October 2008; *Berladir and Others v. Russia* of 10 July 2012; and *Malofeeva v. Russia* of 30 May 2013.
[252] *Novikova and Others v. Russia* of 26 April 2016.

The third approach is represented by the case of *Novikova and Others*. Although examination of cases on protests is beyond the scope of this study, I have included this one in my analysis because of its focus on free speech issues, rather than on freedom of assembly. The applicants alleged that their actions had constituted "solo demonstrations," rather than public meetings or assemblies and the ECtHR, therefore, suggested it would be more appropriate to examine this case from the perspective of freedom of expression.

Novikova protested in front of the building of the State Duma in Moscow with a poster displaying the message: "Psychiatry kills our children and our taxes are paying for it." As she stated, it had been a "solo static demonstration" and therefore exempt from the need for a prior notification of the public authorities, which is required by Russian law. To clarify, the 2004 Russian Public Assemblies Act[253] obliges demonstrators to notify the relevant authorities before conducting any public events. Prior notification is not required for the so-called "solo static demonstrations," a form of public expression during which individuals stand still and do not use loudspeakers. According to the 2012 amendment to the Public Assemblies Act, solo demonstrators must position themselves at a distance from each other. National courts are free to determine the exact distance, but it cannot exceed fifty meters.

As the law required, Novikova kept a significant distance from other people who were also protesting in front of the State Duma with other posters. After a few minutes, Novikova was arrested for reasons unclear to her. She was taken to the district police station and after about three hours was allowed to leave.

The government report to the courts stated that, apart from the applicant, five other people had been present in front of the State Duma. Therefore, the Russian courts ruled that Novikova violated the Russian law on solo demonstrations. They ruled that the protest had in fact been a gathering because five other people had also participated in it. Similar rulings were made in cases involving the same situation, but other applicants.

The ECtHR agreed with the national authorities that governmental interference in this case was based on the law. However, the Court noted that the case of the first applicant had been considered before the 2012 amendment. At that time, the law had not been sufficiently explicit on which conduct requires notification because the act was lacking criteria to distinguish group events from several simultaneous solo demonstrations or one solo demonstration, as the ECtHR argued. Because the other

[253] Federal Statute of the Russian Federation No. FZ-54 of 19 June 2004 on Gatherings, Meetings, Demonstrations, Marches and Pickets.

applicants were arrested after the amendment came into force, the ECtHR applied other criteria to their cases.

In general, the Court casted doubts on the legitimacy of the aim in this case. While the interference could be said to aim the "prevention of crime" and "prevention of disorder," the ECtHR noted that the demonstrations had been peaceful and had not disturbed traffic. The aim of the 2012 amendment was unclear to the Court, which did not see any rationale for the reclassification of a peaceful assembly to a solo demonstration.

The Court observed that the Russian authorities had *failed to justify the proportionality of their actions*. Their rulings lacked consideration relating to public safety, prevention of disorder, or protection of the rights of others. The ECtHR particularly criticised *the formalist approach* of the Russian courts, which classified the solo demonstration of one of the applicants, Kirpichev, as an assembly only because his staging attracted the attention of passers-by.

The ECtHR severely criticised the Russian authorities *for their failure to consider the charges in light of freedom of expression*. It observed that the applicants' "solo demonstrations" constituted political expressions enjoying maximum protection under Article 10 of the ECHR. It concluded that terminating the demonstrations and charging the applicants had constituted a disproportionate interference with their right to freedom of expression.

With regards to state secrets, the case of Pasko is the only one concerning this issue. It is among the few cases in which the ECtHR found no violation of Article 10 of the ECHR. The Court's ruling may seem controversial, particularly given the PACE's repeated criticism of Russian legislation on state secrets (see section 1.5). However, there was nothing in this case that would have warranted a different decision, the ECtHR noted. The Court stated that the decisions of the Russian courts were "well-founded" and proportionate, unlike most of the cases against Russia considered by the ECtHR on Article 10 of the ECHR. In this case, this ruling was exceptional, as my study revealed. This case may be interpreted as an example that the Russian courts are able to provide proper and careful justification when the case concerns issues that are particularly sensitive for the country, such as the protection of state secrets.

The applicant Pasko was a Navy officer and a military journalist for the Russian Pacific Fleet's newspaper *Boyevaya Vakhta* ("Battle Watch"). His articles mainly addressed issues of environmental pollution, accidents with nuclear submarines, transport

of military nuclear waste, and other subjects concerning the Russian Pacific Fleet. As a freelancer, he also collaborated with Japanese journalists, providing them with some information and videos, which, as he stated, he took from open sources. *Boyevaya Vakhta*'s editor claimed that he was unaware of these contacts and that Pasko had never been entrusted with the task to collaborate with Japanese nationals.

Before his trip to Japan, Pasko was searched. Some of his papers were seized, allegedly because they contained state secrets. After he came back, he was arrested and accused of treason, through espionage, for collecting and storing secret information and communicating it to foreigners. The national courts ruled that the classified information in Pasko's papers contained the names of very important and secure military formations, and that he had stored them in order to transfer the information to Japanese nationals. The applicant was sentenced to four years in prison, but was released on parole after a year.

Pasko stated that in his case legislation was used retroactively because at the time of his crime, there had been no statutory list detailing what information constituted a state secret. He also complained of the extensive and unforeseeable interpretation of the legal instruments by the national courts which had allegedly relied on an unpublished ministerial decree. He also claimed that political motives were involved in his case because of his critical publications.

The ECtHR ruled that the national law had met the qualitative requirements of accessibility and foreseeability. The ECtHR noted that the legal rules were "sufficiently precise." It stated that, as a military employee, Pasko had read and signed the unpublished decree; therefore, he was aware of the limitations. In this case, governmental interference had a legitimate aim, namely, to protect the interests of national security.

The ECtHR noted that the applicant was convicted as a serving military officer and not as a journalist. Therefore, he "was bound by an obligation of discretion in relation to anything concerning the performance of his duties,"[254] as the Court ruled. Relying on the scrutiny of the Russian national courts of Pasko's phone conversations, experts' reports, *et cetera*, the ECtHR found that such scrutiny had been careful. Therefore, it rejected the applicant's arguments that his intent to transfer secret information had not been proven and that such information was available from open sources. The Court also noted that the applicant's sentence was much lower than the statutory minimum, although his actions could have caused considerable damage to national security.

[254] *Pasko v. Russia* of 22 October 2009. See also *Hadjianastassiou v. Greece* of 16 December 1992.

In general, my analysis shows that Russia has largely failed to examine the cases on freedom of expression in light of the CoE standards and to achieve balance between the protection of this right and other rights and freedoms. One the one hand, the media sector and opposition are faced with a lack of protection of the right to free speech; on the other, Russian citizens may lack judicial protection from irresponsible journalism.

My analysis also reveals a lack of progress in the implementation of the ECtHR perspective by the Russian national authorities. Over the entire period of the ECtHR's consideration of case law on Russia on Article 10, the Court repeatedly found many similar problems that Russia failed to resolve. Therefore, the scholarly assumptions of the effectiveness of the ECtHR case law as a legal source for Russia can be hardly confirmed with regards to media freedom. Russia continues to apply a formalist approach and to provide a superficial analysis of cases. It has failed to acknowledge the value of freedom of expression and the importance of the press.

The ECtHR has also revealed several other problems such as the lack of foreseeability of some clauses of Russian legislation concerning the media. The Court has tried to point to the vulnerability of editors and journalists who work for state-run outlets, which implies that Russia will have to address this problem. However, the section 1.5 concerning the evolution of Russian media regulation has shown that state-run media concentration has increased. Similarly, while the ECtHR insisted that the agency overseeing media registration in the country has to be reformed, the same agency has actually seen its powers extended.

Despite the specific attributes of Russian legal culture, the forcible methods of the CoE cannot work with Russian media freedom because these methods are restrained by political factors. The case of Pasko shows that Russia is able to apply the ECtHR standards in cases that meet the Russian concept of information safety.

1.8. Russian Judiciary Doctrines of Free Speech and Media Freedom

A central issue of this section is the practice on free speech of the two high Russian courts, the Constitutional Court and the Supreme Court of the Russian Federation. Russia is not a common law country, but the examination of court practice is, nevertheless, very important to determine how the right of free speech is interpreted or implemented. As Danilenko (1999, p. 51) notes, the real status of international law in CIS countries depends not only on their constitutions, "but also by the willingness of domestic courts to rely on that body of law." In cases concerning free speech, the judicial branch should

help to find the right balance between freedom of speech and other human rights or interests. If there is no "judicial independence, there is no rule of law" (Jarquin & Carrillo, 1998, p. vii). This section examines the Russian judicial interpretations of freedom of speech and media freedom and their role in protecting these fundamental rights. It also studies their strategies on the implementation of the CoE standards.

Russian Judiciary Power

Russia was the first CIS country to conduct considerable judicial reform to comply with international standards (Danilenko, 1999). Like many countries of continental Europe, Russian judicial power is ensured through four separate "streams": constitutional courts, general jurisdiction courts, military courts, and *arbitrazh* courts. General courts deal with criminal, civil, as well as administrative issues. If such cases relate to military personnel or services, they are heard in military courts. *Arbitrazh* courts consider cases concerning economic activities.

The Supreme Court of the Russian Federation is the highest court over general jurisdiction courts, military courts, and *arbitrazh* courts and it is entitled to supervise their activities. Before 2014, the Supreme *Arbitrazh* Court of the Russian Federation was the highest judicial body presiding on cases related to economic activities. In 2014, it was abolished, and the Supreme Court took over its powers. The Supreme Court is empowered to study and systematise the court practice in Russia. It has the authority to explain and clarify the issues concerning judicial practice of international treaties ratified by Russia and the USSR within the Court's competence. Unlike the Constitutional Court, the Supreme Court has the power to address any law of its choice. However, its documents are not legally binding, which reduces their impact and prevents consistent implementation of its position by the lower courts.

The Constitutional Court of the Russian Federation is authorised to verify whether legal acts comply with the Russian Constitution, while other constitutional courts verify the compliance with constitutions of constituent entities of the Russian Federation. If the courts find laws and regulations unconstitutional, such laws lose effect (Article 125 paragraph 6 of the Constitution). The Constitutional Court may also form new legal rules, and it is empowered to send cases back for reconsideration.

Nevertheless, its authority is significantly limited, in comparison to most other constitutional courts in European countries and the ECtHR. The Russian Constitutional Court is entitled to assess legal regulations and can neither assess the actions of

governmental bodies nor the decisions of lower courts. It must refrain from establishing and examining the factual basis of cases, if this relates to the competence of other courts or bodies (Article 3 of the Statute, "On the Constitutional Court of the Russian Federation"[255]). Even if it finds violations, it may only examine the issue of whether the law applied in the case is consistent with the Russian Constitution or not. Such limitation of the Court's authority considerably curtails its ability to protect human rights and freedoms. Apart from its politicisation, its limited power may explain why complaints from Russian citizens to the Constitutional Court are far less frequent than complaints to the ECtHR.

The Russian Constitution stipulates several guarantees for judicial independence and impartiality. According to the Constitution, the judicial branch acts independently from other branches of power, and the courts alone are authorised to administer justice. The Constitution also guarantees independence, irremovability, and inviolability of judges. Constitutional Article 123 in paragraph 1 proclaims the openness of judicial examinations and states that hearings *in camera* (in chambers) are allowed only in cases stipulated by federal law. In paragraph 3, Article 123, the Constitution proclaims that judicial proceedings are held on the basis of controversy and equality of the parties.

However, scholars argue that Russian judiciary power is not independent and, furthermore, that it is integrated to the Kremlin's vertical of power (Provost, 2012; Trochev, 2008). In several of its resolutions, the PACE called for legal reforms that would protect judges from undue governmental influence.[256] Russia's insufficient experience with an independent judiciary is considered one of the obstacles for impartial justice (Epstein, Knight, & Shvetsova, 2001). The increasing "politicisation" of the courts also stands in the way of enhancing the notion of free expression in Russia (Foster, 2002).

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[255] Federal Constitutional Statute of the Russian Federation "On the Constitutional Court of the Russian Federation" of 21 July 1994 No. 1-FKZ.

[256] Resolution 1619 (2008) of the CoE Parliamentary Assembly, "State of democracy in Europe. The functioning of democratic institutions in Europe and progress of the Assembly's monitoring procedure," adopted on 25 June 2008 (24th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17660&lang=en; Resolution 1676 (2009) of the CoE Parliamentary Assembly, "State of human rights in Europe and the progress of the Assembly's monitoring procedure," adopted on 24 June 2009 (23rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17757&lang=en; Resolution 1685 (2009) of the CoE Parliamentary Assembly, "Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states" adopted on 30 September 2009 (32nd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17778&lang=en; Resolution 1896 (2012) of the CoE Parliamentary Assembly, "The honouring of obligations and commitments by the Russian Federation," adopted on 2 October 2012 (31st Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19116&lang=en

According to Russian regulations, the judges of Constitutional and Supreme Courts are assigned by the upper chamber of the Russian Parliament upon the recommendation of the president (Article 9 of the statute "On the Constitutional Court of the Russian Federation", Article 4 of the statute "On the Supreme Court of the Russian Federation"[257]). In his book *Judging Russia*, analysing the activity of the Russian Constitutional Court in the period 1990–2006, Trochev suggests that it "appears to stick to nondemocratic policies" (2008, p. 2) in general. Several Constitutional Court judges had to resign after their criticism of the Kremlin (While, 2009). Relative political weakness is another challenge for the Russian judiciary branch, and many judgments are unenforced (Provost, 2012). All this undermines the public's confidence in the Russian judicial system, which has been declining (Savkina, 2013).

Russian Constitutional Court's Doctrine on Free Speech and Media Freedom

The most comprehensive study on the Constitutional Court's practice on issues of free speech has been conducted by Krug (2008). It revealed several main trends in the period 1991–2006, and the results from this study will be used in this section to compare with the tendencies of 2007–2016.

Krug uses two notions to describe trends regarding judicial doctrine on the constitutional Article 29 observable in the first decade after the adoption of the Constitution. These notions are *abstention* and *engagement*. The former refers to the courts' abstention to reference Article 29 on free speech in cases concerning the media, or referencing the article, but not applying it; the latter refers to the lack of application of the article. Krug argues that in the practice of the Russian high courts *engagement* is almost inexistent in comparison with *abstention*: the courts mostly abstained from applying constitutional Article 29 when considering media cases.

Under abstention, Krug classifies two further tendencies. The first one occurs when the courts fail to recognise the constitutional dimension of cases involving the media. For instance, in the cases of the shutdown of NTV and TV-6,[258] Krug notes a normative paradox: while these cases explicitly concerned freedom of speech, the court failed to

[257] Federal Constitutional Statute of the Russian Federation "On the Supreme Court of the Russian Federation" of 5 February 2014 No 3-FKZ.

[258] Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of Article 35 of the Federal Statute "On Joint-Stock Companies," Articles 61 and 99 of the Civil Code of the Russian Federation, Article 31 of the Tax Code of the Russian Federation, and Article 14 of the Arbitral Procedural Code of the Russian Federation, in response to complaints by a citizen, A. B. Borisov, and companies Media-Most and Moscow Independent Broadcasting Corporation, Moscow, 18 July 2003.

mention Article 29 of the Constitution. The second tendency occurs when Russian courts fail to develop further grounds to uphold rights and freedoms guaranteed by Article 29, even though court decisions formally cite this article. As Krug notes, in such cases, even if the Constitutional Court quoted Article 29 while considering the case, it did not establish any patterns or any sort of doctrine on free speech, although the doctrine of the Constitutional Court may help the lower courts to properly apply Article 29 of the Constitution in media cases.

It should be noted that Krug does not include in his study two important Constitutional Court decisions[259] concerning the media and the elections—cases from 2003 and 2006—which advanced the Russian judicial doctrine on free speech and incorporated some of the most important ECHR concepts. Particularly, the Constitutional Court acknowledged the importance of the mass media during electoral campaigns in a democratic, rule-of-law state because the information from the media facilitates deliberation and voting, which correlates with the ECtHR practice, as shown in the previous section.

Referring to the ECHR and the ICCPR, the 2003 Court resolution stated that media freedom implies specific *duties and responsibilities* of media organisations. It acknowledged that media professionals act "on the basis of editorial independence and rules of self-regulation elaborated by the journalistic community i.e. professional standards and ethical principles." Consequently, as the Court noted, they must adhere to "ethical and balanced standpoints and report on electoral campaigns in a fair, balanced and impartial manner."

The Court tried to incorporate the *criteria used by the ECtHR to check the admissibility of limitations to freedom of expression* to its media freedom doctrine. It stated that such limitations must be "necessary" and "proportionate to the Constitutional purposes." Even if the purposes allow legislators to limit the rights, the limitations cannot "encroach on the very essence of the right," according to the Court. It ruled that the government must ensure the balance between constitutional rights and interests and it must exploit only those measures that are "necessary" and proportionate with the

[259] Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of certain provisions of the Federal Statute "On the Main Guarantees of Electoral Rights and the Right to Vote at Referendum of the Citizens of the Russian Federation," in response to request of the deputies' group of the State Duma and complaints of citizens S.A. Buntman, K.A. Katanyan, and K.S. Roshkov, Moscow, 30 October, 2003; Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of Articles 48, 51, 52, 54, 58, and 59 of the Federal Statute "On the Main Guarantees of Electoral Rights and the Right to Vote at Referendum of the Citizens of the Russian Federation," in response to a request by the State Duma of Astrakhanskaya Oblast, Moscow, 16 June 2006.

constitutional purposes. From the Court's standpoint, limitations are justifiable if only they are fair, adequate, proportionate, and necessary for the protection of legitimate aims. Additionally, they must be expressed in formal rules that are precise, clear, and that do not allow extensive interpretations or implementation of such limitations.

In 2010, the Court contributed to integrating some of the basic ECtHR standards to the Russian judicial doctrine on defamation.[260] It stated that the Russian courts cannot justify their rulings only by checking whether they are true or false. According to the Constitutional Court, they must also assess the meaning of the publication, its context, objectiveness, and whether it has manipulated the facts or not.

My study reveals that the Russian Constitutional Court directly refers to international standards when ruling on freedom of expression issues. Furthermore, the research shows that in the last decade the Constitutional Court has almost always quoted Article 29 of the Constitution in cases concerning free speech or media. The exception were issues concerning the freedom of assembly, which shows the different approaches of the ECtHR and the Russian Constitutional Court. Russian laws limiting this right have been challenged in the ECtHR several times, but the Constitutional Court has not acknowledged the free speech dimension when justifying the constitutionality of these laws. At the same time, such quotations, alongside references to the Constitution, often remain *a formality* or they are used to justify legitimacy of new and excessive restrictions on freedom of speech—and these trends have been increasing over the last decade.

For instance in 2013, the Court rejected consideration of the complaint of the citizen Kochemarov[261] who complained about the ambiguity of the notions of extremism and extremist materials (for details, see section 2.2). The Court claimed that the challenged provisions were constitutional because they merely elaborated the constitutional ban on propaganda exciting hatred, enmity, and supremacy, which he did not clarify. This approach exemplifies the previous tendency revealed by Krug, where the Constitutional Court recognised freedom of speech, but abstained from both its protection and from investigating the issue further.

[260] Resolution of the Constitutional Court of the Russian Federation on the admissibility of the complaint of citizen A. I. Uskov, complaining about the violation of his constitutional rights by Article 46 part 1 of the Statute of the Russian Federation "On Mass Media" and Article 152 part 3 of the Civic Code of the Russian Federation, 1 March 2010.

[261] Resolution of the Constitutional Court of the Russian Federation on the admissibility of the complaint by citizen V. S. Kochemarov, complaining about the violation of his constitutional rights by Article 1 paragraphs 1 and 3 and Article 13 paragraph 3 of the Federal Statute of the Russian Federation "On Counteraction of Extremism Activity," 2 July 2013.

The Court referred to some of the key CoE concepts concerning freedom of expression. It acknowledged that this freedom is one of the pillars of a democratic society and a key element in the progress and self-realisation of such society. It reiterated the ECtHR formula that freedom of expression should also be applied to unpopular, shocking, or provocative expressions. However, referring to the Constitution and the ECtHR case law, the Constitutional Court merely concluded that the exercise of human rights and freedoms must not violate the rights and freedoms of others.

The Constitutional Court *failed to explain how to employ a balancing test in cases involving allegedly extremist materials*. It quoted the ambiguous provision of the Shanghai Convention "On Combating Terrorism, Separatism and Extremism" [262] (hereinafter—"Shanghai Convention") stating that terrorism, separatism, or extremism cannot be justified under any circumstances. Thus, the Court implied that *no balancing test is required* in extremist cases, which is consistent with the ECtHR standards. The Shanghai Convention was signed by six countries: China and five post-Soviet states (Russia, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan). These countries agreed to cooperate in the area of prevention, identification, and suppression of acts of terrorism, separatism, and extremism. Formally, the Constitutional Court was right to conclude that the Shanghai Convention constitutes "international" law. This Convention was adopted in formal compliance with all necessary procedures,[263] and therefore it is an inherent part of Russian law—it is legally binding and has legal force equal to that of the ECHR. But by forming its own interpretation of "international law" miscorrelating with the universal perspective on freedom of speech in order to better fit its "national interests" as defined by the government, Russia shows a dangerous precedent to other countries.

In the ruling on Kochemarov's case, the Court stated that the Shanghai Convention allows *broader interpretation* of extremism in national law. It misinterpreted several ECtHR decisions[264] to support Russia's arguable viewpoint that the ECtHR case law

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[262] Shanghai Convention "On Combating Terrorism, Separatism and Extremism," adopted on 15 June 2001 and entered into force on 29 March 2003. Retrieved from http://www.mid.ru/sanhajskaa-organizacia-sotrudnicestva-sos-/-/asset_publisher/0vP3hQoCPRg5/content/id/579606

[263] Article 15 of the Federal Statute of the Russian Federation "On International Treaties of the Russian Federation" provides that international treaties concerning human rights may become legally binding only after their ratification. Therefore, the president proposed the ratification of the Shanghai Convention to the State Duma, which adopted the appropriate statute, the Federal Statute of the Russian Federation "On Ratification of the Shanghai Convention of on Combating Terrorism, Separatism, and Extremism," No. 3-FZ of 10 January 2003. Then, the statute was approved by the Council of Federation and signed by the president.

[264] *Cantoni v. France* of 15 November 1996; *Coeme and others v. Belgium* of 22 June 2000; *Achour v. France* of 26 March 2006; and *Huhtamaki v. Finland* of 6 March 2012.

allows using vague legal terms, which would be further interpreted by the judicial branch at its own discretion. In other words, the Constitutional Court misinterpreted one of the main ECHR criteria of admissibility of free speech limitations, which requires that the law be clear and foreseeable. The Constitutional Court also ignored the documents of several CoE bodies to reformulate this concept (see section 2.2). The Court stated that Russian laws on extremism fully comply with international standards.

The same trends can be observed in almost every decision on free speech of the Constitutional Court in the last decade. In its 2011 landmark decision on the complaints of Kondratijeva and Mumolin,[265] the Court misinterpreted the ECtHR case law to justify the constitutionality of the statutes "On the State Civil Service" and "On the Police," prohibiting officials civil servants and the police force to make any public expressions, opinions, or assessments, including in the mass media, concerning the institutions for which they work. The Court's argumentation in this ruling has become key for the adjudication of many cases involving public interest in Russia.

Aleksei Mumolin was a former police major, who had been fired due to his video-recorded appeal to Rashid Nurgaliev, the then-head of the Russian Ministry of Internal Affairs. Mumolin reported on the shortcomings of the local police activities and exposed several unlawful methods that were used in their work. Kondratijeva was a former civil servant fired after criticising the interdistrict inspectorate of the Federal Tax Service during a TV show. Both cases were high-profile in Russia. The applicants appealed to Article 29 arguing that the challenged provisions had violated their right to free speech and the right to disseminate information.

The Constitutional Court recognised that Article 29 was applicable to the relationship between employer and employees, and it was also "a factor of effectiveness of the public control over public authorities," which was in line with the ECtHR's perspective. The court stressed the key importance of public interest in considering cases on freedom of expression. It noted that freedom of criticism and opposition was permissible when it pertained to the public interest. However, these statements were made in isolation of the complaint and did not affect the ruling.

Reversing its argumentation, the Court stated that public expressions of criticism from officials were limited by the ECtHR concept of *loyalty and restraint*. It ruled that

[265] Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of art. 17, para. 1(10) of the Federal Statute on the State Civil Service and of art. 201 of the Statute of the Russian Federation on the Police in response to complaints by two citizens, L. N. Kondratijeva and A. N. Mumolin, 30 June 2011.

such expressions undermine the authority of state bodies representing "a precondition of solving problems" in protecting human rights, sovereignty, and the state's integrity. If criticised, governmental bodies would not be able to effectively exercise their powers, the Constitutional Court concluded. Therefore, it found that the impugned provisions had been fully consistent with Article 29 of the Russian Constitution and Article 10 of the ECHR.

This ruling, however, is inconsistent with the ECtHR's freedom of speech doctrine, which provides the strongest protection to *any* political expression, particularly those criticising public officials. In its judgment, the Constitutional Court misinterpreted several ECtHR decisions[266] and misused the concept of loyalty and restraint. For instance, in *Vogt v. Germany*, the ECtHR determined that a democratic state is entitled to require civil servants to be loyal towards the constitution rather than towards the state itself. Furthermore, the ECtHR found that the applicant's dismissal violated Vogt's right to freedom of expression and was disproportionate to the legitimate aim. In the case of *Ahmed v. the UK*, the ECtHR found no violation of the right to free expression only because the case concerned restrictions of political activities of local governmental officers preventing them from taking part in electoral campaigns. In other words, none of the ECtHR decisions, to which the Russian Court referred, establishes a general ban on public officials' criticism of their employers.

In the case of *De Diego Nafria v. Spain*, the ECtHR held that the dismissal of a former civil servant does not violate Article 10 of the ECHR. It ruled that Nafria's insulting letter to the bank's inspectorate had exceeded the limits of criticism and observed that the Spanish courts had carefully and appropriately balanced the conflicting interests. However, the Russian Constitutional Court is not entitled to assess the details of the Mumolin and Kondratijeva cases because its power is limited by law. Therefore, its formalist approach may be, to a certain degree, legally determined.

Nevertheless, its ruling on this case also shows a large degree of *selectiveness* on the part of the Court in its reference to international standards. There had been other examples from the ECtHR case law concerning the limits of freedom of speech of public officials overlooked by the Constitutional Court when it ruled on Mumolin's and Kondratijeva's complaints. The Constitutional Court made no reference to the ECtHR

[266] *Vogt v. Germany* of 26 September 1995; *Ahmed v. the UK* of 2 September 1998, and *De Diego Nafria v. Spain* of 14 March 2002.

case *Kudeshkina v. Russia*[267] in which the ECtHR found the dismissal of the judge Kudeshkina to be a "disproportionately severe" penalty "capable of having a 'chilling effect' on judges wishing to participate in the public debate on the effectiveness of judicial institutions." *Fuentes Bobo v. Spain* is another case that can be referenced here.[268] The ECtHR ruled that the Spanish authorities interfered with the freedom of expression of the applicant for having dismissed him after he had criticised in the media certain management practices of the public broadcasting organisation TVE where the applicant was employed. Thus, in its decision on Kondratijeva's and Mumolin's complaints, the Constitutional Court used the ECtHR case law selectively and interpreted it in its own way.

A similar approach can be observed in the Constitutional Court's justification of the constitutionality of the ban against propaganda for "untraditional" sexual relationships between minors[269] (see for details section 2.2). The Court invoked the UN and the CoE conventions to justify the constitutionality of this ban. No reference was made to the landmark ECtHR decision of 9 February 2012, *Vejdeland and Others v. Sweden*, banning homophobic speech.

The Constitutional Court found inadmissible the complaint by Tolokonnikova, one of the members of the band Pussy Riot, who challenged the constitutionality of the provision that had been applied in the Pussy Riot case.[270] The provision (Article 213 Part 2) provides liability for hooliganism committed by a group of people acting in previous concert, or by an organised group engaged in an act of resistance against a representative of the authorities or against any other person whose duty it is to protect the public order. The Constitutional Court claimed that freedom of religion and freedom of speech, alongside freedom of assembly and other human rights, "determine the meaning, the content and the application of laws, the activities of legislative and executive power as well as local self-government bodies, and [that such freedoms] are ensured by justice." The Court stated that religious issues and value judgments concerning religion are encompassed in the constitutional order. It also held that the Russian Constitution provides no ideological or religious limitations or criteria. The Court noted that the

[267] *Kudeshkina v. Russia* of February 26, 2009.
[268] *Fuentes Bobo v. Spain* of February 29, 2000.
[269] Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of art. 6.21 part 1 of the Russian Code of Administrative Offences in response to complaints by citizens N. A. Alexeev, Y. N. Yevtushenko, and D. A. Isakov, 23 September 2014.
[270] Resolution of the Constitutional Court of the Russian Federation on the admissibility of the complaint by citizen N. A. Tolokonnikova, complaining about the violation of her constitutional rights by part 2 Article 213 of the Criminal Code of the Russian Federation, 25 September 2014, No. 1873-O.

Constitution "excludes any ban of public discussions on religious issues" and allows free expression of any opinions, even when they are controversial and criticise the activities of religious organisations.

At the same time, referring to Article 19 of the UDHR, Article 19 of the ICCPR, and Article 10 of the ECHR, the Court stated that international standards allow limitations to freedom of expression to protect public order and morals, as the Russian Constitution does. Therefore, the Court noted, it is legitimate to criminalise violation of public order and morals. The Constitutional Court justified the national courts' decisions in the Pussy Riot case without any study of the case. To avoid analysis, the Court merely provided its own general perspective to the issue of balance between freedom of expression and protection of public morality. It stated that these religious issues are sensitive and, therefore, any "form of expression concerning religion that may insult public morals" is inadmissible. Consequently, the Court ruled, if the form of expression "is based on ostentatiously rude negligence of socially accepted views on admissible behaviour in religious places" and if it lacks "any aesthetic and artistic value and is insulting," then, "such activity goes beyond" the constitutional right to freedom of expression. By having said this, the Court in fact justified not only the conviction of the Pussy Riot members, but also the 2013 amendments criminalising insult of religious feelings (see section 2.2).

Sometimes the Constitutional Court's rulings intended to legitimise restrictions that lawmakers had not introduced, but which the Russian laws formalised (as was done in the ruling challenging enforceability of the ECtHR decisions). The 2013 controversial decision on the Krylov's complaint[271] sought to justify new restrictions to online defamatory statements that soon were realised in the renewed version of Article 152 of the Russian Civic Code regulating defamation (see for details section 2.1). This ruling may partly be consistent with the CoE standards, but it, nevertheless, reflects the abovementioned trends of the court's practice on free speech and press.

Defamatory statements were made about Krylov by an unidentified individual in the online *Surgutskij forum*. In 2010, the Surgut City Court ruled that the statements were false. Then, Krylov filed a lawsuit against the domain owner requesting removal of the defamatory statements as well as the photograph of Krylov that was also posted on the forum. Because at that time the Russian Civil Code did not provide such measure, the

[271] Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of Paragraphs 1, 5, and 6 of Article 152 of the Civil Code of the Russian Federation in response to the complaint of citizen Ye. V. Krylov, 9 July 2013.

district court dismissed the lawsuit. Furthermore, the court noted that because *Surgutskij forum* was not registered as a mass media outlet it could neither be responsible for defamation nor be obliged to rectify or delete information according to the Russian legislation. Krylov believed that the law was unconstitutional because it could not protect his reputation.

The Constitutional Court directly quoted the Joint Declaration by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, and ACHPR Special Rapporteur on Freedom of Expression and Access to Information of 1 June 2011 addressing the issue of intermediary liability. The Court confirmed that

> no one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specially intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so.[272]

Therefore, administrators of Internet forums could not be held liable for defamatory statements, from the Court's perspective. The Court ruled that these persons were, nevertheless, obliged to delete statements if courts had found them defamatory. Otherwise, the Constitutional Court claimed, citizens would be deprived of the possibility to implement their constitutional right of protection of their honour and dignity. This part of the ruling fully correlates with the international standards, including the ECHR perspective on intermediary liability for online defamation (for details, see section 2.3). This might protect online non-media services from arbitrary requests on information removal.

However, the Constitutional Court further held that allegedly defamatory statements should also be removed before the court's consideration merely upon the request of the person concerned by such statements. The Court provided no additional criteria for the implementation of its perspective. For instance, it said nothing on the value of information of public interest. Consequently, it legitimised removals of criticism or

[272] Joint Declaration on Freedom of Expression on the Internet, adopted by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information on 1 June 2011 (in OSCE, 2013b, p. 67).

politically sensitive information upon requests of people who disliked such information. This approach could facilitate a "chilling effect" on online free speech and it can hardly meet the criteria of foreseeability.

In general, the role of the Constitutional Court's resolutions in incorporating international standards into Russian free speech doctrine has been controversial and mainly politically motivated. On the one hand, the Court often tries to engage some of the international concepts in its judgments and it sometimes acknowledges the value of free speech and media freedom. Despite their controversial character, the Court's resolutions could be used by other courts to protect these rights and to properly implement the CoE standards.

On the other hand, these positive developments are counterbalanced by the restrictive character of the Court's perspective, which may create certain judicial narratives for the lower courts and other enforcers. It can be argued that the Constitutional Court's role during the last decade has been mainly limited to legitimising national free speech limitations that are inadmissible from a universal perspective. In spirit, its rulings contradict the CoE standards, although the Court tried to formally acknowledge them. As mentioned in the previous section, the ECtHR criticised Russia for its formalist approach.

Furthermore, the Constitutional Court often justified Russia's "*margin of margin of appreciation*" doctrine concerning free speech limitations with references to various international standards, including the ECtHR rulings. Therefore, one cannot say that the inconsistency of the Constitutional Court rulings with international standards is due to a lack of legal literacy or expertise on the part of the Court. Its statements of reasoning usually look very sophisticated and show a high degree of awareness of conventional and non-binding international law, particularly the CoE standards.

Consequently, the Court mostly acts as an advocate of the governmental position. Its approach to free speech cases can be characterised as having a certain *judiciary bias* against political dissent, which may have a considerable chilling effect on free speech in Russia. To a certain extent, it also challenges the global prestige of the ECtHR. Most likely, the lack of authority of the Court to challenge the decisions of other courts or governmental bodies contributes to its lack of independence and is among the most important factors that can explain its increasing politicisation.

The Russian Supreme Court's Doctrine on Free Speech and Media Freedom

In his analysis, Krug (2008) notes some positive trends regarding the Supreme Court of the Russian Federation in judicial practice concerning freedom of speech. Richter (2015) labelled this Court a media freedom protector. Since 2005, the Supreme Court has issued several specific decrees (*postanovlenija*) of its Plenum on various free speech issues, such as defamation (2005), on the application of the statute "On Mass Media" (2010),[273] on extremism (2011), elections (2011), terrorism (2012), on access to judicial information (2012). The Court also prepared several reviews of Russian court practice involving freedom of speech, among which very important were the reviews specifically addressing defamation.

The Plenum of the Supreme Court is a body that assembles all Supreme Court judges and whose aim is to ensure the proper and cohesive application of the law by the various courts in the country. It also issues decrees that explain and interpret the law, sometimes relying on international standards. *De jure*, these decrees represent nonbinding explanations and recommendations—lower courts have no commitments to apply them. At the same time, *de facto*, lower courts have to take them into account when considering cases because noncompliance with the Plenum's decrees, could be, for instance, legal grounds for an appeal of these courts' rulings.

In general, the Supreme Court's policies have counterbalanced the restrictive media regulation and practice of the Constitutional Court. They have considerably contributed to the formation of the Russian legal concept of freedom of mass information and its protection. The OSCE Representative on Freedom of the Media, Dunja Mijatović, has welcomed the decrees of the Supreme Court of the Russian Federation several times (see, for instance, OSCE, 2012, 2010a, 2010b).

In this section I focus on provisions of the decree on the statute "On Mass Media," specifically addressing several issues concerning freedom of mass information in general. The decree was the first attempt to apply "On Mass Media" to online media, and the recommendations of the Supreme Court concerning this issue are examined in section 2.3. The recommendations of the Court given in this decree as well as in other decrees that concern issues of defamation, extremism, and terrorism are studied in sections 2.1 and 2.2, respectively.

As Richter (2015) describes, the processes of developing and discussing the draft of the decree on the statute "On Mass Media" were balanced and complex. The draft was

[273] The decree of the Plenum of the Supreme Court of the Russian Federation, "On the Practice of Application of the Statute of the Russian Federation, On Mass Media, by Courts" of June 15, 2010.

prepared by the working group of the Supreme Court. It then involved Russian media law scholars and experts, including the co-authors of "On Mass Media," Fedotov and Baturin, as well as Richter himself, to discuss the draft and the amendments to it. The draft was approved by the extended group, the Council of Legal Scholars and Experts, a permanent institution of the Supreme Court, and sent to the regional courts, to various interested governmental bodies, and the editorial offices of the main Russian media outlets. Their representatives were invited to further debate the draft. After reaching a consensus, the draft was unanimously supported by seventy-eight judges of the Supreme Court at its plenary meeting on 15 June 2010. Soon, the decree was published with commentaries by Richter (2010) that have been helpful in understanding and properly enforcing the Supreme Court's position.

The decree has become a unique Russian judiciary document developing the foundations for the constitutional rights to freedom of expression and freedom of mass information by underpinning the liberal provisions of "On Mass Media." The Supreme Court directly quoted the Constitution and Article 10 of the ECHR when defining these rights and their limitations. It also insisted that the Russian courts should always balance freedom of expression and freedom of mass information, on the one hand, with other constitutional rights and interests, on the other.

In line with Article 10 of the ECHR, the decree proclaimed that "freedom to express opinions and freedom of mass information comprise fundamentals for the development of a modern society and a democratic state." As Richter explains in his comments (2010, pp. 6–7), this statement means that protecting "secondary" legal interests (for instance, business reputation or public morals) should not violate the "fundamental" right to freedom of mass information.

The decree enumerated the international treaties regulating freedom of expression and freedom of mass information, among which were the ICCPR, the ECHR, the Helsinki Final Act, and the Convention on Human Rights and Fundamental Freedoms of Commonwealth of Independent States (CIS).[274] While the highest courts in Russia had

[274] The CIS Convention on Human Rights and Fundamental Freedoms, signed in Minsk, Belarus, on 26 May 1995 by all CIS member-states, entered into force on 11 August 1998. Retrieved from http://www.unhcr.org/protection/migration/4de4eef19/cis-convention-human-rights-fundamental-freedoms.html
Article 11 of the Convention states:
1. Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas by any legal means without interference by a public authority and regardless of frontiers.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions and restrictions as are prescribed by law and are necessary in a democratic society,

become accustomed to refer to the ICCPR and the ECHR, mentioning the OSCE and the CIS documents of human rights was by far less common, but all of these documents are important references for the proper consideration of issues of press freedom in Russia.

Referring to Article 29 of the UDHR, Article 19 Part 3 and Article 20 of the ICCPR, Article 10 Part 2 of the ECHR, as well as Articles 29 and 55 of the Russian Constitution, the Supreme Court reminded that the enjoyment of freedom of expression and freedom of mass information involves "duties and responsibilities." Therefore, it stressed that the provisions of the Russian Constitution on limitations of freedom of expression should be interpreted consistently with the abovementioned provisions of international law. The decree clarified that the constitutional criterion of legitimacy of limitations to freedom of mass information requires verification of whether such limitations are established in *federal* statutes (rather than in regional legislation or governmental acts).

The Supreme Court also clarified the concept of *media censorship*. It stated that governmental bodies or public officials may demand that their prior approval be given before publication if such publication is mostly based on their interviews or materials. From the Court's perspective, this demand does not constitute an act of censorship. However, journalists have no corresponding duty to satisfy such demand. Even before receiving approval, the media editorial offices have the right to disseminate the information, the decree noted. This position is consistent with the ECtHR decision on *Saliyev v. Russia*.

The right of founders to demand that their prior approval be obtained before publication depends on the editorial charter or other agreement between the founder and the editorial office, according to the decree. It explained that if the charter did not regulate this issue, any interference by the founder with editorial activities was banned.

The Supreme Court clarified that censorship might be applied only as a temporary measure according to Articles 56 and 87 of the Constitution, and strictly as provided in the Federal Constitutional Statutes "On State of Emergency" and "On Martial Law."

As the ECtHR noted in its judgment on the case of *Dzhavadov v. Russia*, the Court stressed that it would be against the law to refuse a media outlet's registration because its title does not reflect "the real state of affairs." From the Court's perspective, the title can be evaluated only as to whether it abused freedom of mass information, i.e. whether it

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in the interests of national security, public safety or public order or for the protection of the rights and freedoms of others.

called for terrorism or hate speech, or promoted pornography or the cult of violence, or cruelty.

Several elaborations on *journalistic access to information* interpreted this right in light of the CoE's perspective. The Court emphasised that providing information upon editorial information requests was a "form of implementation of the citizens' right to promptly receive information" on activities of the state bodies through the media. It stated that Russian courts should take into account and consider the cases on this right as soon as possible. The Court also clarified that information requests include corresponding duties of both commercial and non-commercial public organisations to provide information. This is an important clarification because commercial organisations have usually been excluded from this list because of commercial secrecy (Richter, 2015).

The decree clarified that journalistic accreditation caused additional privileges (rather than obligations) as to access to information. It repeated that accreditation may be limited strictly according to federal statutory legislation, which does not provide a measure as strong as suspension. Therefore, this measure would be illegal.

The Supreme Court also clarified several important guarantees concerning access to information about the courts' activities.[275] It reminded that judges had no right to deny access to court hearings or to prevent journalists from covering court trials on the grounds that this has not been provided in legislation. It clarified that closed sessions may be held only as provided in the Constitution and federal statutory legislation. Otherwise, closed sessions would violate the right to a fair and public hearing provided in Article 6 Part 1 of the ECHR[276] and Article 14 Part 1 of the ICCPR.[277] According to the decree, courts can deny editorial information requests only if they violate Article 6 Part 1 of the ECHR.

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[275] See also a specific decree of the Supreme Court on access to judicial information, "On Openness and Transparency of the Judicial Process and on Access to Information on Activity of the Courts" of 13 December 2012.

[276] Article 6 Part 1 of the ECHR states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[277] Article 14 Part 1 of the ICCPR states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

The Court explained that any person may record court proceeding by writing or using audio equipment. Permission is needed for using video or photo equipment, but the Court specified that, when deciding on this issue, judges must balance consideration of freedom of information and the rights to privacy, honour, good name, likeness, as well as the right to protect correspondence or other types of communication in secrecy. Richter notes that this provision is the first recommendation to pay attention to freedom of information in this respect.

The Supreme Court clarified for courts the application of provisions of "On Mass Media" allowing exemption of journalists and editors from liability (Article 57). It clarified what "obligatory messages" meant, stating that these include materials for election or referendum campaigns, which the media outlet is obliged to publish or broadcast under the relevant legislation. Therefore, the Supreme Court protected editors and journalists from being held liable for violations contained in statements made by politicians during election or referendum campaigns.

The Court stated that journalists and editors were exempt from liability for information contained in interviews with representatives of state and local self-governing bodies, state and municipal organisations, institutions, public associations, as well as with representatives of their press offices, because such interviews are equal to "responses" to editorial information requests, from the Court's perspective. Therefore, the Court exempted editorial offices from the duty to verify information given in such interviews.

Because Article 57 provides immunity from liability for "literal" reproduction of information, the Court explained that "literally" does not necessarily mean verbatim reproduction. It would be enough to retain the same meaning and not to distort a quotation. This recommendation has given editors and authors more artistic freedom, and has contributed to responsible journalism.

The Supreme Court, for the first time in Russian law, tried to define what *public interest* represents. It stated that public interest does not refer to just any interest that the audience may have, but includes, "for instance, the need of society to detect and expose threats to the democratic, legal state and civil society, to public safety, and to the environment." This means that the public's curiosity or its demand for sensational stories would not comprise public interest, while information about illegal actions would always fall into the scope of public concern. The Supreme Court also instructed courts that they

> should distinguish facts (even questionable ones), which may positively affect public debates, for instance, on how public officials perform their functions, from

details of private lives of individuals, who do not engage in any public activities. While in the former case the media performs its public duty to disseminate information of public interest, it does not do so in the latter case.

The Court's standpoint on public interest considerably contributes to political journalism in Russia and fully correlates with the ECtHR standards.[278]

The Supreme Court also clarified that, although Article 56 of the Russian Criminal Procedure Code did not mention journalists among the persons who cannot be called to testify as witnesses in court, this did not contradict Article 41 of "On Mass Media" obliging editorial offices to protect the confidentiality of their sources of information. The Court stated that courts may request the disclosure of the source only if "all other possibilities to establish the circumstances being important for proper case consideration and decision on it are exhausted and public interest to disclose the source of information overweighs public interest to keep it confidential." Thus, the Court narrowed the possibility of applying pressure on editorial offices concerning their information sources. This is another example of compliance with the ECtHR case law.[279]

The Supreme Court made several recommendations against excessive or arbitrary application of Article 4 of the statute "On Mass Media" (on abuses of the freedom of mass information). It stated that cases on this article should be considered by the top court of the Russian region where the media has its greatest share of circulation. This recommendation allowed an outlet that was closed for reasons of extremism on the day of the decree's adoption to successfully appeal this ruling in the Moscow district court, Richter (2015) noted.

The decree challenged the approach applied by the governmental bodies in a few cases[280] that have assessed Roskomnadzor's warnings as forewarning measures that could not be disputed in courts. The Supreme Court clarified that the warning instigated legal consequences and, therefore, it could be appealed. The Court clarified that because the

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[278] *Grinberg v. Russia* of 21 July 2005; *Karman v. Russia* of 14 December 2006; *Krasulya v. Russia* of 22 February 2007; *Dyuldin and Kislov* v. Russia of 31 July 2007; *Chemodurov v. Russia* of 31 July 2007; *Filatenko v. Russia* of 6 December 2007; *Dyudin v. Russia* of 14 October 2008; *Sergey Kuznetsov v. Russia* of 23 October 2008; *Godlevskiy v. Russia* of 23 October 2008; *Obukhova v. Russia* of 8 January 2009; *Kudeshkina v. Russia* of 26 February 2009; *Romanenko and Others v. Russia* of 8 October 2009; *Porubova v. Russia* of 8 October 2009; *Aleksandr Krutov v. Russia* of 3 December 2009; *Makarenko v. Russia* of 22 December 2009; *Fedchenko v. Russia* (No.1 and 2) of 11 February 2010; *Andrushko v. Russia* of 14 October 2010; *Saliyev v. Russia* of 21 October 2010; *Novaya Gazeta v Voronezhe v. Russia* of 21 December 2010; *Ivpress and Others v. Russia* of 22 January 2013; *Reznik v. Russia* of 4 April 2013; *Kharlamov v. Russia* of 8 October 2015; *Nadtoka v. Russia* of 31 May 2016; *Grebneva and Alisimchik v. Russia* of 22 November 2016.

[279] See, for instance, *Goodwin v. the UK* of 27 March 1996.

[280] See, for instance, the case of 2x2 TV station examined in section 2.2.

courts were only empowered to consider criminal cases, they also had a sole right to judge on the issue of the "usage of mass media to commit crimes" representing an abuse of freedom of mass information under Article 4 of "On Mass Media." Therefore, Roskomnadzor is not authorised to hold decisions on this issue, Richter (2015) clarifies.

The Supreme Court noted that Russian courts should study several issues concerning the impugned statements: whether these statements constituted expressions of opinions in political discussions; whether they attracted audience attention to publicly important issues; what attitude did the media editorial office and the interviewer demonstrate towards the statements. The Court clarified that if the statements had been disseminated through radio or TV broadcasting, the courts should consider its peculiarities limiting the possibility for journalists to edit, interpret, or comment such statements (including on live air). The Court stated that the courts should also pay attention to the social and political situation in the country in general or in a certain region. The decree also instructed the courts that they should carefully examine not only the wording of a publication or programme, but also its context, genre, and style when they consider the media cases. The Court directly referred to Article 5 of the CoE Committee of Ministers' Declaration on Freedom of Political Debate in the Media stating that: "The humorous and satirical genre, as protected by Article 10 of the Convention, allows for a wider degree of exaggeration and even provocation, as long as the public is not misled about facts."[281]

These recommendations followed the ECtHR standards. The ECtHR has always examined each case in its entirety and analysed several elements, including the abovementioned, to determine whether the state interference with the right to freedom of expression was necessary and proportionate or not.[282]

The Supreme Court clarified that suspension of media activities should be understood as a temporary and exceptional measure, which should be applied in accordance to Article 140 Part 1 of the Civic Procedure Code of the Russian Federation

[281] Declaration of the CoE's Committee of Ministers on Freedom of Political Debate in the Media, adopted on 12 February 2004, at the 872nd meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl-12.02.2004&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75&direct=true

[282] This approach is very important and can be illustrated by a great number of ECtHR cases. See, for instance, *Grebneva and Alisimchik v. Russia* of 22 November 2016; *Jersild v. Denmark* of 23 September 1994; *Leroy v. France* of 2 October 2008; *Norwood v. the UK* of 16 November 2004; *Sürek v. Turkey* (No. 1) of 8 July 1999; *Belek & Velioglu v. Turkey* of 6 October 2015; *Karatas v. Turkey* of 5 January 2010; *Lehideux and Isorni v. France* of 23 September 1998.

providing the list of preliminary injunctions. The Court explained that suspension of media activities could be applicable in a limited number of cases.[283]

It also banned the possibility of restricting the media from covering certain subjects because that would be inconsistent with the purposes established in the Civic Procedure Code, that is, the protection of the authority and impartiality of the judiciary. It expanded freedom of expression beyond the limits established in Article 10 of the ECHR, as Richter (2015) notes. He also explains that, while in the ruling on *Obukhova v. Russia*, the ECtHR found that preventing the media from covering the traffic accident with the judge was unnecessary in a democratic society, it failed to challenge the legitimacy of this measure, unlike the Supreme Court, which excluded any possibility to ban coverage of certain subjects by the media, Richter suggests.

The Supreme Court stated that Article 140 Part 1 of the Civic Procedure Code of the Russian Federation required that any preliminary injunctions be proportionate. Therefore, when adjudicating on suspension of media activities, courts should pay attention to the nature of violations and, in particular, examine whether they represent an abuse of the freedom of mass information or other violations (which are less severe). The Court instructed courts to evaluate the negative consequences to freedom of mass information that might result from the application of injunctions.

The Supreme Court seems to be the main (and, probably, the only) shield protecting speech in Russia. The abovementioned Pussy Riot case exemplifies that. In 2014, the Supreme Court protected Rosbalt, an online news media outlet, from revocation of its registration certificate for the publication of links to videos containing obscene language. Rosbalt had received two warnings from Roskomnadzor; both instigated by the publication of two videos containing obscene language. The Supreme Court ruled that this decision violates the principle of proportionality with references to the Constitutional Court. The Supreme Court examined the context and gravity of the violation. It observed that the impugned videos merely illustrated facts. It noted that Rosbalt removed them upon request from Roskomnadzor. Consequently, it found that the penalty had been disproportionate to the actions committed by Rosbalt, and the Court abolished the licence revocation. Nevertheless, the Supreme Court has not always protected freedom of expression or freedom of mass information; otherwise, the ECtHR would have no cases on Article 10 against Russia.

[283] As established in the Russian statutes "On Mass Media" and "On Contraction of Extremist Activities," as well as the Civic Procedure Code of the Russian Federation.

Unlike the Constitutional Court, the Supreme Court significantly contributes to the fostering of socially responsible journalism in the country. It tries not only to incorporate the universal vision of freedom of expression, but also to develop it in light of Russia's national legal tradition brought by the statute "On Mass Media" and the Constitution. This aligns with Western judiciary traditions, as studied by Verpeaux (2010).

However, it is complicated for the Supreme Court to stand against the current free speech policy on its own. Contrary to the Constitutional Court, the Supreme Court does not have the authority to bring about repeals or revision of repressive laws. Moreover, its position on many issues has been revised by new laws and Roskomnadzor (see Richter, 2015; Richter & Richter, 2015). Furthermore, because the decrees of the Supreme Court are non-binding for lower courts, they can ignore its interpretations.

1.9. Co-Regulatory and Self-Regulatory Quasi-judicial Bodies in the Russian Media Sector

Perhaps the most effective court to protect the freedom of mass information in Russia was the Judicial Chamber on Informational Disputes (*Sudebnaja Palata po Infromatsionnym Sporam*), a quasi-judicial state body, which was funded from the state budget and functioned under the office of the President of the Russian Federation between 1993 and 2000. Despite its direct affiliation with the president and its financial dependence on the state, scholars argue that the Chamber was politically independent (Mamontova, 2012; Monakhov, 2009). Mamontova (2012) suggests that its power and membership have proved that it was a self-regulatory body. It can be argued that the Chamber achieved a successful balance between being a regulated and a self-regulated organisation. While it had no legally binding enforcement mechanisms, its decisions were effective in Russia (Mamontova, 2012). For instance, state bodies fulfilled their obligation to submit reports on following up on the Chamber's decisions within two weeks of the decision (Monakhov, 2009). Such diligence and respect for the Chamber's decisions could be explained by the authority of the president.

Overall, the Chamber held 180 decisions and provided 89 expert comments, 22 applications, and 11 recommendations. Demjanova and Tkach (2000) classify decisions of the chamber into five categories: 1) cases related to the abuses of freedom of mass information (27%); 2) to the electoral process (25%), 3) defamation (16%), 4) access to information (16%), and 5) administrative and financial disputes (16%). This means that

the Chamber was involved in considering some of the most problematic issues in the media sector.

Nevertheless, the affiliation of the Chamber with the presidency made the Chamber vulnerable. It was created and dissolved upon the political will of two Russian presidents, Yeltsin and Putin. The Regulations on the Judicial Chamber were approved by the president in 1994, and the Presidential Decree of 3 June 2000 abolished the organisation. According to Clause 2 of its regulations, the Chamber "aims to assist the president in effective realization of the constitutional powers to be a guarantor of constitutional rights, freedoms, and legal interests in the area of mass information." The change in presidential policy resulted in the situation where such institution became unnecessary or even undesirable.

The decisions of other Russian still existing self-regulating institutions, notably the Big Jury (*Bol'shoje Juri*) and the Public Board on Press Complaints (*Obschestvennaja Kollegija po Zhalobam na Pressu*), do not enjoy the same degree of respect as the Chamber did. While the Big Jury and the Public Board are formally independent, their decisions have often been ignored by the Russian journalistic community and governmental bodies. This is another indicator of the importance of political will in Russia, which seems to have impact on judicial and quasi-judicial practices in the country.

1.10. The Role of the Regulatory Body's Decisions in the Development of the Russian Free Speech Concept

Without an analysis of the decisions of the regulatory agency, the examination of the development of the concepts on free speech and freedom of the press would not be complete. Regulatory bodies in the area of mass media usually develop media policy and elaborate specific mechanisms and procedures for implementing free speech and media policies.

As previously mentioned, the main regulating body in Russia in the area of media and communications is the Ministry of Communications and Mass Communications of the Russian Federation (Minkomsvyaz). It is a federal executive body responsible for elaborating and implementing the state information policy, including media policy. Acting upon regulations adopted by the government on 2 June 2008, Minkomsvyaz has significant power in shaping Russian mass communication policy. For instance, it can introduce legal drafts to the government or adopt its own legal acts to guide the media and information industry. However, Minkomsvyaz mainly issues orders on very specific

technology-related issues rather than adopting general and flexible guidelines that would somehow determine the role of the press in Russian democracy or elaborate on issues of freedom of expression. Minkomsvyaz's documents mostly concern administrative issues for carrying out certain instructions or directives of the government to which Minkomsvyaz is fully subordinate. Its head, the minister, is appointed and dismissed by the president upon the recommendation of the prime minister. Deputy ministers are appointed and dismissed by the government.

Of particular interest for this study is Roskomnadzor's perspective. This is the main Russian watchdog in media and mass communications, IT, and telecommunications, and it is subordinate to Minkomsvyaz. The head of Roskomnadzor as well as its deputies are appointed and dismissed by the government upon recommendation of the Minister of Communications and Mass Communications.

The governmental resolution establishing Roskomnadzor's power[284] has been amended twenty times since 2009, the year of its adoption, mainly with the aim to give Roskomnadzor more authorities. Overall, this agency fully controls media activities in the country, from the outlets' creation to their closure, and its actions have been sometimes interpreted as media censorship (Turovsky, 2015).

Apart from registering media outlets and bloggers and issuing broadcasting licenses, it issues warnings to media outlets for violations and may initiate revocation of licences or registering certificates. Roskomnadzor is in charge of blacklisting illegal websites, except the extremist blacklist of websites. It also oversees compliance with the law protecting the confidentiality of personal data. It accredits experts who are authorized to give conclusions on whether certain media content violates the legislation protecting morals. These conclusions are taken into account by Roskomnadzor and the courts when they make decisions.

Roskomnadzor and its regional offices oversee the media sector through scheduled and unscheduled "measures of systematic supervision" as well as through monitoring. The inspections are conducted in accordance with recommendations that Roskomnadzor itself has issued.[285] The recommendations enumerate legislation

[284] Resolution of the Government of the Russian Federation of 16 March 2009, No. 228 "On Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications."

[285] Order of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications of 29 June 2012, No. 21, "On Approval of Methodical Recommendations on Organization and Conducting of Governmental Control and Supervision over the Compliance with the Legislation of the Russian Federation."

providing the basis for governmental control over the media. While it includes "On Mass Media," it fails to mention the Constitution and international law. According to the recommendations, Roskomnadzor has great power and discretion to initiate inspections as well as to prolong them, if it deems it necessary. Apart from ensuring compliance with the law, it also inspects broadcasters' programmes to study how they allocate their airtime in covering various issues, which serves as a mechanism to interfere with the outlets' programming policy (see for details section 2.4).

In case of exposing a violation, Roskomnadzor may issue a warning that may result in the outlets' closure or it may complain to other federal governmental bodies to then initiate administrative or criminal proceedings. In case of doubts of a violation, Roskomnadzor's official must examine the issue on his/her own or together with experts selected by Roskomnadzor or by other governmental bodies, and deliver final conclusions on the issue acting on the other Roskomnadzor documents. Such measures of control might cause a chilling effect on media organisations in Russia.

Roskomnadzor's documents usually represent strict orders or instructions. However, it also provides documents that explain and interpret media legislation. The role of such documents has considerably increased since the adoption of restrictive or even impossible to implement legal norms. Media organisations often appeal to the media regulator mainly because the implementation of such norms largely depends on Roskomnadzor's will.

This body is known for applying the method of the so-called "hands-on management" (*ruchnoe upravlenie*) (see, for instance, Weir, 2015), one of the most controversial Russian governmental practices. It implies a broad discretion and selectiveness on the part of Roskomnadzor in the application of legal rules, and represents a form of censorship. This makes legal rules less foreseeable and the media sector more vulnerable and dependent on the government.

This practice can be illustrated by the case of the social network LinkedIn, blocked in Russia in 2016 for the violation of the 2014 regulations obliging all websites to store Russians' personal data within Russia. These regulations had been primarily criticised as unrealistic because of the transboundary nature of the Internet and because it would be impossible to classify the data for foreign or international services.

In November 2016, Roskomnadzor won the lawsuit against LinkedIn in the Moscow's Tagansky District Court, and therefore LinkedIn was blocked. Despite concerns of foreign and international online companies on the inevitable failure to comply

with the regulations, representatives of Roskomnadzor promised that it would not check Google, Twitter, and Facebook this year because they have "built a dialogue" with the agency, but stated that "we will check them sooner or later" (Bryzgalova, 2016b). Such a perspective makes the application of restrictive laws even less foreseeable.

Roskomnadzor's policy is often intimidating to the mass communication industry. In 2014, in his interview with the newspaper *Izvestija,* Maksim Ksenzov, Roskomnadzor's deputy head, stated that the agency could block Twitter or Facebook within several minutes if it decided that the consequences from such blocking would be less harmful than the harm to Russian society caused by the "non-constructive position of the heads of international companies" (Ksenzov, 2014). This interview triggered a negative, even panic, reaction among representatives of the Internet industry, and was criticised by Medvedev, the Russian prime minister. The criticism from the government compelled the agency to review its position and caused an audit of any possible website blockings conducted by the Ministry of Communications and Mass Communications, which also criticised Ksenzov's statements, and this ultimately smoothed out the conflict.

"Hands-on management" is also ensured trough arbitrary interpretation of some regulations. In 2016, Russia introduced Article 10.4 to the statute "On Information" by obliging news aggregating websites to verify information before dissemination. According to the law, the exemption from liability is possible only if a news aggregator literally quotes information or materials taken from a mass media outlet "that may be established and brought to liability" for the violation. The amount of monetary penalties for the violation is high—up to 1 million rubles (almost 16,000 euro). The statute was met with criticism for the restrictiveness and the lack of clarity both within Russia and abroad, and received a negative reaction from the OSCE Representative on Freedom of the Media (OSCE, 2016).

Roskomnadzor (2016) clarified that it would not penalise the news aggregators for the violation of law if such violations was in literally quotations of the materials of the media registered with this agency as well as the materials of official websites of governmental or municipal agencies and legal entities, in which the state has assets. Thus, Roskomnadzor reinterpreted the statute to encourage news aggregators to disseminate governmental information and to avoid aggregating news disseminated by bloggers, websites of other organisations, or other similar sources.

Roskomnadzor issued three general recommendations on the basic provisions of "On Mass Media": for editorial offices of printed outlets, new media outlets, and

broadcasting media organisations.[286] The recommendations are almost identical and mostly reiterate procedural provisions of the Russian legislation to simplify control over the media industry. The recommendations do not engage with issues related to freedom of expression and say nothing on the specific role that the media plays in society.

Over the last few years, Roskomnadzor has addressed a lot of procedural issues by applying a severe *formalist* approach to the media. One of the first was removing readers' online comments,[287] which sought to reconsider the liberal perspective of the Supreme Court (see for details section 2.3). Because of this document, some websites closed their forums (Turovsky, 2015).

Roskomnadzor's documents concern the implementation of the statute "On Protection of Children from Information Causing Harm to Their Health and Development"[288] and provisions on blacklists and the blocking of websites.[289] The agency clarified how to blacklist online search requests,[290] to calculate statistics on visitors to websites (which is necessary to know in order to comply with the blogger's statute). Together with scholarly experts, Roskomnadzor presented the "Concept of Information Safety," which justified the restrictive legislation on protecting minors from harmful information in Russia. The agency also published a list with words, which in its view constitute obscene language. It often participates in meetings with the media and Internet

[286] Recommendations of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications "On Compliance with Specific Requirements of Current Legislation of the Russian Federation in the Area of Mass Communications for Editorial Offices of Periodical Printed Outlets"; Recommendations of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications On Compliance with Specific Requirements of Current Legislation of the Russian Federation in the Area of Mass Communications for Editorial Offices of Web Publications; Recommendations of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications On Compliance with Specific Requirements of Current Legislation of the Russian Federation in the Area of Mass Communications for Editorial Offices of TV stations (Ratio Stations) and Broadcasters.

[287] Order of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications "On Approval of the Order of Filing Complaints on Inadmissibility of Abuses of the Freedom of Mass Information to Mas Media Outlets Disseminated on Information and Telecommunication Networks Including on the Internet" of 6 July 2010, No. 420.

[288] Recommendations for Mass Media Outlets of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications "On Implementation of the Federal Statute of the Russian Federation, On Protection of Children from Information Causing Harm to Their Health and Development."

[289] Recommendations of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications "On the Issue of the Main Approaches to the Implementation of Articles 15.2, 15.6, 15.7 of the Statute 'On Information, Information Technologies and Protection of Information'."

[290] Explanation of the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications "On the Issue of Including to the Register of Prohibited Information of the Links to Searching Requests" of 30 November 2012.

industry to clarify unclear legislation. However, it has never challenged vague or restrictive legal norms. On the contrary, it always tries to find a way to implement them.

Roskomnadzor sometimes applies actions that go beyond measures of formal control. For instance, in 2014, through its website, the agency addressed the editorial office of TV Dozhd', a TV station, with a sort of recommendation (not a warning, because the issue did not concern legislation at all). Being an independent private station, TV Dozhd' was the only station that broadcasted the 2011–2012 mass protests live and sympathised with the Russian opposition. Since that time, its office had been regularly inspected, but no formal reason for its closure was found. In 2014, TV Dozhd' conducted a controversial survey of audience members, which challenged the historical view that during the siege of Leningrad by German fascists surrender of the city was the only option. On its website, Roskomnadzor advised the station to comply with the law and stated that World War II veterans and Leningrad's (now Saint-Petersburg) inhabitants deemed such survey offensive. This document did not have any legal consequences because no courts ever tried to prove or rectify the offensive character of the survey, but in fact the document implied state support for the censoring actions of the main Russian communication service providers that started to switch off the station. Then, a Russian court found that the sudden shutdown of TV Dozhd' was illegal, but Roskomnadzor did not withdraw the document.

In 2015, Roskomnadzor addressed the issue of the caricatures of the Islamic prophet published in the French satirical newspaper *Charlie Hebdo*. The agency stated that Russia is not France, and such activities could be found illegal in Russia because they contradict Russian morals. After these statements, Roskomnadzor issued several warnings to media outlets that had republished the caricatures from *Charlie Hebdo* (Turovsky, 2015).

In 2015, Roskomnadzor recommended that the Russian media label Ukrainian organisations and political groups, such as the Right Sector, as "extremist" when mentioning them in publications (Turovsky, 2015). The agency's notice stated that a failure to do this would result in a warning, but the next day the notice was revoked.

Overall, it is not surprising that Roskomnadzor, being a governmental body, promotes the general restrictive view to freedom of expression and media freedom and contributes to the reinterpretation of the universal perspective on these rights. It also applies a *formalist* approach when addressing media issues and fails to acknowledge the

value of free speech as well as international standards in this area. In general, its power and methods resemble the censoring organs from Soviet times.

CHAPTER 2

SPECIFIC ISSUES OF RUSSIAN MEDIA REGULATION IN THE CONTEXT OF THE COUNCIL OF EUROPE STANDARDS

2.1. Media Freedom and Defamation in Russia

Article 10 Part 2 of the ECHR explicitly mentions "the protection of the reputation or the rights of others" among the legitimate aims for limiting freedom of expression. However, this provision has been sometimes used by national governments to restrict that freedom in order to protect politicians and civil servants against criticism (Macovei, 2004). Excessively protective defamation laws have a "chilling effect" on freedom of expression and public discussion (McGonagle, 2016). Therefore, the ECtHR has developed a comprehensive doctrine for the proper consideration of cases on defamation. The doctrine is based on the Court's three-part test: "interference" with the right to freedom of expression must be "prescribed by law," "pursue a legitimate aim," and be "necessary in a democratic society."[291]

As shown in section 1.7, according to the ECtHR, Russian legal rules for defamation have been problematic and are often improperly implemented. As mentioned above, the Russian Constitution permits the limiting of freedom of expression for the purposes of "protection of [the] legitimate rights and interests of others." Such rights include protection from defamation, which in Russia could result in civic, administrative, and criminal sanctions. The annual number of cases on defamation in the country is consistently high. Every year, the Russian courts consider 5,800 civil lawsuits on defamation,[292] of which around 3,500 claims are against journalists as well as media editorial offices,[293] and the defendants lost most of these lawsuits (Richter, 2016). According to Article 19, an international human rights NGO whose work focuses on the defence of the right to freedom of expression, defamation in particular is often used in

[291] See section 1.4 for details.

[292] Review of the Judicial Practice on the Disputes concerning the Protection of Honour, Dignity, and Business Reputation, approved by the Presidium of the Supreme Court of the Russian Federation on 16 March 2016. Retrieved from http://www.supcourt.ru/Show_pdf.php?Id=10733

[293] Resolution of the X Congress of the Union of Journalists of Russia "On the Primary Trajectories of Work of the Union of Journalists of Russia for 2013–2018," 19 April 2013. Retrieved from http://www.ruj.ru/x/the-resolution-on-priority-directions-of-work-of-the-russian-union-ofjournalists-in-2013-2018-years.php

Russia to silence maladministration and corruption among public officials (Article 19, 2007).

Following up on the analysis of the ECtHR case law in section 1.7, this section provides a broader picture of the Russian legal concept of defamation in the media by outlining the extent to which the CoE standards have been incorporated into Russian legislation. It also presents my own analysis of the judicial practice of the Russian general jurisdiction courts to reveal the degree to which this practice has been influenced by the CoE standards. This section presents an analysis of 100 random cases on defamation against the mass media from the database RosPravosudije,[294] from 1 January 2012 to 1 May 2015. This period was chosen with the aim to track recent trends. In 2007, Article 19 conducted a similar analysis examining 102 cases on defamation from 2002 to 2006, the results of which were published in a report (Article 19, 2007); therefore, this section includes a comparison of the trends observed during both time periods.

Key Notions

Neither the ECHR nor the ECtHR provide a definition of "defamation," thus leaving it up to national lawmakers to define this notion in statutory law (McGonagle, 2016). The CoE standards use the term "reputation." Its meaning includes self-esteem as well as the esteem in which a person is held by others, as McGonagle clarifies. He also notes that, from the CoE's perspective, the act of defamation comprises expressing a "false or untrue statement about another person that can damage his/her reputation in the eyes of reasonable members of society" (2016, p. 14).

Russian law also does not use the concept of defamation. The Constitution acknowledges and shields such values as "human dignity" (Article 21 Part 1[295]), "human honour," and "good name" (Article 23 Part 1[296]). Additionally, the Russian Civil Code mentions and protects "business reputation." In Article 150,[297] the Civil Code qualifies these values as intangible, inalienable, and non-transferable, and states that they deserve

[294] See the official website of the RosPravosudije database at https://rospravosudie.com

[295] Article 21 Part 1 of the Russian Constitution states: "Human dignity shall be protected by the government. Nothing may serve as a ground for its derogation."

[296] Article 23 Part 1 of the Russian Constitution states: "Everyone shall have the right to privacy, personal and family secrets as well as the protection of honour and good name."

[297] Article 150 Part 1 of the Russian Civil Code states: "1. The life and health, the personal dignity and personal immunity, the honour and good name, the business reputation, the right to private life, the personal and family secret, the right to a free movement, of the choice of the place of stay and residence, the right to the name, the copyright and the other personal non-property rights and intangible values belonging to citizens by the virtue of the birth or law, shall be inalienable and non-transferable in any other way."

judicial protection. However, Russian law does not define these notions. Legal scholars often remark that it is difficult to define such notions in law because they are not just legal concepts, but represent moral categories describing personal qualities (Tikhomirov, 2014; Potapenko, 2005). Scholars suggest that "honour" and "dignity" have similar meanings and that they can only be distinguished on the grounds that honour implies esteem of one's personal qualities by others, while dignity implies self-esteem (Tikhomirov, 2014; Skuratov & Lebedev, 2004; Vetrov, 2000; Erdlevskiy, 1998). A "good name" implies both "honour" and "dignity," as the Russian legal doctrine explains. Therefore, Russian national law fails to provide a specific legal mechanism for safeguarding the right to protect a "good name," which is protected under the right to protect honour and dignity. Therefore, Russian national law acknowledges "the right to protect honour, dignity, and business reputation" as comprising two concepts: "the right to protect honour and dignity" and "the right to protect business reputation."

However, business reputation may be protected independently, according to Russian law. It implies the esteem of the "business" qualities of a person in the eyes of the members of a society, while "honour" means the esteem of "personal" qualities (Tikhomirov, 2014; Erdlevskiy, 1998). The Supreme Court, in its 2005 Plenum's decree on defamation, [298] considered the right to business reputation as a category representing a "precondition of successful activities" of legal entities. Because companies have neither honour nor dignity (since these are moral values), they are entitled to protect their business reputation only. This has procedural consequences. As the 2005 Supreme Court's decree clarified, the cases on protecting business reputation are considered in *arbitrazh* courts, which focus on economic disputes, rather than in the general jurisdiction courts.

The Supreme Court's decree declared that the constitutional right to protect honour, dignity, and business reputation should be considered a necessary limitation of the freedom of speech and mass information, but noted that the Russian courts should balance between this right and other constitutional rights and freedoms, including freedom of thought, speech, mass information, and the right to information. The decree marked a significant step towards strengthening the freedoms of speech and of mass

[298] Decree of the Plenum of the Supreme Court of the Russian Federation of 24 February 2005, No. 3 "On Court Practice on the Cases on Protection of Honour and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities."

information in Russia (Golovanov, 2005; Krug, 2008). The Court's vision as to the balance between these rights is fully consistent with the ECtHR jurisprudence.[299]

Legal mechanism for defamation

A concrete procedure for implementing the constitutional clauses against defamation is established in Article 152[300] of the Civil Code of the Russian Federation,

[299] See, for instance, *Abeberry v. France* of 21 September 2004; *Pedersen v. Denmark* of 17 December 2004; *Leempoel v. Belgium* of 9 November 2006; *Kuliś v. Poland* of 18 March 2008; *Alithia Publ'g Co. v. Cyprus* of 22 May 2008; *Riolo v. Italy* of 17 July 2008; *Flux v. Moldova* of 29 July 2008; *Bodrožić v. Serbia* of 23 June 2009; *Europapress Holding D.O.O v. Croatia* of 22 October 2009; *Romanenko v. Russia* of 8 October 2009; and *Erla Hlynsdottir v. Iceland* (No. 2) of 21 October 2014.

[300] Article 152 of the Civil Code of the Russian Federation ("Protection of the Honour, Dignity, and Business Reputation") states:

1. A citizen shall have the right to claim in court that information discrediting his honour, dignity, or business reputation be rectified unless the person who has disseminated such information proves its consistency with the real state of affairs. Correction shall be made by the same means used for dissemination of the information about the citizen or by other similar means. Upon demand of the interested persons, the protection of a citizen's honour and dignity is allowed after their death.
2. If information discrediting the honour, dignity, or business reputation of a citizen has been disseminated by the mass media, it shall be rectified by the same mass media. A citizen, with respect to whom the mass media has published the said information, has the right to publish his reply in the same mass media, alongside a correction.
3. If information discrediting the honour, dignity, or business reputation of a citizen, is contained in the document, issued by an organisation, the given document is subject to an exchange or withdrawal.
4. In cases when information, discrediting the honour, dignity or business reputation of a citizen has become widely known and therefore it is impossible to deliver a correction accessible to a general public, a citizen has the right to seek the removal of the information as well as the prevention and prohibition of further dissemination of the information through seizure and destruction of the copies of tangible carriers containing the information without any compensation, provided that the removal of the information is impossible without destruction of the copies of such tangible carriers.
5. If information discrediting the honour, dignity, or business reputation of a citizen has become available on the Internet, the citizen has the right to request the removal of this information as well as its correction by the means ensuring that the correction would be accessible to the Internet users.
6. In other cases, except from those stipulated in clauses 2–5 of this Article, the procedure of correction of information discrediting the honour, dignity, or business reputation of a citizen shall be established by a court.
7. The application of measures of liability for non-fulfillment of a court decision to an offender shall not exempt him from the duty to execute actions provided by the court decision.
8. If it is impossible to identify the person who disseminated information discrediting the honour, dignity, or business reputation of a citizen, the citizen, about whom the information has been disseminated, has the right to file a lawsuit on recognising the disseminated information as inconsistent with the real state of affairs.
9. A citizen, with respect to whom information discrediting his honour, dignity, or business reputation has been disseminated, shall have the right, in addition to the correction or a reply to the given information, to claim the compensation of losses and of moral harm caused by its dissemination.
10. The court may also apply the rules of clauses 1–9 of this article, except for provisions on the compensation of moral harm, to cases of dissemination of any untrue information about a citizen provided that the citizen proves inconsistency of such information with the real state of affairs. The period of limitation on claims concerning the dissemination of the information in the mass media is one year from the day of publication of such information in the relevant mass media.
11. The rules of the present Article on the protection of the business reputation of the citizen, with the exception of provisions on the compensation of moral harm, shall be correspondingly applied to the protection of the business reputation of a legal entity.

as the Russian Constitutional Court postulated.[301] In 2013, the article was amended due to the development of the Internet. Article 152 Part 1 states that any citizen or legal entity has the right to request in the courts that information (*svedeniya*) *"discrediting his honour, dignity, or business reputation be rectified"* unless those who have disseminated such information prove that it is consistent with "the real state of affairs." Apart from corrections, Article 152 provides several other measures to protect the right to safeguard one's honour, dignity, and business reputation, which include seeking replies, monetary compensations, removal, and seizure and destruction of the copies containing defamatory materials. The article also states that honour and dignity may be protected after death.

Part 8 of Article 152 of the Civil Code states that if discrediting information about a citizen has been disseminated by a non-identifiable person, that citizen may pursue legal action in a court so that the court would acknowledge that the discrediting information is not true. This clause provides protection against anonymous defamation, which is often disseminated online.

The Supreme Court, in its 2005 Plenum decree, instructed the courts that they should be guided by Article 10 of the ECHR and pay attention to the legal position of the ECtHR. The Supreme Court instructed the Russian courts to bear in mind that: "the notion of defamation used by the ECtHR in its judgments is identical to the concept of dissemination of untrue discrediting information established in Article 152 of the Civil Code of the Russian Federation." Therefore, the Supreme Court implied that the Russian legal concept of protection from defamation could be interpreted strictly in line with ECtHR jurisprudence. Since this provision was passed, journalists and editorial offices have been given an important opportunity to directly refer to the decisions of the ECtHR in Russian courts.

The Supreme Court's decree tried to clarify the notion of "discrediting" information through examples. According to the decree, "discrediting" information includes information on: "violating the law; committing dishonest acts; wrongful or unethical behaviour in private, public, or political life; unfair business practices; and violating business ethics or customary business practice provided that such information derogating honour, dignity, or business reputation." In other words, the Supreme Court suggested that the definition of "discrediting information" includes any information on

[301] Resolution of the Constitutional Court of the Russian Federation On the Inadmissibility of the Complaint of Citizen V.A. Shlafman about the Violation of His Constitutional Rights by Article 152 Part 7 of the Civil Code of the Russian Federation, 4 December 2003.

violating the law or morality, and this understanding has assisted Russian courts in making fair judgements (Richter, 2016).

According to the Civil Code, defamation causes liability only if the discrediting information is "*inconsistent with the real state of affairs*." Editorial offices may refuse to issue a correction only if they have evidence that the information is true (Article 43 of the statute "On Mass Media"). With regards to journalism, this clause is underpinned by the journalistic right and duty to verify information before its dissemination (Article 49 of "On Mass Media"), as Richter notes (2016). In case of a lawsuit, the defendants, that is, journalists and editors, must bring evidence before the court that the allegedly defamatory information is "consistent with the real state of affairs."

In general, the ECtHR's perspective on applying the legal concept of "truth" in cases on defamation is by far more flexible. Truth provides an absolute defence against claims of defamation, but it is often difficult or costly to establish it (Milo, 2008). From the ECtHR's perspective, accurate reporting on facts, rather than their consistency with the truth, is key in cases on defamation.[302] Furthermore, the ECtHR accepts some leeway in accuracy because news is a perishable commodity and even a short delay in publication or broadcasting may result in the loss of its value as well as social interest.[303]

Therefore, the ECtHR focuses on examining journalistic practices such as "fact-checking processes" and "ensuring access to sources and documents that can provide evidence in court if an allegation of defamation arises" (McGonagle, 2016, p. 44). Although in the case of *Dyundin v. Russia* the ECtHR acknowledged that the article "contained serious factual allegations against the police and that those allegations were susceptible of proof," it stated that

> in particular where the reporting by a journalist of statements made by third parties is concerned, the relevant test is not whether the journalist can prove the veracity of the statements but whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the allegation can be established.[304]

The ECtHR noted that there was a wealth of documentary evidence to support the impugned statements in this case. Therefore, whether the statements were true or not was not a decisive factor for the ECtHR.

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[302] See *Bergens Tidende and Others v. Norway* of 2 May 2000. See also *Shabanov and Tren v. Russia* of 14 December 2006; *Aleksey Ovchinnikov v. Russia* of 16 December 2010; *Novaya Gazeta and Borodyanskiy v. Russia* of 28 March 2013; *OOO "Vesti" and Ukhov v. Russia* of 30 May 2013.
[303] *Observer and Guardian v. the UK* of 26 November 1991.
[304] *Dyundin v. Russia*.

The ECtHR has also acknowledged the so-called "fair comment defence," which is important "to give the widest scope possible for the freedom of expression in relation to opinions and to allow for comment on a wide range of public as opposed to private matters" (McGonagle, 2016, p. 45). In *Thorgeirson v. Iceland*,[305] the ECtHR ruled that the journalist should not be required to prove the factual basis of his statements. It specified that although the publications were based on rumours, stories, and the statements of others, they concerned an issue of public interest[306]—in this case, police brutality.

The ECtHR has suggested that it is unfair to require journalists to prove the truthfulness of statements if they have used reliable sources of information, as prescribed by professional standards.[307] While Article 57 of the statute "On Mass Media" (see section 1.3) echoes this provision, the Russian rules seem to be more formal, in comparison to the ECtHR's approach.

At the same time, the ECtHR has noted that a factual basis may be needed to justify opinions under some circumstances,[308] as shown in section 1.7. Although the Court also observed that the distinction between facts and value judgments is necessary in cases of defamation because the truth of the former can be demonstrated while the truth of the latter is not susceptible,[309] the ECtHR stated in several rulings that:

> even where a statement amounts to a value judgment, the proportionality 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.[310]

The Russian national legal framework for defamation *does not require the distinction between facts and value judgments*. A significant advance towards incorporating this ECtHR concept was made by the Supreme Court. In its 2005 decree it

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[305] *Thorgeirson v. Iceland* of 25 June 1992.
[306] For more about the incorporation of the concept of public interest in Russian law by the Supreme Court, see section 1.8.
[307] *Colombani v. France* of 25 June 2002; *Bladet Tromsø and Stensaas v. Norway* of 20 May 1999; and *Fedchenko v. Russia* (No. 1 and 2) of 11 February 2010.
[308] *Novaya Gazeta and Borodyanskiy v. Russia* of 28 March 2013; *OOO "Vesti" and Ukhov v. Russia* of 30 May 2013.
[309] See *Lingens v. Austria* of 8 July 1986; *Fedchenko v. Russia* (No. 1 and 2) of 11 February 2010; *Feldek v. Slovakia* of 12 July 2001; *Dichand and others v. Austria* of 26 February 2002; *Karhuvaara & Iltalehti v. Finland* of 16 November 2004; *Keller v. Hungary* of 4 April 2006; *Falter Zeitschriften GmbH v. Austria* of 8 February 2007; *Lombardo v. Malta* of 24 April 2007; *Ivanova v. Bulgaria* of 14 February 2008; and *Axel Springer AG v. Germany* (No. 2) of 10 July 2014.
[310] *Jerusalem v. Austria* of 27 February 2001; *De Haes and Gijsels v. Belgium* of 24 February 1997; *Oberschlick v. Austria* (No. 2) of 1 July 1997; *Dichand and Others v. Austria* of 26 February 2002; *Scharsach and News Verlagsgesellschaft mbH v. Austria* of 13 November 2003.

made a reference both to Article 10 of the ECHR, which represents the legal position of the ECtHR, and to Article 29 of the Russian Constitution, which states that the Russian courts should distinguish statements of facts from value judgments (or opinions). The Supreme Court also indicated that value judgments could not be verified, "being an expression of a subjective opinion and [the] views of a defendant." Therefore, under Article 152 of the Civil Code of the Russian Federation, a defendant should not be held liable for expressing his or her opinions or views. Additionally, the Supreme Court instructed the courts to check whether the disputed information was true at the moment of publication or broadcast, rather than at the moment of the lawsuit. In 2016, the Supreme Court[311] also explained that when determining which are the impugned statements in a publication, the courts should assess the publication in general rather than verify separate words or phrases.

At the same time, the Supreme Court did not elaborate on the ECtHR concept of factual basis. As seen in section 1.7, the failure to properly accept this concept has had various results. On the one hand, the Russian courts have brought the authors of disputed information to liability if the authors lacked concrete evidence for the veracity of their statements (even in cases when they have addressed issues of public interest and have acted *bona fide*). On the other, the Russian courts have sometimes failed to find violations because they did not check whether there had been any factual basis to support them or whether journalists tried to comply with professional standards, as the ECtHR noted[312].

In general, the ECtHR's concept of defence in cases of defamation implies more variations and includes more criteria than the Russian concept of "consistency with the truth." The Russian legislation has failed to provide a framework for a more flexible approach. The Constitutional Court has confirmed that placing the responsibility of proving the veracity of defamatory statements on those who have disseminated them does not violate the freedom of thought or speech guaranteed in the Constitution.[313]

It is worth noting that, before the 2005 Supreme Court's decree, a claimant was not obliged to prove anything in courts—in fact, he or she could not undertake action in the courts at all. After the decree was passed, the claimants were obliged to prove at least

[311] Review of the Judicial Practice on the Disputes Concerning the Protection of Honour, Dignity, and Business Reputation, approved by the Presidium of the Supreme Court of the Russian Federation on 16 March 2016.

[312] See, for instance, *Aleksey Ovchinnikov v. Russia; OOO "Vesti" and Ukhov v. Russia;* and *Nadtoka v. Russia*.

[313] Resolution of the Constitutional Court of the Russian Federation on the Refusal to Consider the Complaint of a Citizen, A.V. Kozyrev, 27 September 1995.

two things: that the information has indeed been disseminated and that it referred to the claimant. The decree stated that the action of "disseminating" defamatory information does not include communicating such information to the person whom it concerns if the communicator took the necessary steps to ensure the confidentiality of the information. If the information has not been disseminated or does not explicitly concern the claimant, the lawsuit cannot be satisfied. Thus, these provisions can be beneficial for mass media outlets since editorial offices and journalists are often the defendants in cases on defamation. Furthermore, this stance of the Court reflects the developments in the ECtHR case law discussed in section 1.7, and exemplified in the cases of Dyuldin and Kislov, Filatenko, Godlevskiy, Reznik, and Nadtoka.

Despite the Supreme Court's stance that a defamation lawsuit can be satisfied on the condition that the information has been disseminated and it is discrediting, the 2013 amendments to Article 152 of the Civil Code of the Russian Federation allowed the imposition of sanctions for the dissemination of any untrue information even if it is non-discrediting. This measure applies for a year after the publication of such information. In this case, the veracity of information should be proved by the claimant, rather than the defendant. However, this provision seems to be excessive if one considers the need to achieve balance between freedom of speech and the right to protect one's reputation. Many untrue statements can represent factual mistakes without being harmful to one's honour, dignity, or business reputation. It may seem disproportionate in light of Article 10 of ECHR to apply such measures as corrections, monetary compensations, removal, or seizure of copies if journalists have made non-discrediting factual mistakes.

Defamation of Public Officials or Political Figures

The Supreme Court's 2005 decree noted that the *limits of criticism are wider for public officials or political figures*, which is a central principle of the ECtHR case law,[314] particularly in cases involving media freedom (see also section 1.7). The CoE standards provide nearly no leeway for the protection of *public officials* from *criticism*, and the limits of permissible criticism of government or public officials are broader than those of

[314] The principle of wider criticism of public figures has been implemented in many ECtHR cases, including *Castells v. Spain* of 23 April 1992; *Janowski v Poland* of 21 January 1999; *Sürek v. Turkey* of 8 July 1999; *Sürek and Özdemir v. Turkey* of 8 July 1999; *Nilsen v. Norway* of 25 November 1999; *Jerusalem v. Austria* of 27 February 2001; *Karman v. Russia* of 14 December 2006; *Lombardo v. Malta* of 24 April 2007; *Lepojić v. Serbia* of 6 November 2007; *Bodrožić v. Serbia* of 23 June 2009; *Renaud v. France* of 25 February 2010; *Brosa v. Germany* of 17 April 2014; *Axel Springer AG v. Germany* (No. 2) of 10 July 2014; and *Stankiewicz and others v. Poland* of 14 October 2014.

private citizens or politicians, from the ECtHR's viewpoint.[315] Politicians, however, are also less protected from criticism than individuals. This principle was formulated in the ECtHR case *Lingens v. Austria* where the Court noted that the limits of acceptable criticism are

> wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large and must consequently display a greater degree of tolerance.

The principle reflects the ECtHR's perspective on the importance of political expression and debates in a democratic society and the significant role of the media for bolstering democratic values and highlighting matters of public interest.

The 2005 decree directly quoted Articles 3 and 4 of the CoE's Declaration on Freedom of Political Debate in the Media[316] noting that

> political figures have decided to appeal to the confidence of the public and accepted to subject themselves to public political debate and are therefore subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions.

This states that a person occupying a public position should tolerate criticism, including criticism in the media.

Correction and Reply

According to the Civil Code, citizens or companies may claim correction of defamatory information in the courts, while the more liberal "On Mass Media" invites them to seek correction or the right to reply—or both—directly with the media editorial office, without initiating a court procedure.[317] Citizens or companies can choose between two these options.

Article 152 Part 1 provides that the information must be rectified by the same or similar means as those used for its dissemination. This means that if a person has been

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[315] See, for example, the ECtHR judgment on the case of *Sürek and Özdemir v. Turkey* of 8 July 1999.

[316] Declaration on Freedom of Political Debate in the Media, adopted by the Committee of Ministers on 12 February 2004, at the 872nd meeting of the Ministers' Deputies. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 80645b44

[317] According to Article 43 of the statute "On Mass Media," media outlets must disseminate the text of the correction provided by the citizens or companies concerned by the disseminated defamation "if such text complies with the statute." Radio or TV stations may give the opportunity to citizens or companies to read aloud the text of the correction and provide it to the stations in the form of a recording. Article 44 of "On Mass Media" sets up the order and requirements for publication of corrections.

defamed in an online publication, the correction must also be published online, on the same website. If the defamatory information has been disseminated by mass media, the same media must publish or broadcast a correction and a reply, as per Article 152 Part 2.

Procedural issues for publishing corrections and replies in the mass media are established in Articles 43–45 of "On Mass Media." In general, they seek to guarantee that corrections and replies will be published promptly, in the same place and with the same length or duration as the defamatory information so that the person's or the company's reputation is properly re-established. However, Richter (2016) argues that these clauses should be revised because they currently do not take into account the peculiarities of online media, which prevent the coherent implementation of these rules in practice. Article 152 Part 6 of the Civil Code states that the procedure for correction may be established by a court, but the statute lacks criteria for that.

The right to reply is established differently in the Russian Civil Code and "On Mass Media." In Article 46, "On Mass Media" provides that this right may be applied if the media has disseminated any untrue information or even information that is true, but that has, nevertheless, encroached on any rights or legal interests of a citizen or a company. The 2005 decree of the Supreme Court considerably clarified the provisions of "On Mass Media" stating that the right to reply should be used to correct errors of fact and inaccuracies or to complement incomplete information or one-sided value judgment. The Court suggested that the right to reply (or comment) might help to justify an opposite perspective. Thus, the Court implied that the right to reply may facilitate public debate in the media, which is encouraged by the ECtHR.

Unlike the American Convention on Human Rights, the ECHR does not formulate the right to reply, but the ECtHR considers the publication of a reply or a correction as a "normal element of the legal framework governing the exercise of the freedom of expression" (Schabas, 2015). The Resolution (74) 26 "On the Right of Reply—Position of the Individual in Relation to the Press"[318] formulated by the CoE's Committee of Ministers states that:

> In relation to information concerning individuals published in any medium, the individual concerned shall have an effective possibility for the correction, without

[318] Resolution (74) 26 On the Right of Reply—Position of the Individual in Relation to the Press, adopted by the Committee of Ministers on 2 July 1974, at the 233rd meeting of the Ministers' Deputies. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 80645b44

undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.

The CoE's European Convention on Transfrontier Television (ECTT) [319] specifically concerns the right of reply on TV (see, for details on the ECTT in the section 2.4). Article 8 of the ECTT states that individuals and legal entities must be provided with the opportunity to "exercise the right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction." To that aim, the name of the programmes service or of its broadcaster "shall be identified in the programme service itself, at regular intervals by appropriate means," as the article states. (Russia signed the ECTT in 2006, but has not ratified it so far.)

Generally speaking, the Russian procedural provisions for corrections and replies could be seen as mainly consistent with the CoE standards. At the same time, according to the CoE, these measures do not constitute censorship only if they meet the criteria of the ECtHR test.

Before the 2013 amendments to the Civil Code, the right to reply was applied when the right to correction was inapplicable, Richter (2016) notes. Mostly, this right was used in situations when the media published or broadcasted false information impacting one's honour, dignity, or business reputation rather than discrediting them—for instance, when the media published or broadcasted imprecise statistical data or any other inaccurate information. This approach is consistent with the abovementioned position of the Supreme Court.

However, the revised Article 152 Part 9 ambiguously states that the right to reply may be claimed "in addition to" the right to correction. This new version does not contradict "On Mass Media" or the Civil Code, but it may cause a change in judicial approaches: the courts may order the publication of both replies and corrections, which does not contradict the law, but may represent a disproportionate interference with media freedom.

Monetary Sanctions

Parts 9 and 11 of Article 152 of the Russian Civil Code provide that, alongside corrections, citizens who have been defamed may also claim compensation for material

[319] European Convention on Transfrontier Television, adopted on 5 May 1989 in Strasbourg. Retrieved from https://www.coe.int/ru/web/conventions/full-list/-/conventions/rms/090000168007b0d8

losses and for moral harm, while legal entities may seek only compensation for losses. The amount of losses caused by defamation is difficult to determine. Therefore, Russian law provides citizens with the opportunity to seek moral harm, which is defined in the Civil Code as "mental or physical anguishes" of individuals, and which is not attributed to businesses. Moral harm may be sought in the courts regardless of the fault of the defendants. In general, the Civil Code provides that the courts should take into consideration the degree of fault as well as other criteria (for instance, the personal characteristics of a defamed citizen) when deciding on the amount to award as a compensation for moral harm (Articles 151 and 1001 of the Russian Civil Code). However, these criteria could be applied arbitrarily. In 2004, a Russian court imposed an enormous monetary penalty to the newspaper *Kommersant*. The publication was ordered to pay the equivalent of more than 9 million euro in rubles to Alfa-Bank for having reported on what it claimed to be financial problems at the bank during the banking crisis at that time. Later, the appellate court reduced the penalty to an equivalent of 0.9 million euro in rubles, which is still a very large sum ("High court," 2010).

The Supreme Court in its 2005 decree noted that the amount of monetary penalty in cases of defamation should be "proportionate" to the harm caused by the defamation and should not curtail freedom of mass information. This position was expressed by the ECtHR in several rulings.[320] For instance, the amount of compensation should not threaten the media enterprise with bankruptcy, as was the case of *Kommersant*.

At the same time, the ECtHR's principle of proportionality of sanctions goes beyond monetary issues. For instance, in *Reznik v. Russia* the ECtHR held that:

> [a]lthough the penalty of 20 Russian rubles was negligible in pecuniary terms, the institution of defamation proceedings against the President of the Moscow City Bar in the context of the present case was capable of having a chilling effect on his freedom of expression.

In 2005, the Supreme Court also tried to make the process of determining the amount of compensation more flexible. In its decree, the Court instructed the Russian courts to pay attention, when determining such amounts, to the specifics of the publications such as their genre and audience reach. The Court also stated that citizens had the right to claim in the courts damages for moral harm even if the media editorial offices have voluntarily agreed to publish a correction; it further stated that the courts

[320] *Tolstoy Miloslavsky v. the United Kingdom*; *Błaja News Sp. z o. o. v. Poland*; *Timpul Info-Magazin and Anghel v. Moldova*.

should consider this fact in their decision about awarding compensation. Despite these developments, the scope of the ECtHR's concept of proportionality of sanctions remains more complex and more flexible than its Russian counterpart.

Since 2013, Article 152 of the Russian Civil Code has unambiguously provided that companies cannot seek moral harm, and the Supreme Court confirmed this position in one of its recent rulings.[321] However, Russian courts continue to award damages for moral harm to legal entities, even if such entities cannot justify losses from defamation. Dobrikova (2015) notes that by doing so the courts refer to the ECtHR's concept of "reputational harm." In a recent Russian high-profile case, the *Arbitrazh* Court of the City of Moscow partly satisfied a defamation lawsuit filed by the giant state-owned oil company Rosneft, ordering the RBC media holding to pay 390,000 rubles (around 610,000 euro) for "reputational harm" ("$6,000 in damages," 2016). Initially, Rosneft had sought the enormous sum of more than 3 billion rubles (48 million euro) from RBC for "reputational harm." While the provisions established by the Supreme Court may reduce the sum in this case, the decision in general is hardly consistent with the CoE standards on freedom of expression in the media, because the lawsuit concerns an issue of public interest. The article in question was published when Russia was attempting to privatise a 19.5% share of Rosneft. The article stated that Rosneft's CEO Igor Sechin had asked the Russian government to prevent the British oil giant BP from securing greater control over Rosneft.

The concept of "reputational harm" has been used in Russia since the 2003 ruling of the Constitutional Court,[322] which stated that legal entities can also claim compensation for "non-material" losses, which the lower courts have often interpreted as a reward for moral harm suffered by legal entities. It should be noted, however, that the ECtHR has never acknowledged that companies can seek compensation for "non-material" losses.

The differing interpretations of the different courts with regards to the protection of the business reputation of companies and individuals have resulted in an ambiguous judicial practice. For instance, Arapova and Ledovskih (2014) note that Russian general jurisdiction courts adhere to the viewpoint that all individuals and legal entities have business reputations, while Russian *arbitrazh* courts suggest that only those engaged in

[321] Ruling of the Supreme Court of the Russian Federation of 17 August 2015, No. 309-ES15-8331.
[322] Resolution of the Constitutional Court of the Russian Federation On the Inadmissibility of the Complaint of a Citizen, V.A. Shlafman, about the Violation of His Constitutional Rights by Article 152 Part 7 of the Civil Code of the Russian Federation, 4 December 2003.

business practices can have business reputations, and that this kind of reputation is not equal to professional reputation or prestige.

Removal of Online Defamatory Content

The 2011 ECtHR ruling on the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*[323] stated that Article 10 of the ECHR must be interpreted as obliging member-states to create appropriate regulation for the effective protection of journalists' freedom of expression on the Internet.

Seeking to strengthen the protection of reputation, the 2013 amendments to Article 152 Part 5 of the Russian Civil Code permitted the *removal of defamatory information from the Internet*, alongside the publication or broadcast of corrections. If defamatory information has become "widely known," citizens or companies may request its removal. They may also seek to ban and prevent its further dissemination, including through such measures as seizure and destruction of the copies containing that information, in cases when all other avenues for stopping this information have been exhausted.

The issue of online defamation has been very problematic. As McGonagle (2016) notes, the ECtHR case law in this area has not yet been settled, and the Court is still shaping its policy regarding many of these issues, including Internet intermediary liability, online archives, user-generated comments, et cetera. However, some of the basic principles on regulating online content have been formulated and they will be considered in detail in section 2.3.

The CoE standards acknowledge that, on the one hand, online media can exacerbate violations of the right to reputation, but on the other, the Internet could be seen as a catalyst for freedom of expression. The 2012 Declaration of the Committee of Ministers, On the Desirability of International Standards Dealing with Forum Shopping in Respect of Defamation, "Libel Tourism," to Ensure Freedom of Expression,[324] reminded that, although freedom of expression "carries with it duties and

[323] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* of 5 May 2011.
[324] The Declaration of the CoE Committee of Ministers, On the Desirability of International Standards Dealing with Forum Shopping in Respect of Defamation, "Libel Tourism," to Ensure Freedom of Expression, adopted by the CoE Committee of Ministers on 4 July 2012, at the 1147th meeting of the Ministers' Deputies. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 80645b44

responsibilities," these must be "prescribed by law" and be "necessary in a democratic society."[325]

While the ECtHR allows the removal of defamatory statements,[326] the three-part test of legality, legitimacy, and proportionality must be applied in the online context (Benedek & Kettemann, 2014). In the same year when the amendments to the Russian Civil Code were passed, the ECtHR's ruling on the case of *Wegrzynowski and Smolczewski v. Poland*[327] held that neither a court nor the media have ever nor could ever rewrite history by removing articles or published materials from the Internet, even if such materials violate someone's rights.

However, Russia has failed to incorporate this concept (see also my analysis of the Constitutional Court's resolution on the Krylov complaint in section 1.8). Arapova argues that the Russian legal framework for online defamation does not meet the ECtHR test (Media Rights Defence Centre, 2013). She suggests that the Russian legislators made no attempt to establish balance between online freedom of speech and the protection of reputation. For instance, Russian law does not provide explanation of what "widely known" means, thus leaving this concept open to arbitrary interpretations. As observed in section 1.8, the Constitutional Court allowed the removal of defamatory information not only upon a court's decision, but also before the court's consideration (as an injunction), although the latter is neither explicitly allowed nor explicitly banned in Russian law. Tikhomirov (2014) concludes that the Russian courts would have to elaborate criteria for the proper application of the provisions of the Civil Code on online defamation. However, the law should provide clear and foreseeable rules, according to the criteria of legality of the ECtHR's three-tier test.

Administrative and Criminal Liability for Defamation

Apart from civil liability, defamation in Russia could also result in administrative and criminal liability, which is established in the Code of Administrative Offences and in the Criminal Code of the Russian Federation. In general, these codes define similar lists

[325] The Declaration of the CoE Committee of Ministers, On the Desirability of International Standards Dealing with Forum Shopping in Respect of Defamation, "Libel Tourism," to Ensure Freedom of Expression, paid attention to the growing negative phenomenon known as "libel tourism," which emerged due to differences between national defamation laws and special jurisdiction rules. The document explained that "Libel tourism is a form of 'forum shopping' when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue."

[326] See, for instance, *Delfi v. Estonia*, which is examined in section 2.3.

[327] *Wegrzynowski and Smolczewski v. Poland*, 16 July 2013.

of offences. However, administrative offences are less severe because they are considered to be less "socially dangerous," which impacts the severity of sanctions. Administrative liability is applicable to both individuals and companies, while criminal offences can be committed only by individuals, according to Russian law. Therefore, such measures as media shutdowns and withdrawals of licenses are regulated by the Code of Administrative Offences. Another difference concerns which governing body makes the decisions: while only the courts can impose criminal liability, decisions on administrative liability are in the purview of different bodies, including those overseen by the government.

The Russian Criminal Code in Article 128.1 criminalises libel (and slander). Russian law does not distinguish between libel and slander, unlike many other countries, such as the UK, USA, or Canada. Libel and slander represent in Russia the same offence, which is defined as the dissemination of knowingly false information in written or oral form, which discredits one's honour and dignity or undermines one's reputation. This means that before dissemination, the author of the information knows that it is untrue, but disseminates it anyways. The punishment varies from monetary penalties (of up to 5 million rubles, or 77,500 euro) to a compulsory community service (to a maximum of 480 hours). The punishment is more severe if a libel (or slander)

- was disseminated in public or in the mass media (with a maximum punishment of compulsory community service of up to 240 hours);
- was disseminated while the person who was offended was performing official duties;
- accuses a person of having a disease that poses danger to the public;
- accuses a person of committing a serious crime.

A separate article establishes criminal liability for a libel against judges, prosecutors, investigators, or court bailiffs (Article 298 of the Criminal Code of the Russian Federation).

Administrative liability is provided for insults (Article 5.61 of the Russian Code of Administrative Offences). Insult is defined as the derogation of a person expressed in an "indecent" form. While it is generally accepted that "indecent form" includes obscene language, the wording of the article is fairly imprecise and leads to various interpretations. The sanctions for insults are monetary penalties, which are higher if the insult was made in public, including in the media (up to 5,000 rubles, or 77.5 euro, for individuals; up to 50,000 rubles, or 775 euro, for public officials; and up to 500,000 thousand rubles, or 7,750 euro, for legal entities). Article 5.61 also provides special sanctions for failing to

stop the dissemination of insulting statements in public or in the mass media, which is likely to be a clause against editors. The monetary sanctions of these offences are up to 30,000 rubles, or 465 euro, for public officials, and up to 50,000 rubles, or 775 euro, for legal entities. Additionally, insulting public officials "while they are performing their duties" can result in criminal sanctions with a maximum punishment of one year of corrective labour (Article 319 of the Criminal Code of the Russian Federation).

Cases on libel and insult of public figures in Russia have been of specific concern to scholars and human rights activists. Such cases often aim to punish criticism against high-ranking public officials, as Arapova suggests (Media Rights Defence Centre, 2014). These cases exert a significant chilling effect because they include "serious mobilisation of state law-enforcement powers": such cases are often brought for consideration before the courts even when there are no sufficient grounds for a lawsuit, Arapova notes.

In the last few years, several libel and insult cases have resulted in prosecutions for criticism or satire, such as the cases of: the information agency SakhalinMedia for the publication of an open letter by Sakhalin residents criticising one senator from Sakhalin; the journalist Mikhail Afanasjev for criticising the Deputy Interior Minister of the Republic of Khakassia; the journalist Sergei Reznik from Rostov for criticising a judge and a prosecutor; the agency Ura.ru for criticising a prosecutor; and Vadim Rogozhin for his satire of local politicians. Over the period 2009–2011, about 800 people in Russia, including many journalists, bloggers, and civil activists, were convicted for libel (Arapova, 2013).

While the ECtHR has never challenged the legitimacy of criminal laws on defamation, it has expressed concerns regarding the application of criminal laws in cases of defamation, which may "hamper the press in performing its task as purveyor of information and public watchdog."[328] The ECtHR stressed that criminal sanctions per se have a disproportionately chilling effect.[329] Therefore, according to the ECtHR,[330] states should employ sanctions other than criminal ones to protect reputation. In the case of *Cumpănă and Mazăre v. Romania*, the ECtHR ruled that

> although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be

[328] *Lingens v. Austria*.
[329] *Cumpănă and Mazăre v. Romania* of 17 December 2004; *Azevedo v. Portugal* of 27 March 27; *Mahmudov and Agazade v. Azerbaijan* of 18 December 2008.
[330] See, for instance, *Castells v. Spain*, *Barfod v. Denmark* of 22 February 1989, or *Feret v. Belgium* of 16 July 2009.

> compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.

Therefore, the CoE standards allow the application of criminal sanctions only for very serious violations, such as hate speech, which is covered in Russia by the specific concept of extremism (see section 2.2).

Similarly, the 2004 Declaration on Freedom of Political Debate in the Media by the CoE Committee of Ministers [331] stated that:

> Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned. Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech.

In 2007, the PACE specifically addressed this issue in its Resolution "Towards decriminalisation of defamation,"[332] which deplores the fact that in a number of member-states, including Russia, prosecution for defamation is misused "to silence media criticism." The resolution states: "Such abuse—leading to a genuine media self-censorship and causing progressive shrinkage of democratic debate and of the circulation of general information—has been denounced by civil society, notably in Albania, Azerbaijan and the Russian Federation."

The Practice of the Russian General Jurisdiction Courts on Defamation in the Media in the Context of the CoE Standards

An analysis of the practice of the Russian general jurisdiction courts confirms that cases on defamation are the most widespread type among those involving Article 29 of

[331] Declaration on Freedom of Political Debate in the Media, adopted by the Committee of Ministers on 12 February 2004, at the 872nd meeting of the Ministers' Deputies.
[332] Resolution 1577 (2007), "Towards Decriminalization of Defamation," adopted by the Assembly on 4 October 2007 (34th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en

the Russian Constitution. Over the period of 1 January 2012 until 1 May 2015, cases on defamation made up nearly 24% of cases involving the constitutional article on free speech (see Figure 2.1), among which one-fifth were cases against the mass media, as depicted in Figure 2.2. Of the total number of cases on defamation, those on libel or insult made up less than 1%.

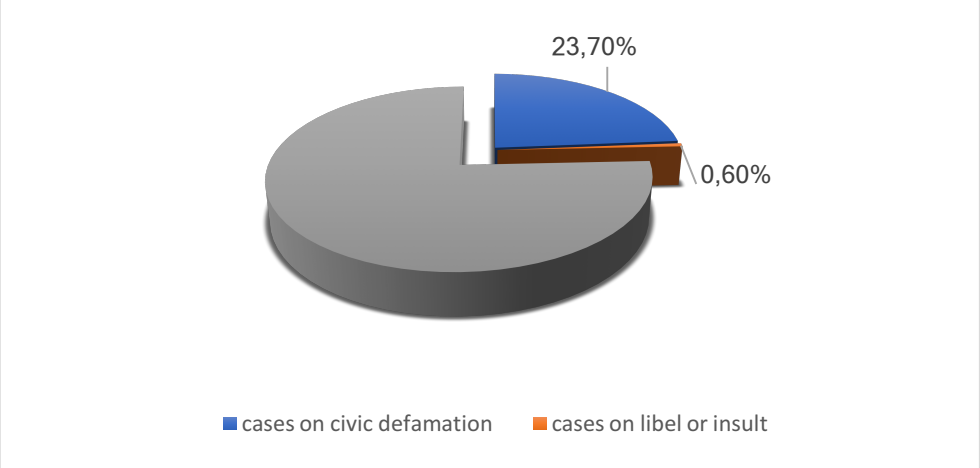

Figure 2.1. Proportion of cases on civil defamation as well as on libel or insult in the Russian judicial practice involving constitutional Article 29, January 2012–May 2015.

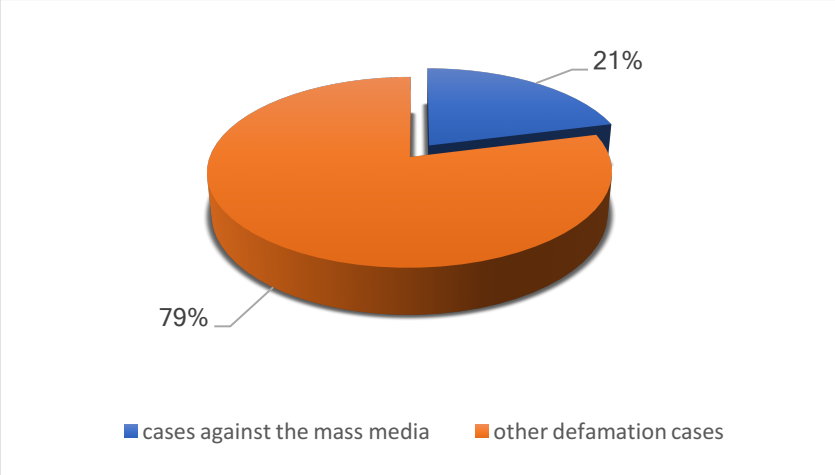

Figure 2.2. Proportion of cases against the mass media or journalists and other cases on defamation in Russia, January 2012–May 2015.

It should be noted that most of the courts' decisions are not detailed enough to conclude whether the case has been decided in line with the CoE standards or not. Therefore, my study could not analyse the conclusions of the courts and investigates, rather, the process of consideration of such cases.

The analysis shows progress in terms of referencing of the CoE standards by the Russian courts in their decisions. Article 19's 2007 report indicates that only 18.6% of cases directly referred to the ECHR, while my analysis reveals that all cases heard between 2012 and 2015 quoted Article 10 of the ECHR (see Figure 2.3). In 2002–2006, only 6% of Russian courts' decisions (7 in total) cited specific judgments of the ECtHR, while in 2012–2015, more than half (54) of the decisions directly quoted ECtHR's rulings (see Figure 2.4). This increase may be explained by the adoption of the Supreme Court's 2005 decree, which is also actively quoted by the Russian courts.

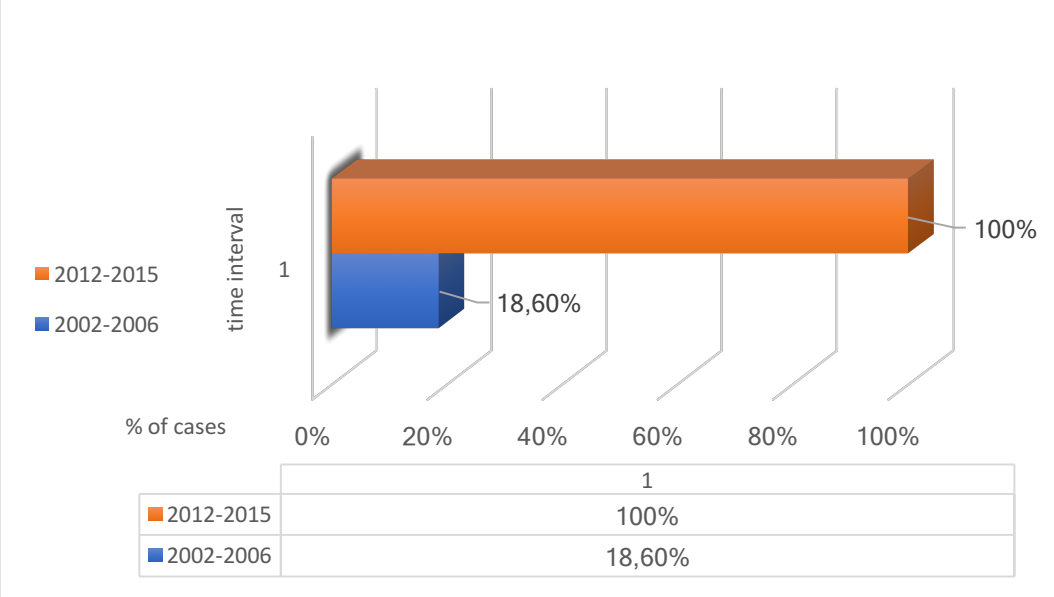

Figure 2.3. Dynamics in references to ECHR's Article 10 in the Russian judicial practice on defamation.

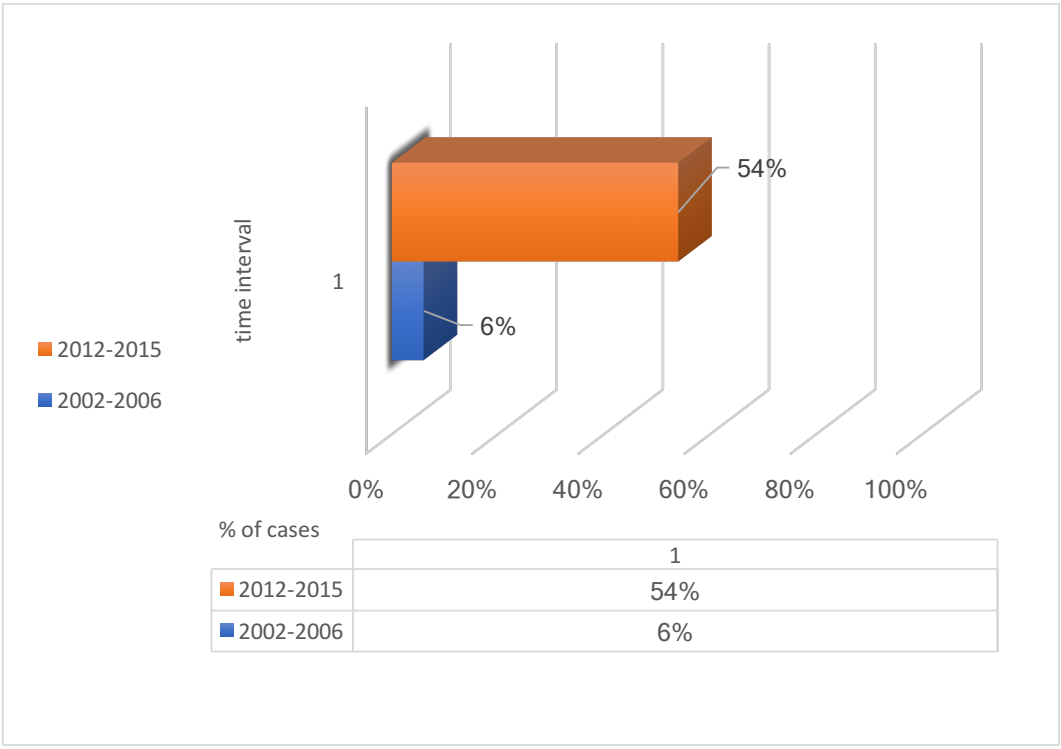

Figure 2.4. Dynamics in references to ECtHR case law in the Russian judicial practice on defamation.

In almost half (46%) of the cases in the period 2012–2015, claimants were public officials or civil servants; Article 19's analysis shows 39% of such cases. Figure 2.5 shows that defamation is still often used by public officials or civil servants to sue for criticism. However, since the 2007 report, the Russian courts have begun to actively refer to the principle that public officials should tolerate wider criticism: from 17.8% (8 decisions) in cases involving public officials in 2002–2006 this index has grown to 87% in 2012–2015 (see Figure 2.6). Almost all of these decisions referred to the Declaration on Freedom of Political Debate in the Media and to the ECtHR case law.

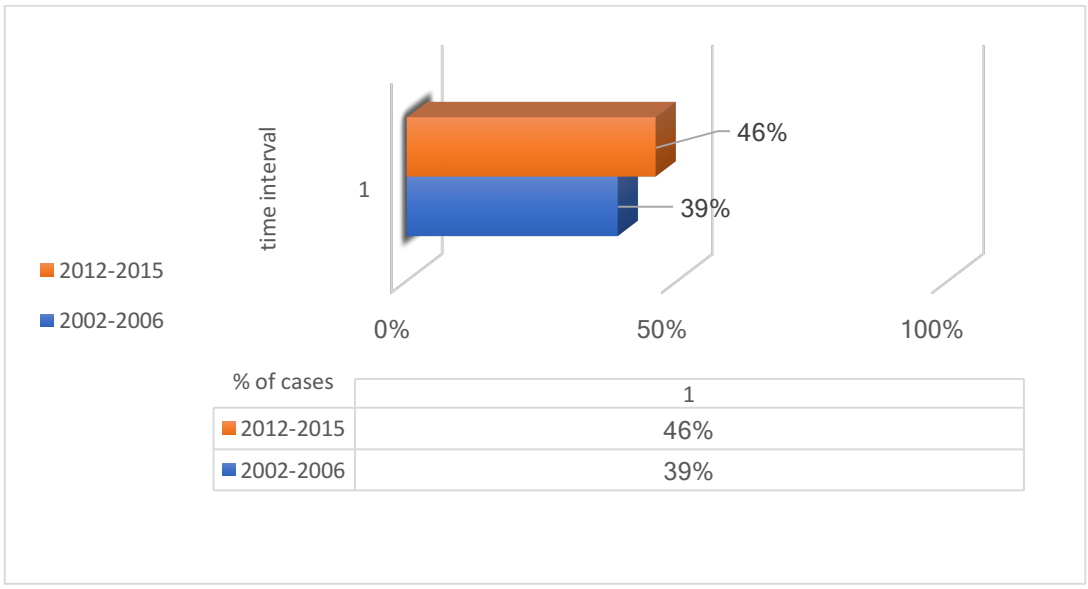

Figure 2.5. Increase of the number of cases involving public officials and civil servants as claimants in Russian judicial practice on defamation.

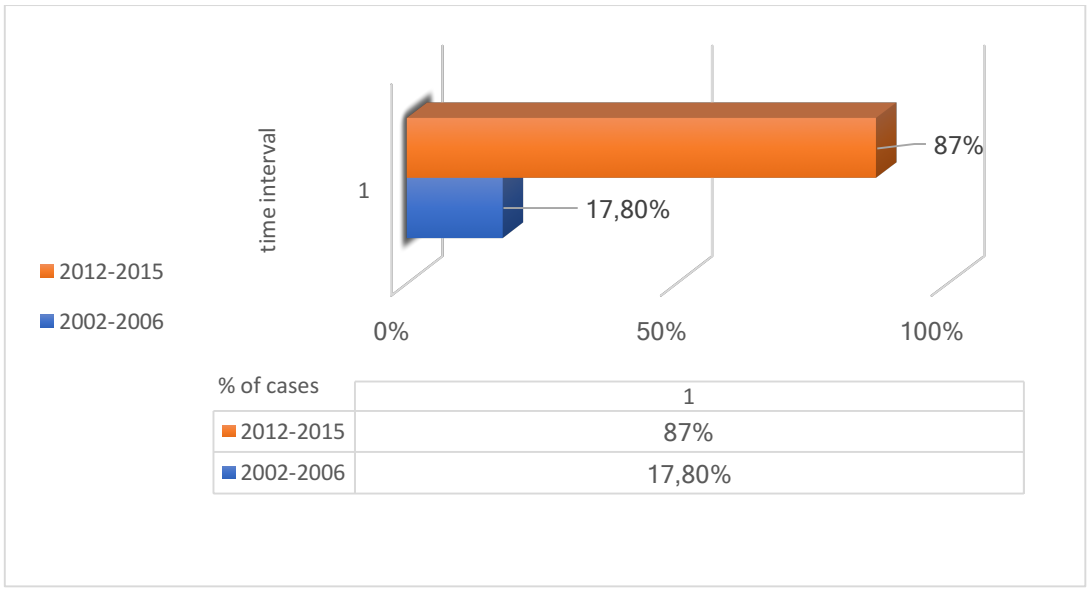

Figure 2.6. Dynamics in references to the CoE concept of public figures' tolerance of criticism in the Russian judicial practice on defamation.

Compared to the period 2002–2006, the Russian courts more often and appropriately applied the principle of tolerance to criticism. For instance, when the Judicial Division for Civil Cases of the Tomsk Regional Court considered the lawsuit of G. Nemtseva, the head of the deputies' group Spravedlivaja Rossija in the Legislative Duma of the Tomsk region, against the Pressa company (on 17 May 2012), the division claimed that "a politician, acting in a public capacity, inevitably and consciously opens her statements and activity to a steadfast scrutiny from journalists and society in general." The court did not protect the claimant because she was a politician, and therefore stated

that as "a public person, she agreed to become an object of public political discussion and criticism in the media."

However, my analysis has demonstrated that in most cases quoting the CoE standards was a *formal gesture* and had no impact on the courts' decisions. The research revealed many examples when the courts protected public officials, despite referencing the CoE standards in the rulings. In its decision in the suit of A. Kuzichkin against N. Grigorjev, M. Stepanenko, and Pressa, the Kirov District Court of the city of Tomsk misinterpreted the ECtHR ideas of balance and "necessity of limitations." Instead of balancing between the two rights (on protecting the reputation and on freedom of expression), the court was striving to achieve balance between the freedom of the media to publish critical materials and the right of public officials to be protected from such criticism. The court protected Kuzichkin, the head of the Department of Culture of Tomsk, and obliged the newspaper *Tomskaya Nedelja*, which had published a critical material about him, to print a correction and to compensate Kuzichkin for moral harm.

Another example is the decision of the Krasninsk District Court of the Smolensk region[333] in the suit of A. Shmatkov against the editorial offices of three newspapers—*Krasninskij Kraj*, *Nasha Zhizn*, *Za Urozhaj*—for publishing an article about fees for communal public services in which an anonymous person was quoted as calling Shmatkov "an opportunist" and "a liar." The court paid attention to the fact that the plaintiff, Shmatkov, was a deputy of the Smolensk regional Duma when the article was published, and therefore it provided latitude for broader criticism. However, the court then also made an opposing statement claiming that the expression of opinion, including in the form of criticism, towards a public official or a politician cannot exempt from liability the person disseminating such information if it causes harm to one's honour, dignity, or business reputation. This is in line with the ECtHR's standards, which also require that several criteria are thoroughly examined before the court concludes whether the journalists had overstepped their bounds. The Russian court, however, abstained from such an analysis. It failed to acknowledge that the issue of the deputy's corruption is of public interest. Instead, it recognised the article as defamatory. The following sentence from the article was also found defamatory: "What should our attitude be regarding […] talks that [the claimant] has suggested that fees be paid for [his] services in *assistance to the people*?" The court did not examine whether the information had a factual basis. Nevertheless, in this particular case, in light of Article 10 of the ECHR, exoneration of

[333] Decision of 15 December 2014.

the journalists from responsibility is most likely because the newspaper article concerned an issue of public interest and because the claimant was the regional deputy.

Sometimes, Russian courts make no reference to the Declaration on Freedom of Political Debate in the Media in cases involving public officials. An example is the lawsuit of N. Denin, the governor of the Bryansk region, against the editorial office of the newspaper *Brjanskij Rabochij*, along with E. Chalijan and Y. Borisov. The Soviet District Court of the city of Bryansk held in favour of the governor.[334] The court qualified the following sentence as defamatory: "This will happen later when Denin acquires the blocking share of stocks from the Uralians in violation of the law." While the article concerned a publicly important issue, the court found no public interest in the case, and it failed to examine whether the journalists' critical opinion had any factual basis.

My analysis shows that in general the concept of public interest is rarely applied in the Russian court practice on defamation. The same trend was marked in the 2007 analysis by Article 19, as Figure 2.7 depicts. Article 19 noted that although 70% of the decisions it analysed concerned issues of public interest (71 decisions), only four rulings referred to the concepts of public interest or political debate. My analysis arrived at similar results: 74% of cases concerned publications of public interest or political debate, but only 7% of the cases incorporated the concept of public interest or political debate.

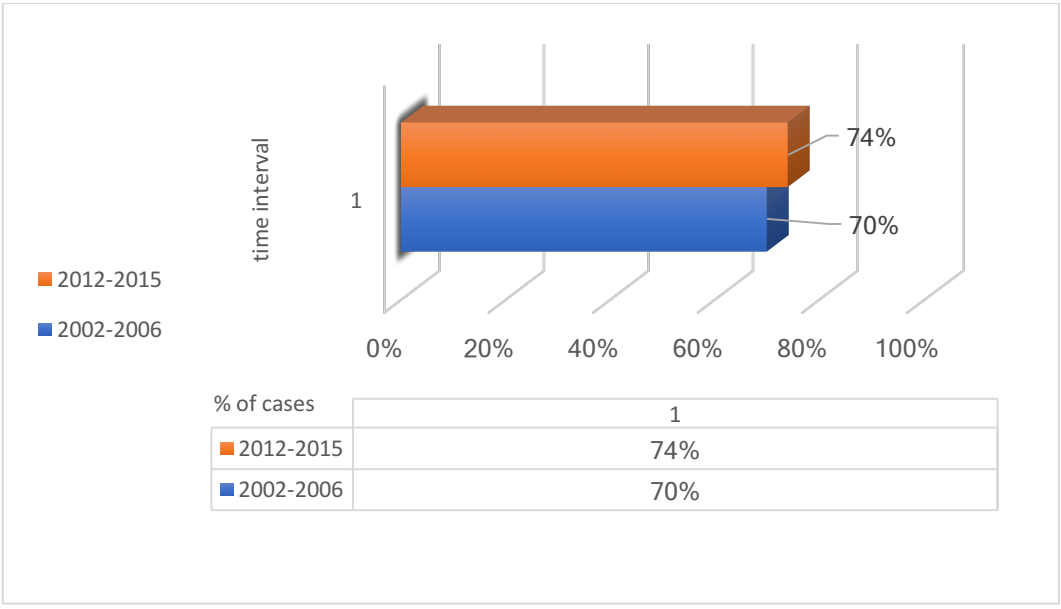

Figure 2.7. Dynamics in references to the concept of public interest in the Russian judicial practice on defamation.

[334] Decision of 12 August 2012.

Here are some examples. In the decision of 14 October 2013 in the lawsuit of Platonov, deputy of the Soviet People's Deputies of the city of Alexandrov, against the newspaper *Delovoy Aleksandrov* the Alexandrov City Court of the Vladimir region obliged the newspaper to correct the information that a group of deputies, including Platonov, had "ignored" the meetings of the city council and the claim that Platonov's family had managed an illegal hotel for migrant workers, because the defendant failed to prove that this information was true. The case concerns an issue of public interest, but the court did not recognise that.

Some court decisions contradict the concept of public interest. In its decision of 29 November 2013 in the lawsuit against the Information TV agency Gubernija, the Central District Court of the city of Khabarovsk recognised that this case concerns an issue of public interest because the plaintiff was the director of the management company of a housing cooperative. The court noted: "The intense interest of the public in the problems of housing and the utilities infrastructure is a generally known fact." On the other hand, the Kirov District Court of the city of Tomsk, in its decision of 27 February 2014 in the suit of the Administration of the October district of the city of Tomsk against the editorial office of the newspaper *Tomskaya Nedelja* and others, failed to find public interest in a case concerning problems of housing and utilities infrastructure. As a result, the court obliged the newspaper to rectify the following sentences:

> The administration of the October district is trying to lobby their interests without consideration of the law.

and

> The administration of the October district distributed the same notification among the tenants. This is an outrage: the proprietor of non-privatised apartments is an administration itself, which means that, as a proprietor, it must participate in co-funding rather than re-imposing its duties on the tenants.

In many respects, this case is similar to the case of *Krasulya v. Russia*.[335] The applicant Krasulya, editor-in-chief of the regional newspaper *Noviy Grazhdanskiy Mir*, was charged with libel against Chernogorov, the regional governor and the applicant's competitor in the 2000 mayoral elections. *Noviy Grazhdanskiy Mir* published under a pseudonym an article criticising the change in the appointment procedure of the town mayor—the mayor could no longer be elected by the town's residents, but was appointed

[335] *Krasulya v. Russia* of 1 January 2007.

by the town's legislative body. The article alleged that that decision was "lobbied" by Chernogorov and referred to him as "loud, ambitious and completely incapable."

In this case, the ECtHR held that there had been a violation of Article 10 of the ECHR. The ECtHR stressed the essential role of the press in a democracy and noted that Chernogorov, as a politician, had to show a greater degree of tolerance to criticism. The ECtHR reminded that there was very little scope under Article 10 for restriction of political discussion on issues of public interest. It noted that the newspaper article raised these issues and contributed to an ongoing debate. The ECtHR observed that it was difficult to determine whether the information concerning the governor's influence is based on fact or is a value judgment, but found that the article had a sufficient factual basis. The Court also observed that the article did not use offensive language and did not overstep the accepted degree of exaggeration or provocation.

Sometimes the Russian courts misinterpret the cause-and-effect connections between various ECtHR concepts. The Soviet District Court in its decision of 8 September 2014 in the suit against the editorial office of the newspaper *Orlovskaya Pravda* and the journalist S. Anisimova found that the claims published by the newspaper were opinions only because the case concerned an issue of public interest. The plaintiff, S. Kotov-Darti, complained that the following sentence was defamatory: "Among the reviewers of his creative works […]is Kotov-Darti who […] engages in activities aimed at the rehabilitation of a traitor, General Vlasov." The court found this sentence to be an opinion only because it "reflected commentaries on issues of public interest." The court misrepresented the concept of public interest assuming that if there is a public interest in a case this means that contested statements must be considered opinions.

My analysis shows that the Russian courts almost always try to formally distinguish statements of facts from opinions, often with the help of linguistic experts. Referring to the constitutional Article 29, the courts have stressed that no one can be held liable for his or her opinion, while anyone can be held liable for statements of facts if they are defamatory. In three cases the courts have also specified that the right to opinion is an inherent right for journalists, according to Article 47 Clause 9 of the statute "On Mass Media."

Despite this, Russian courts frequently order the correction of opinions (Article 19 has noted the same problem in their 2007 analysis). What is more interesting, in 2012–2015, the Russian courts began using the ECtHR case law to justify this approach. However, in many of their decisions, they misinterpreted the ECtHR's concept of factual

basis: they often require that *opinions be based on precise facts* and request proofs of these facts, otherwise, they claim, such opinions cannot be protected. In other words, Russian courts require the defendants to provide evidence for the veracity of opinions and, if they fail to do so, the courts rule in favour of the claimants. This trend is typical for cases involving public officials, which may be an indication that such misinterpretation is often deliberate and politically motivated. In practice, this often results in controversial decisions, which differ from the ECtHR standards on defamation.

For instance, in the abovementioned case of Denin versus the newspaper *Brjanskij Rabochij*, the court obliged the editorial office to prove the phrase: "It will happen later when Denin acquires the blocks of stocks from the Uralians in violation of the law," although the statement was formulated in future tense (as a hypothesis). However, in the abovementioned case of Krasulya, the ECtHR ruled: "The use of future tenses by the applicant suggests that the article contained suppositions rather than facts." While the ECtHR has stated that, according to its case law, a value judgment must be based on sufficient facts to represent "a fair comment," the ECtHR has also noted that it is in the court's authority to examine whether a sufficient factual basis for the statement exists, rather than it is the duty of the defendant to prove his or her value judgment.

Another decision illustrating this trend is the one held by the Tunkin District Court of the Buryat Republic in the suit of A. Samarinov, the head of administration of the Tunkin district.[336] The decision concerns an article published in an online media outlet and involves a public official, the plaintiff. The article alleged that Samarinov "works for his own pocket" and "confuses budget money with personal [finances]." It stated that "he does not consider [the] opinions" of the municipal unit directors and that his activities can be described as "an outrage." The article also quoted the statements of several municipal unit directors about the plaintiff. The court ruled that some phrases were statements of facts, but others were opinions.

However, referring to the ECtHR case law, the court claimed that such opinions could not be protected because they were based on "untrue facts." The court obliged the defendants to pay damages for moral harm and obliged the online media outlet to publish both a correction and a reply on its main web page (even though the article in question did not initially appear on the main page). Nothing was said about tolerance of wider criticism of public officials in this case. Thus, despite the distinction between statements

[336] Decision of 24 May 2013.

of facts and opinions, as well as the application of the ECtHR case law, the decision lacks analysis of other elements that were important in this case.

Another interesting decision was held against the jurist A. Ekaev, also founder and editor-in-chief of the newspaper *Tverskoy Reporter*. The court found him guilty of insulting citizen K. Ekaev, a famous human rights activist in the region, had published an open letter to Russia's president Putin in which he stated that K. was a "swindler" and a "liar" and that K. had "succeeded in creating corruption in the judicial bodies of the region." Ekaev also stated that there had been an attempt on his life and that presumably K. has ordered the assassination. The Magistrate Judge of judicial district No. 73 of the Klinsk judicial district of the Moscow region[337] found Ekaev guilty only because he has legal education and "should have known for certain" that K. has not had any previous guilty verdicts for swindling, perjury, or abuse of powers. The court meant that Ekaev's words "swindler" and "liar" were based on untrue facts and, therefore, he cannot be protected. Neither did the court find public interest in this case, even though the local press kept track of it. Ekaev had previously been convicted for assaulting and insulting a figure of authority. Compounding the two convictions, the court sentenced Ekaev to two years in prison and one month in a penal colony.

Sometimes the courts' requirements that media editorial offices must verify information before disseminating it have resulted in decisions that have misused both the statute "On Mass Media" and the CoE standards. An example is the decision of the Serov District Court of the Sverdlovsk region in the suit of A. Silenko against the newspaper *Serovskij Rabochij* and D. Skrjiabin, its editor in chief.[338] In this case, the defendant merely reproduced information already published several times in other mass media outlets and he should have been exempt from liability, according to Article 57 of "On Mass Media." However, the court stated that even if the information had already been published elsewhere, the editorial office still had the responsibility to check its veracity. Therefore, the defendant was not exempt from liability.

To summarise this section, the Russian legal concept of defamation is largely inconsistent with the universal notion of media freedom and with the CoE standards, despite the considerable number of ECtHR cases on defamation against Russia. The ECtHR jurisprudence has had an impact on the perspective of the Russian Supreme Court. But an analysis of the practice of lower courts shows that they only make formal

[337] Decision of 31 January 2014.
[338] Decision of 4 December 2012.

references in their decisions to some of the CoE concepts. Other standards are ignored, particularly those concerning journalistic ethics, and this can prevent the development of a socially responsible journalism in Russia. All this has led to a significant imbalance between the protection of the freedoms of speech and mass information, on the one hand, and the protection of reputation, on the other. In other words, in considering cases on defamation in the media the Russian courts apply a formalist approach when referring to the CoE standards.

The CoE standards have had an almost unnoticeable impact on Russian legal regulation of defamation in the media. The ECtHR's suggestions to Russia mentioned in section 1.7 have not been incorporated. The advances made at the level of the Constitutional Court have been mainly insufficient or ambiguous. The 2012–2013 changes in Russian legislation extended the difference between the Russian and the CoE's perspectives on defamation in the media and created new possibilities for the use of defamation as a tool to silence criticism, particularly on the Internet. While the lack of legal culture in Russia plays a part in these processes, their most plausible explanation is, in fact, political.

2.2. Extremism and Media Freedom in Russia

The laws forbidding speech that is deemed extremist or in support of terrorism have posed a particular challenge to freedom of expression, Banisar (2008) argues. However, the Russian legal concept of extremism is unique, very problematic, and tremendously imprecise—yet it is applied quite actively. According to Article 1 of the Federal Statute of the Russian Federation of 25 July 2002, No. 114-FZ "On Counteracting Extremist Activity" (hereinafter—"anti-extremist statute"), extremism encompasses the following activities:

forcible change of the foundations of the constitutional system and violation of the integrity of the Russian Federation;

public justification of terrorism or other terrorist activity;

excitation of social, racial, national, or religious strife;

propaganda of exclusiveness, superiority, or inferiority of an individual based on his or her social, racial, national, religious, or linguistic identity or religious beliefs;

violation of human or citizen's rights, freedoms, or legitimate interests based on national, religious, or linguistic identity or religious beliefs;

preventing citizens from exercising their electoral rights and the right to

participate in a referendum or violation of the secrecy of the vote combined with violence or a threat to use violence;

interference with the legitimate activity of state authorities, local government bodies, election commissions, public or religious organisations, or other organisations combined with violence or a threat to use violence;

committing crimes on motives related to political, ideological, racial, national, or religious hatred or strife, or on motives related to hatred or strife towards any social group;

propaganda or public demonstration of Nazi attributes or symbols or attributes and symbols confusingly similar to them, or public demonstration of attributes or symbols of extremist organisations;

public calls for carrying out of the activities mentioned above or mass dissemination of knowingly extremist materials as well as their production or storage for the purposes of mass dissemination;

public libel against federal government officials of the Russian Federation or regional government officials alleging that they have committed the abovementioned criminal acts during the exercise of their official duties;

organisation or preparation of the abovementioned activities or calls to commit them;

funding the abovementioned activities or providing any other assistance for their organisation, preparation, or execution including providing support for the printing of their materials, offering educational and technical facilities, providing phone communication, or other types of communication and information services.

This definition is complex and vague. It describes extremism as a set of acts that vary substantially in degree of social danger and that cover "almost all forms of political dissent," as Richter (2012, p. 290) argues. It is hard to systematise these acts as they encompass a broad range of legal concepts, such as terrorism, separatism, hate speech, libel of public officials, as well as violation of the secrecy of the ballot.

From 2010 to 2016, the number of extremist crimes in Russia increased more than two times, from 656 to 1,410, according to the official Web Portal of Legal Statistics of the Office of the Prosecutor General of the Russian Federation.[339] A study of the database of the independent Russian NGO SOVA Center for Information and Analysis, which monitors extremist crimes, shows a growth in sentencing decisions on propaganda of

[339] See the official Web Portal on Legal Statistics of the Office of the General Prosecutor of the Russian Federation at: http://crimestat.ru/offenses_chart

extremism from 2009 to 2016.[340] Moreover, the Russian legal concept of extremism has already been enthusiastically incorporated into the national legislations of some post-Soviet countries where free speech is even less protected than in Russia.

International organisations, legal scholars, and civil rights activists have repeatedly criticised the Russian legal concept of extremism and have called for its reassessment. On 20 June 2012, the Venice Commission issued an Opinion on the anti-extremist statute[341] in which it examined the statute in the context of the CoE standards and made several recommendations, which Russia has so far ignored. The 2015 report on Russia of the UN Human Rights Committee[342] expressed great concerns about the "vague and open-ended definition of extremist activity." Russian scholars claim that, in general, the anti-extremist mechanism is used to safeguard the Russian government from protests and criticism (Richter, 2012; Verhovskij, Ledovskih, & Sultanov, 2013). Under the guise of protecting terrorism, the "Yarovaya Law" [343] of 2016 amended several Russian legal acts, making anti-extremism legislation harsher.

This section of the dissertation inquires to what extent the CoE standards on freedom of expression have impacted the Russian anti-extremist concept and its application. As seen from the definition of extremism above, the concept refers to considerably more than speech: any act can be recognised as extremist if it is committed with extremist motives. However, for the purposes of this thesis, I study only extremist activities directly related to speech.

This section starts with an explanation of the rationale for the emergence of the legal concept of extremism in Russia. It then considers this concept in light of media freedom through an examination of the rules concerning the dissemination of extremist

[340] The database of the SOVA Centre for Information and Analysis is accessible through the organisation's official website at: http://www.sova-center.ru/en/database/

[341] European Commission for Democracy through Law, Opinion on Federal Law of the Russian Federation, "On Combating Extremist Activity," adopted by the Venice Commission at its 91 Plenary Session, Venice, 15–16 June, No. 660/ 2011, CDL-AD(2012)016, Strasbourg, 20 June 2012. Retrieved from http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1994)011-e

[342] The UN Human Rights Committee's Concluding Observations on the Seventh Periodic Report of the Russian Federation (CCPR/C/RUS/7), adopted on 28 April 2015. Retrieved from the official website of the Office of the UN High Commissioner for Human Rights (OHCHR): http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstWB5OJfDOQhMEkiX20XNhIfwS44vVjDCG9yOfCaGgJ%2b4aMVruPFpyUaMYJvfEOEBQCPHWJdUArBGlBJo5DzI4ZqOZa12FMGUZJqFSjwcIYP

[343] Federal Statute of the Russian Federation "On Amending the Federal Statute of the Russian Federation, On Counteraction of Terrorism, and Other Legal Acts of the Russian Federation in the Parts Establishing Additional Measures to Counteract Terrorism and Ensure Public Safety," No. 374-FZ of 6 July 2016; Federal Statute of the Russian Federation "On Amending the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation in the Parts Establishing Additional Measures to Counteract Terrorism and Ensure Public Safety," No. 375-FZ of 6 July 2016.

materials by Russian media organisations. The section proceeds to compare the Russian legal concept of extremism with the CoE concepts of hate speech, apology and justification of terrorism, calls for violation of territorial integrity, and criticism of state bodies as well as public officials.

This section then compares criteria established by the Russian Supreme Court for consideration of extremist cases with the criteria that the ECtHR applies when making decisions on cases concerning incitement to violence. Such criteria were formulated by the Supreme Court of the Russian Federation in its Plenum Decree of 28 June 2011, No. 11 "On Judicial Practice on Extremist Crimes" (hereinafter—"the decree on extremism") and the Plenum Decree of 9 February 2012, No. 1 "On Certain Issues of Judicial Practice on Terrorist Crimes" (hereinafter—"the decree on terrorism").

The next part of the section presents two analyses. The first examines the dynamics of Russian general jurisdiction court practice on extremist publications in the period 2012–2015. It is mainly based on data from Roskomnadzor's public annual reports and from the SOVA Centre. Finally, the section shows to what extent the Russian general jurisdiction courts have implemented the CoE standards when considering cases on extremist speech. The court decisions analysed in this part have been sourced from the RosPravosudije database.

The Emergence of the Legal Concept of Extremism

Savchenko (2014) suggests that the notion of extremism emerged in Russian legal discourse after the adoption of the Shanghai Convention (see also section 1.5), which defines extremism as

> an act aimed at seizing or keeping power through the use of violence or changing violently the constitutional regime of a State, as well as a violent encroachment upon public security, including the organisation, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the Parties.

Therefore, the Convention refers only to violent acts of extremism. Likewise, its notion of terrorism also includes only acts of violence with no direct connections to speech.

After the adoption of the Shanghai Convention, the Russian government's perspective on this issue developed in the direction of arguing that terrorist acts happen mainly because political extremism incites violence (Richter, 2012). In the initial version of the 2002 Russian anti-extremist statute, speech referred to extremism only if it is

"*combined with violence or calls for violence*." Correspondingly, the Criminal Code of the Russian Federation at that time was supplemented with Article 280 criminalising public calls for extremism.

Four years later, Russia adopted a specifically anti-terrorist statute, the Federal Statute of 6 March 2006, No. 35-FZ "On Counteracting Terrorism" (hereinafter—"anti-terrorist statute"). Article 3 of this statute defined terrorism as an "*ideology of violence"* or *"practice of influence*" on the decisions of state bodies or international organisations combined with intimidation of the population or other unlawful violent activities. In other words, Russia established measures not only against terrorist practices, but also against the "ideology of violence," a concept that remains undefined in Russian legislation.

Since 2012, amendments to the anti-extremist statute have made it possible for speech to be qualified as extremist even in cases when it neither causes nor incites violence. Thus, Russia has significantly extended the legal notion of extremism provided in the Shanghai Convention. This makes the connection between the Russian legal concepts of terrorism and extremism unclear. Despite this fact, the Russian government has continued to justify new anti-extremist measures with the need to prevent terrorism.

As noted in section 1.8,[344] the Russian Constitutional Court tried to justify the constitutionality of the legal concept of extremism by referring to the Shanghai Convention as well as to constitutional Article 29(2), which bans racial, national, or religious hatred and strife, as well as propaganda of social, racial, national, religious, or linguistic superiority. However, the legal notion of extremism in Russia goes beyond the already broad concepts of these legal acts.

In 2012, the Opinion of the Venice Commission specifically noted that the Russian anti-extremist mechanism must be revised in order to limit extremism only to acts or speech advocating violence. This perspective is based on the ECtHR approach. From the ECtHR's perspective, speech deserves protection under Article 10 of ECHR if it does not *call for violence*.[345]

The ECtHR always examines cases as a whole in order to determine whether any

[344] See also Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of a citizen, S. N. Alekhin, complaining about the violation of his constitutional rights by Article 1 paragraph 1 of the Federal Statute of the Russian Federation, 'On Counteraction of Extremist Activity'" of 17 February 2015; and Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of a citizen, V. S. Kochemarov, complaining about the violation of his constitutional rights by Article 1 paragraphs 1 and 3 and Article 13 paragraph 3 of the Federal Statute of the Russian Federation, 'On Counteraction of Extremist Activity'" of 2 July 2013.

[345] See, for instance, the ECtHR judgments on the cases of *Sener v. Turkey* of 18 July 2000; *Ozgür Gündem v. Turkey* of 16 March 2000; *Gündüz v. Turkey* of 4 December 2003; *Sürek v. Turkey* (No. 3) of February 2008.

state interference *is proportionate, pursues a legitimate aim,* and is *necessary in a democratic society***.** The Court distinguishes between expressions that may shock, disturb, or offend, but that deserve protection under Article 10 of the ECHR, and expressions that cannot be tolerated in a democratic society.[346] If the impugned expressions incite violence or hatred, the ECtHR provides no protection for them and allows states a *wider margin of appreciation* when examining the need for interference with the exercise of freedom of expression. In other words, from the CoE's perspective, *incitement to violence is among the most important criteria* in considering cases on hate speech, terrorism, or separatism—in stark contrast to Russia's standpoint.

Sanctions for Disseminating Extremist Speech in the Media and on the Internet

Grigorieva (2015) has noted that the Russian legal anti-extremist acts lack a unified criterion and this has resulted in the redundancy of legal rules on sanctions for extremist crimes. Such redundancy of sanctions not only promotes self-censorship, but also creates an effective mechanism for punishing political dissent. According to the decree on extremism of the Russian Supreme Court, crimes involving extremist speech are deemed to have been fully perpetrated from the moment of dissemination of such speech, regardless of its consequences.

Several articles of the Russian Criminal Code, including 280 (public calls for extremism), 280.1 (public calls for violating territorial integrity), 282 (incitement of hatred or enmity), 205.2 (public calls for terrorism or its justification), 128.1 (libel), 148 (violation of the freedom of consciousness), and 354.1 (rehabilitation of Nazism), can be used to ban extremist speech, while Article 280 extends over crimes banned in all other articles (they will be discussed below).

It should be noted that Russian law also criminalises the acts of organising and assisting extremist groups, including financial assistance. Additionally, the 2016 "Yarovaya Law" introduced a new article, 205.6, with punitive measures against people who do not inform the authorities on crimes covered under the extremist legislation. These amendments also considerably increased the legal liability for some criminal activities associated with extremism.

Article 280 of the Criminal Code criminalises "public calls for extremism." The decree on extremism defines "calls for extremism" as appeals to other persons, in any

[346] See, for instance, the ECtHR judgments on the cases of *Jersild v. Denmark* of 1 September 1994; *Lehideux and Isorni v. France* of 23 September 1998; *Garaudy v. France* of 23 June 2003.

form, "with the aim of inciting them to commit acts of extremism." Consequently, Russia has created and criminalised a unique new legal concept, *incitement to extremism***.** Sanctions under Article 280 vary from monetary penalties to four years of imprisonment with deprivation of rights to carry out certain activities or to occupy certain positions for the term of the penalty. If public calls for extremism are made in the mass media or online, they are considered more serious, and the sanctions for those vary from compulsory labour (of up to five years) to five years of imprisonment and deprivation of rights to do certain activities or occupy certain positions for the same term.

While criminal sanctions for extremist expression apply only to individuals in Russia, media organisations can be held administratively liable. Four articles of the Russian Code of Administrative Offences—13.15 (abuses of the freedom of mass information), 20.3 (propaganda or any display of Nazi symbols), 5.26 (violation of laws on freedom of consciousness), 20.29 (production or dissemination of extremist materials)—provide sanctions for extremism, whereby Article 20.29 is the one most often applicable to media organisations. Article 20.29 bans the mass production and dissemination of extremist materials or the storage of such materials with the intention to distribute them. However, it is usually very complex to prove that media organisations store extremist materials without intending their dissemination. Sanctions under this article vary from fees of up to one million rubles (about 15,400 euro) to suspension of the media organisation for a period of up to ninety days and seizure of the extremist materials and the equipment used for their production.

The anti-extremist statute defines "extremist materials" very broadly as documents or information

> calling for the perpetration of extremist acts or explaining or justifying the need to commit such activities; [such information] includes works by the leaders of the Nazi Party of Germany, the fascist party of Italy, as well as publications explaining or justifying national or racial superiority, or justifying the practice of committing military or other crimes aimed at the full or partial elimination of any ethnic, social, racial, national, or religious group.

Thus, any material *inciting extremism* can be recognised as "extremist material."

Within thirty days after a court's decision, the Ministry of Justice blacklists extremist materials in an online register, which has been maintained since 2005 and includes 4,022 extremist materials as of 31 January 2017 (see Ministry of Justice, 2016). Courts' decisions on whether materials can be qualified as extremist are largely based on

"independent" expert evaluations commissioned by the investigating authorities or the courts themselves. However, as Verhovskij, Ledovskih, and Sultanov (2013) argue, these experts tasked with making legal conclusions, often do not have the relevant qualifications.

Part 2 of Article 13.15 of the Russian Code of Administrative Offences (prohibiting abuses of the freedom of mass information) provides sanctions against media outlets for mentioning an extremist organisation without also saying that it has been closed down or banned in Russia. The courts can qualify as extremist those organisations that have committed extremist acts or have assisted in the commitment of such acts. Extremist organisations are also blacklisted by the Ministry of Justice.[347] At the moment of writing (31 January 2017), the ministry's register consists of fifty-eight organisations (five Ukrainian ones were added to this list in 2014). Another blacklist of the ministry includes organisations whose activities have been temporarily closed down.[348]

Since 2015, Article 13.15 Part 6 has also banned the production and dissemination of any mass media content that *incites or justifies extremism* (or terrorism). Thus, it has extended even further the anti-extremist concept. The sanctions for the mass media are fines of up to one million rubles (15,300 euro) as well as seizure of the equipment used to commit the offence.

As mentioned above, abuses of the freedom of mass information may result in the closure of any media outlet. With regards to the violation of anti-extremist legislation, Roskomnadzor or the Russian General Prosecutor may issue warnings (which may be appealed in court) to media organisations accused of disseminating extremist materials. If, within a year's time, a media outlet repeatedly receives such warnings or fails to remedy the violation, it can be shut down, according to Article 4 of the statute "On Mass Media" and Articles 8 and 11 of the anti-extremist statute.

In August 2008, the Basmanny Interdistrict Prosecutor of Moscow issued a warning to the entertainment TV station for adults 2x2 for the "inadmissibility of disseminated extremist materials." The prosecutor qualified 2x2's broadcast of Episode 1,004 of the US cartoon series *South Park* as extremist, according to the commentary of a little-known expert organisation (Richter, 2009). In September 2008, the same

[347] The register of NGOs banned on the grounds of the Federal Statute of the Russian Federation, "On Counteraction of Extremism Activity," accessed from the official website of the Ministry of Justice of the Russian Federation: http://minjust.ru/ru/nko/perechen_zapret

[348] The register of NGOs whose activities have been suspended for committing extremist acts, accessed from the official web site of the Ministry of Justice of the Russian Federation: http://minjust.ru/nko/perechen_priostanovleni

prosecutor issued another warning about the same episode, which could have led to the closure of the station and to the imprisonment of its editor-in-chief. However, both warnings were successfully impugned in the Basmanny District Court of Moscow because of the opinion of another expert who found that the episode did not feature any extremist materials. Nevertheless, the prosecutor attempted to resist the station's appeal of its first warning. He argued that a warning is a preventive measure, which cannot violate the rights and interests of the applicant. The court, however, ruled that only expert commentaries could constitute a preventive measure, unlike the prosecutor's orders (see, for details, Richter, 2009).

Until 2013, blocking of websites containing extremist materials was exercised in Russia only upon a court's ruling, in accordance with the anti-extremist statute. Currently, websites containing extremism can be blocked without a court's consideration, upon requests from the General Prosecutor or his deputies, according to the 2013 amendments to the statute "On Information." Its new Article 15.3 allowed the blocking of websites if they contain extremism or information calling for mass disorder or participation in mass actions "conducted in contravention of established procedures." No statute explains what "conducted in contravention of established procedures" means. By bringing under one umbrella acts such as extremism, calls for mass disorder, and participation in mass actions, the statute virtually equates opposition activists, who invite people to take part in mass protest actions, with extremists. Three oppositional websites—Grani.ru, Kasparov.ru, and Ej.ru—were blocked for calling on citizens to participate in unsanctioned mass protest actions within two months after the statute entered into force. As of 31 January 2017, the websites are still unavailable. The blog of the oppositional leader Alexei Navalnyy was also blocked on the same date, although on other grounds.

The blocking procedure, which is fully supervised by governmental authorities, is quite questionable. After a prosecutor's request, Roskomnadzor requires the communication service provider to immediately block access to the entire website or to certain information, at the discretion of the provider. Roskomnadzor also sends a request to the web host service provider, who obliges the website's owners to delete the disputed information within 24 hours. At this point, however, access to the website could have already been fully blocked by the communication service provider. The statute "On Information" says nothing about the period of time within which access to the website must be restored after the owners have deleted the information in question. According to

Roskomnadzor's Public Annual Report,[349] in 2015 the agency made 913 decisions to block extremist materials upon prosecutors' requests. In general, the blocking procedure may be viewed as non-transparent and non-proportionate because it allows the blocking of entire websites instead of the illegal content only.

For media organisations, these are severe sanctions, as temporary or permanent closures of media outlets are incompatible with the CoE standards, which always emphasise the important role of the media as a watchdog in a democracy. From the CoE's perspective, these sanctions are disproportionate in their aim to punish the entire media organisation instead of the people responsible for the publication or the broadcast. The ECtHR case *Ürper and Others v. Turkey* of 20 October 2009 is exemplary here. The case concerned the suspension of several newspapers for the spreading of terrorist propaganda. The ECtHR held that the Turkish authorities could have imposed less severe sanctions—for instance, seizing specific issues of the newspapers or restricting the publication of certain articles. The Turkish authorities' suspension of the dissemination of entire newspapers, including unpublished issues, represents a disproportionate sanction. The Court ruled that this had violated Article 10 of the ECHR and stressed the critical importance of the democratic role of the press.

In several judgments concerning Turkey, the ECtHR stated that the press could serve as "a vehicle for the dissemination of hate speech and the promotion of violence" at a time of national tension or conflict and, therefore, it has particular duties and responsibilities. At the same time, the ECtHR noted that the state's interference must be considered in light of the essential role of the press in ensuring political democracy. The press is obliged to impart information or ideas on political issues, however controversial or divisive they are. While the Declaration of the CoE's Committee of Ministers "On Freedom of Political Debate in the Media," adopted on 12 February 2004, points out that freedom of political debate does not include freedom to express racist opinions or opinions inciting hatred, xenophobia, anti-Semitism, or any form of intolerance, its Recommendation (97)21 "On the Media and the Promotion of a Culture of Tolerance," adopted on 30 October 1997, proclaims that the media "*can make a positive contribution to the fight against intolerance, especially where they foster a culture of understanding between different ethnic, cultural, and religious groups in society*."

Below, I look at several Russian legal notions included in the concept of

[349] Retreived from the official website of the Federal Service for Supervision of Communications, Information Technology, and Mass Media (Roskmnadzor) at: https://rkn.gov.ru/docs/docP_1485.pdf

extremism in order to compare their regulation with the CoE's perspective.

Hate Speech and Extremism

In line with Article 20 of the ICCPR, both Russia and the CoE exclude hate speech from protection under free speech provisions. According to the CoE's perspective, hate speech undermines the foundation of democracy based on the ideas of tolerance of differences, promotion of social peace, and non-discrimination—principles that have been repeatedly mentioned by the ECtHR as fundamental values protected by the ECHR. In several decisions,[350] the Court stressed that

> tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance (including religious intolerance), provided that any "formalities," "conditions," "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.

In general, the ECHR has provided the ECtHR with two possible options for considering cases on freedom of expression and the incitement of hatred. The first option is to exclude hate speech from the protection of the ECHR under its Article 17 prohibiting the abuse of rights in the following way:

> Nothing in this Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Another option is to establish restrictions in line with Article 10(2) of the ECHR. The ECtHR applies this option if the speech at issue does not threaten the fundamental values of the ECHR.

As a reminder, the Russian Constitution excludes hate speech from constitutional protection in Article 29(2), which states: "Propaganda or agitation exciting social, racial, national, or religious hatred and strife is not permitted. Propaganda of social, racial, national, religious, or linguistic superiority is banned." Article 19(2) of the Constitution also states that

[350] See, for instance, the ECtHR judgments on the cases of *Gündüz v. Turkey* of 4 December 2003; *Erbakan v. Turkey* of 6 July 2006.

> the state guarantees the equality of the rights and freedoms of persons and citizens regardless of sex, race, nationality, language, origin, ownership of property, or official status, place of residence, religious beliefs, convictions, membership in public associations, and other circumstances. All forms of limitations of human rights on social, racial, national, linguistic, or religious grounds shall be banned.

Article 282 of the Criminal Code of the Russian Federation criminalises the *"excitation of hatred or strife as well as the abasement of human dignity,"* committed in public, through the media, or on the Internet, on the grounds of sex, race, nationality, language, ethnic origin, religious beliefs as well as belonging to any social group. Sanctions under Article 282 are more severe if the crime is committed through force, intimidation, malfeasance, or by an organised group. Sanctions vary from monetary penalties to six years of imprisonment.

In addition to Article 282, Article 280 of the Criminal Code, criminalising "public calls for extremism," may be applied in cases involving "excitation of hatred or strife as well as the abasement of human dignity" because this notion is included in the concept of extremism. Additionally, Articles 20.29 and 13.15 of the Russian Code of Administrative Offences may be applied to any media organisation disseminating materials exciting hatred or strife.

Attempting to clarify what "the excitation of hatred or strife as well as abasement of human dignity" means, the decree on extremism of the Russian Supreme Court describes it as "expressions justifying and (or) promoting genocide, mass repressions, deportations, and perpetration of other illegal acts, including violence against representatives of any nation, race, adherents of other religions, or any other group of people." While this explanation is important for balancing freedom of speech with other rights and it may correlate with the CoE's approach, the definition is not at all comprehensive as it only gives several examples of acts constituting extremism. It should be noted that Russian law does not provide definitions for either the *abasement of human dignity* or human dignity itself, which are very broad notions and may be interpreted quite arbitrarily. In the previous section on defamation, I discussed the lack of a notion on human dignity in Russian legislation, which seems to be less important for judicial practice on defamation than for the practice on extremist crimes.

The CoE standards also do not provide an universal definition for hate speech—for which the Council is often criticised (Harasti, 2012; McGonagle, 2013; Mendel, 2012). Nevertheless, a central point for this thesis is the notion provided in

Recommendation 97(20) "On Hate Speech" by the CoE's Committee of Ministers,[351] which defines hate speech as

> covering all forms of expression which spread, incite, promote, or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants, and people of immigrant origin.

Although this definition has been formulated for the purposes of the abovementioned recommendation, its importance cannot be underestimated because it has been actively applied in the ECtHR case law[352] and quoted by many scholars studying the CoE standards on hate speech. There have been several interpretations of this definition. For instance, Weber suggests that it covers a variety of situations:

> - firstly, *incitement of racial hatred* or, in other words, hatred directed against persons or groups of persons on the grounds of belonging to a race;
>
> – secondly, *incitement to hatred on religious* grounds, to which may be equated incitement to hatred on the basis of a distinction between believers and non-believers;
>
> – and lastly, to use the wording of the Recommendation on "hate speech" of the Committee of Ministers of the CoE, *incitement to other forms of hatred* based on intolerance "expressed by *aggressive nationalism and ethnocentrism*." (2009, pp. 3–4, emphasis added)

Based on this concept, the ECtHR tends to refuse protection for racist,[353] xenophobic, or anti-Semitic speech; [354] expressions denying, challenging, or diminishing the Holocaust;[355] or Nazi and neo-Nazi speech.[356] The ECtHR almost always finds these types of speech to be groundless and consequently inadmissible, according to Article 17 of the ECHR. A similar concept is established in the ICCPR, Article 20, which requires member-states to ban racial, national, or religious hatred. To sum up, the CoE concept on

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[351] Recommendation 97(20) of the CoE's Committee of Ministers on Hate Speech, adopted on 30 October 1997, at the 607th meeting of the Ministers' Deputies. Retreived from http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec%2897%2920_en.pdf

[352] See, for instance, the ECtHR judgments on the cases of *Gündüz v. Turkey* of 4 December 2003; *Erbakan v. Turkey* of 6 July 2006.

[353] See, for instance, the ECtHR judgments on the cases of *Jersild v. Denmark* of 23 September 1994; *Seurot v. France* of 18 May 2004; *Norwood v. United Kingdom* of 16 November 2004.

[354] See, for example, the ECtHR judgment on the case of *Pavel Ivanov v. Russia* of 20 February 2007.

[355] See, for example, the ECtHR judgment on the case of *Garaudy v. France* of 24 June 2003.

[356] See, for example, the ECtHR judgment on the case of *H., W., P. and K. v. Austria* of 12 October 1989.

hate speech is based on banning incitement to hatred on the grounds of race, religion, and national or ethnic identity.

The Russian concept on hate speech is broader. Apart from the ban on racial, national, or religious hatred, it also engages the ban on "*social* hatred and strife," on "racial, national, or religious *strife*" as well as the ban on "propaganda of social, racial, national, religious, or linguistic *superiority*," according to the constitutional Article 29. In contrast with the Russian approach, neither the UN nor the CoE standards prohibit a "social hatred" or use the terms "strife" and "superiority." These Russian legal notions have yet to be defined in national legislation, which impedes the integrated interpretation of the Russian legal concept of extremism by the courts.

The ban on "social hatred" allows prohibiting criticism of any social group based on *any common attribute*—for instance, governmental bodies, public officials, the police or other law enforcement bodies, doctors, students, criminal organizations, *et cetera*. Any group of people may have at least one common attribute. This has led to several cases in Russia, in which criticism towards groups of public officials and law enforcement bodies was qualified as extremism (Verhovskij, Ledovskih, & Sultanov, 2013). The best-known such case is the 2008 trial of the blogger Savva Terentiev, who was given a one-year suspended sentence for the incitement of violence towards the police as a social group. After the police had confiscated hard disks in the editorial offices of the regional newspaper *Iskra*, Terentiev published a harsh post on his blog. He claimed that he hated policemen, and that it would be a good thing if every city had ovens in which people would burn at least one policeman a day, as was practiced in Auschwitz, and that this would lead to the purification of society from the cops' grime. Most likely, the ECtHR would protect such expressions because the CoE standards provide no particular protection to *groups of public officials*, such as the police, and tend to protect criticism towards them in the media (see section 1.7) in order to facilitate the public's control over the work of the police.

The Russian Constitutional Court abstained from defining the notion of "social hatred," despite complaints about the lack of definition. In 2011, representatives of the Supreme Court of the Russian Federation called on judges to interpret this notion narrowly, as the protection of socially vulnerable groups of people (RAPSI, 2011). However, in the decree on extremism, the Supreme Court also failed to include any explanation of social hatred. No clarification was made for the notion of "strife" either, although, on the eve of the adoption of the decree on extremism, representatives of the

Supreme Court did claim that "hatred" and "strife" should not be used interchangeably because they have different meanings in the Russian language.

The ban on propaganda of "superiority" is also arguable. If such propaganda does not incite violence, it should be protected as an expression of an opinion—for instance, if a person merely claims that his or her native language is the best or the most beautiful. In particular, the Opinion of the Venice Commission called for Russia to abolish the ban on propaganda of religious superiority because it contradicts the CoE standards. This ban may threaten the freedom of religion because preachers often proselytize to people by claiming that their religion is better than others.

Article 9[357] of ECHR Part 1 specifically acknowledges one's right to religious expression or belief in "*worship, teaching, practice, and observance*." The right to "try to convince other people through 'teachings'" is also indirectly maintained by the right to change one's religion or belief, which is guaranteed in Article 9 of the ECHR, as Murdoch (2012) notes. He also clarifies that the right to proselytise by "attempting to persuade others to convert to another's religion" is undoubtedly covered within the scope of Article 9 of the ECHR. Therefore, it is subject to the limitations as are "prescribed by law" and are "necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others."

In the ruling on *Kokkinakis v. Greece*,[358] the ECtHR held that the national courts have not shown that the applicant's conviction for proselytism was justified by a pressing social need. In the ECtHR's viewpoint, proselytism could be incompatible with respect to freedom of thought, conscience, and religion, if it would lead to gaining new church members "or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing."

On the contrary, in *Larissis and Others v. Greece*,[359] the ECtHR did not protect the applicants' right under Article 9 of ECHR. They were officers convicted of proselytising to airmen in their command. The ECtHR noted that proselytism in the

[357] Article 9 of the ECHR ("Freedom of Thought, Conscience and Religion") states:
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
[358] *Kokkinakis v. Greece* of 25 May 1993.
[359] *Larissis and Others v. Greece* of 24 February 1998.

military may be seen "as a form of harassment or the application of undue pressure in abuse of power," unlike in the civilian world. Therefore, the concept of violence is also crucial for the ECtHR to distinguish between legal and illegal proselytism, which contrasts with the Russian approach. According to the 2016 amendments to Article 5.29 of the Russian Code of Administrative Offences, "proselytism in violation of the law" causes fines of up to 50,000 rubles (765 euro) for individuals and of up to 1 million rubles for legal entities (15,300 euro).

The Russian legal ban on *Nazi speech or symbols* is by far broader than that provided by the CoE standards, which prohibit specific forms of Nazi propaganda, including denial of genocide, as incompatible with the values protected by the ECHR. The ECtHR does not explicitly ban Nazi propaganda as such, but tends to exclude it from protection when assessing specific cases.[360] At the same time, it is important to note that the ECtHR allows a margin of appreciation for member-states in this area.

The Russian legislation bans not only Nazi symbols, but also any symbols of extremist organisations. Given that extremism encompasses a large definition, this ban oversteps the CoE legal concept prohibiting symbols of hatred. An additional problem is that Article 20.3 of the Russian Code of Administrative Offences bans not only "propaganda of the symbols or attributes of Nazi or extremist organisations or confusingly similar symbols or attributes, but also any instance of their *public display*."[361] Roskomnadzor[362] has noted that if the purpose of such display is not propaganda, it does not violate the law. However, Russian statutes and the Constitutional Court[363] have provided a different perspective.

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[360] See, for instance, the ECtHR judgments on *Kühnen v. Federal Republic of Germany* of 12 May 1988 and *B. H., M. W., H. P. and G. K. v Austria* (decision) of 12 October 1989.

[361] The article also bans the production or sale of attributes or symbols of Nazi or other extremist organisations, as well as their purchase with the aim to sell them if this is aimed at propaganda of such attributes or symbols.

[362] Displaying Nazi symbols without the aim of propaganda cannot be interpreted as a violation of the anti-extremism statute. Retrieved from http://rkn.gov.ru/news/rsoc/news31736.htm

[363] See Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of citizen, S. N. Alekhin, complaining about the violation of his constitutional rights by Article 1 paragraphs 1 of the Federal Statute of the Russian Federation, 'On Counteraction of Extremism Activity'" of 17 February 2015; Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of citizen, V. A. Murashov, complaining about the violation of his constitutional rights by Article 6 of the Federal Statute of the Russian Federation 'On Immortalization of the Victory of the Soviet People in the Great Patriotic War of the years of 1991–1995,' Article 1 paragraphs 1 of the Federal Statute of the Russian Federation 'On Counteraction of Extremism Activity,' and Article 20.3 of the Code of Administrative Offences of the Russian Federation" of 23 October 2014; Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of citizen, V. S. Kochemarov, complaining about the violation of his constitutional rights by Article 1 paragraphs 1 and 3 and Article 13 paragraph 3 of the Federal Statute of the Russian Federation, 'On Counteraction of Extremism Activity' of 2 July 2013.

Several examples confirm that the Russian courts may qualify a public display of Nazi symbols as illegal. In 2015, the journalist Polina Danilevich was fined for the publication of Nazi symbols although her purpose did not constitute Nazi propaganda. On her personal account on the social media site Vkontakte, she had merely placed a picture showing what the common area next to her house had looked like back in 1941–1943 when fascists had occupied it. In another example, Russian politician Vitold Fillippov was fined in 2012 just for "liking" a photo from the film *American History X* showing the actor Edward Norton with tattoos of the Nazi swastika on his body. The film, however, has not been banned in Russia.

In addition, Article 354.1 of the Russian Criminal Code has specifically prohibited "the rehabilitation of Nazism" since 2014. It criminalises not only the denial or acceptance of crimes established in decisions of the International Military Tribunal, but also public dissemination of "knowingly false information of the USSR activities in the period of World War II." If such information has been disseminated in the media, Article 354.1 provides the stronger punishment of up to five years of imprisonment with deprivation of the right to occupy certain positions or do certain activities for up to three years.

This article also goes far beyond the CoE's legal concepts. When considering cases on denial or challenge of historical events, the ECtHR differentiates between issues that "are part of an ongoing debate among historians" and "clearly established historical facts."[364] Although the ECtHR tends to exclude from protection expressions denying "clearly established historical facts," it shields debates on historical events under Article 10 of the ECHR. If we apply this perspective to assess the compliance of Article 354.1 of the Russian Criminal Code with the ECtHR standards, it seems clear that, unlike crimes established in decisions of the International Military Tribunal, activities by the USSR during World War II do not constitute established facts and may be debated. Therefore, the ban on their falsification is vague and may prevent open discussions on Soviet history.

Additionally, Article 354.1 provides another ambiguous ban on the dissemination of material "expressing explicit disrespect for society," such as defamation of the "days of military glory as well as memorable dates in Russian history connected to the protection of the Fatherland," and public desecration of symbols of Russian military glory, the maximum punishment for which is one year of correctional labour. While

[364] See, for example, the ECtHR judgments on the cases of *Ochensberger v. Austria* of 2 September 1994; *Honsik v. Austria* of 18 October 1995; *D. I. v. Germany* of 26 June 1998; *Lehideux and Isorni v. France* of 23 September 1998; *Garaudy v. France* of 24 June 2003.

Article 354.1 partly concerns facts, they are not clearly established: no register of the days of military glory or memorable dates of Russia exists. Therefore, this provision is undetermined and may contradict the CoE standards, especially given that its violation may result in criminal convictions.

Another difference between the CoE's and the Russian concepts of hate speech concerns homophobic speech. While the CoE covers this type of speech,[365] in Russia homophobic speech is not banned. Furthermore, in 2013, Russia banned propaganda of "untraditional" sexual relationships among minors, thus in fact banning speech that promotes the equality of heterosexuality and homosexuality.[366] This ban is very ambiguous. First, it does not provide a definition of "untraditional" sexual relationships. Second, it is formulated very broadly and may prohibit not only the promotion of homosexuality to children, but also any discussions on homosexuality among adults. In 2014, the ban was challenged in the Russian Constitutional Court,[367] but was found to be constitutional. Referring to the UN and CoE conventions, the Court stressed the need to protect minors and families, which includes protection from harmful information. No reference was made to the decision on the case of *Vejdeland & Others v. Sweden*.

With regards to insults of religious feelings, the CoE standards afford a wide margin of appreciation to member-states.[368] At the same time, this margin is not unlimited and goes hand in hand with European supervision.[369] The ECtHR ruled that

> in the context of religious opinions and beliefs [...] may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.[370]

However, the Russian legislation overlooks this differentiation.

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[365] See the ECtHR judgment on *Vejdeland & others v. Sweden* of 9 February 2012.
[366] Article 6.21 of the Russian Code of Administrative Offences bans "propaganda of untraditional sexual relationships among minors expressed in dissemination of information directed to the formation of minors in untraditional sexual settings, attractiveness of untraditional sexual relationships, warped conception of social equality of traditional and untraditional sexual relationships, or touting of information on untraditional sexual relationships exciting interest to such relationships, even if such actions do not constitute criminal acts."
[367] Resolution of the Constitutional Court of the Russian Federation "On the case of the constitutionality test of Article 6.21 Part 1 of the Russian Code of Administrative Offences in response to complaints of citizens, N. A. Alexeev, Y. N. Yevtushenko and D. A. Isakov, Saint-Petersburg," 23 September 2014.
[368] See, for example, the ECtHR judgments on the cases of *Otto-Preminger-Institut v. Austria* of 20 September 1994.
[369] The ECtHR judgment on the case of *Handyside v. the United Kingdom*.
[370] The ECtHR judgment on the case of *Gündüz v. Turkey* of 4 December 2003; see also *Erbakan v. Turkey* of 6 July 2006.

In 2012, the Russian courts held decisions on blocking the video of the punk prayer of the band Pussy Riot, which could be considered as contributing to political discussion because of the content of the song (for more about this case, see BBC, 2013a). This case caused a legislative reform concerning liability for insult of religious feelings. In 2013, Article 5.26 of the Code of Administrative Offences was amended and Article 148 was added to the Criminal Code of the Russian Federation. The latter banned public acts expressing "explicit disrespect to society and perpetrated with the aim to insult religious feeling." Russian law neither explains what "religious feeling" means nor provides any criteria for the assessment of such crimes. The maximum sanction for such acts is one year of imprisonment. Verhovskij, Ledovskih, and Sultanov (2013) consider Article 148 not so much as a legal mechanism protecting morality, but as extending the Russian anti-extremist statute even further by broadening the scope of expressions of religious speech that could be considered criminal.

Verhovskij, Ledovskih, and Sultanov (2013) argue that the Russian concept of extremism emerged because of the problems in the constitutional concept of hate speech, which, from their perspective, should be revised. While this can be a possible solution, I argue that it is not necessary to amend Article 29 in order to revise the Russian concept on extremism so that it would comply with the CoE standards. Furthermore, changes in the Constitution may be insufficient to prevent abuses by anti-extremist legislation. What is needed, however, are relevant and precise reinterpretations of the constitutional concept of hate speech by the Constitutional Court. For instance, the ban on "social hatred" might correlate with the CoE standards if interpreted to protect socially vulnerable groups from hate speech, including homophobic speech. It is interesting to note here that in the decision on the constitutionality of propaganda of "untraditional" sexual relationships, the Constitutional Court referred to homosexual individuals as constituting a "social group."

Terrorism and Extremism

Terrorism is also covered by the Russian legal concept of extremism, although the correlation between these two notions may be unclear, as mentioned before. Russian legislation bans some specific activities related to the dissemination of terrorist ideas. Particularly important for this thesis is Article 205.2 of the Criminal Code of the Russian Federation, which bans "*public calls to commit terrorist activities*" as well as "*public justification of terrorism*," which is qualified as extremist crime, according to the anti-

extremist statute. Both acts are deemed to be fully perpetrated as soon as they are expressed in public, regardless of their results. If these crimes are done by means of the mass media, they are considered to have taken place at the moment when the media distribute the content containing such materials.

Banisar (2008, p. 8) argues that international bodies, including the CoE and the European Union have played a more negative than positive role by adopting many international agreements "that either ignore or only pay scant attention to fundamental human rights and the importance of a free media." When determining the need for state interference with freedom of expression, the ECtHR has allowed states a *margin of appreciation* in cases involving issues of terrorism and speech. In the decision in the case of *Brogan and Others v. United Kingdom* of 29 November 1988, the ECtHR noted that states are "entitled to adopt special measures to combat terrorism, which may extend to media restrictions."

The main CoE conventional document on the fight against terrorism—the 2005 Convention on the Prevention of Terrorism[371]—prohibited not only direct incitement to terrorism, but also "*public provocation*" to commit terrorist offences, and explicitly called member-states to criminalise "indirect incitement." Article 5 of the Convention defined the notion of "public provocation" to commit terrorist offences as

> the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

At the same time, the CoE standards have introduced several criteria to distinguish which expressions may be protected under Article 10 of the ECHR and which may not. For instance, in order to be qualified as a "public provocation," a message must have the "intent" to incite terrorism and instigate a "danger" that a subsequent terrorist act may happen, according to the 2005 Convention. It is important to stress that neither this Convention nor other CoE standards require member-states to criminalise the glorification, apology for, or justification of terrorism.

Additionally, Article 12 of the 2005 Convention required that, when implementing this Convention, member-states respect "human rights obligations, in

[371] The CoE Convention on the Prevention of Terrorism, No. 196, Adopted on May 16, 2005 in Warsaw. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371c

particular the right to freedom of expression, freedom of association, and freedom of religion" provided in the ICCPR, ECHR, and other international treaties. This serves as a reminder that any restrictions to speech, including those used to prevent the dissemination of terrorist ideas, must meet the three-part test on interfering with the right to freedom of expression.

Russia embraced the Convention with enthusiasm and ratified it on 20 April 2006, about a month after the adoption of the anti-terrorist statute. However, the Russian legislation has failed to establish any criteria. The Russian notion of "*public calls to commit terrorist activities*" is defined in the decree on terrorism of the Russian Supreme Court as the expression, in any form, of a public appeal to other individuals with the purpose to incite them to execute terrorist acts. Thus, the decree made "incitement of terrorism" the main element of this crime, which may correlate with the CoE standards. The decree stated that, when determining whether the speech was public or not, courts should analyse the place, means, situation, and other circumstances, for instance, whether appeals were made in public places, during meetings, or were disseminated on websites, blogs, or by an email blast.

Public justification of terrorism is defined in Article 205.2 of the Criminal Code of the Russian Federation as a "public claim recognising that the ideology and practice of terrorism are correct and need support as well as emulation." However, the anti-terrorist statute extends the notion of public justification of terrorism by also banning "propaganda of terrorist ideas; dissemination of materials or information calling for the commitment of terrorist activities; or explaining or justifying the need to commit such activities." Thus, these bans cover not only materials that directly incite terrorism or justify terror, but also any material that tries to explain why terror acts could have happened. For example, if someone were to claim that Chechen terrorists undertook terror acts so that the Chechen Republic would separate from Russia, this claim could be recognised as both terrorism and extremism, according to the Russian legislation.

This significantly contrasts with the CoE approach. The 2005 Declaration "On Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism" of the CoE's Committee of Ministers[372] called for member-states to "refrain from adopting measures equating media reporting on terrorism with support for terrorism." The declaration also speaks against restrictions on freedom of expression and

[372] Declaration of the Committee of Ministers of the CoE "On Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism," adopted on 2 March 2005 at the 917th meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=830679&Site=CM

information unless they are "strictly necessary and proportionate in a democratic society and after examining carefully whether existing laws or other measures are not already sufficient."

It is important to emphasise that Russian law limits the extent to which journalists can cover acts of terror. Carrying out the illegal activities outlined in Article 205.2 through the mass media results in severe sanctions, which vary from fines of up to seven years of imprisonment with deprivation of the right to occupy certain positions or do certain activities. The Supreme Court's decree on terrorism has emphasised that if crimes under Article 205.2 are committed on websites, which have not been registered as mass media outlets, the sanctions are less severe and range between fines, compulsory labour, or imprisonment from two to five years. This may restrict overly severe convictions for individuals who are not professional journalists and, therefore, do not bear specific journalistic responsibilities or duties.

Additional restrictions for journalists are established in the statute "On Mass Media," Article 4. When collecting information at the site of a terrorist act, *journalists must adhere to the order established by the head of the counterterrorist operation*. When reporting on such operations, journalists *cannot disclose information about the tools and tactics used* if it "*may impede such operations*" or threaten human life or health. In fact, this provision totally bans the disclosure of any information about the progress of counterterrorist operations. Personal data of officers participating in such operations, as well as of their families, represent classified information and can be disclosed only through court's decision regarding state secrets and personal data. These provisions of "On Mass Media" contradict the following statement of the CoE's Declaration "On Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism": if the authorities restrict access to scenes of terrorist acts,

"they should explain the reasons for the restriction, its duration should be proportionate to the circumstances, and a person authorized by the authorities should provide information to journalists until the restriction has been lifted."[373] Another CoE document, the 2007 Guidelines of the CoE's Committee of Ministers "On Protecting Freedom of Expression and Information in Times of Crisis,"[374]reminds that governments have the

[373] Declaration of the Committee of Ministers of the CoE "On Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism," adopted on 2 March 2005 at the 917th meeting of the Ministers' Deputies.

[374] Guidelines of the Committee of Ministers of the CoE "On Protecting Freedom of Expression and Information in Times of Crisis," adopted on 26 September 2007 at the 1005th meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=1188493

obligation to ensure that journalists have access to information and not to use the term "incitement" to limit freedom of expression.

Calls for the Violation of Territorial Integrity and Extremism

A specific measure, Article 280.1, criminalising public calls for violating territorial integrity, was added to the Russian Criminal Code in 2013. This is not to say that inciting separatism did not constitute a criminal offense in Russia until that time. The more general Article 280, banning public calls for extremism, was used to punish incitement of separatism because the legal concept of extremism initially included a ban on calls for the violation of territorial integrity and for changes in the constitutional order. Now, either one of these two articles can be used to punish such calls, at the discretion of the law enforcement authorities and courts.

The sanctions in Article 280.1 were upgraded in July 2014, possibly in connection with the annexation of Crimea by Russia whose legitimacy was debated by some journalists and online users. Since that time, the article has provided a maximum punishment of five years of inprisonment with deprivation of the right to occupy certain positions or do certain activities for a period of three to five years. Maximum punishment is applied if calls for the violation of territorial integrity have been disseminated in the mass media or online. Russian law does not define what "calls for violation of territorial integrity" means and does not specify criteria for the consideration of such cases, thus allowing the perpetrators of such calls to be criminally convicted, even in cases when they have neither incited nor advocated violence.

This represents a significant difference between the Russian and the CoE's approaches. *Incitement of violence* is a key factor for determining the legitimacy of restrictions on speech inciting violation of territorial integrity or calling for a change of the constitutional order, from the CoE's perspective. If speech incites people to violence or armed resistance, it cannot be protected because it threatens not only national interests, but also public order and may result in casualties. On the contrary, sharp criticism of state policies, authorities, or institutions cannot be recognised as "incitement," even if such criticism is insulting, provocative, or contains strong claims or accusations of offenses made by officials, as the ECtHR has noted in its decisions.

This trend can be illustrated by several ECtHR judgments on cases against Turkey. The cases concerned propaganda against the integrity of the state and were all considered by the ECtHR on the same day, 8 July 1999. In the cases of *Erdoğdu and İnce v. Turkey*

and *Sürek and Özdemir v. Turkey*, the ECtHR ruled that there had been a violation of Article 10 of the ECHR only because the impugned expressions did not incite violence. The Court found that the applicants' sentences represented a disproportionate measure with regards to the aim of protecting Turkey's national security and territorial integrity. In contrast, the ECtHR declared that no violation of Article 10 of the ECHR existed in the case of *Sürek v. Turkey* (Nos. 1 and 3) because the statements at issue could be deemed capable of inciting violence and hatred. The Court noted that since an owner of a mass media outlet provided a space for publishing such statements, the interference was proportionate to the legitimate aim.

Protection of Public Officials and Extremism

The provisions of the anti-extremist statute for the protection of public officials seem excessive and may result in potential abuses on the part of public officials who want to suppress critical voices by closing media outlets or punishing disloyal journalists and bloggers. Article 128.1 of the Russian Criminal Code criminalises libel, which contradicts the CoE's perspective calling for decriminalisation of defamation, as mentioned in the previous section. The anti-extremist statute" *specifically* bans "libel of public officials that alleges that they have committed extremist acts during the execution of their official duties." This means that, for instance, journalists who have published articles arguing that a major or a governor is involved in any extremist activities, *may be themselves qualified as extremist* because of their allegations, if the journalists were aware that their statements were untrue at the time of publication. In the previous section, I explained that the notion of libel is not sufficiently clear in Russian law, and in most cases, it is difficult for journalists to prove that they had not known in advance that the information they have disseminated was inconsistent "with the real state of affairs." That is why the criminal article on libel may have a "chilling effect"—an effect that the anti-extremist statute makes even stronger since the statute renders participation in public debates on issues concerning the possible involvement of public officials in extremist activities a punishable offence. Although the Russian Criminal Code has no respective article for this type of libel, the courts may give more severe convictions for "extremist" libel than for "regular" libel. Moreover, the dissemination of "regular" libel may result in sanctions only for its authors or editors-in-chief, but not for the entire media organisation, while committing extremist acts may result in the closure of media outlets or in website blocking.

These provisions establishing "extremist libel" cannot correlate with the CoE standards because they provide nearly no leeway for protecting *public officials* from *criticism,* as shown in the previous section. As to the "extremist libel," the CoE approach can be illustrated by the ECtHR's decision on the case of *Otegi Mondragon v. Spain* of 15 March 2011. The applicant, the spokesperson for a left-wing Basque separatist parliamentary group, made statements against the King of Spain during a press conference, referring to him as "the supreme head of the Spanish armed forces, in other words, the person in command of the torturers, who defends torture and imposes his monarchic regime on our people through torture and violence." Otegi Mondragon was criminally convicted for serious insult of the King. However, the ECtHR ruled that imprisonment was a disproportionate sanction for the protection of a legitimate aim, namely the protection of the reputation of the King of Spain, guaranteed by the Spanish Constitution. Although the applicant's language was hostile and provocative, his words neither incited people to violence nor amounted to hate speech, as the ECtHR noted. It also stated that the applicant made his statements during a press conference in oral form and, therefore, could not reformulate or withdraw them before their dissemination. The ECtHR ruled that there had been a violation of Article 10 of the ECHR.

The anti-extremist statute also contains an ambiguous ban on *interfering with the legitimate activities of state bodies or other organisations if such interference was "combined with violence or threat of violence"* (emphasis added). The provision is too ambiguous and may allow convictions for speech containing *unreal* or figurative *threats*, in stark contrast to the CoE's perspective. Since the case of *Gürl v. Turkey* of 8 June 2010, the ECtHR has adopted the perspective that the incitement for violence must create "a clear and imminent danger" rather than represent abstract calls for violence.[375]

The Implementation of the CoE Standards in the Practice of the Russian Highest Courts in Cases Concerning Extremism

While, as discussed above, Russian legislation has generally failed to incorporate the CoE standards, the Supreme Court of the Russian Federation has made significant attempts to clarify the legal concept of extremism and to bring it closer to the CoE's perspective. In its decree on extremism, the Plenum of the Supreme Court specifically called for courts considering cases on extremism to ensure *a balance* between, on the one hand, the protection of public interests, such as the constitutional order, territorial

[375] See concurring opinion of Bonello J., *Sürek v. Turkey* (No. 2) of 8 July 1999.

integrity, and safety of the Russian Federation, and, on the other, the protection of constitutional human rights and freedoms, such as freedoms of religion, thought, speech, and mass information, the right to information, and the right to assembly.

The Constitutional Court also noted that the freedom of conscience and religion, the freedom of speech, and the right to information shall not be restricted by anti-extremist legislation only because *some acts or information differ from common perspectives, miscorrelate with traditional views or opinions, or contradict moral or religious beliefs.* "Otherwise, it would mean the derogation of the constitutional requirement of need, proportionality, and justice" when establishing limitations of human rights, according to the Constitutional Court.[376] This legal position fully correlates with the perspective of the ECtHR, which has always stressed that there should be a *pressing social need* for any restrictions of free speech (see Salinas de Frias, 2012), that such restrictions should be proportionate, and pursue a legitimate aim. The Supreme Court has established several specific criteria for that.

In the decree on extremism, the Supreme Court suggests focusing on the *aim of speech*. It noted that Article 282 of the Criminal Code is applicable only to acts committed "with a direct intent and aim to excite hatred or strife as well as to abase the dignity of a person or a group of people on the grounds of sex, race, nationality, language, ethnic origin, religious beliefs, or belonging to any social group." The court stressed that intent is among the main criteria distinguishing criminal and administrative offences with regards to the dissemination of extremist materials. This means that if extremist materials have been disseminated *with the aim of informing people* about controversial opinions of social significance or criticising those opinions, criminal convictions are inapplicable.

This approach is aligned with the CoE standards. In the ECtHR landmark case on hate speech, *Jersild v. Denmark* of 1 September 1994, the ECtHR stated that a publication

[376] Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of citizen, S. N. Alekhin, complaining about the violation of his constitutional rights by Article 1 paragraph 1 of the Federal Statute of the Russian Federation 'On Counteraction of Extremist Activity'" of 17 February 2015; Resolution of the Constitutional Court of the Russian Federation "On the case of the constitutionality test of the Federal Statute of the Russian Federation 'On Amendments to the Code of Administrative Offences of the Russian Federation and to the Federal Statute of the Russian Federation, on Assemblies, Meetings, Demonstrations, Parades, and Pickets,' in response to the request of the deputes of the State Duma and to the complaint of a citizen, E. V. Savenko" of 14 February 2013; Resolution of the Constitutional Court of the Russian Federation "On the complaint of citizens, A. V. Lashmankin, D. P. Shadrin, and S. M. Shimovolos, complaining about the violation of their constitutional rights by Article 5(5) of the Federal Statute of the Russian Federation 'On Assemblies, Meetings, Demonstrations, Parades, and Pickets'" of 2 April 2009; Resolution of the Constitutional Court of the Russian Federation "On the complaint of a citizen, S. V. Gazarian, complaining about the violation of his constitutional rights by Article 167(2) of the Criminal Code of the Russian Federation" of 5 March 2013.

itself cannot be qualified as incitement of violence if its aim is to inform about issues of public interest. The applicant in this case was a journalist who produced a documentary about the members of the group Greenjackets. The film included extracts from the applicant's interview with three members of this group who made racist statements about immigrants and ethnic groups in Denmark. The ECtHR held that, while members of the Greenjackets made explicitly racist and abusive comments, the documentary did not promote racism. It aimed to inform the public about a social issue and to highlight "specific aspects of a matter that was already of great public concern." Therefore, the ECtHR found a violation of Article 10 of the ECHR.

As examined in section 1.8, the 2010 decree of the statute "On Mass Media" of the Russian Supreme Court has suggested that in cases involving the media, courts should examine whether the publications or broadcasts in question can be considered in light of *political debates*, whether they direct attention to issues of *public interest*, whether they are based on *interviews*, and what is the stated *journalistic attitude* towards the expressed opinions and statements. These general suggestions may be helpful to make the Russian court practice on extremism consistent with the CoE standards on hate speech.

The abovementioned Recommendation (97)20 of the CoE's Committee of Ministers on hate speech declares that national law and court practice should clearly distinguish between the responsibility of the author of "hate speech" and that of the media, which disseminate it as part of their mission to impart information and ideas on matters of public interest (para. 6 of the Appendix). The Recommendation also states that reporting on racism, xenophobia, anti-Semitism, or other forms of intolerance is fully protected by Article 10(1) of the ECHR, and may only be restricted if consistent with Article 10(2) of the ECHR.

Panoussis (2011, p. 208) notes that the ECtHR has permanently "advocated moderation in the behaviour of state authorties" in cases on speech and terrorism concerning journalistic expressions.[377] For instance, in *Demirel and Ates v. Turkey* of 12 April 2007, the ECtHR stated that criminal convictions were severe and disproportionate

[377] In general, the occupation of the applicant may be very important for the consideration of cases concerning incitement of violence or hatred. The ECtHR provides small protection for the speech of politicians who may promote intolerance. In judgments on the cases of *Erbakan v. Turkey* of 6 July 2006 and *Willem v. France* of 16 July 2009, the ECtHR noted that because "the struggle against all forms of intolerance is an integral part of human rights protection, it is crucially important for politicians, in their public discourse, to avoid expression that is likely to foster intolerance."[377] In the case of *Seurot v. France* of 18 May 2004, the applicant, a school teacher, had published an article in a school bulletin in which he claimed that France was overrun by "hordes of Muslims" from North Africa. The ECtHR found no violation of Article 10 of the ECHR not only because of the racist tenor of the publication, but also because of the duties and responsibilities of the applicant in his capacity as a teacher.

in this case because the publications at issue neither incited violence nor promoted hatred, although they had hostile connotations as to the Turkish state. These publications included an interview with a member of the executive committee of the PKK, the Worker's Party of Kurdistan, as well as several statements by PKK members. In the decision on *Sener v. Turkey* of 18 July 2000, the ECHR stated that, despite the aggressive tone of some of the statements, the article in general neither glorified violence nor incited hatred or armed resistance. It represented an "intellectual analysis of the Kurdish problem, which calls for an end to the armed conflict."

In keeping with the protection of freedom of mass information and the encouragement of public debates, the decree of the Russian Supreme Court on extremism noted that opinions or statements *"using the facts of interethnic, inter-confessional, or other social relationship in scholarly or political debates or in other materials"* cannot be criminalised under Article 282 of the Criminal Code "if they are not aimed at the excitation of hatred or strife as well as to abase dignity" on the grounds of sex, race, nationality, language, ethnic origin, religious beliefs, or belonging to any social group.

This perspective complies with the CoE standards and can be illustrated in the ECtHR practice. In the recent case of *Perincek v. Switzerland* of 15 October 2015, the applicant was a Turkish politician who was criminally convicted by the Swiss courts for repeatedly expressing his opinion that the massacres and mass deportations of Armenians in the Ottoman Empire in 1915 were a "great international lie." The ECtHR noted the importance of this issue for Armenians and recognised that Article 8 of the ECHR protects their dignity and identity. At the same time, the ECtHR ruled that the criminal conviction of the applicant was unnecessary in a democratic society. The Court paid specific attention to several elements. The politician's statements did not call for hatred or intolerance and contributed to the debates on issues of public interest, and there had been no tension on this issue in Switzerland. The statements did not impact the dignity of Armenians to the extent that this would require a criminal law response in Switzerland. The applicant had merely expressed his controversial opinion, and a criminal conviction was too severe a punishment for that. Therefore, the ECtHR stated that there was a violation of Article 10 of the ECHR in this case.

The Russian Supreme Court decree on extremism tried to diminish the *protection of public officials* by the anti-extremist legislation referring to Articles 3 and 4 of the Declaration "On Freedom of Political Debates in the Media" of the CoE's Committee of Ministers and to the ECtHR case law. The decree maintained that, according to the CoE

standards, politicians acknowledged subjecting themselves to public political debate and, therefore, "must accept that they will be subject to public scrutiny and criticism, particularly through the media," because it is "necessary for ensuring transparency and the responsible exercise of their functions." The Plenum Decree on Extremism stated that

> criticism in the media of public officials, who are professional politicians, shall not be considered as acts aimed at the abasement of the dignity of a person or a group of people because the limits of criticism towards public official are broader than towards private individuals.

This guarantee significantly contributes to the clarification of the notion of extremism and, in fact, narrows it in line with the CoE standards. This provision may be used to protect disloyal journalists or media activists from abuses by extremist legislation.

The decree on extremism additionally protects critical speech, along the lines of the CoE standards. It states that "criticism of political organisations, ideological and religious unions, political and ideological convictions, national or religious customs itself shall not be considered as an act intended to excitation of hatred and strife." This guarantee is significant given that the anti-extremist statute also contains an ambiguous ban on crimes committed on the grounds of "political" or "ideological" hatred.

Although the Russian higher courts failed to limit the anti-extremist legal mechanism to the incitement of violence only, the Supreme Court nevertheless attempted to incorporate what can be called a differentiated or even nuanced approach, which is used by the ECtHR to consider cases concerning incitement of violence. As noted in section 1.8, its 2010 decree on the statute "On Mass Media" instructed courts considering cases on freedom of mass information to examine the language of a publication or a broadcast, its context, aim, genre, style, and several other criteria. The Russian Constitutional Court also ruled that when considering extremist cases the courts should take into account *"all significant circumstances of every concrete case,"* including the form and content of expressions, the audience and aim, context, possible danger, *et cetera.*[378]

[378] Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of citizen, S. N. Alekhin, complaining about the violation of his constitutional rights by Article 1 paragraphs 1 of the Federal Statute of the Russian Federation 'On Counteraction of Extremism Activity'" of 17 February 2015; Resolution of the Constitutional Court of the Russian Federation "On the case of the constitutionality test of the Federal Statute of the Russian Federation 'On Amendments to the Code of Administrative Offences of the Russian Federation and to the Federal Statute of the Russian Federation, on Assemblies, Meetings, Demonstrations, Parades, and Pickets,' in response to the request of the deputes of the State Duma and to the complaint of a citizen, E. V. Savenko" of 14 February 2013; Resolution of the Constitutional Court of the Russian Federation "On the complaint of citizens,A. V. Lashmankin, D. P. Shadrin, and S. M. Shimovolos, complaining about the violation of their constitutional

The ECtHR has always taken into consideration the details of each case involving the media, such as *the context of the publication or broadcast, its tenor, genre, possible danger, the profession of applicants, et cetera.* In the case of *Leroy v. France* of 2 October 2008, context was perhaps the most decisive factor. The ECtHR noted that a picture parodying the slogan "We have all dreamt of it… Hamas did it" was published just after the 9/11 terrorist act on the twin towers of the World Trade Center in New York. Although the publication at issue was a caricature, in other words, an artistic depiction, and not directly inciting violence, it represented not only criticism of US policy, but also glorification of terrorism. The ECtHR paid additional attention to the publication's location observing that in a "politically sensitive region, namely the Basque Country" such a publication could stimulate greater violence among the population.

In the decision of the case *Norwood v. the UK* of 16 November 2004, the ECtHR paid specific attention to the words and images featured on the applicant's poster, which he had displayed on the window of his apartment. The poster stated: "Islam out of Britain—Protect the British People." It also showed the twin towers on fire and contained the Muslim symbol of a crescent moon and star inside a prohibition sign. As the ECtHR stated, the poster "amounted to a public expression of attack on all Muslims in the United Kingdom." The court also noted that it linking a religious group with terrorism was incompatible with the ECHR's values, notably tolerance, social peace, and non-discrimination. Therefore, the application was judged inadmissible according to Article 17 of the ECHR.

A similar decision was made in the case of *Pavel Ivanov v. Russia* of 20 February 2007. Ivanov, a newspaper owner and editor, had claimed that Jewish leadership has shown fascist tendencies, that the Jewish people were not a nation, and that they conspired against the Russians. The Court declared that his expression had an anti-Semitic tenor, which sought to incite hatred towards the Jewish people, and therefore judged Ivanov's application as inadmissible.

In the judgment on the aforementioned case of *Sürek v. Turkey*, No. 1 of 8 July 1999, the ECtHR paid attention to whether the impugned publications incited people towards violence or not. The Court noted that the use of harsh language, such as "fascist Turkish army" or "murder gang," could be seen as "stirring up violence." Furthermore,

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rights by Article 5(5) of the Federal Statute of the Russian Federation 'On Assemblies, Meetings, Demonstrations, Parades, and Pickets'" of 2 April 2009; Resolution of the Constitutional Court of the Russian Federation "On the complaint of a citizen, S. V. Gazarian, complaining about the violation of his constitutional rights by Article 167(2) of the Criminal Code of the Russian Federation" of 5 March 2013.

these words were published in a situation of severe tension where emergency rule had been imposed and there had already been loss of life. Therefore, the ECtHR ruled that there had been no violation of Article 10 of the ECtHR.

In contrast, in the case of *Belek & Velioglu v. Turkey* of 6 October 2015, the Court determined that the criminal conviction of the applicants and the ban on their publication had violated Article 10 of the ECHR. The Court specifically examined the language and context of the publication containing a statement by an illegal armed organisation. The ECtHR noted in particular that the article as a whole did not comprise any incitement of violence, armed resistance, or hate speech and, therefore, found the state's interference to be disproportionate.

As for possible danger, in the judgment on the case of *Karatas v. Turkey* of 5 January 2010, the ECtHR noted that the publication of impugned expressions in a book of poetry, rather than in a media publication, diminished its potential impact on national security.

While the nature and seriousness of interference does not have a primary meaning for the ECtHR, there have been several cases in which the Court has held decisions based on their analysis of this criterion.[379] For instance, in *Lehideux and Isorni v. France* of 23 September 1998, the ECtHR stated that no sanctions should be imposed without proving their utility. Specific examination has been undertaken in cases in which applicants were sentenced to prison.[380]

The Implementation of the CoE Standards in the Russian Practice of General Jurisdiction Courts in Cases on Extremist Speech

Before proceeding to examine the impact of the CoE standards on the Russian judicial practice of lower courts, I will present my analysis of statistical information on cases concerning extremist speech in Russia. I have used the data collected by the SOVA Centre available on their online database (hereinafter—SOVA Centre Database).[381] According to this database, in total 619 sentences for public extremist speech were given on the grounds of Articles 280, 280.1, 282, 205.2, 354.1 of the Criminal Code in 2012–2015 in Russia. Of these, 568 (about 91.76%) were imposed lawfully, according to the

[379] See, for example, the ECtHR judgments on the cases of *Bayar and Gürbüz v. Turkey* of 27 November 2012; *Belek and Özkurt v. Turkey* of 13 July 2013; Belek and Özkurt v. Turkey (No. 2, 3, 4, 5, 6, 7) of 17 June 2014.

[380] See, for example, the ECtHR judgments on the cases of (*Erbakan v. Turkey* of 6 July 2006; *Karatas v. Turkey* of 8 July 1999"

[381] See SOVA Center's database at: http://www.sova-center.ru/en/database/sentences/

SOVA Centre. The designation "lawful" means that the Centre's experts are completely certain that the sentences were in accordance with Russian laws. Other sentences were deemed as "might be unlawful," "most likely, unlawful," or simply "unlawful."

In general, the analysis of the SOVA Centre Database shows an increase in sentences on extremist speech in Russia over the period 2012–2015. A rapid rise in the number of such sentences is observed in 2013, which might be explained with the tightening of control over online speech in Russia as a consequence of the 2011–2012 mass protest movement as well as with the growth of the number of Internet users in the country (see section 1.5). In 2013, the number of sentences for extremist speech increased by more than half and remained fairly high throughout 2014 and 2015 (see Figure 2.8 below).

According to the SOVA Centre, the Russian government tends to misuse the anti-extremist legislation. More specifically, the Centre argues that not all sentenses on extremist speech in Russia can be qualified as lawful. Interestingly, the year 2013 showed the lowest percentage of lawful sentences on extremist speech (79.2%), which may also be connected with a growing political tension in Russia. The index of lawful sentences for extremist speech increased by more than 16% in 2014, but then decreased slightly by 6% in 2015, as Figure 2.9 shows.

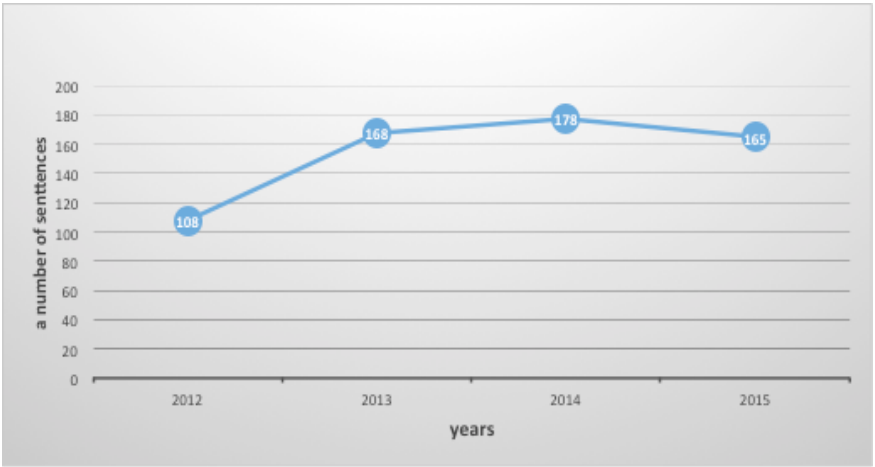

Figure 2.8. Dynamics of sentences on extremist speech in Russia, 2012–2015.

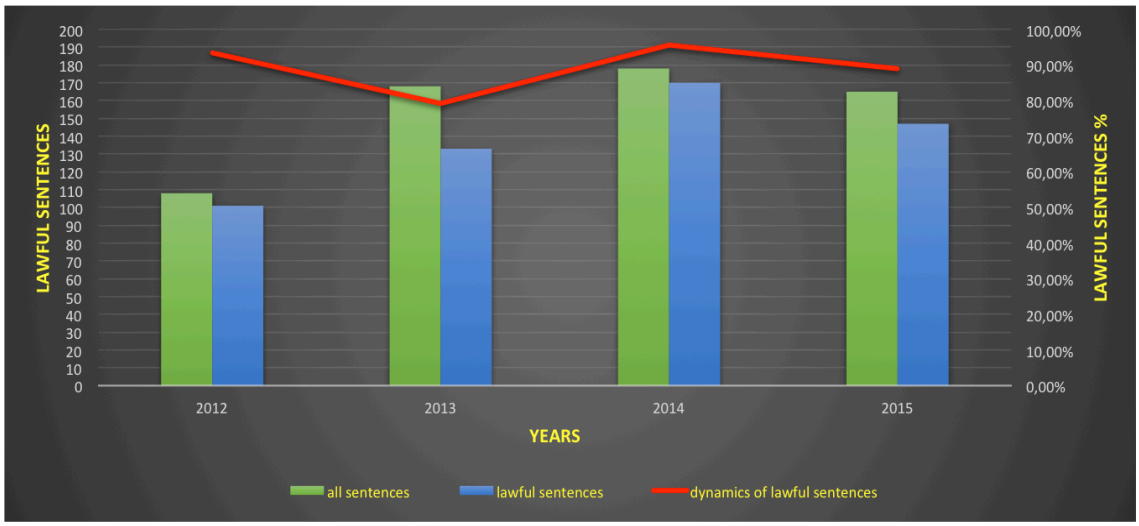

Figure 2.9. Dynamics of lawful sentences on extremist speech in Russia, 2012–2015.

Roskomnadzor's 2012, 2013, and 2014 public annual reports[382] have also revealed the growing number of warnings issued by Roskomnadzor to media organisations for extremist speech. The number more than doubled over the period 2012–2014, as seen in Figure 2.10, while it decreased by more than two-thirds in 2010–2012. This may also be explained by the increasing pressure over the media following the political changes in Russia since 2012. Most likely, the country's new political agenda significantly impacted the development and implementation of anti-extremist legislation. In 2014, more than half of all warnings for extremism were issued to media organisations that had called for the violation of the constitutional order and of Russia's territorial integrity. This may be connected to the Crimean conflict.

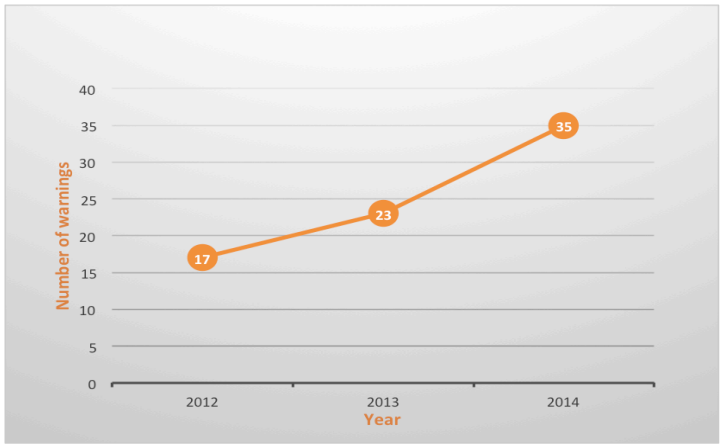

Figure 2.10. Increase in warnings issued by Roskomnadzor to media organisations for disseminating extremist materials, 2012–2014.

[382] Retrieved from Roskomnadzor's official website at: http://rkn.gov.ru/press/annual_reports/

The opposite trend can be observed from Roskomndazor's data on online comments. In 2013, the agency sent 658 requests for removal or edit of extremist comments. In 2014, only 165 such requests were issued. Roskomnadzor explained this drop by the increasingly common practice of moderating discussions on the websites of media organisations. This may suggest a rise in self-censorship on the part of online users.

According to the SOVA Centre Database, the number of sentences based on Articles 282, 280, 205.2, 280.1, and 354.1 is split differently, which can be seen in Figure 2.11 below. Of all cases on extremist speech in 2012–2015, the majority were argued on the grounds of Article 282 of the Criminal Code, which criminalises the public excitation of hatred or strife and the abasement of human dignity. Every year from 2012 to 2015, this was by far the most applicable article among all others concerning extremist speech. Over this period, 509 sentences were given under Article 282, which made up 82.23% of the total number of sentences on extremist speech. A possible explanation for this is the growth of racism and xenophobia in Russia, which was observed by the Concluding Observations in the 2015 Seventh Periodic Report of the Russian Federation prepared by the UN Human Rights Committee. Interestingly, the share of lawful judgments under this article is comparatively high, as follows from the SOVA Centre Database. It made up 92.9% (473 cases) out of the total number of cases involving this article.

The second largest group of sentences on extremist speech in the period 2012–2015 were those for public calls to extremism under Article 280 of the Criminal Code. This group consists of 91 sentences representing 14.7% of the total number of decisions on public extremist speech. The index of lawful sentences under Article 280 is lower than under Article 282, and amounts to 87.9%.

Sentences under "anti-terrorist" Article 205.2 amount to less than 3% of all judgments on extremist speech in 2012–2015. The index of lawful sentences under this article is lower (82.35%) compared to the same index under Articles 282 and 280 of the Criminal Code. Therefore, a sort of correlation between the number of sentences and their lawfulness can be detected: the more applicable articles have higher indexes of lawful sentences.

Decisions on the grounds of Articles 280.1 and 354.1 together made up less than 0.5% (2 sentences) of the total number of sentences, most likely because these articles came into force in May 2014. One sentence under Article 280.1 of the Criminal Code was deemed unlawful, while the other sentence, under Article 354.1, was deemed lawful, in

the SOVA Centre's opinion. However, given the very low number of cases, one cannot derive any conclusions concerning the application of these articles.

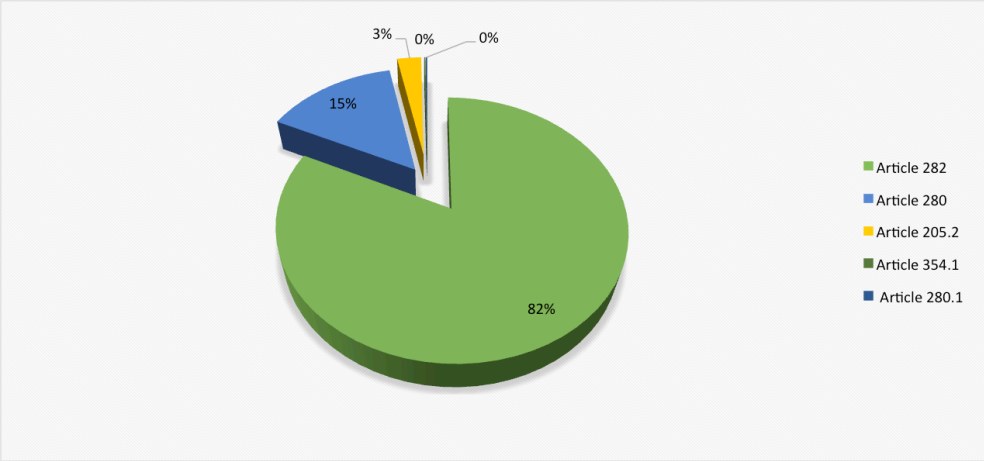

Figure 2.11. Number of sentences on extremist speech in Russia, 2012–2015.

For my analysis of the Russian court practice on extremist materials, I have selected 120 random decisions held between 10 February 2012 (i.e., after both Supreme Court decrees incorporating the CoE standards had come into force) and 1 January 2016 from the RosPravosudiye Database. Since Article 282 of the Criminal Code is the most often applied, the largest group of judgments for my analysis (62 cases) is represented by sentences made on the grounds of this article. I have also examined 30 sentences on Article 280 of the Criminal Code, 10 cases on Article 205.2, two decisions on Article 280.1, and one decision on Article 354.1. Additionally, I have included another 15 court rulings on Article 20.29 of the Code of Administrative Offences banning mass dissemination of extremist materials. The purpose of the analysis is to reveal the extent to which the ECtHR standards have influenced the judicial practice on extremist speech of the Russian general jurisdiction courts.

Among the selected cases, the overwhelming majority of sentences (97%) were given for the dissemination of extremist materials on the Internet, especially in the Russian social media site Vkontakte (83%). Only 16% of judgments concerned publications on other websites, including online mass media, and about 1% of the rulings concerned publications in regional newspapers. There were no cases on extremism in federal traditional media, on TV or radio stations, or in social media other than Vkontakte, such as Facebook or Twitter. It is interesting to note that among all selected rulings there were no not-guilty verdicts.

My study shows that no sentences mention or quote the ECHR or other CoE standards. Therefore, Russian courts have *abstained from even formal application of the CoE standards* when considering cases on extremist speech. In the majority of sentences on Article 282, the courts referred to the constitutional article on free speech only to show that it has limitations and excludes from constitutional protection speech that excites strife or hatred. The courts also quoted Article 19(2) of the Constitution banning all forms of restrictions of human rights on social, racial, national, linguistic, or religious grounds. The overwhelming majority of rulings on other articles did not mention the constitutional provisions at all. Therefore, the Russian courts refrained from explaining how they established *a balance between the protection of free speech and of other legal rights and interests*. It is unclear whether they have ever attempted to find such a balance, as prescribed by the CoE standards and the Russian highest courts.

In the cases under study, 87% of sentences provided *no analysis of impugned publications*.[383] The courts largely based their decisions either on the conclusions of experts or on the decisions of other courts or state bodies that had previously qualified the publications as extremist. Therefore, the examination of sentences often cannot show whether the considered rulings were lawful or not because that would require a thorough analysis of the publications at issue.

Most of the sentences did mention *incitement to violence* as the main cause for criminally convicting the accused persons. However, the decisions did not explain why or how the courts drew the conclusion that the publications' aim was to incite violence. Furthermore, some sentences completely ignored this key element, which diverges sharply from the CoE's approach.

The Russian general jurisdiction courts mostly ignore the ECtHR criteria applied to cases on incitement of violence. They fail to thoroughly examine the aim of the publication, its genre, background, context, and many other criteria, even though this is

[383] Decision on the case of V. Tikhonov, No. 1-287/2015 of 7 September 2015, Berd City Court of the Novosibirsk Oblast; decision on the case of A. Chesnokov, No. 1-33/2015 of 8 July 2015, Kovdor District Court of the Murmansk Oblast; decision on the case of D. Timofeev, No. 1-196/2015 of 23 July 2015, Oktyabrsk District Court of Saransk of the Mordovian Republic; decision on the case of M. Lysyh, No. 1-265/2014 of 15 April 2015, Zheleznodorzhny District Court of the City of Ulan-Ude; decision on the case of V. Bulgakov, No. 1-232/2013 of 12 March 2013, Leninskiy District Court of the City of Novosibirsk; decision on the case of D. Panaev, unknown number, of 15 March 2013, Magistrate Judge of Vologodskaya Oblast on Judicial District No. 10 of the City of Vologda; decision on the case of E. Karandaev, No. 1-8/14 of 14 January 2014, Magistrate Judge L. Fazlyeva of the Judicial District No. 5 on Kirovskiy District of the City of Ufa of the Republic of Bashkortostan; decision on the case of Y. Avdoshkin, No. 1-502/2015 of 3 June 2015, Syktyvkarskiy City Court of the Republic of Komi; decision on the case of K. Kadirov, No. 1-591/2015 of 27 October 2015, the Oktyabrskiy District Court of the City of Tomsk, *etc*.

required by the Russian Supreme Court. When deciding on sentencing, the courts often take into account only character evidence of the accused individuals, their age, marital status, and previous records of convictions.

The Russian general jurisdiction courts also abstained from using other important CoE concepts developed in Russia by the Supreme Court. No case mentioned or applied the concept of *public interest*, and no judgments concerning *public officials* allowed broader limits of criticism. In all cases, the Russian courts protected public officials through the use of various articles. For instance, sanctions under Article 280 were imposed on the citizen E. Karandaev[384] for posting, on the Vkontakte online public community, the comment "We don't believe. We are for honest elections!!! Ufa." The court's ruling did not provide arguments for criminally convicting Karandaev, stating that his publication was intended to interfere with the legitimate activity of government authorities by calling for violent acts on public officials; therefore, the publication had called for extremism, as the judge concluded. Another arguable (and unexplained) judgment was held in the case of the citizen V. Bulgakov[385] who was criminally convicted under Article 282 for the excitation of social groups of policemen, the "ordinary people," and "the Slavic Union."

Furthermore, analysis of the Russian court decisions on website blocking reveals that the courts often confusingly equate the Internet with the mass media, therefore implying that online users may have the same level of duties and responsibilities as media professionals when publishing content online. A positive trend for online freedom of speech is that the courts have denied requests for website blocking if the impugned materials have not previously been qualified as extremist in courts or by other state bodies.

When considering cases on media publications, the courts fail to declare anything about the media's role in a democratic society to inform people about publicly important issues, regardless of how arguable, shocking, or disturbing such issues are, as prescribed by the CoE standards. The Russian general jurisdiction courts do not draw any distinction between journalistic speech and the speech of individuals in cases concerning media publications.

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[384] Decision on the case of E. Karandaev, No. 1-8/14 of 14 January 2014, Magistrate Judge L. Fazlyeva of the Judicial District No. 5 in Kirovskiy District of the City of Ufa of the Republic of Bashkortostan.
[385] Decision on the case of V. Bulgakov, No. 1-232/2013 of 12 March 2013, Leninskiy District Court of the City of Novosibirsk.

This trend can be illustrated by the case of A. Klinkov,[386] considered by the Central District Court of the Tyumen city in 2013. Having found a violation of Article 282(1) of the Criminal Code, the court convicted Klinkov, a journalist for the local Tyumen newspaper, to 269 hours of compulsory labour. He was exempted from liability only because it was found that the lawsuit had been filed after the filing deadline. It is worth noting, however, that the decision on this case is among the few exceptional rulings that contain an analysis of the impugned publications. At the same time, it represents a typical example of the Russian court practice on extremist speech as it lacks persuasive arguments and references to the ECtHR case law or to the decrees of the Supreme Court Plenums, all the while abounding with unreasonable and controversial conclusions.

As seen in excerpts from Klinkov's article, the publication represented strict criticism of religious ideologies and institutions, and incited the authorities "to tackle the religious situation in Russia" and to "root out religious rampancy and fundamentalism." Additionally, the publication suggested that religious sermons should be allowed only in churches, that religious symbols should not be used in advertisement, on clothes, or transport vehicles, and that religion should be excluded from educational programs in schools and universities.

While the article, as a whole, did not directly incite violence, it was, nevertheless, capable of inciting it. In particular, the publication claimed the following: "Buddhism—to Asia. Judaism—to Palestine. Islam—to Mecca. Christianity—to Byzantium and 'Tsarigrad'." This statement might be interpreted by the audience as a call for mass deportations of people exercising these religions. Additionally, the article makes the claim that "there could be no 'good' Islam" and explicitly equated the Koran with Hitler's *Main Kampf*. It asserted that the Koran is based on extremism, chauvinism, and racism, as well as on the idea of world rule and the right to kill. Therefore, the article unambiguously linked an entire religious group with various acts of violence, including Nazism, wars, and murders.

In general, the Klinkov case is in many ways similar to the aforementioned ECtHR case *Norwood v. the UK* in which the application of Article 10 was found inadmissible because Norwood's poster had called for the mass deportation of Muslims and associated them with terrorism. At the same time, there is a substantial difference between these two cases. Unlike Norwood, Klinkov is a journalist whose speech could deserve special

[386] Decision on the case of A. Klinkov, No. 1-83/2013 of 4 April 2013, Central District Court of the City of Tyumen.

protection, as seen in the ECtHR case law. While it did use harsh language, the article could also contribute to public debates on the increasing authority of religious institutions in secular Russia. This does not necessarily mean that the ECtHR would have protected Klinkov's speech, but, most likely, the ECtHR would have taken all this into account if it were to consider this case. However, the Central District Court of Tyumen paid no attention to the fact that the publication, being a journalistic article, may deserve specific protection. Furthermore, the court focused on the fact that the newspaper was state-funded. This might imply the arguable conclusion that journalists working for state media outlets should be less critical and defer to state institutions.

The decision on the Klinkov case presents many other inconsistences with the CoE standards. For instance, the ruling did not distinguish purely critical opinions from statements capable of inciting violence. Moreover, the court interpreted expressions criticising the commercialisation of religion as exciting religious hatred. Klinkov's opinion about the destructive nature of religions was treated as a direct call to eliminate religions. The court could have held the same decision on this case even if the article only criticised religions without inciting people to commit violence.

In conclusion, this section has demonstrated the significant miscorrelation between the Russian legal anti-extremist concept and the CoE standards. This divergence has increased over the last few years. Although the Russian legal anti-extremist concept has emerged as a measure against terrorism, its scope goes far beyond this aim and is constantly being extended to provide Russian authorities with effective new tools to suppress oppositional or critical voices, especially in the media or online.

Publications in Russia could be labelled extremist even if they have not demonstrated any intention to incite violence—and this fundamentally contradicts the CoE approach. The Russian legislation misuses the CoE concept of margin of appreciation by arbitrarily interpreting some of the CoE's legal concepts and notions, such as "rehabilitation of Nazis," "falsification of history," "insult of religious feelings," "justification of terrorism," et cetera. Additionally, some of the unique Russian legal concepts, such as "social hatred," "strife," and "the ban on supremacy," remain undefined. Severe and disproportionate sanctions on media organisations significantly threaten media freedom and prevent the media from being a watchdog of democracy.

The Russian Constitutional Court and Supreme Court have made different contributions to the interpretation of the anti-extremist legal concept in order to bring it closer to the CoE standards. The Constitutional Court's contribution has been moderate

because the Court tends to formally adhere to the CoE standards. The Supreme Court has incorporated several CoE standards and has made important attempts to interpret the Russian legislation on extremism and terrorism in line with those standards. However, one could say that its contribution is in general insufficient, primarily because Russian legislation on extremism has to be reconsidered on a more conceptual level in order to fully correlate with the CoE standards.

The lower courts have completely ignored the developments of the Supreme Court on anti-extremist and anti-terrorist legislation. They have also abstained from any references to the CoE standards and have not attempted to achieve the necessary balance between the protection of freedom of speech and freedom of mass information with that of other rights and interests when considering cases on extremist speech. They tend to make decisions without paying enough attention to the possible harm to society resulting from criminal convictions, bans on publications, or blocking of websites.

What is also important, however, is the increasing number of cases on extremism and extremist speech in Russia. While the share of unlawful decisions on these cases is not negligible, it is not very high. This may mean that the existing anti-extremist legal mechanism is ineffective in combatting hate speech, racism, xenophobia, terror speech, et cetera. To tackle these complex social phenomena, Russia should pay more attention to the CoE approach, which focuses on promoting tolerance, particularly in the media, rather than on banning and concealing information.

2.3. Regulation of Online Speech and New Media

Legal scholars have suggested that freedom of expression constitutes a key human right in the information society (Verpeaux, 2010), and that with the development of information and communication technologies in the digital age, new possibilities have emerged to restrict or exercise that freedom, as Benedek & Ketteman (2013) argue. As a global and interactive platform, the Internet allows immediate dissemination and exchange of information and opinions around the world, which creates new opportunities and challenges for freedom of expression and information.

Until recently, Internet users in Russia enjoyed some freedom of speech online, but since the mid-2011 the Russian government has attempted to curb that freedom and establish total control over the flow of information through the Internet. These attempts intensified in 2014, which may be connected with the political events in Crimea and Ukraine, as the international organisation Freedom House (2014) argues. In 2015,

Freedom House's *Report on Freedom of the Net* described for the first time the Internet in Russia as "not free."[387] In Russian establishment circles, discussions on shutting down the Internet in the country and founding Russia's own Intranet instead (N. Duffy, 2015) have intensified. As this section will show, Russia has passed sufficient legislation to execute such a plan.

This section compares the legal standards of the CoE and Russia on online freedom of speech and media freedom to discover to what extent Russian regulations are consistent with the CoE's perspective on this issue. The first part of this section examines the CoE standards on online freedom of expression and media freedom. The second part considers the Russian policy in this area. The section specifically addresses the CoE and Russian approaches to the basic principles of regulating online freedom of expression and defining new media and editorial responsibility; the section also discusses regulation for bloggers, the right to anonymity as well as the protection of journalists from surveillance.

The CoE Standards on Online Freedom of Expression

Although the ECHR was adopted far before the advent of the Internet, the ECtHR stressed the importance of the world wide web for exercising freedom of expression. Particularly, it stated: "In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general."[388]Additionally, Article 10 of the ECHR is applicable not only to the content of information, but also to the means of its offline and online dissemination, because restrictions of such dissemination interfere with the right to receive and impart information, as the ECtHR noted in the ruling on *Ahmet Yildirim v. Turkey*, referring to the case of *Autronic AG v. Switzerland*.[389] These statements mean that the CoE member-states must ensure equal and adequate level of protection for both offline and online freedom of expression "without interference by public authority" as well as "regardless of frontiers," as provided by the ECHR.

The UN standards[390] adhere to the same approach by guaranteeing that the conventional clauses on freedom of expression fully apply to the online environment. The

[387] In 2011–2014, the reports of *Freedom of the Net* characterised the Russian Internet as "partly free."
[388] The ECtHR judgment on the case of *Times Newspapers Ltd v. the United Kingdom* (No. 1 and 2) of 10 June 2009; see also the case *Ahmet Yildirim v. Turkey* of 18 December 2012.
[389] *Autronic AG v. Switzerland*, 22 May 1990; *Ahmet Yildirim v. Turkey* of 18 December 2012.
[390] See, for instance, the UN Human Rights Council Resolution 20/8 of 5 July 2012 and 26/13 of 26 June 2014, "On the promotion, protection, and enjoyment of human rights on the Internet," as well as

2016 UN Human Rights Council resolution[391] affirmed that "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the UDHR and ICCPR." The OSCE member-states also acknowledged that the Internet strengthens freedom of expression (Akdeniz, 2016) and committed to "take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the UDHR, and to foster access to the Internet both in homes and in schools."[392] In the Joint Declaration on Freedom of Expression and the Internet, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, stated that:

> When assessing the proportionality of a restriction on freedom of ex- pression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its bene ts in terms of protecting other interests. (OSCE, 2013b, p. 67)

The OSCE Representative on Freedom of the Media has repeatedly noted that Internet freedom must be of crucial importance for policymakers, and that member-states must preserve the Internet as a global forum open to exchange of ideas and information, including through international cooperation and involvement of businesses and civil society alongside governments (Akdeniz, 2016).[393]

Resolutions 12/16 of 2 October 2009, "On freedom of opinion and expression"; of 27 June 2016 "On promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development"; see also the UN General Assembly Resolutions 70/184 of 22 December 2015, "On information and communications technologies for development," and 70/125 of 16 December 2015, containing the outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society.

[391] UN Human Rights Council Resolution "On promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development," A/HRC/32/L.20, 32nd session, 27 June 2016. Retrieved from https://www.article19.org/data/files/Internet_Statement_Adopted.pdf

[392] Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999. The full official text is available at http://www.osce.org/documents/mcs/1999/11/4050_en.pdf.

[393] See the position paper of the OSCE Representative on Freedom of the Media on Internet freedom, 11 January 2012, at http://www.osce.org/fom/86003. For more details, see the previous publications of the Office of the OSCE Representative on Freedom of the Media related to the Internet: *Spreading the Word on the Internet: 16 Answers to 4 Questions* (2003), http://www.osce.org/fom/13871; *The Media Internet Freedom Cookbook* (2004), http://www.osce.org/fom/13836; *Governing the Internet: Freedom and Regulation in the OSCE Region* (2007), http://www.osce.org/fom/26169; *Freedom of expression on the Internet: A study of the legal provisions and practices related to the freedom of expression, the free flow of information and media pluralism on the Internet in OSCE participating states* (2011),

Insofar as freedom of expression and information is the oxygen of democracy,[394] the Internet "is the atmosphere, where people are living, breathing, and exercising their freedom of expression," as Benedek & Ketteman (2013, p. 24) note. Because the Internet has specific attributes, such as universality, lack of borders, and decentralised management, it creates new opportunities and challenges for freedom of expression as well as other human rights.

Therefore, the CoE standards recommend that online speech be governed by policies that pay thorough attention to the Internet's specific attributes (Vajic & Voyatzis, 2012). This is necessary to ensure an adequate level of protection of all human rights, including online free speech, in a modern online environment. In several decisions[395] the ECtHR has stressed that the Internet cannot be regulated under the rules provided for traditional media. Particularly, in its ruling on the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* of 5 May 2011, the Court noted that

> . . . the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.

This policy approach to online speech has been reaffirmed in several non-binding documents adopted by the CoE's Committee of Ministers, such as the Recommendation CM/Rec(2015)6 to member-states "On the Free, Transboundary Flow of Information on the Internet,"[396] Recommendation CM/Rec(2011)8 "On the Protection and Promotion of the Universality, Integrity, and Openness of the Internet," [397] Recommendation CM/Rec(2007)11 "On Promoting Freedom of Expression and Information in the New

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http://www.osce.org/fom/80723; *Countering online abuse of female journalists* (2016), http://www.osce.org/fom/220411.

[394] Meeting of the CoE, EU, and the OSCE Leaders on Promoting and Reinforcing Freedom of Expression and Information at the Pan-European Level, Luxemburg, 1 October 2002. Retrieved from http://www.coe.int/T/E/Com/Files/Events/2002-09-Media/CP463a(02).asp

[395] See, for instance, the ECtHR judgments on the cases of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* of 5 May 2011 and *Wegrzynowski and Smolczewski v. Poland* of 16 July 2013.

[396] Recommendation CM/Rec(2015)6 of the Committee of Ministers to Member-States "On the Free, Transboundary Flow of Information on the Internet," adopted on 1 April 2015, at the 1224th meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=2306649&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

[397] Recommendation CM/Rec(2011)8 of the CoE's Committee of Ministers to Member-States "On the Protection and Promotion of the Universality, Integrity and Openness of the Internet," adopted on 21 September 2011 at the 1121st meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=1835707

Information and Communications Environment," [398] and the 2003 Declaration on Freedom of Communication on the Internet.[399]

The same approach is supported by the UN and OSCE standards (Akdeniz, 2016). In the Joint Declaration on Freedom of Expression and the Internet, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, stated that telephony or broadcasting regulations cannot be simply applied to the Internet and that there is a need to design specific policies for online regulation. The declaration suggested that:

> Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognising that no special content restrictions should be established for material disseminated over the Internet. (OSCE, 2013b, p. 67)

When assessing governmental interference to online freedom of expression, the ECtHR applies its general three-tier test, which it also uses to measure restrictions to free speech offline. The ECtHR examines: (1) if restrictions are prescribed by law, i.e. the criterion of legality; (2) if they pursue a legitimate aim, i.e. the criterion of legitimacy; and (3) if they are necessary in a democratic society, i.e. the criterion of necessity, which means that there should be a "pressing social need" for the interference.

Similarly, the UN Human Rights Committee in the General Comment No. 34 on Article 19 of the ICCPR stated that:

> Any restrictions on the operation of websites, blogs, or any other Internet-based, electronic or other such information-dissemination system, including systems to support such communication, such as Internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [of Article 19 of the ICCPR]. … It is also inconsistent with paragraph 3 to prohibit a site or an information-dissemination system from publishing material solely on

[398] Recommendation CM/Rec(2007)11 of the CoE's Committee of Ministers to Member-States "On Promoting Freedom of Expression and Information in the new Information and Communications Environment," adopted on 26 September 2007 at the 1005th meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=1188541

[399] Declaration of the CoE's Committee of Ministers "On Freedom of Communication on the Internet," adopted on 28 May 2003, at the 840th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=37031

the basis that it may be critical of the government or the political social system espoused by the government.[400]

In the decision on the case of the *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, the ECtHR found that the rulings of the Ukrainian courts had failed to meet the criterion of legality and, therefore, found a violation of Article 10. The Ukrainian newspaper *Pravoye Delo* had republished from a website an anonymous letter, which accused several Ukrainian public officials of criminal actions. The newspaper noted that the information had not been verified and mentioned the name of the online source in order to be exempt from liability for defamation. Ukrainian media laws include clauses on exemption of liability similar to those of the Russian statute "On Mass Media." Like Russian law, the Ukrainian mass media statute exempts journalists from responsibility for defamation only if they refer to a source registered as a media outlet. Since the website in question was not such a registered source, *Pravoe Delo* and its editor-in-chief lost the defamatory suit in national courts.

In its ruling, the ECtHR was attentive to the fact that the Ukrainian mass media law does not explicitly regulate registration of online media. Consequently, the applicants could not have foreseen that the exemption was inapplicable in their case, which contradicted the criterion of legality. Below, I provide other examples showing how the ECtHR examines the other criteria of the *three-tier test*.

The ECtHR also applies the doctrine of a *margin of appreciation* to online speech in the same way—and with the same level of supervision—as it employs it to offline speech. This margin is narrowed when restrictions concern online or offline political speech or speech deemed to be of public interest. Given the specific attributes of the online environment regarding the capacity to store and disseminate information, the CoE documents mark its particular importance as a forum for political debates and other activities of public interest.[401]

In the judgment on the case of *Aleksey Ovchinnikov v. Russia* of 16 December 2010, the ECtHR ruled that its task

> . . . in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a

[400] The UN Human Rights Committee, General Comment No. 34 on Article 19 of the ICCPR, adopted at its 102nd session, 11–29 July 2011. Retrieved from http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf

[401] For instance, the Recommendation of the CoE's Committee of Ministers "On the Protection and Promotion of the Universality, Integrity, and Openness of the Internet" states that the Internet "provides essential tools for participation and deliberation in political and other activities of public interest."

whole, the decisions they have taken pursuant to their margin of appreciation. In so doing, the Court has to satisfy itself that the national authorities applied standards, which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

In this case, the applicant was a journalist of the *Ivanovo-Press* newspaper. He published two articles about a violent incident at a summer camp, where a minor had been beaten and sexually abused by his twelve-year-old roommates who were the children of high-ranking public officials. After it had been disclosed online who the offenders' relatives were, Ovchinnikov also gave their names and positions in his second article and claimed that they had attempted to interfere with the investigation. The Russian courts found the applicant liable for disclosing private information and for disseminating defamation.

The ECtHR found no violation of freedom of expression in this case. It clarified that the information about the involvement of the public officials in the incident had no public interest because it did not concern their official functions. It stated that officials should not be exposed to opprobrium because of matters concerning their families.

In the case of *Perrin v. the United Kingdom* of 18 October 2005, the ECtHR also ruled that the interference of the UK government in an online publication was necessary in order to achieve a legitimate aim. The applicant, a resident of the United Kingdom, had published the content, which contained obscene scenes of coprophilia, coprophagia, and homosexual fellation, on a website operated by a US company. Therefore, he argued that his case should be heard in the United States, where his publication might have been legal. However, the ECtHR stated that the United Kingdom had sufficient grounds for limiting the dissemination of the content to protect children from harmful information within the scope of its jurisdiction because the obscene content was available in the United Kingdom. Consequently, the interference with the right to freedom of expression was necessary because there was a pressing social need to protect morals in the country.

At the same time, in the ruling on *Renaud v. France* of 25 February 2010, the ECtHR stated that the criminal conviction of the applicant for the online public insult of a city mayor had violated Article 10. The applicant was the chairman of a local association opposing a building project in the city of Sens, and he was also the webmaster of the association's website. On this website, the applicant sharply criticised the local mayor, who supported the construction project, comparing his policy to that of the former

Romanian dictator Ceausescu. The ECtHR ruled that such severe criticism of the public official was part of a *political debate* on an important issue, and reminded that politicians must tolerate criticism.

However, in the ruling on the case of *Mouvement Raélien Suisse v. Switzerland* of 13 January 2011, the ECtHR found no violation of Article 10 because the impugned online poster campaign was closer to *commercial rather than political speech*. Therefore, the state had a broader margin of appreciation when imposing restrictions.

In numerous non-binding documents, the CoE specifically addresses Internet access, which should be considered as an "emerging human right in itself," as Benedek & Ketteman (2013) suggest. The CoE's Recommendation "On Promoting Freedom of Expression and Information in the New Information and Communications Environment" emphasises the importance of access to information for individuals who use and depend on public services: "Access to the new information and communications environment facilitates the exercise of their rights and freedoms, in particular their participation in public life and democratic processes."

The ECtHR stressed that the influence of information increases when it is widely accessible online.[402] Therefore, it stated in *Ahmet Yildirim v. Turkey* of 18 December 2012:

> The right to Internet access is considered to be inherent in the right to access information and communication protected by national Constitutions, and encompasses the right for each individual to participate in the information society and the obligation for States to guarantee access to the Internet for their citizens. It can therefore be inferred from all the general guarantees protecting freedom of expression that a right to unhindered Internet access should also be recognised.

The ECtHR case of *Ahmet Yildirim v. Turkey* is particularly important when examining the CoE standards on access to information and on the issue of blocking online content. In the ruling on this case, the ECtHR found a violation of Article 10. The applicant was the owner and manager of a website hosted by the Google Sites platform. On this website, he published his academic work and opinions on various issues. The applicant himself did not violate any laws. However, information considered in violation of the Turkish law because it insulted the memory of Kemal Atatürk, the first president of the Republic of Turkey, was published by another user on another website also hosted

[402] See, for instance, the ECtHR judgment on the case of *Mouvement Raélien Suisse v. Switzerland* of 13 January 2011.

by Google Sites. Because of this publication, a local criminal court issued an order to block access to the website containing the publication.

Then, the Turkish Telecommunications and Electronic Data Authority (TİB) asked the court to permit a wholesale blocking of the Google Sites. The TİB stated that there was no technical means to block only the infringing website because its owner lived abroad. The court ruled to block the Google Sites portal in its entirety, and as a consequence, the applicant had been unable to access his website for about three years. He complained that this violated his right to freedom of expression.

The ECtHR ruled that although this was a restriction on Internet access rather than a blanket ban, its limited effect did not diminish its importance because the Internet has become one of the major means of exercising the right to freedom of expression and information. The ECtHR also noted that Article 10 guarantees not only the right to communicate information, but also the right to receive it. The ECtHR stated that, although Turkish law authorised courts to block access to online illegal content, the law did not allow blocking of an entire website. Additionally, national court proceedings neither concerned the applicant's website nor Google Sites, which was not even informed about the violation. Furthermore, the ECtHR noted, the law had accorded extensive powers to an administrative body, the TİB, by authorising it to implement a blocking order.

In order to be compatible with the ECHR, restrictions to online access had to meet the criterion of legality, as the ECtHR emphasised in its ruling in this case. As the ECtHR stated, the Turkish criminal court only referred to TİB's opinion and, because not required by law, failed to examine whether a less severe measure could have been applied. However, blocking online access directly affects the rights of Internet users and, therefore, has to be convincingly justified by the courts. The ECtHR ruled that the consequences from Turkish law were unforeseeable and that the law failed to provide the relevant protection for free speech, in violation of Article 10.

In another ruling concerning online access to information, in the case of *Wegrzynowski and Smolczewski v. Poland* of 16 July 2013, the ECtHR stated that newspapers could not be obliged to completely remove articles from their Internet archives even if the courts had found such articles to be inaccurate. In this case, two lawyers complained about the fact that a newspaper article about them was accessible to the general public on the newspaper's web archive, even though the national courts had ruled that the article breached their reputation and privacy.

The ECtHR upheld the perspective of the Polish government. It noted that if anyone could sue a publisher of online material regardless of the date of its publication, this would cause a "disproportionate uncertainty" and a "chilling effect" on journalists and publishers. The ECtHR ruled that the order to remove the impugned publication from the newspaper's archive, as if it had never existed, would mean a "rewriting of history," which would go beyond the role of the judicial authority. Furthermore, the Court noted that "the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention." Therefore, seeking to strike a balance between the rights guaranteed by Articles 10 and 8, the ECtHR found violation of the right to freedom of expression.[403]

A New Notion of Media

Technological advances have significantly transformed the media landscape worldwide and have triggered a reconsideration of media policy at the CoE level. Digital convergence has not only changed the role and activities of traditional media, but has also instigated the emergence of "media-like" actors as well as "citizen journalists" that use online platforms for mass content distribution. As Jakubowicz (2009) argues, media policy has to be adapted to these new circumstances so that old and new media could perform their role of watchdogs in a democracy by facilitating public debates in a digital era.

Accordingly, the 2011 Recommendation of the CoE's Committee of Ministers "On a New Notion of Media" stresses that, despite the transformation of the media landscape, the role of the media in a democratic society has not changed. Article 10 of the ECHR and the ECtHR case law are fully relevant to both old and new media regulation, as the document states. Consequently, legal frameworks for media policy must meet the ECtHR three-tier test: they must be clear, lead to foreseeable consequences, pursue legitimate aims, and fulfil a need in a democratic society. The recommendation reminds that undue state interference to media freedom is incompatible with the right to freedom of expression as well as with democratic principles, and calls on member-states to "promote media freedom, independence, pluralism, and diversity."

The recommendation also advises member-states to reconsider their media policies. It suggests extending the notion of media "to encompass all actors and factors whose interaction allows the media to function and to fulfil their role in society." As the

[403] See also the ECtHR judgment on the case of *Delfi AS v. Estonia*, which is examined below.

document notes, this is vital "to ensur[ing] the highest protection of media freedom and to provid[ing] guidance on duties and responsibilities." However, web services that do not act as media can be neither treated nor governed as media even if they disseminate mass content or participate in mass communication, as the recommendation states. In other words, the CoE makes a crucial distinction between online media and non-media actors because media policy is inapplicable to non-media actors. Therefore, the recommendation introduces a "graduated and differentiated" approach to identifying media in the online environment.

The recommendation provides several criteria for such identification: (1) intent to act as media; (2) purpose and underlying objectives; (3) editorial control; (4) professional standards; (5) outreach and dissemination; (6) public expectations. If online actors meet these criteria they should be treated as media and would, therefore, have specific freedoms and responsibilities and be subject to media regulation. Each criterion has its indicators that help to determine whether and to what extent it is fulfilled. Some indicators relate to more than one criterion, and not all indicators have to meet a specific criterion. Table 2.1 below lists the CoE's criteria and their indicators.

Table 2.1

The CoE's criteria and indicators for identifying media organisations

Criterion	Indicators
Intent to act as media	• Self-labelling as media • Working methods that are typical for media • Commitment to professional media standards • Practical arrangements for mass communication
Purpose and objectives of media	• Produce, aggregate, or disseminate media content • Operate applications or platforms designed to facilitate interactive mass communication or mass communication in aggregate, and/or to provide large-scale, content-based interactive experiences • With underlying media objectives[404] • Periodic renewal and update of content
Editorial control	• Editorial policy • Editorial process • Moderation • Editorial staff
Professional standards	• Commitment • Compliance procedures • Complaints procedures • Asserting prerogatives, rights, or privileges
Outreach and	• Actual dissemination

[404] Such objectives are to: animate and provide a space for public debate and political dialogue; shape and influence public opinion; promote values; facilitate scrutiny and increase transparency and accountability; provide education, entertainment, cultural, and artistic expression; create jobs and generate income; or most frequently—a combination of all of the above.

dissemination	• Mass-communication in aggregate • Resources for outreach
Public expectations	• Availability • Pluralism and diversity • Reliability • Respect of professional and ethical standards • Accountability and transparency

The criteria vary in importance, the recommendation notes. For instance, if online actors fail to satisfy some of the criteria, that does not disqualify them from being considered media because their intent or the expectations of their audience are not always apparent. The most significant criteria are the purpose of the web source, editorial control, and outreach and dissemination. If actors exploit editorial control and disseminate content for the general public with underlying media objectives, they should be deemed to be media even if they fail to meet some of the other criteria.

The application of such a "graduated and differentiated" approach may seem complex because it requires a thorough analysis of each online actor in order to establish the relevant level of its regulation. At the same time, the modern media environment is so intricate that a more simplistic approach would be insufficient to ensure proper media governance.

Editorial Responsibility

The CoE's Recommendation "On a New Notion of Media" pays attention to the "new opportunities for democratic citizenship," such as interaction between media and its audience as well as the audience's engagement in media activities, which blur the boundaries between public and private communication. On the one hand, the public's active involvement in media activities may facilitate free exchange of information and ideas. On the other, the content produced by the public may involve illegal and unverified information, unlike publications where editorial control has been exercised. Such information may have a strong public impact if published on a media platform, for instance, in the form of users' comments to editorial content.

Therefore, the legal notion of editorial responsibility has become more complex as it may now include liability for public-generated content disseminated through media platforms. The Recommendation "On a New Notion of Media" suggests that editorial responsibility depends on the level of editorial control: "Different levels of editorial control or editorial modalities (for example ex ante as compared with ex post moderation) call for differentiated responses and will almost certainly permit best to graduate the

response."

The EU Audiovisual Media Services Directive,[405] the main legal document regulating audiovisual media services at the EU level, states that the concept of editorial responsibility is essential in defining media and in identifying the role of the media service provider. The directive defines the media service provider as "the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised." Like the CoE recommendation on the new notion of media, the directive proposes the use of the criteria of editorial responsibility to distinguish between media and non-media audiovisual services. It defines editorial responsibility as "the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services." The directive clarifies that editorial responsibility "*does not necessarily imply any legal liability under national law for the content or the services provided*" and proposes that the EU member-states further specify aspects of the definition of editorial responsibility in each state's national legislation, notably the concept of "effective control."

Editorial responsibility for user-generated content is a central issue in the ECtHR case law. In the judgment on *Delfi AS v. Estonia*[406] the Court found no violation of Article 10, ruling that Delfi, one of the leading news portals in Estonia, should be sanctioned for readers' comments posted online in response to one of its articles. Delfi had published an article about the ferry operator SLK under the heading "SLK Destroyed Planned Ice Road." In the comments section below the article, many readers posted personal threats and offensive language against L., the owner of the ferry company. The portal had removed the impugned comments around six weeks after their publication at the request of L.'s lawyers. Then L. sued Delfi for defamation. The Estonian courts found Delfi responsible for the readers' comments and awarded monetary damages of around 320 euros. The courts ruled that Delfi was a publisher, rather than a service provider, because it had an economic interest in publishing the readers' comments. Delfi complained to the ECtHR that this violated its right to freedom of expression.

[405] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 "On the coordination of certain provisions laid down by law, regulation or administrative action in member-states concerning the provision of audiovisual media services" (Audiovisual Media Services Directive). Retrieved from http://data.europa.eu/eli/dir/2010/13/oj

[406] See the rulings of the Chamber of 10 October 2013 and of the Grand Chamber of 16 June 2015.

The ECtHR emphasised that a "user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression," but noted also that this activity may cause dangers. Therefore, in establishing the level of liability, it is crucial to distinguish between a portal operator and a traditional publisher. While the ECtHR noted that duties and responsibilities of online news portals and traditional publishers regarding user-generated content may differ, it also stressed that Delfi was a professional news portal, well-known in Estonia. It had pursued economic interests in providing a space for user-generated comments and could foresee the consequences from these comments. Delfi was able to ensure *editorial control* over the site and had the technical means to remove comments, while it was impossible for L. to hold the authors liable because Delfi allowed the comments to be posted anonymously, as the Court stated. The Court also noted that the restrictions pursued a legitimate aim and it was attentive to the harsh nature of the impugned comments, which had been explicitly unlawful and amounted to an incitement to hatred or to violence. Finally, the ECtHR found that the amount of monetary damages was not excessive for one of the leading news portals in Estonia. Its popularity had not suffered and people continued to post anonymous comments, as the Court observed. The ECtHR concluded that the state's interference with Delfi's freedom of expression was proportionate. It found that if accompanied by effective procedures allowing for rapid response, the notice-and-take-down-system[407] could function as an appropriate tool for balancing rights and interests.

Some critics caution that the ruling this ruling might create a worrying precedent that could force websites to censor content (see, for instance, Article 19, 2015; "*Delfi AS vs Estonia* judgement," 2015; Moody, 2015; Voorhoof, 2015a, 2015b). Thomas Hughes, Executive Director of the organisation Article 19, stated that the ECtHR delivered "a serious blow to freedom of expression online, displaying a worrying lack of understanding of the issues surrounding intermediary liability, and the way in which the Internet works" (2015a). Others have expressed concerns that this ruling may mean that intermediaries are liable for "manifestly unlawful" content, although what "manifestly unlawful" means has not been clarified (Moody, 2015). McIntyre found disturbing the finding that "proactive monitoring" of Internet users could be required, which would contradict the case law of the Court of Justice (ECJ) of the European Union, as for

[407] This is a procedure performed online hosting providers on removing or disabling access to websites in response to court orders or allegations of illegal content.

instance, in the 2012 SABAM case.[408] And the European Digital Rights (EDRi), an organisation defending human rights in the digital environment, concluded that the ruling appeared to encourage the practice of monitoring information online (EDRi, 2016).

In 2016, the ECtHR held a ruling on the case of *MTE-Index v. Hungary*,[409] which clarified the issue of editorial responsibly of online portals for readers' comments and diminished the potential broad interpretations of the ECtHR ruling on the Delfi case to curtail freedom of expression.

Magyar Tartalomszolgáltatók Egyesülete ("MTE"), a non-profit, self-regulatory body of Internet content providers, published an article criticising the business practices of two real estate management websites. An online news portal, Index.hu Zrt ("Index"), fully reproduced the article and wrote about it. In response to these publications, the readers posted comments criticising the real estate websites. The real estate companies initiated a civil lawsuit against MTE and Index. The Hungarian courts found the websites liable for the offensive and unlawful comments of their readers.

In this case, the ECtHR found a breach of Article 10 of ECHR and it criticised the Hungarian courts for their failure to properly balance the right to freedom of expression and the right to respect reputation. The Court explained that the case of MTE and Index differed from the Delfi case. First, readers' comments in the former case were "notably devoid of pivotal elements of hate speech and incitement of violence." Second, the ECtHR observed that Delfi was a commercially run news portal, while MTE was a non-profit organisation. The ECtHR provided new perspective on the application of the notice-and-take-down system. As noted above, with reference to the Delfi case, the Court found that "if accompanied by effective procedures allowing for rapid response, the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved." This perspective would narrow the scope of the ruling on the Delfi case and, as the EDRi suggested, the Court's judgment on the MTE-Index case restricted the Delfi ruling to cases on hate speech and incitement to violence.

Reflecting on the ECtHR judgement on MTE and Index in light of the Delfi lawsuit, Bea Bodrogi, a Hungarian lawyer involved in the former case, specified several criteria that the ECtHR used in its consideration of both cases (see Bodrogi, 2016). She noted that national courts must observe many issues: the context and content of comments; the

[408] See the summary of this case in brief at http://ec.europa.eu/dgs/legal_service/arrets/10c070_en.pdf
[409] *MTE-Index v Hungary* of 2 February 2016.

measures taken by the claimant to prevent or remove defamatory comments; whether the portal can be considered a media provider with an editorial responsibility; whether the author of the comments has ensured that the comments were accurate; and the consequences of national legal proceedings upon the claimant. They also should address the question of whether the published comments raise issues of public interest and pay attention to the intentions of the portal's owners (while Delfi pursues commercial interests, MTE's main intention is to represent member organisations). The identity of the person whose right might be violated by the comments is also important (L. was a private citizen in the Delfi case, while the MTE's and Index's publications affected commercial companies). Consequently, Bodrogi noted that the ECtHR's jurisprudence demands from national courts a complex and thorough examination of the cases' circumstances to balance the competing rights when they rule on editorial liability for readers' comments.

In the most recent decision regarding the intermediary liablity for offensive comments, *Rolf Anders Daniel Pihl v. Sweden* of 9 March 2017, the ECtHR confirmed its perspective that, in general, intermediaries do not need to moderate in advance users'comments. It found no violation of Article 8 of the ECHR: the online portal was a non-profit organisation, it promptly removed the offensive comment and apologised for pulishing inaccurate information, and the comment itself nether incited violence nor constituted hate speech. Reflecting on the importance of this ECtHR decision, Voorhoof (2017) concludes that it may be useful to understand how to properly react to the increasingly important problem of online dissemination of "fake news." He also suggests that the ruling itself should be interpteted as guaranteeing minimal protection for the rights of internet intermediaries and users' rights, despite the fact that the application was ill-founded, from the ECtHR's perspective.

The Right to Anonymous Online Publications and the Protection of Journalists from Surveillance

International standards also specifically shield the right to anonymity on the Internet. It is protected under two human rights: the right to freedom of expression and to privacy. In particular, David Kaye, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated: "Encryption and anonymity provide individuals and groups with a zone of privacy online to hold opinions and exercise freedom of expression without arbitrary and unlawful interference or

attacks."[410] Any restriction to the right to anonymity, therefore, is subject to scrutiny under the same three-tier test that applies to any other speech restrictions. The ECtHR judgment on the case of *Delfi AS v. Estonia* of 16 June 16 stated: "[A]nonymity on the Internet, although an important value, must be balanced against other rights and interests." The Declaration of the CoE's Committee of Ministers, "On Freedom of Communication on the Internet,"[411] allows disclosure of identity only "in order to trace those responsible for criminal acts," and proclaims this right as one of the main principles of online communication.

The ECtHR also specifically addressed the issue of journalistic surveillance in its decision on the case of *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* of 22 November 2012. This ruling is very important in light of technological advances that facilitate surveillance of journalists and bloggers. In this case, two journalists published an article claiming that highly secret information had been leaked to the drugs mafia. After the journalists refused to provide documents related to the publication upon the order of the National Police International Investigation Department, the Netherlands' secret service AIVD taped their telephone conversations and spied on them. The ECtHR ruled that the Dutch authorities had violated Articles 8 and 10 of the ECHR. The Court criticised the fact that the national law "did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources." This means that, from the ECtHR's perspective, the CoE member-states should adopt relevant legislation to ensure that journalists are well-protected from surveillance in the digital era.

Russian Policy of Freedom of Expression Online in the Context of the CoE Standards

The Runet: background.

The Russian-language Internet has its own name, the Runet: "ru" stands for Russia's top-level domain as well as for the code of the Russian language, and "net" means the Internet, in short (Konradova & Schmidt, 2014). The name *runet* emerged in the late 1990s, promoted by early and advanced Russian online users. The idea of the

[410] *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2015), UN Doc, A/HRC/29/32, 22 May. Retrieved from http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc

[411] Declaration "On Freedom of Communication on the Internet," adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies.

Runet has a symbolic connotation, too, given Russia's attempts to transform the Runet into Intranet, or the Russian Internet.

The Runet's content is extremely important in the global online space. Russia has the largest numbers of online users among the European countries and is in sixth position in the world's rating of countries (Internet World Stat, 2016). Two of the most popular websites in the world are Russian:[412] the social media service VK.com and the search engine service Yandex.ru. Another Russian social media service, Odnolkassniki.ru, along with the Russian email service site Mail.ru, are in the top twenty of the world's most popular websites. All three, VK.com, Odnolkassniki.ru, and Mail.ru, are owned by the rich businessmen Usmanov through the Mail.ru Group.

In general, the Runet has become one of the main sources of information in many other former Soviet states. Contrary to some of its neighbouring countries, such as China or Turkmenistan, Russia does not ban global companies such as Facebook, Twitter, or Google; however, they are less popular than their Russian counterparts.

As of 3 January 2017, Russia had about 103 million online users (70,5% penetration rate), according to the data of the Internet World Stats (2016). The 2016 survey of the GfK market research company provides similar results. It also shows that the Russian Internet increased by 4 million users over the year 2015, which the GfK explains with the development of mobile connectivity. The research report *Runet's Economy, 2014–2015* notes that the Internet's economic weight on Russia's GDP continued to grow and reached 2,2%.[413] More than half of Internet users in Russia (55%) are active users, i.e. they go online at least once per day, as the 2015 fall survey by the Russian social research firm FOM (2013) has shown. It has also noted that the number of Russians online is growing.

Several domestic surveys have examined why Russians access the Internet. In a 2014 survey conducted by the Russian marketing and opinion research company VTSIOM (2014), 82% of the respondents claimed that they had accessed the Internet to read news, 81% to get new knowledge and expand their horizons, 80% to access music, films, and books, and 74% to communicate in social media. However, a more recent survey by the Fund of Public Opinion, led in January 2016, demonstrates a change in Russians' most popular online activities: online communication predominated (64%),

[412] Information retrieved from the official web site of the research company SimilarWeb: https://www.similarweb.com/global

[413] See the official website of the research project the Runet's Economy [*Ekonomika Runeta*] at: http://экономикарунета.рф/2015/#accents

while less than half of the respondents claimed that they use the Internet to acquire knowledge (44%) and to read the news (42%). The change in users' attitudes could be connected to the strict governmental control of online news, noted by scholars.

Russian principles for regulating online freedom of speech.

The main statute regulating online content in Russia, the statute "On Information," proclaims several key principles for informational policy in Russia in its Article 3. Some of them specifically refer to freedom of expression, others are more general. The principles are the following:

1) the freedom to seek, receive, impart, produce, and disseminate information by any legal means;

2) establishment of restrictions of access to information by federal statutes only;

3) openness of information on activities of state federal bodies and local bodies as well as free access to such information, except in cases provided by federal statutes;

4) equal status of the national languages of the Russian Federation when creating and exploiting information systems;

5) ensuring the safety of the Russian Federation when creating and exploiting information systems as well as the protection of information contained in them;

6) adequacy of information and its prompt provision;

7) the right to privacy, inadmissibility of collecting, storing, using, or disseminating private information without permission of an individual;

8) inadmissibility of establishment by legal acts of any advantages of the application of some information technologies over others, unless obligation to apply certain information technologies for creation and usage of public information systems is established in federal laws.

While many of these principles are important for the development of provisions on free speech, which is guaranteed in Article 29 Part 4 of the Russian Constitution, they seem to be insufficient to ensure online freedom of expression in Russia in compliance with the CoE standards. The statute merely reiterates the constitutional provision guaranteeing the freedom "to seek, receive, impart, produce, and disseminate information by any lawful means." However, it fails to reinterpret it in the context of the new online environment, as the CoE standards require.

So far, no statute in Russia explicitly guarantees that the constitutional provisions on free speech apply to the online sphere. The Constitutional Court[414] stated that the constitutional provisions on free speech are applicable to any information "regardless of the place or the means of producing, imparting, or disseminating [it], including information on the Internet." However, the lower courts have interpreted this statement primarily in the aim to restrict online speech, as I will show below. Furthermore, this statement concerns only information accessible on the Internet and does not apply to other expressions online such as opinions or ideas.

No legal act in Russia specifically prohibits online censorship, which could prevent the application of the constitutional provision of Article 29 Part 5 that bans any censorship of online speech. A new broad notion of censorship should include blocking and filtering measures because they represent forms of prior state control, according to the Declaration of the CoE's Committee of Ministers "On Freedom of Communication on the Internet."[415] The ban on censorship should also protect means of dissemination or hosting information online because restrictions imposed on such means interfere with the right to receive and impart information, as the Recommendation of CoE's Committee of Ministers "On the Free, Transboundary Flow of Information on the Internet" notes.[416]Additionally, a ban on censorship should be declared as one of the principles in the statute "On Information" in order to avoid misinterpretation of the constitutional provisions.

Russian legislation lacks essential guarantees on equal protection of human rights in offline and online environments, which is a key point of the CoE's Internet policy, as noted above. In terms of the principles of Russian information policy, the statute "On Information" mentions only the right to privacy and access to information, ignoring other human rights. Without any doubts, information technologies have posed considerable challenges to privacy; however, other human rights also need explicit guarantees for their protection because the Internet has created much potential for their violation as well. For example, it makes possible the immediate dissemination of hate speech, defamation,

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[414] Resolution of the Constitutional Court of the Russian Federation "On the case of the constitutionality test of Paragraphs 1, 5, and 6 of Article 152 of the Civil Code of the Russian Federation, in response to the complaint of the citizen Y. Krylov," Saint-Petersburg, 9 July 2013.

[415] Declaration "On Freedom of Communication on the Internet," adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 80645b44

[416] Recommendation CM/Rec(2015)6 "On the Free, Transboundary Flow of Information on the Internet," *adopted by the Committee of Ministers on 1 April 2015, at the 1224th meeting of the Ministers' Deputies*. Retrieved from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3f20

obscenity, and other expressions that may violate human rights. Therefore, the statute "On Information" should enshrine protection of human rights online as one of the guiding principles of Russian information policy.

The legal base for *assessing restrictions* to online freedom of speech and to other human rights, as established in Article 3 of the statute "On Information," is insufficient. First, the statute fails to explicitly say that any attempts to restrict online freedom of speech are subject to the same rules as restrictions to offline speech. Second, the guarantees as to the legality of restrictions are underdeveloped. The statute proclaims that this principle is relevant to access of public information, while it must also be applicable to restrictions of all human rights, according to the ECHR and Article 55 Part 3 of the Russian Constitution. Third, the statute fails to state that restrictions must be applied in the pursuit of legitimate aims only, as provided in ECHR and Article 55 Part 3 of the Russian Constitution. The insufficient legal base for assessing restrictions of online freedom of speech might lead to improper consideration of the cases concerning human rights on the Internet.

In 2010, the Russian Supreme Court's decree on the statute "On Mass Media" tried to establish the right to access Internet in Russia. The decree proclaimed that anyone can access online content "from any place and at any time at one's own choice if the appropriate infrastructure is available and Internet connection shall be possible." In other words, the decree stated that if the infrastructure allowing access to the Internet was in place, such access should be provided without any restrictions. This statement echoes the CoE's principle of net neutrality, as defined in the Declaration of the CoE's Committee of Ministers "On Network Neutrality": "[U]sers should have the greatest possible access to Internet-based content, applications, and services of their choice, whether or not they are offered free of charge, using suitable devices of their choice."[417] However, the Supreme Court did not explicitly state that access to the Internet should be considered as a human right. Russian law also does not recognise it as such, in contrast to the CoE standards.

Russian legislation has not elaborated the principle of net neutrality. In February 2016, the working group under the Russian Federal Antimonopoly Service formulated the basic rules for net neutrality ("Basic document," n.d.) to guarantee users' non-

[417] Declaration of the CoE Committee of Ministers "On Network Neutrality," adopted at the 1094th meeting of the Ministers' Deputies, on 29 September 2010. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=1678287

discriminatory access to online sources. However, this non-binding document has not been applied.

Article 3 Part 8 of the statute "On Information" establishes an important principle for Internet policy by stating that no legal acts can give preference to any person for the use of certain information technologies—this means that Russian citizens and companies should have equal opportunities to use them. This principle might be applied to prevent concentration in the area of new information and communication technologies. However, the same article contains a vague provision allowing the adoption of laws creating additional preferences for the exploitation of public information systems.

The statute "On Information" also proclaims the principle of protecting national security. While this represents a legitimate aim in restricting the right to free speech, according to Article 55 Part 3 of the Russian Constitution and Article 10 Part 2 of the ECHR, the implementation of this principle demands a balance between the protection of national security and freedom of expression.

In practice, however, Russia lacks such balance. As Budnitskiy and Kulikova (2016) argue, the Russian concept of information safety significantly differs from the Western concept of cybersecurity. He suggests that the latter concerns only infrastructure-information issues, while the former is a broader term, which includes the "substantive information itself, not simply [the] channels for its delivery." Budnitskiy and Kulikova argue that the concept of information safety has caused the country's "growing domestic authoritarianism and international isolationism" (in 2014, Putin explicitly called the Internet a "CIA project" [MacAskill, 2014]).

Russia refused to ratify the 2001 CoE Convention on Cybercrime,[418] an international treaty on computer and online crimes. The convention seeks to harmonise national legal frameworks for cybercrimes, to advance investigative practices, and to facilitate cooperation on cybercrimes among countries. As of February 2017, the convention has been ratified by forty-two CoE member-states and ten non-members.[419] The sticking point for Russia has been Article 32(b), which provides that one country may, without the authorisation of another country,

access or receive, through a computer system in its territory, stored computer data

[418] Convention on Cybercrime, Budapest, 23 November 2001. Retrieved from https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561

[419] Chart of signatures and ratifications of Treaty 185, Convention on Cybercrime, Status as of 3 February 2017. Retrieved from https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=iKp4JDIL

located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.

In other words, Russia refused to ratify the convention to ensure protection from possible information leaks.

Russian regulation of online content.

Scholars tend to distinguish two main opposing periods in the evolution of Internet policy in Russia, and to suggest that Putin's comeback to power in 2012 was a watershed dividing these periods (N. Duffy, 2015; Budnitskiy & Kulikova, 2016). The policy before his comeback is characterised as "liberal" or "hands-off" (Duffy, 2015), while the subsequent policy is considered "state-centric" (Nocetti, 2015) or "restrictive" (Sherstoboeva & Pavlenko, 2015). Although these two policies are contrasting in many respects, they are similar in that they both have failed to comply with the CoE's standards.

In comparison to the "restrictive" policy, the "liberal" policy indeed allowed a greater degree of online free speech, but it was, in fact, not liberal. At that time, Russia merely lacked any rules that considered the specific nature of the Internet and could ensure adequate human rights protections, including the protection of freedom of speech, as the CoE standards require.[420] In Russia, online media freedom has never been regulated in a liberal manner, in contrast to traditional media governed by the relatively liberal "On Mass Media" statute.

The government mainly abstained from regulating online content not because it wanted to ensure genuine online free speech in Russia in line with international standards, but because at the time the Internet had only a modest impact as a news source, in comparison to the completely state-controlled national television. (In 2000, about 2% of the Russian population had access to the Internet.[421]) Strukov (2009) argues that online freedom in Russia was considerably curtailed as early as in the 2000s, but the Internet policies of that time were mainly focused on codifying the usage of new technologies, rather than on online content. However, as soon as the Internet became a mass platform for communication, the government began introducing regulations of online content.

[420] See, for instance, the ECtHR judgments on the cases of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* and *Ahmet Yildirim v. Turkey* of 18 December 2012.
[421] See the official website of the Internet Live Stats at: http://www.internetlivestats.com/internet-users/russia/

For instance, as early as 2007, Russia established the blacklist for "extremist materials" (see Ministry of Justice, 2016), a "forerunner" of the numerous blacklists that have been introduced in Russian law since 2012. This list registered both offline and online publications from the outset. The Russian anti-extremist legal concept has been widely criticised in the CoE documents and in legal studies (Richter, 2012; Verhovskij, Ledovskih, & Sultanov, 2013), mostly because of its vague definition of extremism, which allows criminal convictions for political dissent. At that time, blocking extremist materials required a court's consideration, however, the policy combating online extremists cannot be considered as liberal.

On the one hand, the lack of state control over online content facilitated the rapid development of the Internet in the country as well as online democracy in the Russian-language Internet. In 2011, the Internet penetration in Russia reached for the first time nearly a half (49%) of the country's population (Internet Live Stats, 2011), and the Internet played an enormous role in consolidating the 2011–2012 mass protest movement in the country. After the parliamentary elections of December 2011, the Runet was abundant with user-generated content showing carousel voting and other falsifications (N. Duffy, 2015). This led to some of the largest oppositional meetings in Russia since the USSR's collapse (Lenta, 2011a). The largest demonstration in December 2011 gathered around 100,000 people in Moscow. In April 2012, for the first time, the users of Yandex exceeded the audience of First TV Channel, the main TV station in Russia and a state mouthpiece (Boletskaya, 2012). The impact of online information on public opinion in Russia has been growing considerably.

On the other hand, the lack of rules also accelerated rampant online criminality in the early 2010s. According to the 2012 Norton Cybercrime Report, Russia had the highest number of cybercrime victims among the twenty-four countries selected for analysis. As the report shows, 92% of Russians were victims of cybercrimes, with social media as the main platforms for such crimes. Russian users suffered from spam, fishing attacks, cracking of accounts, and obscene content, including pornography. To some degree, this situation is reminiscent of the story of Russian journalism in 1994–1995 when the state nearly lost economic and ideological control over information flows in the country, and free speech was realised more as a free-for-all, including bootlegging, payola, and yellow journalism, instead of a free flow of information, as I described in the first chapter.

Due to this state of affairs, in the 1990s as in the early 2010s, the demand for censorship of online content had significant support in Russian society. The 2012 survey

of the Russian social study agency The Levada Centre shows that 63% of respondents supported online censorship because, in their opinion, the Internet "contained many dangerous websites and materials." Only 19% of respondents stated that online censorship should not be introduced. Even higher numbers (65%) claimed that Internet access should be limited for teenagers. Russian users wanted to use the Internet in a safe way; however, the national policy on information safety failed to ensure the protection of human rights online.

Many scholars suggest that a starting point for the formation of a new "restrictive" Internet policy in Russia was the 2012 "Statute on blacklists." In fact, this policy was launched in June 2011 with the reform of mass media legislation, which will be considered in the section on online media policy. It is important to mention the starting point for the policy because some scholars tend to associate stricter Internet regulation with Putin's comeback to power in May 2012 and his reaction to the mass protest movement. While the movement had a significant impact on the further development of the policy on online speech, the state actually launched its repressive regulations of online content during the term of Dmitriy Medvedev, despite his claim that "the state will not lay hands on the Internet" (RIA Novosti, 2011). The approach to Internet policy was liberal in political rhetoric only, but not in practice.

The misalignment of Russian and the CoE's approaches to online freedom of speech and media freedom has widened since the middle of 2011. Like the Russian pre-2011 Internet policy, the post-2011 policy still lacks enough protective rules for online speech. However, in contrast to the previous legal model, the current one abounds of excessive restrictions adopted speedily by unanimous votes and without sufficient public debates.

The list of the main statutes constituting the modern Russian legal frameworks for online content is represented in Table 2.2. A detailed examination of all the statutes is beyond the scope of this analysis because some of them only indirectly concern media or even online speech, such as the statutes banning the storage of personal data of Russians abroad, limiting anonymous payments, or prohibiting online gambling. The statutes addressing blocking and removal of online content[422] will be analysed in this section only to the extent that they concern access to online information and content. Amendments to

[422] Nos. 139-FZ, 50-FZ, 187-FZ, 398-FZ, 222-FZ, 364-FZ, 264-FZ.

the regulation of defamation[423] and extremism[424] have been examined in sections 2.1 and 2.2, respectively. The amendments of the "Yarovaya Law,"[425] restricting freedom of speech on the grounds of religious expression and terrorism, have been considered in section 2.2. The parts of the statutes concerning users' online speech are included in this section. The statutes regulating new media, bloggers, and news aggregators[426] are particularly important for this thesis and will be considered in the next part of this section.

Table 2.2

The main Russian federal statutes for online content policy

Official title and number of the statute	Unofficial title	Signed on	In force since	Proposed aim	Main rules
"On Amending Some Legal Acts in order to Improve Legal Regulation in the Sphere of Mass Information," No. 142-FZ	None	14 June 2011	10 Nov 2011	Improvement of legislation on mass media	• Extended the scope of the statute "On Mass Media" to online media; • introduced the notion of "web publications" as websites registered with Roskmondazor; • introduced new licensing rules for broadcast media.
"On Amendments to the Federal Statute On Protection of Morals from Information Harmful to Their Health and Development, and to Some Legal Acts of the Russian Federation," No. 139-FZ	Statute on Blacklists	28 July 2012	11 Nov 2012	Protection of minors	• Introduced blacklists of websites; • introduced controversial out-of-court blocking procedures; • authorised Roskomnadzor with great power as to blocking and blacklisting websites.
"On Amending Some Legal Acts of the Russian Federation for Limiting the Dissemination of Information about Minors Who Have Suffered from Illegal Actions (Inactions)," No. 50-FZ	None	5 April 2013	19 April 2013	Protection of minors	Authorises Roskomnadzor to blacklist and block websites containing personal data of minors who have suffered as a result of illegal actions or inactions.
"On Amending Some Legal Acts of the Russian Federation on Issues of Protection of Intellectual Rights in Information and Telecommunication Networks," No. 187-FZ	Antipiracy Statute	2 June 2013	1 Oct 2014	Protection of copyright	• Authorises Roskomnadzor to blacklist and block websites containing pirated films; • defines information intermediaries; • stipulates liability of information intermediaries for copyright infringements.

[423] Subsections 3 of Section 1 of Part 1 of the Civil Code of the Russian Federation (No. 142-FZ).
[424] The so-called "Lugovoi Statute" (No. 398-FZ).
[425] 374-FZ and 375-FZ.
[426] Nos. 142-FZ, 97-FZ and 208-FZ.

"On Amending Subsections 3 of Section 1 of Part 1 of the Civil Code of the Russian Federation," No. 142-FZ	None	2 July 2013	1 Oct 2013	Protection of human rights	• Enshrines citizens' right to seek in courts the deletion of defamatory information; • enshrines citizens' right to seek in courts the deletion of information if it violates the right to privacy.
"On Amending the Federal Statute On Information, Information Technologies, and Protection of Information," No. 398-FZ	Lugovoi Statute	28 Dec 2013	1 Feb 2014	Opposition to extremism	Authorises Roskomnadzor to blacklist and block websites if they contain information inciting extremist actions, "mass disorders," or participation in public actions conducted in "contravention of established procedures."
"On Amending Some Legal Acts of the Russian Federation," No. 110-FZ	Statute Limiting Anonymous Payments	5 May 2014	16 May 2014, except some rules	Opposition to terrorism	• Bans users from sending money to any individual, NGOs, or foreign companies without an identification procedure; • limits the sums that can be stored or transferred without an identification procedure; • establishes control over money transfers to NGOs.
"On Amending the Federal Statute On Information, Information Technologies, and Protection of Information, and Some Legal Acts of the Russian Federation on Issues of Harmonising the Exchange of Information with the Use of Information and Telecommunication Networks," No. 97-FZ	Blogger's Statute	5 May 2014	1 Aug 2014	Opposition to terrorism	• Introduces regulation for bloggers; • obliges them to register with Roskomnadzor; • obliges bloggers to perform journalistic duties without providing the relevant rights; • bans bloggers' anonymity; • introduces the vague legal notion of "organisers of dissemination of information"; • obliges them to collect and store online correspondence and provide it to state bodies upon request.
"On Amending the Federal Statute on State Regulation of Activity on Organization and Conducting Gambling Games and on Amending Some Legal Acts of the Russian Federation," No. 222-FZ	None	12 July 2014	22 Aug 2014	Ban of online gambling	• Authorises Roskomnadzor to blacklist and block websites conducting gambling games or lotteries; • introduces "perpetual" blocking of websites if they infringe the copyright of the same right-holder twice.
"On Amending Some Legal Acts of the Russian Federation for Specifying Order of Personal Data Processing in Information and Telecommunication Networks," No. 242-FZ	Statute Limiting the Storage of Personal Data	21 July 2014	1 Sep 2015	Improvement of legislation on personal data	• Bans the storage of personal data of Russian citizens abroad; • authorises Roskomnadzor to blacklist and block websites storing personal data of Russians outside Russia.
"On Amending the Federal Statute on Information, Information	None	24 Nov 2014	1 May 2015	Protection of copyright	• Extends the scope of the Anti-Piracy Statute to any copyrighted objects, except photographs;

Technologies, and Protection of Information, as well as the Code of Civil Procedure," No. 364-FZ					• introduces "permanent" blocking of websites.
"On Amending the Federal Statute On Information, Information Technologies, and Protection of Information, and Articles 29 and 402 of the Code of Civil Procedure," No. 264-FZ	Statute on the Right to Be Forgotten	13 July 2015	1 Jan 2016	Protection of human rights	• Enshrines the right to oblige searching engine services to delete information if it is untrue, outdated (published more than 3 years ago), or if it contradicts the law.
"On Amending the Federal Statute on Information, Information Technologies, and the Code of Administrative Offences," No. 208-FZ	Statute on News Aggregators	23 June 2016	1 January 2017	Protection of human rights	• Introduces regulation for news aggregators; • obliges them to register with Roskomnadzor; • obliges news aggregators to perform journalistic duties without providing the relevant rights; • obliges them to collect and store the news and provide it to state bodies upon request.
"On Amending the Federal Statute of the Russian Federation, On Counteraction of Terrorism, and Other Legal Acts of the Russian Federation in the Parts Establishing Additional Measures to Counteract Terrorism and Ensure Public Safety" No. 374-FZ; Federal Statute of the Russian Federation "On Amending the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation in the Parts Establishing Additional Measures to Counteract Terrorism and Ensure Public Safety" No. 375-FZ.	Yarovaya Law	6 July 2016	29 July 2016 except for some parts	Opposition to terrorism	• Toughens legal regulation of governmental surveillance over the Internet users • Toughens legal regulation for dissemination of religious material including on the Internet

The main contrast between the Russian policy and the CoE standards is that Russia permits and encourages a strong dependence of various online activities, including speech, on the state, while Article 10(1) of the ECHR explicitly prohibits state interference to speech. In fact, Russian laws legitimise governmental control over online media through unclear or excessive rules as well as out-of-court blocking and numerous registering procedures, which will be considered below. In line with the principle of

national security protection, significant pressure is applied on global media companies—they have to comply with the national policy or leave the Russian market.

Currently, Russia lacks specific regulation against illegal interference in the right to online freedom of expression. The "Blogger Statute" (in Article 13.18 of the Russian Administrative Code) introduced the rule establishing monetary sanctions for interfering with the operation of websites. However, these sanctions are almost negligible: the maximum for an individual is 1,000 rubles (about 12 euros), for public officials—2,000 (about 24 euros), and for legal entities—20,000 (about 235 euros). Nevertheless, this article has not been applied yet, as my examination of the Rospravosudije database shows.

Almost all statutes regulating online speech contradict the ECtHR three-tier test and the Russian Constitution because they go beyond the legitimate goals; the "Yarovaya Law" is one such example (see section 2.2). Neither the "Blogger's Statute" nor the "Statute Limiting Anonymous Payments" directly address the issue of terrorism. The statute banning storage of personal data of Russians abroad, which supposedly protects personal information, is too excessive to achieve this aim: Russian users usually voluntarily provide their personal data to foreign companies.

Russian statutes regulating online content tend to ignore the specifics of the Internet, in contradiction to the CoE standards. For instance, the statute requiring the storage of personal data of Russians within the country fails to take into consideration that the Internet is a transboundary medium, although Article 12(2) of the CoE's Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data,[427] ratified by Russia on 15 May 2013, directly prohibits the restriction of transborder flows of personal data for the purpose of privacy protection. While some foreign companies, such as Google, eBay, and PayPal, have already agreed to store Russians' personal data on Russian servers, others, such as Facebook, claimed that this would be technically impossible (Lenta, 2015).

The online media industry complained about the difficulties surrounding the implementation of the "Blogger's Statute" (Sherstoboeva & Pavlenko, 2015). Roskomnadzor has also received many complaints about the excessive blocking mechanisms, which occasionally allow the blocking of websites that share the same IP address with infringing sites. Disregarding the specifics of the Internet leads to unclear

[427] The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. ETS No. 108, adopted on 28 January 1981. Retrieved from: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108

and unforeseeable regulations, in contradiction to the CoE standards.[428] As a result, online businesses and users are vulnerable and depend on the sometimes arbitrary decisions of state bodies.

Many rules establish state surveillance of users' speech. The "Bloggers' Statute" forces any company dealing with online correspondence, such as social media, messengers, email services, et cetera, to collaborate with ongoing investigations in the country. These online media outlets are defined as "organisers of dissemination of information" and are required to store all data, including personal user information, for three years and to supply it to investigators upon request. Similar regulations are provided for the national postal service and communication service providers.[429]

These measures may be justifiable under some circumstances, and they are globally debated. Nevertheless, the ECJ[430] ruled in 2016 that legal regulations permitting the blanket collection and storage of location and traffic data violates EU legislation (see, for details, "European Court of Justice," 2016). The ECJ noted that such regulation "exceeds the limits of what is strictly necessary and cannot be considered to be justified within a democratic society." It may violate the right to privacy because the collected data allows for "very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained," as the ECJ clarified. It noted that exceptions are possible in cases against serious crimes and that the obligation to store the data should be targeted and subject to strict supervision by an independent court.

Russian regulations allowing mass surveillance are not properly balanced to ensure that users' other rights are protected. The Governmental Regulations[431] of 31 July 2014 requiring users to provide IDs in order to access the Internet in public places could serve as an example here. So far, this rule has not been enforced due to the interpretations of the Minkomsvyaz (the Russian Ministry of Communications and Mass

[428] See, for instance, the ECtHR judgment on the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* of 5 May 2011.
[429] By the "Yarovaya Law."
[430] The ECJ is the EU institution ensuring that the EU law is interpreted and applied in the same way in every EU country. It also settles legal disputes between national governments and EU institutions. Individuals, companies, or organisations can also use the ECJ to initiate action against an EU institution in case of violation of their rights or freedoms. See the official website http://curia.europa.eu/jcms/jcms/j_6/en/
[431] Regulations of the Government of the Russian Federation "On Amending Some Acts of the Government of the Russian Federation Due to the Adoption of the Federal Statute, on Amending the Federal Statute on Information, Information Technologies and Protection of Information, as well as Some Legislative Acts of the Russian Federation Concerning the Issues of Exchange of Information with the Usage of Information and Telecommunication Networks" of 31 July 2014, No. 758, Moscow.

Communications) (TASS, 2014). Nevertheless, one can say that anonymous access to the Internet in public places in Russia has been abolished.

Russia specifically incorporated the EU concept on the "right to be forgotten." In fact, it recognised this right as a legal concept even earlier than it was done in the EU. Initially, the right to be forgotten was not a legal term in the EU and it was not specifically protected by EU regulation until the 2016 data protection reform which will become effective only in May 2018.[432] In the EU, the right to be forgotten emerged in 2014 as a result of the ECJ's landmark ruling on the case involving Google Spain. The Court held that EU's 1995 Data Protection Directive covers the right of individuals to demand that search engines remove links to personal information about them that they view as "prejudicial" (European Union Committee, 2014). The ECJ did not view this right as absolute and stated that it had to be balanced with freedom of expression and media freedom. According to paragraph 93 of the ruling, a search engine service must assess several criteria when making decisions to remove links: accuracy, adequacy, relevancy (including a consideration of how much time has passed since the link was posted), and proportionality with regards to the purposes of data processing. As the ECJ clarifies, a case-by-case assessment is always needed. A search engine service may reject the request if, for instance, the information is of public interest. The refusals may be appealed in national data protection bodies or in the courts. Nevertheless, neither politicians nor criminals can use this right.

Russian law on the right to be forgotten, obliging search engines to remove search results containing false, outdated, or illegal information about a person, has failed to incorporate the concept of public interest, as noted by the company Yandex (2016). Yandex also complained that it cannot properly verify all information and that the statute lacks clear criteria on the removal of content. In general, the Russian mechanism protecting the right to be forgotten does not balance the right to free speech with other rights and freedoms, as an analysis by the organisation Article 19 has shown (2015b). In fact, this right has already been abused by Russian criminals (see "Businessman Sergei Mikhailov," 2016).

[432] EU Regulation 2016/679 Of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679

Russian legislation actively applies extreme measures, such as blocking of Internet access, which have not always proved effective in protecting legitimate aims.[433] According to the statute "On Information" and the subsequent Governmental Regulations,[434] Roskomnadzor can block online publications without a court's ruling if they contain:

- information about means to produce or use drugs, places to buy them (upon decisions of the Russian Federal Service of the Russian Federation for Control of Drug Trafficking or the Roskomnadzor);
- information about means to commit suicide or inciting suicide (upon decision of the Russian Federal Service for Customer Rights and Human Welfare Protection);
- child pornography (upon decisions of the Roskomnadzor);
- information on minors who have suffered from illegal activity or inactivity;
- extremism (upon decisions of the Russian General Prosecutor or his deputies);
- information inciting mass disorder or participation in mass actions "conducted in contravention of established procedures" (upon decisions of the Russian General Prosecutor or his deputies);
- information violating legislation on gambling and lotteries (upon decisions of the Federal Tax Service).

While some of these grounds may be legitimate, others can hardly be justified in the light of the CoE standards. For instance, online dissemination of child pornography is a serious cybercrime, according to the CoE Convention on Cybercrimes. However, the ECtHR narrows the state's margin of appreciation with regards to political speech, as shown above. Therefore, the ECtHR would protect publications that invite participation in oppositional mass actions (if they do not incite violence, for instance). The ban on "extremist" speech online is also arguable in light of Article 10 of the ECHR, as shown in section 2.2.

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[433] In addition to "regular" blockings, Article 15.6 of the statute "On Information" provides a "permanent" blocking of websites if website owners repeatedly infringe copyright. On 9 November 2015, the Moscow City Court supported the first decision on permanent blocking of the torrent website Rutracker.org. However, as of 11 March 2016, the site is available to users, which confirms the ineffectiveness of this procedure even against the worst offenders.

[434] Regulations of the Government of the Russian Federation "On United Automatized Information System, the United Register of Domain Names, Website Addresses on the Information and Telecommunication Network, Internet, as well as Net Addresses Allowing the Identification of Website Addresses on the Information and Telecommunication Network, Internet That Contain Information the Dissemination of which Is Banned in Russia" of 26 October 2012, No. 1101, Moscow.

The procedure of blocking established in Article 15.1 of the statute "On Information" also contradicts the CoE standards, in particular those formulated through the ECtHR's ruling on the case of *Ahmet Yildirim v. Turkey*. Blocking is organised in Russia as follows. Upon the decision of the courts or another state body, Roskomnadzor includes the infringing website in the blacklist and informs its web hosting service provider about this. Within a day, the provider informs the website's owner who must immediately remove the infringing web page (and not only the information!). If the owner fails to comply, the provider must within a day block access to the entire website (not only to the web page!) containing the infringing information. Similar procedure applies in cases of copyright violation, except that the provider has three days to block the website.

A rare example of correlation between the Russian regulation of the Internet and the CoE standards are the rules on the liability of service providers (Article 1253.1 of the Russian Civil Code). Russian law does not hold information intermediaries liable for content if they are not aware that it violates Russian law, in line with the CoE's perspective. [435] At the same time, because legal regulation incites information intermediaries to remove content that is often excessively deemed "illegal," the intermediaries often become cogs in a large governmental censoring mechanism.

In May 2014, there was an attempt to challenge in court Roskomnadzor's order to block the blog of Alexey Navalnyy.[436] His blog had been unavailable for three days because it had disseminated calls for participation in mass actions "conducted in contravention of established procedures." Some of the blog's readers initiated a lawsuit against Roskomnadzor's order claiming that the blocking violated their right to access the website. The court did not elaborate on this issue and ruled in favour of the agency merely stating that the blocking was legitimate because the publication had violated national law.

The Russian Constitutional Court on online freedom of speech.

The Russian Constitutional Court has so far abstained from applying the Constitution to protect online speech or media freedom on the Internet and to restore the

[435] See, for instance, the Declaration of the CoE's Committee of Ministers "On Freedom of Communication on the Internet" and Recommendation CM/Rec(2011)7 of the CoE's Committee of Ministers to Member-States "On a New Notion of Media," adopted on 21 September 2011 at the 1121st meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=1835645

[436] Judgment of the Tagansky District Court of the City of Moscow of 5 May 2014. Retrieved from: https://rospravosudie.com/court-taganskij-rajonnyj-sud-gorod-moskva-s/act-453444950/

constitutional balance between protection of free speech and other legitimate rights and interests. On the contrary, the Court has consistently referred to constitutional provisions or to international standards to legitimise censorship despite the absolute ban of censorship in Article 29 of the Russian Constitution. In the resolution of the Constitutional Court on Krylov's complaint discussed in section 1.8, the Court claimed that the "technological opportunities of the Internet to disseminate information for unlimited number of people or to retain anonymity justified the need to specifically restrict online speech." While this statement in general might correlate with the ECtHR position on the need to ensure protection of human rights online, because of the specific nature of the Internet,[437] the Constitutional Court failed to elaborate on the CoE's perspective to specifically protect online freedom of speech, media freedom, access to the Internet, et cetera.

In 2015, the non-profit foreign organisation Watchtower Bible and Tract Society of New York, Inc. tried to challenge in Constitutional Court the provisions of the statute "On Information," which allows blocking of access to entire websites containing extremist content.[438] The reason for the challenge was that Russian courts had qualified as extremist some materials of the organisation Jehovah's Witnesses and had ruled to block the *entire* website disseminating them. When justifying this decision, the Supreme Court stated that the website had to be blocked in its entirety, rather than in part, to prevent further posting of extremist materials on it.

The Constitutional Court found that the impugned provisions fully complied with the Russian Constitution and with international standards. It stated that blocking of a whole website is a legitimate measure in preventing the dissemination of extremism with the aims to protect national security and human rights and freedoms. The Court also noted that, when holding decisions on qualifying an entire website or its parts as extremist, the courts must "judge from the need for the most effective counteraction of extremism," *inter alia* "by eliminating the causes and circumstances facilitating mass dissemination of information that had been previously found to be extremist." Thus, the Court recommended to lower courts to impose the harshest sanctions possible in cases

[437] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* of 5 May 2011.
[438] Resolution of the Constitutional Court of the Russian Federation "On the admissibility of the complaint of the foreign organization Watchtower Bible and Tract Society of New York, Inc., complaining about the violation of its constitutional rights by Article 1, paragraph 3 and Article 13 of the Federal Statute of the Russian Federation 'On Counteraction of Extremism Activity'" of 17 February 2015 as well as Article 15.1, paragraph 2 part 5 of the Federal Statute of the Russian Federation "On Information, Information Technologies and Protection of Information" of 22 December 2015.

concerning online extremist materials. This perspective cannot correlate with the CoE, and in particular with the ECtHR ruling on *Ahmet Yildirim v. Turkey*. It should be noted that the resolution of the Constitutional Court neither referred to the ECtHR case law nor addressed the issue of online freedom of expression.

A new notion of media?

Russia lacks specific guarantees for the protection of online media freedom. No legal document interprets the freedom of mass information as protecting online media, media-like, and other activities related to mass communication (see also section 1.8). Therefore, this freedom has never been applied to protect blogging or user-generated content in the country.

In Russia, the legal status of online "media-like" services was unclear before 2010. The statute "On Mass Media" does not explicitly say to what extent it is applicable to the Internet. The lack of clarity on this issue vis-à-vis Ukraine was considered a violation of the ECHR's Article 10 by the ECtHR in the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*. According to Article 2 of the Russian statute, the notion of mass media includes not only print and broadcast media, but also "other mass media." Therefore, all websites could be obliged to register with Roskomnadzor because the statute "On Mass Media" banned unregistered dissemination of mass information (see section 1.3). Consequently, after the registration, websites would be legally considered as mass media and subject to regulation by mass media legislation, regardless of their intentions and whether they exercise editorial control or not.

Such an approach may have dangerous consequences for freedom of expression online, as the experience of neighbouring Kazakhstan has shown. In 2009, Kazakhstan amended its national mass media statute by merely extending its scope to the entire Internet. Therefore, journalistic duties have been imposed on online users, and the procedure for removing online content deemed to be offensive for the country's political establishment was simplified.[50]

The first attempt to shed light on the regulation of new media in Russia was undertaken by the Supreme Court in its 2010 decree on the statute "On Mass Media," whose importance for media freedom was discussed in section 1.8. First, the decree unambiguously declared that "creation of websites and their usage for periodic dissemination of mass information is not banned by [Russian] legislation." It also stated that: "Websites are not subject to a compulsory procedure of registration in the capacity

of mass media. This means that it is impossible to bring to liability individuals who disseminate mass information on the Internet without registration." In other words, the Court established a guarantee that website owners can register their website as a media service, but that this registration is voluntary. The Court clarified that if a website is not registered, its activities, owners, and authors are not subject to the specific liability provided by Russian legislation for media services. Furthermore, the Supreme Court stated that the application for registering websites as media services cannot be refused if the application formally complies with the rules of the statute "On Mass Media." The decree also clarified that licensing of online broadcasters is unnecessary.

In general, these instructions of the Supreme Court protected online media freedom and can be said to comply, in spirit, with the CoE standards, particularly with regards to the criterion of media intent and purpose. If website owners intend to act as media and have underlying media objectives they may register their website with Roskomnadzor and consequently obtain media rights and obligations. At the same time, those who wish to register may not necessarily act as media services. In this case, the CoE and the Supreme Court's perspective differ. Under the CoE standards, such services would not be deemed media-like, while the Supreme Court suggested that they should be acknowledged as media only because of their initial intent. The Supreme Court's approach overlooked many criteria suggested by the CoE standards including the most important one—editorial control. However, this may be explained by the fact that the Court's decree predated the CoE's recommendation "On a New Notion of Media."

Nevertheless, the subsequent reform of the "On Mass Media" statute counteracted the liberal perspective of the Supreme Court, as Richter and Richter (2015) observe. On 14 June 2011, the amendments to the statute introduced a new type of mass media, a "web publication" defined as a website "registered in the capacity of a mass media outlet according to the statute." The amendments failed to explicitly establish that registration is voluntary, which could be interpreted to mean that any online "media-like" activities require registration.

While so far the registration of mass media has been voluntary, it is also important to note that the statute allows Russian authorities to impose registration on websites and to ban dissemination of mass information through unregistered websites. Currently, online journalists and editorial offices have the same scope of rights and obligations as offline media professionals. The procedures for establishing offline and online media outlets are the same, as guaranteed by the decree; the only differences are in the details.

For instance, the application for registration of a web publication must contain a domain name.

A significant distinction between web-based and traditional media concerns the shutting down of media outlets. Unlike traditional media, web publications are available to users even after the revocation of their registering certificates. The revocation deprives the media of rights and obligations; however, websites can continue to exist and function. This was the case, for example, of the online media Rosbalt, which continued to disseminate information after its registering certificate had been revoked and before the Russian Supreme Court had restored it (for details on this case, see section 1.8).

The 2011 amendments to "On Mass Media" reconsidered the Supreme Court's view on regulating online broadcasters and obliged broadcasters to obtain an "universal" license to broadcast on various platforms, including the Internet (Article 34 of "On Mass Media"). In practice, the licensing requirement has been so far applied in Russia only to traditional broadcasters, but the statute allows the possibility to penalize and shut down any online broadcaster, including foreign ones, broadcasting in the country without universal license. This approach considerably contrasts with the CoE standards (see also section 2.4).

The decree of the Russian Supreme Court was the first document addressing the issue of editorial responsibility of online media for user-generated comments. The Court found that the publication of readers' comments to editorial content are similar to organising live air broadcasts: in both cases editors cannot control in advance the content of third parties, as the Court stated. The Court reminded that, therefore, Article 57 Part 5 of the statute "On Mass Media" exempts media professionals from liability for the speech of their invited speakers during live air programs. Consequently, as the Court noted, this rule should also apply to media professionals in online media with regards to readers' comments. At the same time, the decree further noted that editorial offices should remove or edit comments at the request of an authorised state body if it found that the comments had violated the law. Otherwise, editors can be held liable for the content in the readers' comment, as the Court clarified. In principle, such a perspective may correlate with the CoE standards.[439]

However, in less than a month, Roskomnadzor significantly reconsidered the Supreme Court's perspective to editorial responsibility for user-generated comments and reduced the freedoms allowed by the Supreme Court's decree (Richter & Richter, 2015).

[439] *Delfi AS v. Estonia* and *MTE-Index v Hungary*.

On 6 July 2010, Roskomnadzor approved an order[440] obliging editorial offices to remove or edit comments within only one working day after Roskomnadzor's notice has been "sent" (and not necessarily received). In case of the outlet's failure to address the notice, Roskomnadzor may issue a warning of suspension of activities.[441] In its official press release[442] addressing the Delfi case, Roskomnadzor claimed that this action was fully consistent with the ECtHR's position, which is arguable because, at the least, the ECtHR demands a case-by-case consideration and because the Court has consistently noted that suspension of media outlets is a disproportionate restriction to media freedom (see section 2.2).

Since the 2014 amendments to the statute "On Information," blogs are not considered as media in Russia even if they act like media. At the same time, blogs with more than 3,000 daily visitors must register with Roskomnadzor, alongside operators of online correspondence ("organisers of dissemination of information"). In 2016, Russia obliged news aggregators that disseminate news in Russian and that have more than 1 million daily users to register with Roskomnadzor as well (Article 10.4 of statute "On Information"). Roskomnadzor's prescribed method to account for the number of users remains unclear.

Russian bloggers cannot be granted the same rights as journalists, as became evident from the Russian government's observations communicated to the ECtHR on a recent complaint by Alexey Navalnyy (Kornia, 2017). In 2011, the Lublinsky Court of Moscow ruled that the video, which Navalnyy had posted on his blog, defamed the reputation of the plaintiff, Vladlen Stepanov, and ordered Navalnyy to pay Stepanov a compensation of 100,000 rubles (around 1,600 euro) (Rozhdestvensky, 2016). The video featured the investigations of a massive fraud of money from the Russia's state budget. Previously, Magnitsky had tried to investigate frauds involving Stepanov and his ex-wife Olga Stepanova who figured in the Magnitsky case (see section 1.5 for information on the case). Under Stepanova's management, a Moscow tax office denounced most of fraudulent tax reimbursements, and her husband Stepanov got substantial funds because

[440] Order of Russian Federal Service for Supervision of Communications, Information Technologies, and Mass Media, "On Approval of the Procedure for Sending Injunctions on the Inadmissibility of Abuses of Freedom of Mass Information to Mass Media Outlets Disseminated on Information Telecommunication Networks, Including the Internet," No. 420 of 6 July 2010. Retrieved from http://rkn.gov.ru/docs/doc_537.pdf

[441] Accoring to Article 16 of the statute "On Mass Media."

[442] The official Facebook account of the Russian Federal Service for Supervision of Communications, Information Technologies, and Mass Media, 17 June 2015. Retrieved from https://www.facebook.com/roskomnadzor.official/photos/a.1485309358414507.1073741828.1460928964185880/1606030579675717/?type=1&theater

of this fraud, as noted by Andreas Gross,[443] a rapporteur to the CoE Committee on Legal Affairs and Human Rights.[444] Gross stated that, despite public evidence against the spouses, the Russian authorities exonerated Stepanova.[445]

On the complaint by Navalnyy, the ECtHR communicated to the Russian authorities to provide information on whether the national courts had examined such issues as: if Navalnyy's publication concerned issues of public interest; if they had paid attention to differences in legal regulation for bloggers and journalists; and if Navalnyy was requested to provide evidence in support of his perspective (Kornia, 2017). Georgy Matushkin, Russia's representative at the European Court, responded that Stepanov was not a public official and, therefore, was not obliged to tolerate wider criticism, as the CoE standards require (Kornia, 2017). Furthermore, the Russian official noted that Navalnyy was not a professional journalist, but a politician, and cannot enjoy the legal privileges accorded to the press. Therefore, Russian courts were not obliged to pay attention to the fact that Navalnyy had referred in his post to the previous publications of the impugned material in the mass media, the Matushkin stated (Kornia, 2017). Most likely, these justifications on the part of the Russian authorities will not satisfy the ECtHR.

According to Articles 10.2 and 10.4 of the statute "On Information," bloggers and news aggregators must comply with the general *requirements* of mass media legislation including the statute "On Mass Media." In general, the Russian regulation for bloggers and news aggregators imposes on them many journalistic obligations without providing the relevant rights and freedoms. The abovementioned articles explicitly oblige bloggers and news aggregators to verify information before publication, and to comply with some of the specific legal limitations during pre-election campaigns that journalists have. Like journalists, they cannot use obscene language in their publications. Furthermore, the provisions of the Russian statute "On Advertisement" also apply to them. Bloggers also must label information in accordance with the legislation protecting minors. While these requirements may be seen as relevant from the perspective of the CoE's standards, the regulation in general is imbalanced because bloggers and news aggregators lack the

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[443] See Addendum to the report *Refusing impunity for the killers of Sergei Magnitsky*, approved by the CoE Committee on Legal Affairs and Human Rights on 27 January 2014, Doc. 13356 Add. Retrieved from http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20345&lang=en

[444] The CoE Committee on Legal Affairs and Human Right is a CoE institution seeking to promote the rule of law and defend human rights. The Committee is, de facto, the PACE's legal adviser.

[445] Addendum to the report *Refusing impunity for the killers of Sergei Magnitsky*, approved by the CoE Committee on Legal Affairs and Human Rights on 27 January 2014, Doc. 13356 Add.

relevant media rights and freedoms. Additionally, the Russian concept of exemption from liability is only partly applicable to bloggers and news aggregators.

Some duties hardly correlate with the CoE's perspective. For instance, if they receive a request from Roskomnadzor, news aggregators are obliged to immediately stop disseminating any information (including the content of readers' comments). Unlike journalists, bloggers and news aggregators are deprived of the right to anonymity. Sherstoboeva and Pavlenko (2015) note that bloggers can remain anonymous to the general public, but not to state bodies. After their registration with Roskomnadzor, bloggers can receive a specific QR-code allowing them to keep their personal data hidden from readers. However, Benedek and Ketteman (2013) observe that anonymity mainly serves as a protection from the state and, therefore, is particularly irritating to governments. That is why the right to anonymity is strongly protected by international standards. In contrast to the CoE standards, the Russian ban on anonymity concerns any blog's publications, rather than addressing illegal speech only. In addition to the obligation of "organisers" to provide state bodies with users' correspondence upon request, as described above, Russian regulation of new media represents a legal mechanism that allows online censorship and surveillance, thus excessively limiting both free speech and privacy.

A failure on the part of bloggers and news aggregators to register entails considerable monetary sanctions of up to 30,000 rubles (about 480 euro) for individuals and up to 300,000 rubles (about 4,800 euro) for legal entities (as Article 19.7.10 of the Russian Code of Administrative Offences provides). Repeated violation causes the increase of monetary sanctions or suspension of media activities for up to 30 days, which is a severe and disproportionate measure. If a news aggregator fails to stop disseminating information upon Roskomnadzor's request, the fines are enormous—up to 400,000 rubles (about 6,360 euro) for individuals and up to one million rubles (about 15,900 euro) for legal entities, according to Article 19.7.10–1 of the Russian Code of Administrative Offences. If news aggregators repeat this violation the penalties increase to up to 700,000 rubles (about 11,130 euro) for individuals and up to three million rubles (about 47,700 euro) for legal entities. These provisions will most likely have a considerable chilling effect for free speech and media freedom in Russia.

In contrast to the CoE's "graduated approach," the Russian registration procedure is a mere formality and a tool of state control. Roskomnadzor's Register of Mass Media

Outlets[446] includes many websites that do not meet the criteria of media services, such as official web portals of state bodies, museums, universities, hospitals, and even online shops.

Roskomnadzor does not provide open data on the number of registered bloggers and "organisers," but these statistics are monitored by Roskomsvoboda. Its website states that around 2,109 blogs [447] and 67 "organisers" [448] have been registered with Roskomnadzor, as of 1 February 2017. The list of blogs mostly consists of web pages on VK.com, but also contains accounts with global services such as Instagram, Twitter, YouTube, LiveJournal. The list of "organisers" includes the popular Russian online services Yandex.ru, VK.com, Odnoklassniki.ru, and Mail.ru, and comprises no global "organisers," such as Google, Facebook, or WhatsApp, which, like many popular Russian bloggers, have largely ignored the requirements of the repressive Russian regulation. Unlike LinkedIn, they have not been blocked in Russia, although they violate national regulations.

In Russia, journalistic sources are protected under Article 41 of the statue "On Mass Media," but this provision does not shield bloggers' sources because they are non-media sources, according to the Russian legal perspective. "Whistleblowing" also remains unprotected in Russia, despite several ECtHR decisions in defence of this practice.[449]The fact that Edward Snowden was granted asylum in Russia in 2013, has no legal grounds. Unlike Snowden, Russian civil servants are not protected in Russia if they disclose confidential information even if such information involves public interest, as it follows from the resolution of the Constitutional Court on Mumolin's complaint that was examined in section 1.8.

To sum up, Russian regulation on online content is, for the most part, disproportionate and unclear, and has largely not correlated with the CoE standards. In Russia, protection of online freedom of speech and media freedom is not balanced with other rights, which could be explained by the fact that the Russian liberal regulation on speech and media was formed at a time when the Internet was not yet a widely used media platform in the country. Therefore, the Russian policy on online content has been consistently driven by a specific Russian concept of "information safety" put forward in

[446] The Register of Names of Registered Mass Media. Accessed at Roskomnadzor's official website: http://rkn.gov.ru/mass-communications/reestr/media/
[447] Retrieved from the official website of Roskomsvoboda: http://reestr.rublacklist.net/blogers/
[448] Retrieved from the official website of Roskomsvoboda: http://reestr.rublacklist.net/distributors/
[449] See, for instance, the ECtHR judgments on the cases of *Heinisch v. Germany* of 21 July 2011 and of *Guja v. Moldova* of 12 February 2008.

2000, as shown in the first chapter. The rising popularity of the Runet and its growing impact on public opinion caused the 2011 change in Russian Internet policy that resulted in the establishment of a broad legal mechanism for control over the online information flows both from within the country and without. In other words, while the pre-2011 policy contrasted with the CoE standards in that it mainly lacked rules protecting human rights and freedoms online, including free speech and media freedom, the post-2011 Russian legal model abounds with excessive restrictions to online content and lacks protective rules, thus miscorrelating with the CoE standards as well.

Russia often uses the same concepts as many other Western countries to limit online free speech and media freedom; however, in Western democracies the balance between protection of these rights and other rights or freedoms is controlled by existing institutions, including the ECtHR, while Russia mainly ignores the CoE standards.

Furthermore, Russia has created a system of governmental bodies that put in practice its repressive approach to online free speech and media freedom. Control over online free speech and media freedom is ensured by the Russian parliament, enforced by Roskomnadzor, and supported (or ignored) by the Constitutional Court. These bodies successfully resist the pro-liberal legal stances developed by the Supreme Court, which attempted to interpret the Russian legislation in line with the CoE standards. So far, the only factor constraining the repressive Russian policy on online content is its selective implementation, which may be accounted for by the Russian establishment's intentions to develop the Internet as a platform for business communication (rather than as a forum for political debates).

2.4. Audiovisual Regulation in Russia in the Context of the CoE Standards

The CoE standards provide specific regulation for broadcast media. Although Article 10 of the ECHR protects the freedom to receive and impart information and ideas through any media, including broadcasting,[450] it does not "prevent States from requiring the licensing of broadcasting, television, or cinema enterprises," which has been mainly justified by spectrum scarcity. While standards for licensing traditional TV and radio broadcasters are similar in many respects, audiovisual regulation has more requirements because of the visual component. The ECtHR has noted[451] that TV programmes have considerable power to form and mislead public opinion. As this section shows,

[450] See the ECtHR judgment on the case of *Sacchi v. Italy* of 12 March 1976.
[451] See the ECtHR judgment on the case of *Demuth v. Switzerland* of 5 November 2002.

audiovisual regulation is becoming even more multidimensional due to recent changes in information technologies as well as in viewers' habits.

As discussed in the first chapter of this thesis, regulation of the Russian broadcasting sector has been a very problematic issue. Freedom of mass information implies freedom of broadcasting, but it has not been articulated neither in the country's legislation nor in court practice. As early as 2003, the UN Human Rights Committee raised concerns about increasing governmental control over major Russian media organizations, "either directly or indirectly through state-owned corporations" (2003, p. 5) meaning mostly TV companies. It invited Russia "to protect media pluralism and avoid state monopolisation of mass media, which would undermine the principle of freedom of expression enshrined in article 19 of the Covenant [meaning ICCPR]" (p. 5). As mentioned in section 1.5, since 2005, the PACE has consistently criticised Russia for the lack of public service broadcasting and political pluralism in this area. As I mentioned before, Russia failed to ratify the ECTT, the main CoE convention regulating TV broadcasting. Russia still lacks parliamentary acts on broadcasting and public service media. At the same time, Russian broadcasting regulation is abundant, as TV and radio broadcast media is governed by various statutes and numerous governmental regulations.

Russian TV broadcasting regulation is particularly complex because television plays the most significant role in forming public opinion in Russia among other forms of media. According to the report of the CoE European Audiovisual Observatory (2016: 3), "TV has found its way into most homes in Russia"— Russian households have on average 1.6-1.7 TV sets. Although Russians' level of credibility of the information they hear on TV has decreased over the last few years,[452] 86% of Russian adults still consume news and information through TV, as the Levada Centre's survey of July 2016 shows (Levinson, 2016). Even those Russians who use the Internet daily (80%) claim that they trust TV news more than online news. Information radio stations are not popular among Russians, particularly among the age group of 50 and up.[453] As to audiovisual services on-demand,[454] the report of the CoE European Audiovisual Observatory (2016) shows

[452] The survey RosIndex (Ipson Comcon, 2016) has illustrated a significant drop in trust in television among Russians. In comparison to the beginning of 2014, it decreased by around 10% in 2015 and made up 33%, which is, nevertheless, a respectively high index showing that one third of the Russian population trusts TV.

[453] However, *Radio Rossii*, owned by VGTRK, reached top-five of the most popular stations among Russians aged 50+ in 2015. This station has the greatest number of broadcasting points in Russia. Another information station among the leaders in the number of broadcasting points is *Mayak*, which also belongs to VGTRK. See for details, Federal Agency on Press and Mass Communications (2016b).

[454] On-demand systems provide services allowing users to select and watch or listen audio or audiovisual content at the time and place they choose.

that its market is low in Russia.

Therefore, this section strongly focuses on a comparison between the CoE's and Russian approaches to regulation of traditional TV, but it also concerns other issues relevant to radio broadcasting and new audiovisual media services. Apart from the process of licensing of radio and TV broadcasting, this section studies several issues that are important for audiovisual regulation. They are the following: media pluralism and media concentration, broadcast regulatory authorities, public service media, digitalisation, protection of minors, access to information of public interest through audiovisual media, support for national production, advertisement and teleshopping in audiovisual media. The section first outlines the CoE's perspective on audiovisual regulation and then proceeds to the Russian one.

The CoE's Perspective on Audiovisual Regulation

In the Western countries, licensing as a form of governmental control over broadcasting emerged in the 1920s–30s. Licensing was mainly justified by spectrum scarcity, electoral gains, and mass deception. It was presumed that pluralism and quality of broadcast programming policy could be ensured only with governmental intervention, which led to a high degree of state control over broadcast media (van Cuilenburg & McQuail, 2003).

The adoption of the international conventions [455] guaranteeing freedom of expression after the end of World War II impacted national broadcast policies in the Western countries. However, the opening of the European broadcasting market was impeded by attempts to protect the relatively weak and subsidised European industry from Hollywood productions, as Oster (2017) notes. He stresses that this was more cultural than economic protectionism. Consequently, as he suggests, the European transnational broadcasting law has been based, on the one hand, on the idea of "free flow of information" and, on the other, on the intention to protect cultural values as well as public policy interests.

Therefore, independent regulation of broadcasting emerged in Western Europe much later than in the United States, during the last quarter of the twentieth century (Barata, 2014), after the concept of spectrum scarcity was challenged due to the emergence of cable and satellite TV. During that time, as Barata notes, independent authorities in broadcasting were established to ensure appropriate regulation and to

[455] UDHR, ICCPR, ECHR.

protect public interest in sectors where state operators still functioned. Barata observes that European independent regulation of that period mainly focused on "gradual liberalisation and opening of broadcasting markets in traditionally state-monopolised markets" (2014, p. 18).

The advent of digital technologies and converged media has created new opportunities for everyone to disseminate information in an audiovisual form, without occupying a frequency spectrum. Justifications for regulating the broadcasting sector have shifted to mainly include considerations of support for public service broadcasting (Czepek, Hellwig, & Nowak, 2009), promotion of cultural independence, and resistance to globalisation (Salomon, 2008). However, Noam (2007) suggests that the principal rationale for broadcasting regulation remains the same. He argues that legal frameworks for broadcasting always seek to address particular national concerns, problems, priorities, and traditions, which do not disappear with the development of digital technologies. Building on Noam's perspective, Barata considers the rationale for audiovisual regulation in a broader sense:

> audiovisual regulation exists due to a general understanding of the need to avoid the negative effects of the dissemination of certain forms of content and, more broadly, to preserve a certain idea of the relationship between the media sector, governmental institutions and the citizens. (2014, p. 19)

In Europe, audiovisual legislation remains a national issue, despite the impact of international standards, as Barata notes, and Noam predicts that nations would simply adjust their regulative tools to the new environment.

Oster (2017) suggests that the European broadcasting order has been mainly shaped by the CoE, its European Convention on Transfrontier Television (ECTT)[456] and the ECtHR case law on Article 10 of the ECHR. Additionally, he notes, the EU's broadcasting order has been affected by internal EU market provisions, such as the decisions of the ECJ, the Television without Frontiers Directive (TWFD) and its successor, the EU Audio-Visual Media Services Directive[457] (AVMSD), as well as the decisions of the Court of the European Free Trade Association (EFTA), interpreting the TWFD and the AVMSD. Some of the basic principles of the ECTT and the AVMSD are

[456] European Convention on Transfrontier Television, adopted on 5 May 1989 in Strasbourg. Retrieved from https://www.coe.int/ru/web/conventions/full-list/-/conventions/rms/090000168007b0d8

[457] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, "On the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)." Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0013

considered below.

The ECTT remains the main CoE convention specifically addressing audiovisual regulation and is a legally binding document for the signatory parties. The ECTT was adopted in 1989 to create a clear legal framework for the free transfrontier transmission and retransmission of television programme services in Europe. It develops the commitments of Article 10 of the ECHR with regards to the broadcasting sector through the provision of minimal standards for its regulation. The ECTT greatly relied on the TWFD, but after the latter was considerably amended and codified as the AVMSD, these documents diverged in important aspects concerning the development of digital technologies. In particular, the ECTT only applies to traditional TV broadcasting. It is neither applicable to VoD services nor to online broadcasters, unlike the AVMSD, whose approach to audiovisual regulation is studied below.

The ECTT is applicable to any television programme service within the party's jurisdiction (transmitted either through cable, terrestrial transmitter, or satellite) that can be received, directly or indirectly, in at least one other party (Article 3). A "programme service" means "all the items within a single service provided by a given broadcaster" (Article 2(d)). "Broadcaster" is defined as "the natural or legal person who has editorial responsibility for the composition of television programme services for reception by the general public and transmits them or has them transmitted, complete and unchanged, by a third party" (Article 2(c)) The ECTT thus makes a distinction between communication service operators through the notion of editorial responsibility. "Transmission" means "the initial emission by terrestrial transmitter, by cable, or by satellite of whatever nature, in encoded or unencoded form, of television programme services for reception by the general public," according to Article 2(a), which also explicitly states that it does not cover communication services operating on individual demand.

The ECTT establishes the minimum common regulatory rules in various fields, such as programming, advertising, sponsorship, and the protection of certain individual rights. Article 5 obliges each transmitting party to "ensure that all programme services transmitted by broadcasters within its jurisdiction" comply with the ECTT terms. Furthermore, Article 28 permits the parties to apply stricter or more detailed rules than those provided for in the ECTT "to programme services transmitted by a broadcaster deemed to be within their jurisdiction." These rules, however, must match the criteria of

the three-part test,[458] as provided by Articles 19(3) of the ICCPR and 10(2) of the ECHR.

Article 4 bans the restriction of retransmissions of programme services of another party if they comply with the ECTT. If the ECTT party identifies a violation, it must communicate it to the party where the violation originated, and the two parties must overcome the problem through cooperation and arbitration procedures (Articles 19, 24–26). According to Article 24, if the "alleged violation is of a manifest, serious, and grave nature, which raises important public issues and concerns" and "if it persists within two weeks following the communication," the receiving party has a right to suspend the retransmission of the infringing programme service.

TWFD was codified as AVMSD in 2007 to establish common rules for the EU audiovisual market and to ensure the free movement of broadcasting services throughout the EU in a digital media environment. To that aim, the directive introduced the notion of "audiovisual media services" encompassing television broadcasts, VoD services as well as audiovisual commercial communications. According to Article 1 Part 1(a) of the AVMSD, an audiovisual media service is a service in the sense of Articles 56 and 57 of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU),[459] "which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform,

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[458] The limitations (1) must be established by law, which means clear and transparent frameworks for the broadcast media (the criterion of legality); (2) they must pursue a legitimate aim, i.e. must meet the criterion of legitimacy; and (3) they must be necessary in a democratic society, i.e. they meet the criterion of necessity. If licensing requirements fail to comply with this test, licensing cannot serve broadcasting media pluralism or independence, from the ECtHR's standpoint.

[459] Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), 2012/C 326/01, in Article 56 says:
Within the framework of the provisions set out below, restrictions on freedom to provide services within the [European] Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the [Union].
Article 57 states:
Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
"Services" shall in particular include:
(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions.
Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.
Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

entertain, or educate the general public by electronic communications networks."[460] In other words, the AVMSD proposes the following collective criteria for identifying an audiovisual media service: (1) a service as defined by Articles 56 and 57 of the TFEU, which includes "commercial" purposes; (2) providing programmes; (3) the provision of the programmes is the service's major purpose; (4) the programmes are provided to the general public; (5) with the intention to inform, entertain, or educate; (6) under the editorial responsibility of a media services provider; (7) via electronic communication networks.

Consequently, the AVMSD excludes from its regulation user-generated videos on online platforms such as YouTube or Vimeo, because they are not provided on commercial basis and do not subject to editorial responsibility. The directive does not cover private websites or goods, such as video tapes, DVDs, *et cetera*. Its regulations do not extend to radio because it defines a programme as a set of moving images (Article 1(b)). The directive does not regulate video interactive services on-demand, such as video conferences, electronic data banks, *et cetera.* At the same time, Oster (2017) notes that, after the ECJ's landmark decision on the New Media Online case,[461] the AVMSD should be understood to provide a relatively low threshold for the regulation of videos that are offered on commercial basis and are not randomly posted by online users.

The AVMSD distinguishes between linear and non-linear audiovisual media services and provides different regulation for them. Linear audiovisual services, such as analogue or digital TV, live streaming, webcasts, or near-video-on-demand, [462] are provided "for simultaneous viewing of programmes on the basis of a programme schedule" (Article 1 Part 1(e) of the AVMSD). Non-liner services, such as iTunes or the BBC player, offer the opportunity to watch programmes in a time-delayed manner. It is presumed that non-linear audiovisual media services have a less harmful effect on viewers than TV broadcasting because the viewers are able to choose non-linear services and control their usage. Additionally, TV broadcasting is of greater social import, according to the AVMSD. Therefore, non-linear media services have to comply with the basic rules

[460] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, "On the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)."
[461] See the ECJ's judgment of the New Media Online case of 21 October 2015. Retrieved from http://curia.europa.eu/juris/liste.jsf?num=C-347/14
[462] On near-video-on-demand, see ECJ decision on the 2005 case *Mediakabel v. Commissariaat voor de Media*.

provided by the directive,[463] such as incitement to hatred, advertising, and the protection of minors from harmful content. EU member-states are free to establish and apply more detailed or stricter rules provided that they are consistent with the general EU principles,[464] which are, in turn, aligned with the CoE standards.

Oster (2017) outlines six main principles for the European broadcasting order. First, it is generally acknowledged that broadcasting is crucial in ensuring free flow of information and ideas as well as media pluralism (a concept, which will be specifically examined below). According to the European standards, national authorities should ensure freedom of expression and information in accordance with Article 10 of the ECHR and they "shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services" in line with Article 10.[465] Thus, broadcasting freedom encompasses freedom of reception,[466] transmission,[467] and retransmission[468] so that viewers can enjoy freedom of information regardless of frontiers and without interference.

The second principle is country-of-origin, meaning that providers of audiovisual media services only need to abide by the rules of a member-state rather than by those of other EU countries. If another country has stricter national rules than those set in the AVMSD, one must apply the provisions of the country under whose jurisdiction the providers operate. The third principle is the importance of broadcasting for domestic as well as pan-European culture. The fourth is the so-called "broadcasting dualism," or coexistence of private and public broadcasting. The fifth principle encourages co-regulation and/or self-regulation in broadcasting. The sixth principle distinguishes between regulation of audiovisual content and transmission because the ECTT and the AVMSD are applicable to content, but not to transmission. According to Article 3 of the ECTT, transmission of programme services may be ensured by any technical means.

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[463] See, particularly, Articles 6, 9 and Chapter IV of the AVMSD at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0013

[464] See for details https://ec.europa.eu/digital-single-market/en/general-principles#stricter-rules

[465] See Article 4 of the ECTT.

[466] The ECtHR stated in one of the rulings on the case of *Autronic AG v. Switzerland* of 22 May 1990 that the freedom to receive information through broadcasting may be executed across borders and without the consent of the broadcasting state even if this freedom is implemented for purely economic gains.

[467] Transmission does not include communication services operating on individual demand, as the ECTT notes. Transmission is defined in Article 2 of the ECTT as "the initial emission by terrestrial transmitter, by cable, or by satellite of whatever nature, in encoded or unencoded form, of television programme services for reception by the general public."

[468] According to Article 2 of the ECTT, retransmission "signifies the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public."

Within the EU, issues of transmission are regulated by the legislation on electronic communication, with the exception of "must-carry" rules, which concern content regulation and, therefore, are examined below.

It should also be emphasised that despite their differences, the AVMSD and the ECTT are based on the same general concepts: the notions of "programme" and "editorial responsibility" (for a discussion on the latter notion, see the previous section on new media). At the CoE level, the main documents regarding the broader notion of audiovisual media services are the Recommendation of the CoE's Committee of Ministers "On a New Notion of Media"[469] (examined in the previous section) as well as the 2009 PACE's Recommendation "The Regulation of Audio-Visual Media Services."[470] The latter noted the trends towards increasing convergence in the media sphere stating that

> Traditional audio-visual and print media are increasingly converging into new forms of electronic media for images, sound, and text which are accessible via different fixed or mobile platforms using analogue or digital terrestrial transmissions, satellite, or cable. Much of what is now considered broadcasting may in future be delivered over the Internet, where the user controls his or her access to countless sources of content, which know no geographic boundaries.

Therefore, the document urged national legislators to review the existing regulation and to establish new means for achieving their goals concerning audiovisual media policy. The recommendation paid particular attention to the issues of media pluralism, "public service mission," and licensing—these have been traditionally crucial issues for broadcasting regulation, as I show below. The PACE recommendation gave some suggestions on how these concepts should be applied in the context of new audiovisual media services. For instance, it stated that Internet radio and web television should be regulated in similar ways as Internet-based newspapers or regular websites.

The recommendation also made several suggestions for improving the draft of an amending protocol to the ECTT seeking to transform the ECTT into a new CoE convention, which would establish legal framework for any audiovisual media services (not only for TV broadcast media). However, the draft has been frozen (Council of Europe, 2011b) as of 2011 because of pressure from the EU. The Vice-President of the

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[469] Recommendation CM/Rec(2011)7 of the CoE Committee of Ministers to member-states "On a New Notion of Media," adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies.

[470] Recommendation 1855 (2009) of the CoE Parliamentary Assembly, "The regulation of audio-visual media services," adopted by the Assembly on 27 January 2009 (3rd Sitting). Retrieved from http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17700&lang=en

European Commission (the EU institution responsible for proposing legislation) stated in a letter to the CoE's Secretary General that the EU has "exclusive competence for the issues covered by the draft" and that "EU member States are not allowed to become party to the Convention on their own" (Council of Europe, 2011b). The CoE's Committee of Ministers authorised proposals to discontinue work on the draft and to halt further negotiations on the Convention.

Nevertheless, audiovisial regulation in Europe remains a complex issue, hotly debated among scholars and legislators. A proposal to amend the AVMSD "in view of changing market realities" was published by the European Commission in May 2016. The proposal suggests that the AVMSD would oblige video-sharing platform services (such as YouTube) to comply with the basic rules on hate speech and the protection of minors. However, the proposal might contradict current EU regulation, as Oster notes (2017). He also suggests that the distinction between linear and non-linear services is often difficult to establish and that it is becoming increasingly artificial with further developments of new technologies. Noam argues that because in the future most media will be delivered through the Internet, media will be governed by Internet regulations, which, in turn, will resemble telecom regulations.

In this new context, Barata suggests that

> audiovisual regulation will need to move from the traditional areas of licensing and content monitoring under pre-established rules to the terrain of ex post, flexible, and principled intervention to find in each case the adequate way to protect classic values such as pluralism, competition, freedom to access content, and protection of vulnerable audiences. (2014, p. 22)

Therefore, he notes that national legislators should pay considerable attention to the increasingly important independent character of regulatory authorities, should ensure proper antitrust regulation and support the institutions of self-regulation and co-regulation. Additionally, he emphases that the fundamental principles of broadcast regulation should not be disregarded. He stresses that restrictions to the broadcast market or to freedom of expression and information should comply with the basic principles of subsidiarity and proportionality.

Pluralism in audiovisual media.

Media pluralism is a multifaceted notion, and it is increasingly complex to identify and measure media pluralism in a digital media environment. The abovementioned PACE

recommendation, "The Regulation of Audio-Visual Media Services,"[471] pays attention to the fact that a greater choice of audiovisual media services and content, ensured by new technologies, "does not necessarily mean greater plurality, diversity, and quality of content, which remain priorities for audio-visual policies."

As a legal concept, media pluralism relates to any media. Hitchins emphasises that, being a forum for ideas and information and a generator of debate, the media "must be able to offer a variety of voices and views, and operate independently, without undue dominance by public or private power" (2006, p. 31). Media pluralism is a universal concept deriving from commitments included in Article 19 of the ICCPR and Article 10 of the ECHR. The concept is also partially addressed in Article 27 of the ICCPR, which reinforces media pluralism in some aspects. It states that:

> In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Consistent with the ECHR, the Charter of Fundamental Rights of the EU,[472] enshrining human rights for EU citizens, includes a specific reference to media pluralism. Its Article 11 on freedom of expression and information in Part 2 states: "The freedom and pluralism of the media shall be respected."

Media pluralism may be particularly important for broadcasting due to spectrum scarcity. Several judgments were held by the ECtHR on broadcasting pluralism.[473] In *Verein Alternatives Lokalradio Bern, Verein Radio Dreyeckland Basel v. Switzerland*, the ECtHR noted that: "Such factors, encouraging in particular pluralism in broadcasting, may legitimately be taken into account when authorising radio and television broadcasts." Additionally, pluralism in audiovisual media is crucial because of the strong influence that audiovisual media services have on social opinions, views, and cultural settings. The ECJ has defined media pluralism as a "cultural policy," which is intended to protect "the freedom of expression of the various—in particular social, cultural, religious, and philosophical—components of a Member State in order that that freedom may be capable

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[471] Recommendation 1855 (2009) of the CoE Parliamentary Assembly, "The regulation of audio-visual media services," adopted by the Assembly on 27 January 2009 (3rd Sitting). Retrieved from http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17700&lang=en

[472] Charter of Fundamental Rights of the EU. OJ C 326, 26.10.2012. Retrieved from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

[473] See, for instance, *Verein Alternatives Lokalradio Bern, Verein Radio Dreyeckland Basel v. Switzerland* of 16 October 1986; *Informationsverein Lentia and Others v. Austria* of 24 November 1993; *VgT Verein gegen Tierfabriken v. Switzerland* (No. 1) of 28 June 2001; and *Manole and others v. Moldova*.

of being exercised in the press, on the radio or on television."[474]

Media pluralism itself does not constitute a human right, but ensuring media pluralism implies positive obligations of member-states under the conventional standards on freedom of expression, as Oster (2017) argues. He notes that governmental obligations with regards to media pluralism are complex and include establishing public service broadcasting, proper antitrust media policies, and providing support for media pluralism. Additionally, he observes that the case law of both European courts, the ECtHR and the ECJ, provides evidence that "a high level of media pluralism may constitute an unwritten legitimate aim justifying an interference with media freedom" (2017, p. 160). For instance, the ECtHR has stated that "[i]t is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself."[475]

In general, the CoE's Parliamentary Assembly acknowledges media ownership as an "indicator" for media in a democracy.[476] The Assembly noted that "media ownership and economic influence over media must be made transparent. Legislation must be enforced against media monopolies and dominant market positions among the media."[477] The Assembly stated that private media should not be run or held by the state or state-controlled companies because governmental control per se puts media freedom in danger, as derived from Article 10 of the ECHR.

While the CoE principles provide no detailed standards with regards to media ownership, this issue becomes of concern to the CoE's institutions if it threatens media pluralism (I raised this issue in the first chapter when examining the ECtHR ruling on the case of *Saliyev v. Russia*). For instance, in the ruling on the case of *Informationsverein Lentia and Others v. Austria*, the ECtHR noted that a public audiovisual monopoly is a disproportionate interference to freedom of expression. In this case, the applicant complained of the impossibility to establish a broadcaster in Austria because this right was limited to the Austrian Broadcasting Corporation, an autonomous public-law

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[474] The ECJ judgments on *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media* of 25 July 1991; *Commission v. Netherlands* of 30 May 1991; *Veronica Omroep v. Commissariaat voor de Media* of 3 February 1993; *TV 10 SA v. Commissariaat voor de Media* of 5 October 1994.

[475] *Manole and others v. Moldova* of 17 September 2009; see also *Centro Europa 7 S.r.l. and Di Stefano v. Italy* of 7 June 2012.

[476] Resolution 1636 (2008) of the CoE's Parliamentary Assembly "Indicators for Media in a Democracy," adopted by the Assembly on 3 October 2008 (36th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17684&lang=en

[477] Resolution 1636 (2008) of the CoE's Parliamentary Assembly "Indicators for Media in a Democracy," adopted by the Assembly on 3 October 2008 (36th Sitting).

corporation. The national authorities were of a viewpoint that only a system based on monopoly of the corporation would ensure impartial and objective reporting, pluralism of opinions, and the independence in programming policy. However, the ECtHR found that this approach threatened freedom of expression and represented a violation of Article 10 of the ECHR.

Any media concentration, whether it is private or governmental, is a threat to media pluralism and democracy in general, from the CoE perspective. In the 2007 Declaration "On Protecting the Role of the Media in Democracy in the Context of Media Concentration,"[478] the CoE's Committee of Ministers stated that

> media concentration can place a single or a few media owners or groups in a position of considerable power to separately or jointly set the agenda of public debate and significantly influence or shape public opinion, and thus also exert influence on the government and other state bodies and agencies.

The declaration proclaimed the ECtHR and Article 10 of the ECHR as "guarantors of pluralism," thus stressing that media concentration cannot be a national issue.

Recommendation R(99)1 of the CoE's Committee of Ministers "On Measures to Promote Media Pluralism"[479] advises the governments of member-states to examine and enshrine several measures in their national legislations, among which are the following:

- defining legal thresholds to media ownership. Such thresholds may be based on a maximum audience share or on the revenue/turnover of media companies;
- ensuring media pluralism through the activities of regulating bodies, for instance, authorities governing general competitions. The government may also consider the possibility to create a dedicated independent body with the power to act against mergers or other concentration operations in the media industry.

Additionally, anti-concentration measures may also include refusals of an authorisation or a licence request, according to another recommendation of the Committee of Ministers, "On Media Pluralism and Diversity of Media Content."[480]

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[478] Declaration of the Committee of Ministers "On Protecting the Role of the Media in Democracy in the Context of Media Concentration," adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies. Retrieved from https://search.coe.int/cm/Pages/resultdetails.aspx?ObjectID=09000016805d6b78

[479] Recommendation R(99)1 of the CoE's Committee of Ministers to member-states "On Measures to Promote Media Pluralism," adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers' Deputies. Retreived from https://search.coe.int/cm/Pages/resultdetails.aspx?ObjectID=09000016804fa377#globalcontainer

[480] Recommendation CM/Rec(2007)2 of the Committee of Ministers to member-states "On Media Pluralism and Diversity of Media Content," adopted by the Committee of Ministers on 31 January 2007 at

Licensing.

Neither the CoE standards nor the AVMSD bans national authorisation requirements. Salomon argues that licensing procedures are still needed, from the CoE's perspective, to ensure pluralism and free flows of information: "It is the licensing process through which governments introduce and enforce the other purposes of broadcasting regulation: the democratic, economic, cultural, and consumer protection purposes" (2008, p. 9). Nevertheless, licensing procedures must match the criteria of the three-part test, as the ECtHR has explicitly stated.[481]

The broadcast media are not guaranteed the right to obtain a licence, as the ECtHR noted in the ruling in the case of *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland* of 16 October 1986. This, however, does not mean that states have an unlimited margin of appreciation concerning licensing, as the court suggests. It stated that "a licensing system not respecting the requirements of pluralism, tolerance, and broad-mindedness without which there is no democratic society would thereby infringe Article 10 §1 of the Convention."

In the ruling on the case of *Meltex Ltd and Movsesyan v. Armenia*,[482] the ECtHR stated that the authorities had failed to ensure adequate protection against interference by a public authority. The broadcast licence of the applicant TV company was suspended after its refusal to broadcast a pro-governmental material during the 1995 presidential campaign. Two years later, the company was granted a five-year license. In 2000, the national authorities introduced new licensing legislation and established a new public organisation, whose members were appointed by the president, to monitor and grant licences to private broadcasters. According to the new licensing rules, in 2002 the organisation announced a call for tenders for several frequencies, including the frequency of the applicant. At a public hearing, its band was awarded to another company without any reasoning. Consequently, the ECtHR found a violation of Article 10.

In the case of *Centro Europa 7 S.r.l. and Di Stefano v. Italy,*[483] the ECtHR ruled that the national authorities had violated Article 10 of the ECHR because they failed to ensure media pluralism through their licensing system. The court found that national

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the 985th meeting of the Ministers' Deputies. Retrieved from https://search.coe.int/cm/Pages/resultdetails.aspx?ObjectID=09000016805d6be3

[481] See, for instance, the ECtHR judgment on the case of *Groppera Radio AG and others v. Switzerland* of 28 March 1990.

[482] See the ECtHR judgment on the case of *Meltex Ltd and Movsesyan v. Armenia* of 7 June 2008.

[483] *Centro Europa 7 S.r.l. and Di Stefano v. Italy* of 7 June 2012.

frameworks were unclear as to the terms of frequency allocation and, therefore, did not meet the criterion of foreseeability of restrictions to freedom of expression.

The CoE standards recommend that governments follow several principles when executing licensing procedures. These principles help to ensure that such procedures are carried out in a fair, transparent, and non-discriminatory manner so that licences would be granted to those broadcasters that would better serve the public's interest. In general, the CoE standards suggest that:[484]

- licensing rules be explicitly established by law that would pay attention to the specifics of broadcast media and its crucial role in supporting and facilitating democracy in member countries;
- licensing systems should be precise and non-discriminatory; licensing rules should contain clear terms and conditions as well as unambiguous, non-discriminatory criteria for granting licences and allocating frequencies; calls for tenders should be public;
- licensing should be overseen by independent governing bodies, whose decisions are accountable and accessible to the public;
- the main criterion for granting a licence should be the programming policy, otherwise, a licensing system would not be able to ensure pluralism and diversity of opinions;
- the licensing term be of long duration.

It is worth noting that international standards distinguish between licensing requirements for broadcasting and registration: while the former is permissible, the latter may represent a disproportionate interference with freedom of expression. Compulsory media registration may be compatible with media freedom only if the requirements meet the three-tier test (section 1.7 examined the two ECtHR rulings on the cases of *Dzhavadov v. Russia* and *Gaweda v. Poland* in which the ECtHR found violations of freedom of expression noting that the registering requirements were not prescribed by law). At the same time, so far CoE standards only provide general criteria on the issue of the "necessity" and "proportionality" of registering requirements in light of Article 10.

This matter has been examined most comprehensively by the OSCE Representative on Freedom of the Media in his special report (OSCE, 2006a) on media registration. The

[484] See Recommendation Rec(2000)23 of the CoE's Committee of Ministers to member-states "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector," adopted by the Committee of Ministers on 20 December 2000, at the 735th meeting of the Ministers' Deputies. Retrieved from: https://search.coe.int/cm/Pages/resultdetails.aspx?ObjectID=09000016804e0322

report explains the difference between three regimes for establishing media in the OSCE region: licensing, registration, and notification. Comparing registration and notification, the report states that: "The essential difference between the two terms is that notification allows a newspaper owner to inform the government of its existence, while registration allows the government to inform a newspaper that it may exist."

The report notes that "registration" usually means "official authorisation," or "permissive" procedure, and it stresses the disproportionate nature of this regime, in light of media freedom. Registration requires substantive information from the applicant before the governmental authority allows the creation of the media outlet. By contrast, notification implies informing the authorities about the creation of a new media outlet, in order for it to be listed in the national register. The report notes that, unlike registration, notification is compatible with the OSCE commitments on media freedom and information pluralism. The report criticises the excessive registration and re-registration procedures that Russian legislation has established for media outlets, and it also advises Russia to reconsider them. While the report fails to explicitly state that neither registration nor notification are required to establish broadcast media, it is implied from its statement that broadcast companies are governed through licensing procedures.

Broadcasting regulatory authorities.

The existence of independent broadcasting regulatory authorities is a precondition for ensuring freedom of expression and information through broadcasting as well as audiovisual media pluralism. From the CoE's perspective, member-states have committed to guarantee the independence of broadcasting regulatory authorities and ensure their effectiveness, transparency, and accountability.[485] The Recommendation of the CoE's Committee of Ministers, "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector,"[486] states that the member-states should

> include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an effective, independent, and transparent manner, in accordance with the guidelines set out in the appendix

[485] Declaration of the CoE's Committee of Ministers "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector," adopted by the CoE's Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies.
[486] Recommendation Rec(2000)23 of the CoE's Committee of Ministers to member-states "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector," adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies.

to this recommendation.[487]

The appendix establishes guidelines for member-states in ensuring the independent and effective functioning of broadcasting regulators:

1) Member-states should devise appropriate and clear legislative frameworks establishing: (i) rules and procedures affirming and protecting the independence of regulatory authorities; (ii) duties and powers of the authorities; (iii) obligations of their accountability to the public; (iv) procedures for appointment of their members and the means of their funding.
2) The frameworks should include rules protecting regulators from any interference. National legislation should guarantee that the members of regulating bodies have no interests in media or other sectors. In case of a conflict of interests, dismissals are acceptable. Appointment procedures of such members should be democratic and transparent.
3) Financial independence is a key element of the independence of regulatory authorities, as the appendix says. Funding arrangements should be specified in law and should comply with a clearly defined plan containing the estimated cost of the regulators' activities. Any possibility of governmental interference in financial decision-making processes should be eliminated through national legislation.

The Declaration of the CoE's Committee of Ministers, "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector," develops the concept of "culture of independence" in broadcasting, which is "vital for the adequate regulation of broadcasting in the new technological environment"[488] because, without this culture, broadcasting systems may serve the interests of state authorities or political structures that may abuse them through the use of licensing mechanisms. Apart from independent regulatory authorities, a "culture of independence" in broadcasting also includes commitments by civil society and by broadcasters themselves. Specifically, the document invites civil society and media organisations to monitor how broadcasting regulatory authorities perform their functions.

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[487] Recommendation Rec(2000)23 of the CoE's Committee of Ministers to member-states "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector," adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies..

[488]Declaration of the CoE's Committee of Ministers "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector," adopted by the CoE's Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(26.03.2008)&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75&direct=true

Public service broadcasting.

Public service broadcasting is a vital element of democracies and an inherent component of media pluralism, according to the CoE. Public service broadcasting represents "an essential factor of pluralistic communication accessible to everyone," as Resolution No. 1 of the CoE's Committee of Ministers "The Future of Public Broadcasting"[489] stated in 1994.

The CoE standards note that public service media may be run by public organisations or privately-owned companies, but it differs from the state-owned or private media "for purely commercial or political reasons because of its specific remit, which is essentially to operate independently of those holding economic and political power," as noted in the CoE Parliamentary Assembly's Recommendation 1641 (2004) "Public Service Broadcasting."[490] This document stresses that public service broadcasting is different from state-owned or private media in terms of programming policy, which meets the public's interest, enhances "social, political, and cultural citizenship and promotes social cohesion."

Most of the CoE documents concerning public service broadcasting are dedicated to the issue of its independence, which emanates from more general commitments to Article 10 of ECHR. The CoE Parliamentary Assembly's Resolution "On Indicators for Media in a Democracy"[491] suggests that "public service broadcasters must be protected against political interference in their daily management and their editorial work. Senior management positions should be refused to people with clear party political affiliations."

The appendix of an earlier CoE document, the Recommendation No. R (96) 10 of the CoE's Committee of Ministers "On the Guarantee of the Independence of Public Service Broadcasting,"[492] provides member-states with guidelines for the governance of public service broadcasting. They concern the following issues:

1) General frameworks

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[489] Resolution No 1, "The Future of Public Broadcasting," adopted by the CoE's Committee of Ministers in the 4th European Ministerial Conference on Mass Media Policy, Prague, 7–8 December 1994.
[490] Recommendation 1641 (2004), "Public Service Broadcasting," adopted by the CoE's Parliamentary Assembly on 27 January 2004 (3rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17177&lang=en
[491] Resolution 1636 (2008) of the CoE's Parliamentary Assembly "Indicators for Media in a Democracy," adopted by the Assembly on 3 October 2008 (36th Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17684&lang=en
[492] Recommendation No. R (96) 10 of the CoE's Committee of Ministers "On the Guarantee of the Independence of Public Service Broadcasting," adopted by the CoE's Committee of Ministers on 11 September 1996 at the 573rd meeting of the Ministers' Deputies.

National legislation should provide clear and precise guarantees for editorial independence and institutional autonomy for public service media organisations, especially concerning the issues of programming, management of human and financial sources as well as its supervisory bodies.

2) Boards of management of public service broadcasting organisations

The legal framework should provide that boards of management are solely responsible for operation of public service broadcasting organisations. Any risk of political or other interference should be avoided. There should be no possibility for conflict of interests. The boards should only be accountable for the exercise of their functions to the supervisory body of their organisations. The legal frameworks should provide an opportunity for a court appeal of decisions by the supervisory body.

3) Supervisory bodies of public service broadcasting organisations

The legal framework should clearly and precisely establish the competences of supervisory bodies. Any preliminary control over programming should be avoided. There should be no risk of any political or other interference to the activities of supervisory bodies. In particular, their members should be appointed in an open and pluralistic manner. There should be no conflict of interests. The legal framework should provide guarantees that their members may be dismissed, suspended, or replaced only by the body that has appointed them. The legal framework should also clearly set up the rules of their payment.

4) Staff of public service broadcasting organisations

The rights and obligations as well as recruitment of the staff should be established on a non-discriminatory basis, particularly, it should not depend on their political or other beliefs. The legal framework should unambiguously guarantee that the staff may take instructions only from the public service broadcasting organisations that employs them.

5) Funding of public service broadcasting organisations

The main recommendation to member-states is to establish and maintain "secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions." To that aim, they may be funded from the state budget. However, it should not cause any impact on their editorial responsibility, institutional autonomy, or programming matters.

6) Programming policy of public service broadcasting organisations

The legal framework should clearly provide that the organisations ensure "that news programmes fairly present facts and events and encourage the free formation of

opinions." Official announcements are acceptable, but they "should be clearly described as such and should be broadcast under the sole responsibility of the commissioning authority."

7) Access by public service broadcasting organisations to new communications technologies

Such access should be guaranteed in national legislation.

With the advent of Internet technologies, the need for public service broadcasting in Europe has been challenged many times not at the least because online services provide audiences with access to a variety of information. Some claimed that public service media might not be needed anymore because new media would perform this role better in the digital environment. However, the CoE standards stress the importance of public service media in the era of new technologies. The abovementioned Parliamentary Assembly's recommendation reaffirms the main principles of public service broadcasting. They are:

- universality in terms of content and access;
- editorial independence and impartiality;
- high standards of quality of programmes and services;
- a variety of programmes and services satisfying the needs of all groups in society;
- public accountability.[493]

According to the document, these principles should be applied regardless of technological changes because they meet the requirements of the twenty-first century.

Digital TV.

Digitalisation creates new opportunities and challenges for freedom of information and media pluralism. Digital TV offers a new way of packaging signals for further transmission of TV programmes and can carry more channels than analogue terrestrial TV. Consequently, digital TV allows the release of a frequency spectrum ("digital dividend") that may be used for various purposes.

The International Telecommunications Union (ITU),[494] a United Nations agency for information and communication technologies, plays a crucial role in managing digitalisation on an international level. It seeks to advance access to such technologies in

[493] Recommendation 1641 (2004), "Public service broadcasting," adopted the CoE's Parliamentary Assembly on 27 January 2004 (3rd Sitting). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17177&lang=en

[494] See the official website of the ITU at: https://www.itu.int/en/about/Pages/default.aspx

support of freedom of expression around the world. The ITU is responsible for allocating the global radiofrequency spectrum as well as satellite orbits. It also develops the technical standards for information and communication technologies. Its membership consists of 193 countries and over 700 private-sector entities and academic institutions.[495] Russia has participated in the Union since 1866 (a year after the ITU's founding).

The ITU ensures proper and efficient use of the frequency spectrum through Radio Regulations and Regional Agreements, which are legally binding for member-states. As a result of ITU's Regional Radiocommunication Conference (RRC-06) in Geneva, the participants signed an agreement on 16 June 2006, which is known as GE-06 Agreement. It established a plan for the digitalisation of broadcasting and set 17 June 2015 as the end of the switch-over period in Europe, Africa, the Middle East, Mongolia as well as the countries of the former Soviet Union.

The CoE and the EU approaches to digital switchover have reflected each institution's priorities (Korteweg & McGonagle, 2010). The EU has mostly concentrated on economic opportunities, such as innovation, competition, consumer benefits, and single market goals, as Korteweg and McGonagle note. They observe that the CoE has focused on furthering various public interests and values, such as pluralism, cultural and linguistic diversity, innovation, education, and prevention of digital exclusion. The CoE has provided guidance and recommendations outlining its main concerns. The Office of the OSCE Representative on Freedom of the Media has also issued a special *Guide to the Digital Switchover* (see Nyman-Metcalf & Richter, 2010).

The CoE's Committee of Ministers Recommendation Rec(2003)9 to member-states, "On Measures to Promote the Democratic and Social Contribution of Digital Broadcasting,"[496] sets up several main principles for digitalisation. Specifically, it suggests that member-states should

> create adequate legal and economic conditions for the development of digital broadcasting that guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes, including the maintenance and, where possible, extension of the availability of transfrontier services.

In the appendix to this recommendation, it is said that member-states, "in

[495] The list of the ITU's member-states is available at: https://www.itu.int/online/mm/scripts/gensel8

[496] The CoE's Committee of Ministers' Recommendation Rec(2003)9 to member-states "On Measures to Promote the Democratic and Social Contribution of Digital Broadcasting," adopted on 28 May 2003. Retrieved from https://wcd.coe.int/rsi/common/renderers/rendstandard.jsp?DocId=38043&SecMode=1&SiteName=cm&Lang=en

consultation with the various industries involved and the public," should develop a strategy for digitalisation in order to avoid possible negative effects of the changes and to extend its benefits. It is noted that the strategy

> should seek to promote co-operation between operators, complementarity between platforms, the interoperability of decoders, the availability of a wide variety of content, including free-to-air radio and television services, and the widest exploitation of the unique opportunities which digital technology can offer following the necessary reallocation of frequencies.

The CoE standards stress that governments should take into account the needs of society and the media industry when preparing frameworks for digitalisation, and that such frameworks should be adopted as a result of open debates.

According to the recommendation, member-states should take "positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in this sector." These measures include non-discriminatory allocation of digital broadcasting licences and must-carry commitments. The recommendation specifically suggests that, when awarding digital broadcasting licences, the authorities have to ensure a variety of services on offer and to encourage the establishment of local services.

The CoE Committee of Ministers' Declaration "On the Allocation and Management of the Digital Dividend and the Public Interest"[497] states that the digital dividend should be allocated and managed in the interest of the public. The document recommends that the member-states pay

> special attention to the promotion of innovation, pluralism, cultural and linguistic diversity, and access of the public to audiovisual services and, for this purpose, take in due account the needs of broadcasters and of the media at large, both public service and commercial media, as well as those of other existing or incoming spectrum users.

According to the declaration, governments should consider the social advantages that would follow from the allocation and management of the digital dividend. Such advantages may include not only more diversified audiovisual services, but also mobile services that improve "geographical coverage and interactive capability, as well as services offering high definition technology, mobile reception, or easier and more

[497] Declaration of the CoE's Committee of Ministers "Allocation and Management of the Digital Dividend and the Public Interest," adopted on 20 February 2008. Retrieved from https://search.coe.int/cm/Pages/resultdetails.aspx?ObjectID=09000016805d3d25

affordable access."

The CoE pays particular attention to the role of public service media in a new digital environment. The recommendation "On Measures to Promote the Democratic and Social Contribution of Digital Broadcasting" observes that public service media should play "a central role in the transition to terrestrial digital broadcasting" and a universal access to its programme services should be ensured. Its remit remains the same in a digital era, as the recommendation states, and governments should ensure its fulfilment.

Access to information of public interest through TV.

From the European perspective, it is legitimate to limit broadcasters' exclusive rights of their programmes with the aim to protect broader public interests, particularly media pluralism (Oster, 2017). In Articles 9–9bis, the ECTT guarantees the so-called right to "short reporting on events of high interest for the public." This right means that ECTT parties commit to ensure that their broadcasters would not prevent others from short reporting on events of high interest for the public, even if these broadcasters have exclusive rights for transmitting or retransmitting reports on such events.

The ECTT also provides guarantees for the public to access, through television programme services, the events "of major importance for society." Article 9bis obliges any party of the ECTT to ensure that its broadcasters do not use their exclusive right to broadcast the events "of major importance for society" in such a way as "to deprive a substantial proportion of the public in that party of the possibility of following such events by live coverage or deferred coverage on free television." A party of the ECTT may draft a list of the events "of major importance for society," such as major sport competitions or cultural events. The European Commission has provided guidelines[498] for assessing whether an event could be qualified as of "major importance for society."

Support of European TV production.

The ECTT provides some rules for the support of the European audiovisual production industry and of European producers of audiovisual content. Such support pursues mainly cultural purposes, such as resisting the US hegemony on the European audiovisual producing market and the development of the European TV production market.

[498] COM Working Document CC TVSF (97) 9/3, Implementation of Article 3A of Directive 89/552/EEC, as modified by Directive 97/36/EC: Evaluation of National Measures.

Article 2 defines "European works" as "creative works, the production or co-production of which is controlled by European natural or legal persons." The ECTT also obliges its signatories to "look together for the most appropriate instruments and procedures" to maintain and encourage European production, without any discrimination between broadcasters, "particularly in countries with a low audiovisual production capacity or restricted language area."

According to Article 10 of the ECTT, its parties should ensure that broadcasters would reserve for European works "a majority proportion" of the transmission time, "excluding the time appointed to news, sports events, games, advertising, teletext services, and tele-shopping." This proportion should be achieved progressively, on the basis of suitable criteria, and according to the broadcasters' informational, educational, cultural, and entertainment responsibilities to the viewers, as the ECTT requires. At the same time, the quotas for European works have been challenged by scholars who have argued that such quotas may disrupt information flows, reduce viewers' choice, and negatively impact media pluralism (Katsirea, 2003; Harrison & Woods, 2001).

Protection of minors from harmful TV programmes.

It is acceptable, from the point of view of the CoE standards, to limit media freedom in the aim to protect public morality. This concept includes protection of minors from content that may cause harm to their health or moral development. It is particularly true with regards to audiovisual content because its influence on children's minds may be profound. In general, there is no uniform legal concept at the CoE level on the protection of minors against harmful content, and member-states have a broad "margin of appreciation" in introducing regulations that would better respond to their specific national cultural and social context. Yet the ECtHR supervises this margin of appreciation in line with Article 10 of ECHR.

As a result of the development of new technologies, the CoE adopted several documents seeking to provide recommendations on the protection of children against harmful content and behaviour in a digital environment.[499] Within the EU, the AVMSD

[499] See, for instance, Recommendation CM/Rec(2009)5 of the CoE Committee of Ministers to member-states "On measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment," adopted by the Committee of Ministers on 8 July 2009 at the 1063rd meeting of the Ministers' Deputies. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680645b44; Recommendation CM/Rec(2008)6 "On measures to promote the respect for freedom of expression and information with regard to Internet filters," adopted by the CoE Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies. Retrieved from

in Chapter IV provides basic legal frameworks for the protection of minors from harmful content in audiovisual on-demand services. Article 12 of the AVMSD obliges the EU member-states to take measures to ensure that minors would not "normally hear or see" the on-demand audiovisual media services if such services "might seriously impair the physical, mental, or moral development of minors," for instance, through content featuring pornography or gratuitous violence.

In general, the European rules for audiovisual broadcasters on this issue are stricter because of the viewers' choice of broadcast programmes and control over when and how they watch them is limited, in comparison to on-demand services. At the CoE level, the basic frameworks ensuring the protection of minors from programmes that may be harmful to them are provided in Article 7 of the ECTT. It bans pornography on TV and indecent programmes. It also obliges broadcasters to ensure that any programmes, which "are likely to impair the physical, mental, or moral development of children and adolescents," shall not be scheduled when they may watch them. Similar rules are stipulates in Article 27 of AVMSD. Additionally, the article obliges EU member-states to ensure that the programmes broadcasted in unencoded form would have to be preceded "by an acoustic warning or are identified by the presence of a visual symbol throughout their duration."

TV advertisement and teleshopping.

The ECtHR has repeatedly noted that, with commercial speech, the Court's standards of scrutiny may be less severe, unlike for other forms of speech.[500] This has been particularly important with regards to audiovisual media because of their power of influence. Oster (2017) notes that the European standards on commercial communication are based on several principles: transparency requirements, content-based regulations, ban on aggressive or misleading practices; editorial independence; restrictions on air time and duration of commercials.

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https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 80645b44; Declaration "On protecting the dignity, security and privacy of children on the Internet," adopted by the CoE Committee of Ministers on 20 February 2008 at the 1018th meeting of the Ministers' Deputies. Retrieved from https://wcd.coe.int/ViewDoc.jsp?Ref=Decl; Recommendation Rec(2006)12 "On empowering children in the new information and communications environment," adopted by the Committee of Ministers
on 27 September 2006 at the 974th meeting of the Ministers' Deputies. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 80645b44

[500] See, for instance, *Demuth v. Switzerland* of 5 November 2002; *Tele 1 Privatfernsehgesellschaft mbH v. Austria* of 21 September 2000; *Radio ABC v. Austria* 20 October 1997; *Verlag GmbH and Klaus Beermann v. Germany* of 20 November 1989; and *Jacubowski v. Germany* of 23 June 1994.

At the CoE level, the ECTT is the main document establishing minimum common standards for TV advertising and teleshopping in order to ensure the minimal protection of European consumers. Article 11 of the Convention states that advertising and teleshopping should be fair and honest; they should not be misleading and should not prejudice the interests of consumers. The advertiser cannot have an impact on editorial content. Advertising and teleshopping should be recognisably separated from TV programmes (Article 13).

Article 11 of the ECTT also sets up basic rules concerning advertising and teleshopping addressed to or using minors: it shall pay attention to minors' special susceptibilities and should not cause harm to their interests. Additionally, teleshopping shall not "exort minors to contract for the sale or rental of goods and services." Article 15 bans TV advertising and teleshopping of tobacco products, and provides limits for advertisement of alcoholic beverages. The ECTT also sets up limitations on advertising for medication and medical treatment.

The ECTT also sets up standards for the duration of advertising and teleshopping (Article 12). For instance, the transmission time for advertising shall not exceed 15% of the daily transmission time, and within an hour, advertising and teleshopping spots cannot exceed 20%.

Articles 17–18 of the ECTT address sponsorship. They ban any influence of the sponsor on the editorial independence of the broadcaster. The sponsorship credits should be identified at the beginning and the end of the sponsored programme. Such programmes must not encourage the sale, purchase, or rental of the products or services of the sponsor or a third party. The ECTT also prohibits sponsorship by persons who sell products or services, the advertising of which is banned by Article 15.

Within the EU, commercial communication in audiovisual media is also regulated by the AVMSD. Its rules on advertisement and teleshopping are based on the same legal principles as those of the ECTT, but the AVMSD's scope is broader because it is applicable to on-demand services. Additionally, unlike the ECTT, the AVMSD regulates product placement.[501]

The Russian Audiovisual Media Regulation

[501] Article 1(m) of the AVMSD defines "product placement" as "any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration."

The statute "On Mass Media" is the main legal Russian act regulating broadcast media, the press, and new media (following its registration with Roskomnadzor, as explained in section 2.3). This statute regulates the fundamentals of broadcast media in Russia, such as establishing and shutting down broadcast companies, licensing and revocation of licenses, ownership, regulatory authorities, editorial aspects, replies and corrections, et cetera. It also provides basic content requirements concerning extremism in the media (in Article 4; see section 2.2).

Such a "comprehensive" approach seems to be problematic when it comes to its implementation. It seems that European regulation has become increasingly diversified, in response to the development of information and communication technologies. As shown in this dissertation, the CoE standards tend to focus on the differences between media because these differences affect the scope of their regulation. While in some cases the statute "On Mass Media" explicitly states that some rules apply only to certain types of media, it fails to do so in many cases. As a result, Roskmonadzor has to employ its "hands-on management" approach to clarify the implementation of the rules (see section 1.10). Another option that the agency espouses is to simply ignore the rule. While this is a fairly typical policy in relation to all types of media, it considerably affects audiovisual media services whose regulation involves an extensive number of issues, and creating as well as operating audiovisual media business is quite costly.

This policy leaves many questions unanswered. While the statute "On Mass Media" is evidently applicable to traditional broadcasters, the degree to which it is applicable to on-demand services and online broadcasts is unclear for a number of reasons. As noted in section 2.3, "On Mass Media" establishes the "universal" licence permitting broadcasting on any platform. While this type of license may seem to be convenient for traditional broadcasters, which also use the Internet to disseminate their content, the rationale for introducing this type of licence is unclear. As a limitation, it must match the criteria of the three-tier test, but, most likely, it meets no criteria. Which legitimate purpose does it seek to protect? Why is it necessary to receive a licence to disseminate programmes online? It is also worth pointing out that the statute provides no difference in licensing procedures for online broadcasters and those disseminating their content on all possible platforms, which creates a problem of proportionality in light of the three-part test of Article 10 of the ECHR. In general, it is not clear whether this type of license abolishes the perspective of the Supreme Court, which stated in 2010 that licensing of online broadcasting was unnecessary (see section 2.3). So far, Roskomnadzor has not

obliged new media outlets disseminating audiovisual content in any way to obtain this type of license, but at the same time, no clarification of these issues has been provided.

A similar problem concerns the process of media registration with Roskmondazor, a procedure that was initially meant for the regulation of print media. Later, because of the scope of "On Mass Media," it became applicable to broadcasters. Before applying for a license, "On Mass Media" requires all Russian broadcasters who operate editorial offices to register with Roskomnadzor (see section 1.3 about registration procedures). The revocation of a registering certificate causes the revocation of a licence. Given the standpoint of the OSCE Representative on the Freedom of the Media, registration *per se* is a worrisome procedure and it creates an additional unnecessary barrier for media businesses. The cumulative requirement of registration and licensing for broadcast media may be viewed as a disproportionate limitation of media freedom in light of Article 10 of the ECHR, although the CoE standards do not ban registration and licensing procedures as such.

It has already been stated that "On Mass Media" uses registration as a criterion to identify media activity. Therefore, if new audiovisual services do register, they become media services and are, therefore, regulated by media legislation. It is unclear, however, whether this also entails the media outlet's obligation to obtain a universal license for new audiovisual services after its registration with Roskomnadzor. Or are these services viewed as broadcasters? And under what conditions?

Another ambiguous issue concerns online broadcasting (or rebroadcasting) of foreign channels. According to Article 54 of the statute "On Mass Media," "transmission of [a] foreign TV or radio channel" is permitted only after its registration. While these provisions might be consistent with the CoE standards with regards to traditional broadcasters, they are nevertheless disproportionate in the case of online broadcasters or on-demand media services. In light of Article 10 of the ECHR, it is excessive to oblige, for example, the BBC website or iPlayer to undergo the process of registration (and, arguably, to obtain a universal licence) before broadcasting on the Runet. So far, Roskomnadzor has not applied this rule to online foreign audiovisual services, but the issue remains unclear.

The definition of broadcasters poses further questions. "On Mass Media," in Article 2, defines a "broadcaster" as a Russian legal entity that "*forms* TV or radio station and *transmits* it in the prescribed manner in accordance with a broadcast licence." Unlike the European and international standards, the Russian definition lacks the criterion of

editorial responsibility (or control), which is one of the main attributes of media services. According to Russian law, there are two types of broadcasters: those who execute editorial control (TV or radio content providers) and those who only "form" and transmit the content prepared by an editorial office (communication service providers[502]). This means that communication service providers are also viewed as broadcasters even if they do not provide media services. Does this mean that providers of audio or audiovisual non-media services fall under the regulation of "On Mass Media," despite the fact that they are governed by the statute "On Communications"? The Russian law provides no answer to this question, although it does view such providers as broadcasters, who, in turn, have traditionally been viewed as providers of media services. It is true that, due to media convergence, it is not always easy to clearly distinguish between the providers of their own content and those who only disseminate the content of third parties as well as between providers of media and non-media services. At the same time, these distinctions are at the core of the CoE policies on new media and the EU audiovisual regulation, as shown above.

It is interesting to note that the unofficial translation of the text of the ECTT into Russian on the CoE website[503] applies the same approach to the definition of a TV broadcaster as the Russian statute—it omits the notion of editorial responsibility. The Russian translation delineates a TV broadcaster as a "legal entity or individual" who "compiles" (*sostavliajet*) TV programmes to be viewed or listened to by the general public and "transmits them or ensures their transmission in full and unchanged form by a third party." The definition does not fit with the notion of a TV broadcaster set up in the official English-language version of the ECTT.

Another problematic aspect of the Russian definition of broadcasters is that it permits only legal entities to become broadcasters, while the approach of the ECTT and the AVMSD is informed by technological changes. Today, any person in Russia with online access can begin broadcasting on the web. It remains to be seen whether in the future Russian law would discontinue this practice and would oblige individuals to establish a company before broadcasting online.

It can be argued that Russian licensing procedures do not meet the ECtHR three-tier test because they are too intrusive. Russia has a system of dual licences granted by

[502] A communication service provider is defined in Article 2 Part 12 of the statute "On Communications" as a legal entity or individual proprietor "providing services in communication in accordance with the appropriate licence."
[503] See https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b0fa

Roskomnadzor: for broadcasting and for "communication services with the purpose of broadcasting." Broadcasters ensuring editorial control must obtain both licences. Those broadcasters who only (re)transmit the editorial content of third parties in an unchanged form are required to only have a license for "communication services with the purpose of broadcasting." However, they must enter into a licensing agreement with the broadcaster who operates an editorial office and whose content they (re)transmit. This is a normal practice whose aim is to protect copyright. However, it seems undue to oblige broadcasters to notify Roskomnadzor that a communication services provider is (re)transmitting their programmes within ten days after the start of the retransmission (Article 31.9). Broadcasters also must notify Roskomnadzor in advance about termination of any agreements on (re)broadcasting. As Richter (2016) notes, these rules have led to absurd practices. For instance, Roskomnadzor warns a broadcaster that it has failed to notify the agency that a communication services provider "A" has begun rebroadcasting the broadcaster's TV channel "B." Then, the broadcaster has to notify the agency that its TV channel "B" has been retransmitted by the communication services provider "A." The CoE standards do not explicitly ban such governmental control, but such measures could be considered disproportionate because they put excessive bureaucratic weight on broadcasters.

Broadcasting licences in Russia are regulated by several legal acts, which complicates the implementation of regulations. Apart from the statute "On Mass Media" (Articles 31, 31.1–31.9), licensing is also regulated by the 2011 statute "On Licensing of Specific Types of Activities,"[504] which completely ignores the specifics of media organisations. Additionally, broadcasting licences are governed by the 2011 regulations "On Licensing of TV Broadcasting and Radio Broadcasting"[505] approved by a resolution of the Russian government. Licensing for "communication services with the purpose of broadcasting" is regulated by the federal statute "On Communication."[506] Such abundance of acts complicates the understanding of the licensing process for media companies in Russia.

Some rules may contravene the ECtHR's criterion of legality of limitations of freedom of broadcasting because they are too disruptive or too vague. The 2011 regulations "On Licensing of TV Broadcasting and Radio Broadcasting" fail to provide

[504] Federal Statute of the Russian Federation "On Licensing of Specific Types of Activities," No. 99-FZ, of 4 May 2011.
[505] Regulations "On Licensing of TV Broadcasting and Radio Broadcasting," approved by the Resolution of the Government of the Russian Federation No 1025 on 8 December 2011.
[506] Federal Statute of the Russian Federation "On Communication," No. 126-FZ, of 7 July 2003.

an exhaustive list of licensing requirements. Furthermore, the government has the power to change such requirements at any time. Applicants for broadcasting licences are required to provide Roskomnadzor with a great deal of data, including programme orientation, territory and platform of dissemination, the scope of broadcasting in hours (Articles 31, 31.1–31.2 of the statute "On Mass Media"). This data is listed in the appendix to the licence; it constitutes the "licensing requirements" and becomes one of its inherent parts. Transfer of a licence to third parties is completely prohibited (Article 31 of "On Mass Media), therefore, any change (even minor) of such data has to be approved by Roskomnadzor and requires the licence to be reissued before a broadcaster can start implementing such changes. Broadcasting licences are granted in Russia for a relatively long term of ten years (Article 31.1 of the statute "On Mass Media"), which may correlate with the CoE standards, but the procedure of their renewal is identical to the process of obtaining them and depends on Roskomnadzor's approval (Article 31.4 of "On Mass Media").

Tendering procedures for obtaining a licence to broadcast on a certain frequency are regulated by three legal acts[507] approved by the Russian government in 2012[508] and supervised by Roskomnadzor. It solely forms a commission, the Federal Tendering Commission on Broadcasting (FKK), which decides on a competition's winner on the basis of the resolution approved by Roskomnadzor. The FKK is managed by the head of Roskomnadzor, and most of its members represent various governmental structures. In case of a regional competition, FKK includes three additional members representing, respectively, the president's office and the highest local legislative and executive bodies. As a result from such strong dependence of the tendering procedures on the will of the government, Russian broadcast media regulations differ significantly from the CoE standards, particularly those formed in the abovementioned ECtHR's ruling on the case of *Meltex Ltd and Movsesyan v. Armenia* and the recommendation "On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector."

[507] They are the Resolution of the Government of the Russian Federation "On Tendering Process for the Right to Execute the Terrestrial Broadcasting, Satellite Broadcasting with the Use of Certain Radio-Frequencies"; the Regulations for Allocation of Certain Radio-Frequencies for Broadcasting with the Use of Limited Radio-Frequency Source (Terrestrial Broadcasting, Satellite Broadcasting); the Regulations on Collection of One-time Fee for the Right to Execute the Terrestrial Broadcasting, Satellite Broadcasting with the Use of Certain Radio-Frequencies.

[508] Resolution of the Government of the Russian Federation No 25 of January 26, 2012, "On Allocation of Certain Radio-Frequencies for Broadcasting with the Use of Limited Radio-Frequency Source (Terrestrial Broadcasting, Satellite Broadcasting); Conducting of Competition; Collection of One-time Fee for the Right to Execute Terrestrial Broadcasting, Satellite Broadcasting with the Use of Certain Radio-Frequencies; and Revoking of Some Regulations of the Government of the Russian Federation."

In the ruling on another case, *Demuth v. Switzerland*,[509] the ECtHR stated that the member-state may refuse to grant a licence only if the proposed channel does not satisfy public interests. Russian tendering procedures do not include assessment of public interests: no specific criteria on how to select a winner in the tendering process are provided in Russian law. This also miscorrelates with the ECtHR's position on the case of *Centro Europa 7 S.r.l. and Di Stefano v. Italy*.

According to Article 31.7, Roskomnadzor is authorised to issue orders (*predpisanije*) to *any* broadcaster if it (1) breaches mass media legislation, (2) violates licensing requirements, or (3) stops broadcasting for a period of more than three months (Article 31.7 of "On Mass Media"). According to Article 14.1 Part 3 of the Russian Code of Administrative Offences, broadcasters may also be imposed monetary sanctions of up to 40,000 rubles (650 euro) for these violations. More "serious" violations are defined by the government in the regulations "On Licensing of TV Broadcasting and Radio Broadcasting." They are: (1) change of programming policy or of the platform determined in the licence or (2) breach of conditions of terrestrial broadcasting violating the rights or the legitimate interests of citizens, national defence, or state security. According to Article 14.1, Part 4 of the Russian Code of Administrative Offences, "serous" violations may result in monetary sanctions of up to 200,000 rubles (around 3,200 euro). Then, Roskomnadzor may suspend a licence for a period of less than three months if broadcasters have "seriously" violated licensing requirements or have failed to perform orders issued on violations set up in Article 31.7 of "On Mass Media." If Russian broadcasters have failed to perform Roskomnadzor's order within the period of suspension, the overseeing body has the power to file a lawsuit to revoke the licence. According to Article 31.7 of "On Mass Media," the court has a power to revoke a licence if broadcasters repeatedly commit "serious" violations or violate limitations regarding the ownership (establishment) of media organisations. Under Article 31.6 of the statute "On Mass Media," Roskomnadzor may initiate scheduled and unscheduled inspections of broadcasters.

In general, these regulations may be acceptable in light of Article 10 of the ECHR if other Russian legal clauses are consistent with Article 10's commitments. Otherwise, they seem too broad and imbalanced. It should be understood that, according to Article 14.1 Parts 3 of the Russian Code of Administrative Offences, any failure to notify Roskomnadzor of a change in "licensing requirements" or in communication providers

[509] See judgments on the case of *Demuth v. Switzerland* of 5 November 2002.

constitutes a violation, regardless of whether a broadcaster operates online or uses a frequency to disseminate its programmes, and regardless of whether this change concerns, for instance, *the address of the editorial office or the change in subject matter of the programmes*. As already noted, the CoE and the EU regulations try to distinguish levels of liability of traditional and new audiovisual services, while Russian law fails to do so. Additionally, insofar as the rules listing "licensing" requirements are exhaustive and non-transparent, clauses imposing sanctions for the violation of such requirements would contradict the ECtHR's criterion of legality of limitations of freedom of broadcasting. The revocation or the suspension of a licence are exceptional measures from the CoE's perspective and they must strictly comply with the ECtHR's criteria for limiting freedom of expression. Another explanation for the potential excessiveness of the entire Russian licensing mechanism is the lack of independent regulatory authority. In section 1.10, I have shown how controversial is Roskomnadzor's policy in light of media freedom. In this context, the role of the courts is tremendous. Below, I examine the Russian court practice on liability for the violation of "licensing" requirements, which shows that the Russian courts have failed to ensure balance between media freedom and governmental interests. Instead of stimulating media pluralism and preventing abuses, as provided by the CoE standards, this situation has made the Russian broadcast business vulnerable and unstable.

Russian judiciary perspective on violation of licensing conditions or requirements.

For my analysis of the Russian court practice on the licensing of TV broadcasters, I have selected fifty random decisions (around 5,4%) out of the 928 court rulings on violation of licensing requirements or conditions (Article 14.1, Part 3 of the Russian Code of Administrative Offences), held between 1 January 2012[510] and 1 January 2016, according to the RosPravosudiye database.[511] All lawsuits were brought by Roskomnadzor, as stipulated in Russian law.

The Russian Code of Administrative Offences, in Article 14.1, Part 3, provides the following sanctions in case of violation of licensing requirements or conditions: for citizens—a warning or a fine of up to 2,000 rubles (around 29 euros); for public officials—up to 4,000 rubles (around 56 euro); and for legal entities—up to 40,000 rubles

[510] I have chosen this date because the licensing rules were amended in December 2011, as previously said.
[511] I have limited the search to the keyword phrase "broadcasting license."

(around 580 euros). Although these amounts may not seem very high, these violations may further cause suspension or revocation of broadcasting licences (as provided by "On Mass Media," Article 31.7), which the CoE views as serious sanctions.

Only four judgments (8%) did not entail sanctions for the broadcasters. In two out of these four cases, the Russian courts released the broadcasters from liability only because the deadline to file a claim had passed.[512] In one case, the court found the broadcaster not guilty, but still issued a verbal warning. In another case, the court ruled that Roskomnadzor's actions were in contravention with formal procedures and consequently, released the broadcaster from liability. These rulings are considered below.

The analysis shows that none of the court's decisions considered the cases in the context of freedom of expression or freedom of information. No ruling even mentioned the ECtHR case law or other CoE standards. In addition, the Russian courts were inconsistent in giving penalties. Sometimes they imposed varying sanctions for the same violations, in disregard of the ECtHR principle of proportionality of sanctions.

Of the fifty cases considered here, the overwhelming majority (thirty-seven cases or 74%) concerned minor violations of the licensing condition to maintain a certain programming direction. This type of violation can be illustrated by a quite typical example, for instance, of the case where the Magistrate Judge of the Court Circuit No. 1 of the Nikolaevsk court district of Uljanovsk region[513] imposed fines on the general manager of NIK TV, a small regional media company, because the company had allocated one hour of its airtime to broadcasting a musical programme instead of promoting a healthy way of life as stated in its licence.

A local TV broadcasting company Arshin was penalised for exceeding the scope of broadcasting of the station TV Dozhd by giving TV Dozhd three extra hours of Arshin's airtime per week. According to its licence, these hours were reserved for a local TV station.[514] It was charged a fine of 30,000 rubles (around 430 euros). Similar ruling was held against a local TV company Mediaholding KVANT, which was fined for broadcasting less hours of its own programmes in order to transmit TNT, a national TV

[512] Decision of the Arbitrazh Court of the Magadan region on case No. A37-4156/2012 of 1 April 2013. Retrieved from https://rospravosudie.com/court-as-magadanskoj-oblasti-s/judge-komarova-lyubov-petrovna-s/act-306391640/; https://rospravosudie.com/court-as-tomskoj-oblasti-s/judge-sennikova-irina-nikolaevna-s/act-319061423/

[513] Decision of the Arbitrazh Court of the Tomsk region on case No. 5 - 104/2014 of 8 March 2014. Retrieved from https://rospravosudie.com/court-sudebnyj-uchastok-1-nikolaevskogo-rajona-ulyanovskoj-oblasti-s/act-215932954/

[514] Decision of the Arbitrazh Court of Orlovskaya region on case No. A48-443/2013 of 15 May 2013. Retrieved from https://rospravosudie.com/court-as-orlovskoj-oblasti-s/judge-zhernov-a-a-s/act-306646269/

station,[515] but the fine for Mediaholding KVANT was ten times smaller than that of Arshin.

It can be argued that, from the CoE's perspective, these cases should be considered differently. While Arshin broadcasted via cable, Mediaholding KVANT occupied a frequency for broadcasting. Therefore, their commitments to the audience are different. Furthermore, the increase in airtime for TV Dozhd may facilitate pluralism because this station provides a distinct (and often oppositional to the government) news agenda in Russia, while the transmission of a TV station like TNT, which instead of local programming airs national entertainment content, could, on the contrary, have negative consequences for media pluralism. Yet the Russian courts failed to examine these aspects when ruling on the cases.

Only one judgment out of the fifty reviewed here tried to assess the genuine reasons for breaching licensing conditions and to evaluate whether the change in programming policy was beneficial to the audience. This case [516] concerned the Publishing House Gubernskije Vedomosti, a local company. According to its licence, it transmitted the local station OTV and Domashnij, a national entertainment station geared to homemakers, in the scope of 14 and 154 hours per week, respectively.

OTV started producing more programmes, including content for Gubernskije Vedomosti's local area. In order to give more broadcasting hours to OTV, Gubernskije Vedomosti proposed to the owners of Domashnij to reduce the hours of their station. Domashnij not only rejected the proposal, but also terminated the licensing contract permitting Gubernskije Vedomosti to transmit their programmes. Gubernskije Vedomosti then asked Roskomnadzor's local directorate to change its licence, but that request was refused. In order not to stop broadcasting, which could cause a revocation of its licence, Gubernskije Vedomosti hurriedly entered into an agreement with National TV Syndicate, a company aggregating audiovisual entertainment content. Gubernskije Vedomosti started transmitting its own programmes instead of those of Domashnij. In three months, Gubernskije Vedomosti renewed the broadcasting of Domashnij as soon as they signed a new contract. However, Roskomnadzor sued Gubernskije Vedomosti for violating its

[515] See also Decision of Smirnova, the Magistrate Judge of the Court Circuit No. 3 of Verkhnesaldinsky District of Sverdlovsk Region, No. 5-379/2014 of 25 September 2014. Retrieved from https://rospravosudie.com/court-sudebnyj-uchastok-mirovogo-sudi-3-verxnesaldinskogo-rajona-s/act-215069948/

[516] Decision of the Arbitrazh Court of the Sakhalin region on the case No. A59-1160/2015 of 22 May 2015. Retrieved from https://rospravosudie.com/court-as-saxalinskoj-oblasti-s/judge-loginova-e-s-s/act-319393015/

licensing conditions by broadcasting the programmes of National TV Syndicate.

The Arbitrazh Court of Sakhalinskaya region did not satisfy Roskomnadzor's lawsuit for several reasons. It noted that Gubernskije Vedomosti substituted the programming of Domashnij "with the aim to ensure the right of the TV viewers." Moreover, the court stated, the programmes of Domashnij and of National TV Syndicate were similar in terms of their "nature" and programming orientation. As the court ruled, it was important that Gubernskije Vedomosti addressed Roskomnadzor to amend its licence. Nevertheless, the court, for whatever reason, issued a verbal warning to Gubernskije Vedomosti:

> With this in mind, and with the aim to ensure the implementation of the constitutional principles of differentiation, justice, and proportionality the court finds possible to release the company from administrative liability because of de minimis infraction committed and limits the penalty to a verbal warning.[517]

It is also important to note that the court failed to examine the legitimacy of Roskomnadzor's actions in this case. Neither did it pay attention to Gubernskije Vedomosti's desire to work in the public's interest by offering local programming. Therefore, to say that this ruling complies with the CoE standards is arguable.

In another case, the Russian court did check the legitimacy of the inspection conducted by the local directorate of Roskomnadzor and found no violation in the actions of the broadcaster.[518] However, instead of challenging the legitimacy of the inspection from the position of the right to freedom of expression, the court applied a formal approach. It merely referred to the absence of legal grounds for this particular inspection because Roskomnadzor had failed to publish in advance the annual schedule of its inspections, as is required by law.

Sometimes, formal approaches of the Russian courts lead to absurd decisions. This can be illustrated by the case of TV-2,[519] a local independent company in the city of Tomsk. It was one of the first private companies in Russia, distinguished by a great number of awards for journalism. Due to state pressure, it had been transformed from a

[517] Decision of the Arbitrazh Court of the Sakhalin region on the case No. A59-1160/2015 of 22 May 2015.
[518] See also Decision of L. Badritdinova, the Magistrate Judge of the Court Circuit No. 3 of Rezhevsky District of Sverdlovsk Region, No. 5-594/2014 of 20 August 2014. Retrieved from https://rospravosudie.com/court-sudebnyj-uchastok-mirovogo-sudi-1-rezhevskogo-rajona-s/act-214866775/
[519] Decision of the Arbitrazh Court of the Tomsk region on case No. A67-8621/2014 of 13 April 2015. Retrieved from https://rospravosudie.com/court-as-tomskoj-oblasti-s/judge-sennikova-irina-nikolaevna-s/act-319061423/

profitable organisation into a small, unprofitable broadcaster.

The story of TV-2's resistance to Roskomnadzor is long. Roskomnadzor tried to deprive the company of the opportunity to broadcast on a frequency in Tomskaya region because it had given 1,6% of its airtime to TV Dozhd, but a 2012 court ruling abolished this order. [520]Then, the Russian government terminated another of the company's licences allegedly because of technical problems.[521] This licence permitted the company to broadcast for "communication services with the purpose of broadcasting." The company could not use a frequency for broadcasting its services any more.

The 2015 decision of the Arbitrazh Court of Tomsk concerned a new case. In the course of "unscheduled inspection," the local directorate of Roskomnadzor detected that TV-2 was retransmitted via cable in the city of Kolpashevo in Tomskaya region, although its licence stated that it could broadcast only in two areas of the Tomsk region, the cities of Tomsk and Seversk, where it had previously broadcasted on frequencies. Nevertheless, it had a universal licence for broadcasting. Therefore, the company claimed that, since a universal licence gave it the right to disseminate by any available means and at any platform, including online, it could disseminate its station in any territory, due to the transboundary nature of the Internet. At least, they noted, the station could be retransmitted within Russia.

However, the Arbitrazh Court of Tomsk region rejected this argumentation by applying a formal approach. The court noted that TV-2's registering certificate limited its dissemination to the city of Tomsk and the Tomsk region. Therefore, the station was not allowed to distribute its content throughout Russia. Furthermore, the company's licence limited its dissemination to two cities in the Tomsk region; in order to broadcast beyond these cities, the company's licence had to be reissued by Roskomnadzor, the court stated. The court did not satisfy the complaint because the deadline to file a complaint had passed.

Yet, this ruling may have far-reaching consequences not only for this particular station, but for online freedom of broadcasting in Russia more generally. Unlike the

[520] According to the company's licence, it had to broadcast only its own TV programme services. Roskomnadzor revealed that TV-2 had also "retransmitted" the content of another private TV station, TV Dozhd (1.6% of TV-2 airtime). Roskomnadzor filed a lawsuit stating that the company had breached the licensing requirements. However, the Russian courts stated that "own program services" might also include licensing content (films, programmes, etc.) that the company had purchased on licensing contracts. This usage should not be interpreted as retransmission, the courts ruled. Therefore, TV-2 was neither obliged to notify the Roskomnadzor nor change its broadcasting license.

[521] TV-2 (2014, December 2), "RTRS on switching off a TV channel: TV-2 went beyond the borders of the acceptable" [RTRS ob otkljuchenii telekanala: "TV-2 vyshla za granicy dopustimogo..."]. Retrieved from http://www.tv2.tomsk.ru/news/rtrs-ob-otklyuchenii-telekanala-tv-2-vyshla-zagranicy-dopustimogo

CoE's standards, Russian courts still consider broadcasting in old-fashioned terms rejecting the idea of the transboundary nature of the Internet. Instead of recognising its benefits for the free flow of information and pluralism of opinions, Russian courts tried to resist such benefits through the formal application of strict regulation for the audiovisual sector.

Media concentration.

The report by KVG Research (2013) prepared for the CoE European Audiovisual Observatory notes that one of the main characteristics of the Russian TV market has always been the predominance of terrestrial channels. Because the state established and supplied the federal broadcasting system, the main TV channels were national and their broadcasts reach the entire country, the report remarks.

The Russian audiovisual market is an oligopoly with a dominantly pro-government position. I argue that this puts freedom of expression at significant risk and does not comply with the abovementioned CoE standards promoting pluralism and public service media. In total, Russia has twenty-two national TV channels, mainly owned by the state-run companies VGTRK and Gazprom Media Holding,[522] as well as by the National Media Group, which is controlled, through the bank Rossija, by the Russian, pro-government, businessmen Kovalchuk.[523] Rogov (2016) argues that these companies constitute the core of the country's media ecosystem and the main factor in maintaining the unity of the national informational space.

The Russian government—directly or indirectly—is the main owner of the so-called "big troika" of national TV channels: First TV Channel (*Pervyi Kanal*), Russia-1 (*Rossija-1*), and NTV. They collectively accounted for 65.5% of the Russian TV audience in 2015 (Federal Agency on Press and Mass Communications, 2016a). First TV Channel is partly directly state-owned (51%) and partly owned by the National Media Group company (25%) (BBC Russia, 2014). It is not clear who owns the remaining 24% of First TV Channel. As scholars suggest, they belong to the billionaire Roman Abramovich who "has in practice long ceded his control rights to the state" (Lipman, Kachkaeva, & Poyker, 2017). Russia-1 is part of the VGTRK.[524] NTV is almost fully owned (99.94%) by Gazprom Media Holding Company (Federal Agency on Press and Mass

[522] Gazprom Media Holding also owns the greatest number of radio stations. See Federal Agency on Press and Mass Communications (2016b).
[523] See section 1.5 for information on the establishment of his media empire.
[524] See VGTRK's official website at http://vgtrk.com/#page/221

Communications, 2016a).

For Lipman, Kachkaeva, and Poyker (2017), the popularity of pro-governmental TV among Russians could be explained with the feeling of "emotional gratification" that Russian TV creates for national audiences. As they note, it "offered versions of reality that—although not infrequently untrue—made Russians feel good about themselves and their country." Another explanation is the fact that access to First TV Channel, Russia-1, and NTV is free, and has been for a long time.

Russia is among the few European countries that maintain a state-run broadcasting system. State broadcasters in Russia are directly controlled by the president who appoints and dismisses their top managers. As Richter (2010) notes, such dismissals are often executed without citing specific reasons, but merely because the Russian leaders feel dissatisfied with the programming policy or dislike the programmes.

State broadcasters in Russia are funded by the state budget: the amount is annually requested by the government and approved by parliament. The expenses for VGTRK occupy a specific item in the federal budget. Additional revenues for state broadcasters come from advertising. The government tries to ensure the broad accessibility and high popularity of such broadcasters. They have to produce or buy costly entertainment programmes that would attract mass audience. Alongside news programs, First TV Channel, Russia-1, and NTV broadcast expensive entertainment TV shows, series, and movies. State broadcasters are therefore often unprofitable, despite their high viewership rates.

Apart from the 1993 Presidential Decree "On Guarantees of Information Stability and Requirements for TV and Radio Broadcasting," two other statutes establish specific content requirements for state broadcasters.

The 1995 federal statute "On the Order of Covering Activities of the Governmental Bodies in the State Media"[525] mainly obliges state-owned national TV broadcasters to cover major public events, such as the presidential inauguration ceremony, the opening sessions of the parliament and the government as well as speeches by the president, ministers, and members of both chambers of the parliament (Article 5). State-owned TV broadcasters must also speedily inform the audience about some decisions and actions of governmental bodies and on visits of foreign officials (Article 6). They also must provide professional assistance to government officials during their appearance in TV

[525] Federal Statute of the Russian Federation "On the Order of Covering Activities of the Governmental Bodies in the State Media," No. 7-FZ of January 1995.

programmes (Article 12).

Article 11 of the statute obliges state-owned broadcasters, when they are forming programming policy, to inform the audience in a "comprehensive and impartial" manner on the activities of the national government, the president, the parliament as well as on Russia's external and internal policies and court decisions. Nevertheless, the statute has not been implemented, mostly because it must be supervised by a body that does not exist (the Federal Broadcasting Commission).

Another document is the 2009 statute "On Guarantees of Equality of Parliamentary Parties When Reporting on Their Activities by State Publicly Available TV and Radio Stations."[526] It guarantees that such stations respect the equality of all political parties when reporting on their activities. The statute does not apply during election campaigns covered in the media; these periods are regulated by the federal statute "On Basic Guarantees of Electoral Rights and the Rights to Participate in Referendum of the Citizens of the Russian Federation"). This statute has a very limited scope. Firstly, it applies only to VGTRK's national stations because the definition of a "state publicly available station" is narrow, as established in the form of a state federal unitary enterprise, while most of the federal publicly available stations are private entities (see Richter, 2016). Secondly, the statute focuses on the parties' administrative activities rather than on the ideas they promote or debate. In other words, it only gives the impression of political pluralism on Russian state TV.

The issue of governmental media ownership seems to be controversial and arguably not sufficiently developed at the CoE level. As noted above, the CoE standards do not ban governmental media ownership unless it leads to a monopoly. At the same time, Russian state broadcasting ownership may not be consistent with the CoE standards, which exclude state-controled broadcasters and suggest that such broadcasters should be reformed into public service media. In Russia, state ownership represents a Soviet legacy, which may intrinsically lead to non-compliance with the universal vision of freedom of expression. As the ECtHR stated in the *Saliyev* case, the role of the editor-in-chief in state-run media is different from that in private media, and this could impact the editorial orientation of the media outlet as a whole, especially in state-owned media, which could become subject to governmental interference. Some would argue that the existence of a few state-run media outlets may not threaten media pluralism, but this depends on many

[526] Federal Statute of the Russian Federation "On Guarantees of Equality of Parliamentary Parties When Reporting on Their Activities by State Publicly Available TV and Radio Stations," No 95-FZ of 12 May 2009.

crucial factors. As the case of Russia shows, state-run media usually receive considerable privileges in terms of funding, access, *et cetera* (see also the section on digital TV below). In return, they do not perform media's public watchdog service and mainly advance the perspective of the government, all the while, in their role of public service broadcasters, they are financed by tax money from the Russian people. Thus, they implicitly discredit the very idea of journalism in general and public service media, in particular.

It also worth noting that it is often hard to identify governmental monopoly. Russian rules on private ownership allow a company to conceal who its real owners are. Apart from direct state ownership (for instance, in the case of VGTRK's stations as noted above), Russia practices "indirect" state ownership in the case of broadcasters belonging to private structures owned by national companies, such as Gazprom Media Holding Company's broadcasting assets (see the abovementioned Concluding Observations on Russia of the UN Human Rights Committee, 2003) or owned by private structures, but informally controlled by the government (see section 1.5 on the Kovalchuk's National Media Group's broadcasting assets; see also Lipman, Kachkaeva, & Poyker, 2017; Rogov, 2016). These companies do not have special content commitments as per Russian law; their commitments are mostly informal. As Lipman, Kachkaeva, and Poyker (2017) suggest, they receive privileges, which often go beyond the media sector and concern their most profitable enterprises.

Similar situation exists in some of the post-Soviet countries, in disregard to the CoE's standards on media ownership. Particularly, the CoE's Parliamentary Assembly condemned this practice in Belarus:

> The Assembly is deeply concerned by the level of state control over the electronic media, in particular the public television and radio company of Belarus, which works under a presidential decree, but also private joint-stock companies, in which the state typically holds major shares and interests.

Although Magdanov (2012) notes that the Russian concept of freedom of mass information entails a ban on media concentration, it has neither been elaborated in Russian law nor in its implementation, in contradiction to the CoE standards. Article 10 of the statute "On Mass Media" obliges applicants to inform Roskomdanzor, when registering their outlet, about other outlets "in which the applicant is a founder, owner, editor-in-chief, or distributor." If the data is inaccurate, Roskomnadzor may refuse the registration (which would be hardly possible in the cases of state-controlled outlets, given that Roskomnadzor is a state body). However, if the information is correct, there are no

legal consequences against media concentration.

Existing antitrust regulations are ineffective in properly governing the media business due to the specifics of this industry, as Richter argues (2016). Strong antitrust regulations do not necessarily protect the media market from media concentration. While the Russian statute "On Protection of Competition"[527] does not explicitly concern the media, its general rules could be used by the Russian Federal Antimonopoly Service to prevent media concentration, particularly in the broadcasting market. For instance, the statute bans unfair competition (Chapter 2.1), abuse of one's dominant position in the market (Article 10), and the cooperation of companies with the purpose to limit competition. However, due to Russia's lack of transparency in media ownership, media companies may be established by affiliated "trustees," such as friends, relatives, business partners, or even various governmental bodies. The Antimonopoly Service attempted to constrain state concentration in the broadcasting sector, but the impact of these decisions has been limited so far (see Richter, 2010).

Foreign ownership of TV broadcasting companies.

Another problematic issue reinforcing media concentration in Russia is the regulation for foreign media ownership. Although Article 7 of the statute "On Mass Media" originally prohibited foreign individuals, or non-Russian residents, or stateless persons to found media outlets in Russia, foreign companies were allowed to do this. The rules concerning the broadcast media were considerably strengthened in 2001, 2008, 2014, and 2015.

In 2001, a new Article 19.1 supplemented "On Mass Media." Until the 2014 amendments, it provided that:

- foreign companies, or Russian companies with foreign participation, whose share in the capital stock was equal or exceeded 50%, or Russian citizens with dual citizenship were not allowed to found TV broadcast outlets;
- foreign companies or citizens, stateless persons, Russian companies with foreign participation, whose share in the capital stock was equal or exceeded 50%, or Russian citizens with dual citizenship were not allowed to found organisations carrying TV broadcasting in a half or more of the Russian regions or on the territory of residence of a half or more of the Russian population;
- the founders of TV broadcast outlets as well as organizations carrying TV

[527] Federal Statute of the Russian Federation "On Protection of Competition" of 26 July 2006 No. 135-FZ.

broadcasting in a half or more of the Russian regions, or on the territory of residence of a half or more of the Russian population, were not allowed to transfer their shares if this would result in foreign shares in the capital stock becoming equal or exceeding 50%.

In 2008, a new statue,[528] which is still in force, proclaimed that commercial joint-stock companies in Russia were of "strategic importance for the defence and security of the nation" if they carried TV broadcasting on the territory where half or more of the population of any Russian region resides (which in fact includes almost any regional TV station). The statute obliged any foreign investors (including international organisations) to obtain governmental approval before concluding some business transactions, for instance, obtaining 5% or more of the stock of strategic companies (see Richter, 2008b).

Nevertheless, as Richter noted in 2010, foreign legal entities and individuals did enjoy greater freedoms than the law permitted because the government supervised over this issue mostly "with political and economic expediency in mind," allowing investments in media outlets carrying entertainment and politically neutral programming (Richter, 2010, p. 40).

This approach was drastically reconsidered in 2014–2015 with the adoption of the amendments to the statute "On Mass Media" intended to push foreign media owners out of the Russian market and to redistribute Russian TV assets among the business people from Putin's inner circle, as Lipman, Kachkaeva, and Poyker (2016) suggest.

As a result, Article 19.1 of "On Mass Media" bans the establishment or ownership of broadcast media in Russia by foreign governments, citizens or companies, international NGOs, Russian companies with foreign participation, stateless individuals, or Russian citizens with dual citizenship. They may neither directly or indirectly control or "determine the decisions" of owners or editorial offices of *any media* including broadcast media organisations, or of the owners of the companies who founded such organisations.

The article also provides that foreign governments and international NGOs, or companies controlled by them, or foreign companies or citizens, or Russian companies with foreign participation with a share in stock capital that equals or exceeds 20%, or stateless individuals, or Russian citizens with dual citizenship may not own, "manage or somehow control" (directly or indirectly) 20% or more of a capital stock in any company with shares in a company that owns *any media* including broadcast media organisations

[528] Federal Statute of the Russian Federation "On the Procedures of Foreign Investments in Commercial Joint-stock Companies Presenting Strategic Importance for the Defence and Security of the Nation," No. 57-FZ of 29 April 2008.

in Russia. Such detailed approach to the thresholds of foreign media ownership is in stark contrast with the lack of Russian regulation on media concentration.

In 2015, Article 19.2 was added to "On Mass Media," and it obliged Russian broadcast media companies to inform Roskomnadzor about any funding that they may have received from foreign governments, foreign NGOs, foreign citizens, stateless individuals, or Russian NGOs qualified as "foreign agents." This limitation does not concern sums of less than 15,000 rubles (around 200 euros), and, in line with the concern of "economic expediency," it is inapplicable to advertisement as well as copyright licensing of programmes.

Due to the changes in legislation, foreign companies are forced to sell their shares in profitable Russian TV entertainment companies to Russian owners. The most illustrative example is the case of STS Media, one of the biggest Russian TV media holding companies. Its foreign owner had to sell 75% of shares to UTV, the Russian company controlled by the tycoon Alisher Usmanov, a friend of Putin's. The contract value is estimated at 200 million US dollars, although the real value is higher, and "the purchase is among the biggest media ownership redistribution deals in the history of Russian TV market" (Federal Agency on Press and Mass Communications, 2016a, pp. 19–20).

Several Russian TV companies with foreign stakeholders will have to sell their foreign shares to Russian owners in order to comply with the legislation. Among them are First TV Channel, a number of popular entertainment TV stations, Pyatnitsa, 2x2, TV-3 as well as RBK, which has so far allowed some degree of dissent.

In 2016, Russia established a threshold of 20% for foreign ownership in Russian media measurement companies. Additionally, such companies must be determined by the government and supervised by Roskomnadzor (Articles 24.1–24.2 of "On Mass Media"). TNS Russia, a private foreign company, had long been a leader in the Russian media research market. Because of these legal changes, TNS Russia had to sell 80% of its shares to the state-owned public opinion research company VTSIOM. In such a way, Russia established a state monopoly on measuring the audiences of broadcast media.

The CoE standards allow member-states to limit foreign ownership through national legislation. Limitations are considered legitimate if their aim is to resist globalisation and support cultural identity, i.e., to ensure media pluralism, as mentioned above. However, such limitations should neither serve media concentration nor threaten the culture of independence in broadcasting, as it happens in Russia. Such limitations may

be particularly dangerous in a situation of a governmental broadcast monopoly as is the case in Russia.

Apart from strict regulation, Russian rules limiting media ownership are extensively interpreted by Roskomandzor, which is exemplified by another case involving TV-2. In 2016, Roskomnadzor refused this station's application for a new licence to broadcast through cable and to register a new media outlet. Roskomandzor claimed that TV-2's owner, Vicktor Muchnik, might have double citizenship, in violation of the new rules on media ownership. Roskomandzor failed to clarify which documents have to be provided (Muchnik provided a document by the Russian migration service confirming that he only has a Russian citizenship). TV-2's editorial offices sent requests to 144 embassies accredited in Moscow to confirm that Muchnik was not among their citizens (Borodiansky, 2016). In August 2016, the Moscow Arbitrazh Court obliged Roskomnadzor to renew TV-2's licence for radio frequency broadcasting, but its TV station has been so far only available online.

Public service broadcasting.

As noted in the first chapter, there have been many attempts to establish public service broadcasting in Russia. In his 2011 annual address to the Russian parliament, the then-president Medvedev proposed to transform one of the national TV stations into a public service media. He claimed that this would make the Russian information environment more competitive and assured that the new station would be independent (Lenta.ru, 2011b). Some Russian media experts claimed that this step would be unnecessary because Russia "jumped" the stage when there was a real need to create a public service media. They also argued that new media would substitute for the lack of public service media in Russia (see more about this discussion in Sherstoboeva, 2013).

Such an approach contravened with the perspective of the Parliamentary Assembly of the CoE. It paid particular attention to Russia's situation in its 2004 recommendation on public service broadcasting stating that the lack of independent public service broadcasting in the country "was a major contributing factor to the absence of balanced political debate in the lead-up to the recent parliamentary elections."[529]

The Russian legal frameworks for public service broadcasting were formed and adopted during Medvedev's term, in 2012. A new station, *Obshhestvennoe Televidenie*

[529] Recommendation 1641 (2004), "Public Service Broadcasting," adopted by the CoE's Parliamentary Assembly on 27 January 2004 (3rd Sitting). Accessed at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17177&lang=en

Rossii (OTR) started broadcasting a year later, during the third term of Putin's presidency.

My analysis of the legal frameworks for ORT (Sherstoboeva, 2013) has shown that this new governmental media institution mainly imitates a public service media organisation. Its governing frameworks and objectives significantly differ from those provided by the CoE standards. Public service broadcasting in Russia was formed by a presidential decree.[530] OTR and its editorial charter were established by a governmental order.[531] Another presidential decree approved the members of the OTR's supervisory board.[532] Its frameworks lack guarantees of independence and say nothing on its specific remit or programming policy. The charter merely states that the main aims of a public service broadcaster are "production and dissemination of a TV channel."

In violation of the CoE standards, the Russian law does not guarantee OTR's editorial independence or institutional autonomy. On the contrary, it establishes a multi-layer direct and indirect control of Russian authorities over the station. This is described in more detail in Table 2.3. Particularly, OTR's top manager and editor-in-chief is appointed or dismissed by the president of Russia, which means that the Russian executive branch may directly interfere in the station's activities.

Table 2.3
OTR's dependence on the Russian authorities

The body	**Its power regarding OTR**
Government	Established OTR and, therefore, may liquidate it, as follows from the statute "On Mass Media"
President	• Appoints and approves the editor-in-chief (top manager) • Approves the members of the Board on Public TV Control, which in turn forms OTR's managing body, the Supervisory Board, which assigns audits and appoints the members of the Board on the Use of Endowment and of the Auditing Committee. • Participates in forming the Public Chamber, which also has a role in selecting the members of the Board on Public TV Control.
Presidential Administration	Forms the Board on Public TV Control

Another problem of the Russian legal framework for public TV is the lack of guarantees for public access to its programmes. No national frequencies were provided

[530] Decree of the President of the Russian Federation "On Public Service TV in Russian Federation," No. 455 of 17 April 2012.
[531] Order of the Government of the Russian Federation, No. 1679-r of 12 September 2012.
[532] Decree of the President of the Russian Federation "On Approving Membership of the Board on Public Service TV," No. 1012 of 18 July 2012.

to OTR; it was launched as an online service. A year after its creation, 65% of Russians claimed that they had never heard of this TV station (FOM, 2013). Now it is also available via cable, satellite, and IP TV.

Formally, OTR exploits a mixed scheme of funding. It may receive funding from the state budget, advertising, grants, endowments, etc. Yet in practice, OTR lacks stable funding, which it needs to accomplish its mission, as provided by the CoE standards. In 2016, the authorities allocated 1,43 billion rubles for OTR (almost 20 million euro). In comparison, RT, the main Russian propagandist TV station abroad, received 19 billion rubles from the state budget (around 260 million euro) ("The Ministry of Finance proposes," 2016).

Just after the adoption of the presidential decree on creating a public service TV in Russia (when, most likely, its pro-governmental orientation in policy was not obvious to the Russian population), the public opinion research company FOM conducted a survey (FOM, 2012) examining public opinion on the funding of the new institution. 81% of respondents claimed that they would not pay fees for a public service TV. More than a third (39%) said that governmental funding would bring more positive than negative consequences. Only 19% of respondents claimed that state financial support would cause more harm than benefit.

Responding to criticism of OTR's political bias in 2013, its head Anatoly Lysenko stated that he did not believe in independent TV at all. In his opinion, an independent TV is no more than just an abstract idea (BBC Russia, 2013).

To a certain extent, Russia retraces the same path as that of other Central and Eastern European countries that have failed to properly implement public service media institutions. As the abovementioned recommendation of the CoE's Parliamentary Assembly on public service broadcasting notes,

> In central and eastern Europe it is not yet socially embedded, since it was "transplanted" into an environment that lacked the necessary political and management culture, and in which civil society is still weak, has inadequate resources and little dedication to public service values.

Indeed, Russian society is still fairly immature to grasp the importance of independent broadcasters and to resist the government's attempts to control them. It can also be argued that this "paternalistic mode" is to a large degree acceptable by journalists and the public at large, particularly in the context of Russia's economic problems.

Digital TV.

In most European countries, analogue terrestrial TV has been already phased out, but Russia is still transitioning to digital TV. In contradiction to the CoE standards, which suggest strengthening media pluralism as a result of the digital switchover, Russian rules on digitalisation may only facilitate media concentration (see Richter, 2013; Strukov, 2011; Richter, 2010; Richter & Shevchenko, 2010).

The shift towards digital television in Russia is fully regulated and controlled by the executive branch of the government, which played the biggest role in developing the strategy for the shift, with some participation from powerful business structures and without open debates (Richter, 2016). No public discussions were held about a parliamentary act concerning digitalisation. The transition to digital broadcasting is regulated by the 2009 National Purpose-Oriented Programme for the Development of Television and Radio Broadcasting, 2009–2018 (*Federal'naia Tselevaia Programa "Razvitie Teleradioveshchaniia v Rossiiskoi Federatsii na 2009–2018 gody"*) approved by a resolution of the Russian government.[533] This approach considerably miscorrelates with the suggestions of the CoE's recommendation "On Measures to Promote the Democratic and Social Contribution of Digital Broadcasting."

The programme was initially supposed to be implemented by 2015, but in August of that year the government unilaterally decided to prolong the programme for three additional years, in breach of the above-mentioned Agreement GE-06, adopted at the ITU's Regional Conference. As mentioned before, Russia had to switch over to digital TV by 17 June 2015, alongside other European and post-Soviet countries, but failed to do so. Because of the renewal, the programme's cost increased; it has reached the enormous sum of almost 165 billion rubles (around 2,3 billion euro), of which the national budget share is around 98,5 billion rubles (around 1,4 billion euro).

It was initially planned that Russia would have three multiplexes, each including ten TV channels. However, it is still uncertain whether the third multiplex, reserved for regional channels, would be launched (Korolev, 2016). Nevertheless, it is most likely that the digital shift in Russia will negatively impact regional broadcasting companies because their interests and concerns have been almost entirely ignored in the course of the transition towards digitalisation.

[533] Resolution of the Government of the Russian Federation "On National Programme Purpose-Oriented Programme for the Development of Television and Radio Broadcasting in 2009–2018" of 3 December 2009, No. 985.

Table 2.4

Must-carry channels in Russia, November 2016

No	Channels	Description	Ownership
1	First TV Channel (*Pervyi Kanal*)	Information and entertainment TV channel A successor of the First TV Channel of the USSR's Central Television, which was replaced by Ostankino channel in 1991 Founded on the basis of Ostankino in 1995 with the name ORT (which in the Russian language stands for Russian Public Service Television); in 2002, it was renamed First TV Channel	51% state-owned 25% owned by the National Media Group, owner is a billionaire Kovalchuk 24% owned by the companies of a billionaire Abramovich
2	Russia-1 (*Rossija-1*)	Information and entertainment TV channel A successor of the Second Channel of the USSR's Central Television Founded in 1991 as RTR; renamed into RTR-1 in 1997, Rossija in 2002, and Rossija-1 (since 2010) It has slots for all regional TV channels owned by VGTRK	100% owned by VGTRK
3	Match TV	Sports and entertainment TV channel Established as a sports TV channel (called Sport) in 2003 and owned by VGTRK; renamed into Rossija-2 in 2010 In 2015, its frequency was granted to Gazprom Media Holding, which launched Match TV on this frequency in November, 2015	100% owned by Gazprom Media
4	NTV	Information and entertainment TV channel Established in 1993; replaced Fourth Channel of the USSR's Central Television	100% owned by Gazprom Media
5	Fifth Channel (*Pjatyi Kanal*)	Information and entertainment TV channel A successor of Leningrad's Channel of the Central Television of the Soviet Union, it was titled Peterburg-Pjatyi Kanal (between 1991–1998 and 2004–2010) and TRK Peterburg (in the period 1998–2004); in 2010 it was renamed Fifth Channel	100% owned by the National Media Group
6	Russia-K *(Rossija-K)*	TV channel about art and culture Established in 1997 as RTR-Kultura, renamed into Kultura in 1998 and into Rossiya-K in 2010	100% owned by VGTRK
7	Russia-24 *(Rossija-24)*	News TV channel Established in 2006 as Vesti; renamed in 2010 into Rossija-24	100% owned by VGTRK
8	Karusel	TV channel for children and youth Established in 2010 to replace two TV channels for children and youth: Teleniania (the former channel of First TV Channel) and Bibigon (the former channel of VGTRK)	50% owned by VGTRK and 50% owned by First TV Channel
9	OTR	Russian Public Service TV channel Established in 2013; was included into the first multiplex in 2012	100% state-owned

10	TV Tsentr	Information and entertainment TV channel Established in 1997 as TV Tsentr as the channel for Moscow region; between 1999 and 2006, it was titled TVTS In 2012, it was included in the second multiplex. In 2013, following a presidential decree, became a national TV channel and was included into the first multiplex in 2012	99.2326% owned by the Government of Moscow 0.7674% owned by Promtorgtsentr company, controlled by the billionaire Vladimir Yevtushenkov
	Vesti FM	News radio channel Established in 2008	100% owned by VGTRK
	Mayak	Information and entertainment radio channel Established in 1964 by the Central Committee of the CPSU	100% owned by VGTRK
	Russia's Radio *(Radio Rossii)*	Information and entertainment radio channel Established in 1990	100% owned by VGTRK

Must-carry channels are included into the first multiplex that currently covers more than 90% of Russia's population. In compliance with the CoE standards, Russian regulation guarantees that must-carry channels will be accessible to audiences at no charge. Russian legislation also provides that the first multiplex includes one regional TV channel for the population of every Russian region. However, Russian rules on must-carry channels merely create an impression of media pluralism and ignore the public's interest in certain TV programme services. Public access to must-carry channels is provided in line with the Soviet tradition of ensuring an easy and broad accessibility to state propaganda.

In 2011, the statute "On Mass Media" was supplemented with Article 32.1 empowering the president with the authority to approve must-carry channels despite the fact that it had already been done in 2009 through a presidential decree[534] (that has been changed seven times). The first multiplex in Russia consists of ten must-carry TV channels and three radio channels, allocated among the three main media holding companies mentioned above: VGTRK, Gazprom Media, and the National Media Group (see Table 2.4). In contradiction to the CoE standards, the Russian legal frameworks for digitalisation create discriminatory privileges for these companies. According to Article 32.1 of "On Mass Media," broadcasters of must-carry stations receive universal licences and are released from tendering procedures. Their expenses for broadcasting must-carry channels in small local areas are covered from the state budget.

[534] Decree of the President "On All-Russian Must-carry Publicly-available TV and radio channels," No. 715 of June 24, 2009.

The 2016 amendments to the statutes "On the Mass Media" and "On Communications" established guidelines for the selection of regional TV channels for must-carry purposes. A regional TV channel for the first multiplex would be determined in accordance with rules established by the government and from the channels whose broadcasts have already reached no less than 50% of the population of their region. Most likely, this means that all regional channels would be those owned by VGTRK because it has the biggest regional broadcasting network (which it recaptured in 1999, as outlined above).

Another organisation that receives extensive benefits from digitalisation is the state broadcasting communication network RTRS, which was assigned to be a sole distributor of must-carry channels by a 2009 presidential decree. The 2014 presidential decree[535] established that the RTRS would be a communication service provider of all channels included into digital multiplexes in Russia. The broadcasters of channels of the second multiplex were obliged to conclude, after a competition, ten-year contracts with the RTRS for providing communication services to them.[536]

The FKK (under the head of Roskomnadzor, it must be remembered) conducted the competition for a second multiplex. The procedures and criteria of the competition were not clear enough. The second multiplex includes the TV station of the Russian Orthodox Church, SPAS; that of the Ministry of Defence, TV Zvezda; the information TV channel owned by some of the CIS countries, MIR; information and entertainment station REN TV, and six entertainment stations: STS, Domashnij, TNT, Pjatnitsa, TV 3, and MUZ TV. [537] REN TV is owned by the National Media Group; TNT, Pjatnitsa, and TV 3 are owned by Gazprom Media; STS, Domashnij, and MUZ TV are owned by UTV, the media holding company of a billionaire Usmanov. The only channel with an alternative news agenda that competed for a spot in the second multiplex was TV Dozhd, but it lost for unexplained reasons.

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[535] Decree of the President of the Russian Federation "On Guarantees of Distribution of TV and Radio Channels on the Territory of the Russian Federation" of 11 August 2014, No. 561.

[536] Announcement of the Federal Service on Supervision in Communication, Information Technologies and Mass Communication "On Results of the Competitions on Granting the Right for Terrestrial Broadcasting with the Usage of a Position in the Second Multiplex when Executing Terrestrial Digital Broadcasting" of 14 December 2012. Retrieved from Roskomnadzor's official website at: http://www.rsoc.ru/docs/Soobshhenieorezul6tatakhk1212ot14122012.doc

[537] Announcement of the Federal Service on Supervision in Communication, Information Technologies and Mass Communication "On Results of the Competitions on Granting the Right for Terrestrial Broadcasting with the Usage of a Position in the Second Multiplex when Executing Terrestrial Digital Broadcasting" of 14 December 2012. Retrieved from Roskomnadzor's official website at: http://www.rsoc.ru/docs/Soobshhenieorezul6tatakhk1212ot14122012.doc

Russian audiences will have free access to the channels of the second multiplex, but state subsidies will be allocated only for transition of must-carry channels. Because of decline in the advertising market, media outlets cannot cover expenses for digital broadcasting in the second multiplex and some managers had informally appealed to the Russian authorities for subsidies (Afanasieva & Balashova, 2015). Other outlets that are now available to audiences for free will have to broadcast on cable. In this case, many of them will not be allowed broadcasting advertisement (see below about these limitations) and may have to declare bankruptcy.

As the digital switchover in Russia has not been completed yet, many issues remain unclear. However, the analysis of the existing legal frameworks has demonstrated that digitalisation in Russia could hardly contribute to enhancing freedom of information and media freedom in the country.

The ECTT and Russia's Perspective on Its Ratification

On 4 October 2006, Sergei Lavrov, the Russian Minister of Foreign Affairs, signed the ECTT on behalf of the Russian Federation. Subsequently, the then-Ministry of Culture and Mass Communication developed two draft laws. The first one proposed to amend the statues "On Advertising" and "On Mass Media" so that they would fully comply with the ECTT. The second draft law would ratify the ECTT with only one reservation concerning commercials of alcohol products. It was proposed that Russian rules, stricter than those of the ECTT, should be applied in this case. However, the draft laws were not considered in parliament. As Richter argues, Russia had not ratified the ECTT because of the reluctance of the TV industry to be regulated by "rules outside its influence and control" (2010, p. 20). Currently, Russia's ratification of the ECTT could hardly be possible mainly for political reasons.

It is important to note that the ECTT plays a central role in the media freedom issues that became evident during the Russian-Ukrainian conflict. The fact that, unlike Russia, Ukraine has ratified the ECTT became a formal rationale for terminating the retransmission of almost eighty Russian TV channels in Ukraine (as of October 2016) over the last two years. Yurij Artemenko, Chairmen of the Ukrainian National Council on TV and Radio Broadcasting, claimed that Ukraine, as a party of the ECTT, had to complain to the other parties' national regulators if their broadcasters had breached Ukrainian law, but in the case of Russia, a non-party of the ECTT, the Council had "the right to take immediate measures" and to switch broadcasting off the air in case of any

breach (Portnikov, 2016).

At the same time, Artemenko admitted that the Council had not switched off TV Dozhd (which provides a critical perspective to the annexation of Crimea by Russia), when the station broadcasted a programme featuring a person "from the [Ukrainian] banning list."[538] He stated that the Council had only sent a warning letter asking the station to provide guarantees that they would not show this person anymore, but "if they fail to do this, I will vote for its removal eagerly," he claimed. He also noted that even if a company showing Russian content is registered in EU countries, the Council "identified" that the company was Russian and switched it off. In other words, it is inferred that the real reasons for switching off Russian stations in Ukraine are mainly political rather than legal.

Artemenko explained that Russian broadcasters had violated Ukrainian law in that they insulted Ukraine, called for separatism, or denied the annexation of Crimea. However, it seems that legal rules are interpreted extensively in Ukraine. For instance, its Council banned the Russian children's cartoon TV station Multimania because the map used during the stations' weather forecasts segments depicted Crimea as part of Russia. Sometimes the Council switched off the transmission of Russian stations only because they had not eliminated Russian commercial spots.

The ECTT does oblige broadcasters to ensure that their "news fairly present facts and events and encourage free formation of opinions" (Article 7). It also bans the dissemination of hate speech and giving "undue prominence to violence," but such cases, nevertheless, demand court consideration.

In the ruling on the case on separatist propaganda, *Başkaya and Okçuoğlu v. Turkey* of 8 July 1999, the ECtHR stated that it is difficult to draft laws with absolute precision on this issue and that "a certain degree of flexibility may be called for to enable the national courts to assess" it. This means that, from the CoE perspective, every case on separatist propaganda demands precise court analysis, including the assessment of proportionality of measures against media organisations, among which "switching off" is incredibly harsh and, therefore, hardly desirable, from the CoE's standpoint.

The report *Propaganda and Freedom of the Media* by the OSCE Office of the Representative on Freedom of the Media (2015, p. 29) also states that encouraging media pluralism and professional ethics is a proper measure against media propaganda. In the context of the conflict in Ukraine, the OSCE report refers to the guidelines of the CoE's

[538] A list of people banned from being shown on TV.

Committee of Ministers on protecting freedom of expression and information in times of crisis.[539] These guidelines state that, during crisis, the CoE member-states should provide guarantees against undue limitations of the freedom of expression and information and against manipulation of public opinion. The document reminds that the public's access to information in the course of crisis should not be restricted beyond the limitations allowed by Article 10 of the ECHR and should be interpreted in line with the ECtHR case law. This includes receiving information through the media.

The recommendation suggests that, in time of crisis, member-states should avoid applying vague terms to restrict the right to freedom of expression and information. The protection of this freedom should be ensured through dialogue and cooperation between the states, the recommendation notes. CoE considers media pluralism, and not the closure of media outlets, as one of the main solutions for resolving a crisis:

> Member states should constantly strive to maintain a favourable environment, in line with the Council of Europe standards, for the functioning of independent and professional media, notably in crisis situations. In this respect, special efforts should be made to support the role of public service media as a reliable source of information and a factor for social integration and understanding between the different groups of society.

Protection of others' rights and interests on TV.

In Russia, broadcasting organisations must follow general limitations of the right to freedom of expression, concerning defamation (Section 2.1), extremism (Section 2.2), and other violations. Article 4 of the statute "On Mass Media" ("Inadmissibility of the Abuses of the Freedom of Mass Information") specifically bans the dissemination of mass information containing public incitement to terrorism and its public justification, other extremist materials as well as materials promoting the cult of violence and cruelty. As to audiovisual services that have not been registered with Roskomnadzor as media—but could be viewed as media services from the CoE perspective—they are regulated by general rules provided for online content (see the section 2.3).

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[539] Guidelines of the Committee of Ministers of the Council of Europe "On Protecting Freedom of Expression and Information in Times of Crisis," adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies. In "Recommendations and declarations of the Committee of Ministers of the Council of Europe in the field of media and information society," Strasbourg, 2016, pp.138-141. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680645b44

Article 27 of the statute requires announcing the name of the TV station (no less than four times in 24 hours) and the name of the programme. Broadcasters also must mention the name of the registering body and their registering certificate number. According to the article, each copy of a TV programme must contain its name, date of release, issue number, the surname of its editor-in-chief, number of copies, the address of the editorial office, the cost (or the mention "free of charge") as well as the appropriate age rating symbol. Article 13.22 of the Russian Code of Administrative Offences establishes the fines (imposed by Roskomnadzor) for violation of the abovementioned requirements.

Protection of minors from harmful TV programmes.

"On Mass Media" in Article 4 also bans dissemination of materials promoting pornography and obscene speech by mass media organisations. As noted in the first chapter, the 2010 statute "On Protection of Children from Information Harmful to Their Moral Health and Development" (effective since September 2012) provides an age rating system obliging producers and distributors of mass information to rate their content and feature age rating signs at the beginning of the programme and after each break during the programme. Content is divided among five age groups: "0+," "6+," "12+," "16+," and "18+," according to the statute's Articles 5–10. Traditional broadcasters are obliged to inform the audience on the appropriate age category of every programme, except those broadcasted live. If online audiovisual services are not registered with Roskomnadzor, they are not obliged to provide a sign signalling the age category of the content.

Pornography is categorised as "18+" content. Its "illegal" dissemination and production is also banned in Article 242 of the Russian Criminal Code; however, no statute explains what kind of dissemination of pornography would be considered legal. As mentioned in section 2.2 dissemination of child pornography online is specifically banned by the statute "On Information."

In line with the ECTT, the statute "On Protection of Children from Information Harmful to Their Moral Health and Development" obliges TV companies to provide special time slots for the broadcasting of adult content. The "16+" programmes may be broadcasted only from 9 pm to 7 am, the "18+"—from 11 pm to 4 am. Erotic TV stations can also broadcast only in the "18+" time slot. Article 37 of the "On Mass Media" defines such stations as "systematically exploiting interest to sex."

In disregard of the ECtHR requirements on foreseeability of free speech

limitations, the statute contains imprecise wording, which opens it to arbitrary application. For instance, Article 1 excludes from its scope the content of "considerable historical, artistic, and cultural value," but the meaning of this provision is not clear enough. Many questions also emerge from Article 5(2), which outlines the criteria for classifying content as "18+". Among such criteria is information "denying family values, promoting untraditional sexual relationships, or forming disrespect to parents or other family members," or "able to cause among children the willingness to consume drugs, tobacco products, alcohol, to participate in gambling, or to engage in prostitution, vagrancy, or mendicancy." Such wording is ambiguous and may stand in the way of ensuring proper balance between protection of media freedom and protection of morals. Roskomnadzor is authorised to accredit experts to assess compliance of content with the statute requirements. It imposes fines on broadcasters who have breached the provisions of the statute (Articles 6.21, 13.21(2), 13.15(3) of the Russian Code of Administrative Offences).

While the CoE standards provide a broad "margin of appreciation" for member-states with regards to issues concerning morality, it seems that the Russian statute protecting minors from harmful content goes beyond this concept since it is not sufficiently foreseeable. In addition to strict supervision by Roskomnadzor, its imprecise clauses allow disproportionate interference with media freedom.

Access to information of public interest through TV.

In general, the Russian fair use doctrine could be understood to correlate with the ECTT's right to "short reporting on events of high interest for the public." Article 1274(1) of Part 4 of the Russian Civic Code allows the use of copyrighted works for informational, polemical, and critical purposes and in a scope justifiable by these purposes. The works can be used without consent from the copyright holder provided that the author's name and the source are mentioned. Thus, Russian broadcasters cannot prevent others from quoting excerpts from their programmes that report on major events or facts. However, no equivalent of the ECTT's guarantees for the public's access to events "of major importance for society" through TV are provided.

TV advertisement and teleshopping as well as support of national TV production.

The 2006 statute "On Advertising"[540] applies to all media, but contains specific rules pertaining to the regulation of commercials in certain types of media, including TV broadcasting. Article 5(1) of the 2006 statute "On Advertising" provides that commercials should be fair and honest. Article 5 bans unfair competition in advertising. The Russian Federal Antimonopoly Service, to a greater degree, effectively supervises the implementation of these rules. Like the ECTT and unlike the AVSMD, the Russian statute does not regulate product placement.

Like the ECTT, the Russian statute in Article 6 stipulates limitations for commercials with the purpose to protect minors "from abuses by their trust and lack of experience." The statute bans commercial messages that would excite minors to persuade their parents into buying the advertised products. To name a few other restrictions, advertisements must not discredit parents or tutors, present misleading information about the affordability of the advertised products, or create the impression that, with these products, minors would be in privileged positions compared to their peers without such products.

Article 14 provides specific requirements for TV commercials. They should be separate from editorial content. Crawl line with commercials cannot exceed 7% of the screen or be superimposed on subtitles or titles with commentaries. In national days of mourning, TV advertisement cannot be broadcasted at all. The sound volume of TV programmes and advertisement should be identical.

The transmission time for advertising shall not exceed 15% of the hourly transmission time, which complies with the ECTT. Advertisement cannot interrupt religious TV programmes, pre-election campaign content, programmes less than 15 minutes long, or any programmes broadcasted according to the federal statute "On Guarantees of Equality of Parliamentary Parties When Reporting on Their Activities by State Publicly Available TV and Radio Stations." Each TV advertising spot cannot exceed four minutes. Limitations for the length of commercials are also provided for children's educational TV programmes and broadcasts of sports competitions. However, unlike the ECTT, Russian regulation lacks rules concerning the frequency of advertisement slots.

Article 3 of the statute "On Advertising" defines a sponsor as a legal entity or a person that provides funding for an event, broadcast, or creative work. Sponsored programmes must inform the audience about their sponsor. A programme cannot be

[540] Federal Statute of the Russian Federation "On Advertising" of 13 March 2016 No. 38-FZ.

sponsored by products or services. Therefore, if a TV programme contains trademarks, or information on products or services of a sponsor, such advertisement cannot be qualified as sponsorship, which may be deemed as fully consistent with the ECTT. "On Advertisement" provides certain preferences for sponsorship. Unlike the ECTT, the Russian regulation allows the interruption of TV programmes for sponsor advertising without announcing that a commercial break would follow.

Article 7 of "On Advertising" prohibits commercials of tobacco products. Article 24 provides limitations for commercials of medical products and services, as the ECTT does. Commercials of beer products constituted a significant share of the Russian advertisement market before August 2012 when Russia introduced the total ban on commercials of alcoholic products in Article 21.

Most of the provisions in the 2006 statute "On Advertising" are generally consistent with the ECTT, with a few exceptions. However, due to the decline in Russia's advertising market, "On Advertising" was significantly amended in 2014–2015. The amendments were mainly aimed at increasing broadcasters' advertising income by easing some requirements and reallocating advertising incomes in favour of state-controlled broadcasters, as I show below.

In 2014, Russia amended Article 21 of "On Advertising" and allowed TV advertisement of beer during broadcasts of sports competitions, with the exception of competitions for children and youth. Russia also permitted advertising of beer on TV stations specialising in sports. The amendments were established, as the drafters note, to "properly conduct sports competitions" and to "let everyone make money" (Sostav, 2016) in the course of the FIFA Confederations Cup and the World Football Cup, both of which will be held in Moscow in 2017 and 2018, respectively. Therefore, these amendments will be effective until January 2019. Even before the start of these sports events, the amendments have already brought benefits to state-owned sports and other entertainment TV stations. Particularly, Gazprom Media's Match TV was able to sign a very lucrative contract with the beer producer Heineken, for an estimated cost of 150 million rubles (around 2,1 million euros) (Sostav, 2016). Analysis of the data of TNS Russia shows that the amendments have also benefitted other state-controlled entertainment stations, such as First TV Channel, NTV, TNT, REN TV, and STS.

Russia also allowed advertising of Russian wine products from 11 pm to 7 am (except during live programmes and programmes for youth and children). Apart from supporting broadcasters, this easing of restrictions is in line with promoting the "import-

substituting" strategy introduced by the Russian government in response to foreign sanctions imposed after the annexation of Crimea. Additionally, this change might also be intended to support Crimean wine producers, since Crimea has the second biggest vineyards in Russia (Sostav, 2016).

In order to reallocate advertising income in favour of state-controlled national broadcasters, broadcasters offering pay TV programme services were banned from disseminating TV commercials in 2014. The Russian government claimed that this measure is in the audience's interest of not making "double payments": when buying subscription and when consuming commercials. However, the real intention was to support national broadcasters on the backdrop of an economic crisis and the expenses they were occurring for the digital shift. The Russian law provided no definition for pay TV. Thus, media organisations could not plan their managing strategies because they did not know whether this rule was applicable to them or not. The Russian Federal Antimonopoly Service clarified that the new rule would only exclude the holders of licences for broadcasting on frequencies. The day before the new rule entered into legal force, Roskomnadzor granted licences for broadcasting on the same frequency in Moscow to forty state-controlled companies (Boletskaya, 2016). In such a way, they were allowed to circumvent the new regulation. For many other broadcasters, the new requirement could mean bankruptcy in the near future. In 2015, however, Russia "smoothed" the measure by banning the dissemination of advertisement only for those pay TV companies that broadcast less than 75% of Russian "national audiovisual" works. Thus, the main target of this regulation became companies broadcasting foreign TV content via cable or satellite.

Support of Russian TV production.

Audiovisual media works are considered "Russian national" if they meet several criteria: 1) they are in the Russian language or in foreign languages, but are produced for Russian media organisations; 2) they are produced by Russian citizens or legal entities, or produced for Russian media organisations and Russian investments in such programmes are no less than 50% of the total production costs. Additionally, the statute qualifies as "Russian national" audiovisual media works the programmes produced according to the international agreements of the Russian Federation. Translated, dubbed, and subtitled foreign programmes do not qualify as Russian national production.

The new article of "On Mass Media," Article 32.1, also obliged broadcasters of

must-carry channels to transmit more than 75% of Russian national audiovisual works. The Russian Federal Antimonopoly Service supervises this rule. To this aim, the Service was given the power to request from the broadcasters their TV programs, registers of programmes as well as information on the producers of such programmes.[541]

Russian measures supporting national audiovisual producers not only intervene in the market, but they have also created discriminatory rules, in contradiction to the CoE's standards. While these limitations may be interpreted as protecting Russian cultural policy, as has been the practice on the level of the EU, their primary aim is to support companies loyal to the ruling power by allowing them to grab the biggest share of advertising revenue.

To sum up, the perspectives of Russia and the CoE on audiovisual regulation are different. Different historical backgrounds for the Russian and European broadcasting legal orders are the likely explanations for this. Instead of employing the concepts of freedom of expression and information and cultural protectionism, the Russian (or Soviet) broadcasting system developed under governmental (in fact, the Party's) control and the Party's protectionism. As shown in the first chapter, after the end of Perestroika, the new political establishment gradually regained the Party's role in exercising governmental control.

At the same time, since the end of the Soviet period, Russian law has not progressed from issues of licensing and content regulation towards the protection of democratic values such as competition, pluralism, freedom of access to content, and protection of vulnerable audience groups, unlike the CoE standards or EU legislation. While the CoE standards consider audiovisual regulation as a tool in service of the public interest through the promotion of pluralism and free flow of information, Russian legal frameworks for broadcasting are mainly a governmental tool for ideological control (propaganda) and to serve the commercial interests of loyal business executives.

Considering the maturity of democratic institutions in Russia is also important when trying to understand the nature of the audiovisual policies enacted in the country. The Soviet model of state protection may be acceptable in the industry because the broadcasting business is costly, while its regulation is fairly harsh, unclear, and its implementation is often selective. The government shields the industry so that it can

[541] Order of the Federal Service on Supervision in Communications, Information Technologies, and Mass Communications of the Russian Federation "On Procedures of Compliance of National Production of the Mass Media to the Requirements of Part 5 Article 32.1 of the Statute of the Russian Federation, "On Mass Media," of 29 August 2016, No. 218. Retrieved from https://rg.ru/2016/11/02/roskomnadzor-dok.html

survive in harsh market conditions by ensuring stable funding and providing other privileges. In exchange, the industry has become a governmental mouthpiece. Russian audiences, also part of this informal agreement, seem to be satisfied with consuming expensive TV entertainment for free and, what is maybe even more important, with the state propaganda appeal to their sense of Russia's unique identity. All this resembles the practices of Soviet times, particularly, in the area of TV broadcasting.

As to the implementation of the CoE standards, two strategies can be revealed in Russian broadcasting policy: Russia either imitates the CoE institutions or concepts (for instance, public service media) or ignores them (as in the case of media concentration). Nevertheless, both imitation and disregard cause the same result: the Russian government strengthens its dominance in the broadcasting market. This trend has been driven by the complex political and economic situation in the country, technological changes, and television's great impact on the public. In the context of this situation, the government tries to regain control over information flows through broadcasting by means of audiovisual regulation.

Unlike in the rest of Europe, a specific approach to regulating on-demand services has not been formed in Russia yet, which can be accounted for by the relatively low impact that this type of media has on public opinion. Russia still views audiovisual regulation in a traditional sense, which is no longer relevant. At the same time, Russian legislation applies restrictive online regulations (see the previous section) to audiovisual media services. Perhaps, if and when such services become more powerful, the harsh restrictions of "On Mass Media" concerning compulsory registration or licensing would become applicable to on-demand media services as well, or perhaps new regulations would emerge (and it would not be surprising if they imitate European concepts as a way of justifying the limitations that they might want to impose).

Most likely, the government will make all possible efforts to maintain control over broadcast media through the institutions of media regulation and media ownership. The basis for that has already been established. It is very likely that the shift to digital TV would lead to a more concentrated media market in Russia and would herald the end of independent regional broadcasters in the country. Being aware of the Soviet practices of harsh governmental control, the CoE should pay more attention to the problem of state broadcast media ownership. This issue is still very important when it comes to protecting freedom of expression not only in Russia, but also in other CoE member-states with a Soviet or communist past.

CONCLUSION

Freedom of expression and communication through any media is a value cherished as a universal human right in the main international treaties including the ECHR. However, such a vision of this right became a new challenge for many former Soviet republics, including Russia. This dissertation has identified the influence of this vision on media policies in Russia by examining its national media legislation, judicial interpretations, regulations, as well as political and social outlooks on media freedom in the context of the CoE standards. The dissertation concludes that, over more than two decades of Russia's membership in the CoE, the Russian media policies have mostly been superficially impacted by the CoE perspective and are still considerably effected by complex Soviet traditions. Although the Russian constitutional concept guaranteeing freedom of speech and freedom of mass information was formed in early 1990s in line with the universal standards, this concept has generally remained nominal during Russia's CoE membership.

Furthermore, since the mass development of the Internet in Russia, the country has largely proceeded from ignorance of the CoE standards on speech and media to a reinterpretation of them in the interests of the Russian political establishement. Russia has increased attempts to challenge the universality of the right to free speech. The identification of this trend is probably the most important result of this study contributing to an understanding of the governmental strategies for implementation of the CoE standards at national levels.

The dissertation has exposed the fact that Russian media legislation mainly contradicts the CoE standards and insufficiently balances freedom of expression with other rights and interests, contrary to the Fedotov findings made in 2001, when Russia's media legistation was more consistent with CoE standards than it is now. The Russian media legislation lacks legal rules as well as mechanisms which, according to the CoE standards, should be incorporated to protect the media from undue interference. Adopted under various pretexts, the excessive Russian restrictions on media freedom almost always go beyond the limits of the ECtHR doctrine of "margin of appreciation." Russian law tends to apply many European legal notions, but generally incorporates them in a

specifically national way, thereby contradicting the universal vision of the right to freedom of expression. This policy may create the illusion of formal compliance.

However, rather than serving the protection of legitimate aims set up in the Constitution and the international treaties, the restrictive Russian media policies facilitate isolation and serve as control over the information flows in the interests of the political establishment, which are merely camouflaged in law as being "governmental" or "national." Such aims fundamentally contradict the intentions advanced by the CoE as well as other international human rights organizations, such as the UN and OSCE. Although the PACE has addressed a great deal of the problems in Russia's media policies since 2002, its suggestions were mostly negated and, furthermore, were often criticized as politically biased. Recommendations of the Venice Commission regarding reforms of Russian extremist legislation were also ignored.

Russian officials tend to justify Russia's broad "margin of appreciation" by misinterpreting universal and European values as being "Western." This perspective has also penetrated Russian legal research (see, for instance, Shugrina, 2016; the Centre of Actual Politics, 2017). However, there can be no doubt that such a perspective is ideologically driven and legally unfounded. The Russian authorities certainly understand that human rights are intrinsically universal and that the UN, the CoE, and the OSCE operate through mutual collaboration of their members whose locations go beyond the western world. The Russian authorities are aware of their commitments towards the UN, the CoE, and the OSCE to respect the freedom of expression in accordance with international parameters rather than in line with Russia's own "national" interests.

This dissertation has clarified how the highest Russian courts have applied the CoE standards on media freedom and how the resulting outcomes for this freedom have differed among the highest courts. It was shown that not only did the Supreme Court stop ignoring the CoE standards on media in the last decade, as Richter (2015) notes, but that the Constitutional Court also started to apply them often throughout the 2010s. However, while the Supreme Court applied the CoE standards to make the Russian national media policies more in alignment with international values, the Russian Constitutional Court refered to CoE standard mostly to prove that Russia's restrictive policies on speech are consistent with the Constitution and international standards.

The Constitutional Court's current strategy provides substantial benefits for the political regime. The previous strategy of simply ignoring the CoE standards is convincing evidence for Russia's disrespect toward them, but the new method merely

imitates compliance in order to provide formal evidence for the official governmental position that Russia does indeed respect the international standards on the human right to freedom of expression. The Constitutional Court often reinterprets the CoE standards or applies them selectively making the constitutional provisions on free speech and freedom of expression legally powerless. Its policies also create certain patterns for lower courts and other law enforcement bodies on implementation of media and speech policies.

The Russian media and mass communication watchdog, Roskomnadzor, and the lower national courts still typically ignore the CoE standards and serve instead the restrictive national media policies. Rather than helping to balance the media freedom with other rights and interests, Roskomnadzor mainly administers restrictive media policies and presents the governmental position on how to cover various controversial issues in the Russian media.

The analysis of the ECtHR jurisprudence against Russia for violation of freedom of expression and our study of the Russian general jurisdiction court decisions concerning the media have revealed the same central problems of Russian jurisprudence, which imply that they are intrinsically fundamental and systematic. Russian jurisprudence is chiefly formal and decisions lack in-depth consideration of the cases in light of Article 10 of the ECHR. The Russian courts frequently fail to acknowledge the specific role of journalism or the importance of the right to freedom of expression in a democracy. They primarily provide insufficient protection for political expression and tend to overlook the importance of public debates over issues of public interest. They often apply legislation as a tool to protect public officials from criticism or investigation and to impose disproportionate sanctions.

Overall, the dissertation concludeds that the ECtHR jurisprudence against Russia for violation of freedom of expression has had insufficient impact on Russian media policies, contrary to Shönfield's (2014) assumption. In cases on extremism and on broadcasting licenses, general jurisdiction courts have largely ignored the CoE standards. Their decisions on defamation in the media have indeed invoked the CoE standards, but it has been shown that this application was mainly a formality and has had an almost unnoticeable influence on court decisions nonetheless.

All this implies that Russia's strategy of de-universalising the right to freedom of expression is deliberate and well-orchestrated. Russia tends to imitate the democratic process of formation, development, and implementation of media policies; the country has developed a comprehensive system of laws and institutions, which may look very

similar to those operating in many Western democratic countries. However, most of the Russian policies are intrinsically non-democratic and inconsistent with the CoE perspective. As observed, the parliament and the executive bodies tend to form prompt legislation censoring media and the Internet. The Constitutional Court justifies the constitutionality of such laws. The lower courts apply the restrictive legislation to cases involving media issues. Roskomnadzor audits the implementation of these laws and issues warnings to the media that may lead to shutdowns. This system may support self-censorship in the Russian media.

Despite their formal proclamation in law, freedom of speech and freedom of mass information are not well-established concepts in Russia, either legally or socially. The principles, nature, and outcomes of the Russian policies are still predominantly Soviet. They are reminiscent of Soviet ideology which justified the restrictions to free speech with the need to protect the Russian political establishment from its real and potential Western enemies. Despite its membership in the UN and the OSCE, the Soviet Union disregarded the international legal standards on free speech on the concept of free speech in the USSR. In Russia, freedom of speech and media freedom are still mainly understood as collective values, and their importance for individuals' self-realization is largely unrecognized. Most Russian people don't realize how much they need freedom of expression and media independence in order to have any measure of control over how their public officials perform their functions for society. The concept of media freedom still means the governmental right to support (or not to support) the media, which is accepted by many journalists against the backdrop of sanctions and restrictions. Private media ownership in Russia is mainly a formality, as it was in Soviet times. Both formal compliance and disregard of the laws, including international ones, are the attributes of the Soviet legal culture. While the impact of the Soviet past is inevitable, it cannot serve as an excuse to disrespect human rights in Russia.

It is fairly clear that Russia needs considerable reform in order to balance the protection of media freedom and free speech with other legitimate rights and interests and to bring their national media policies in line with international standards. Particularly, Russia should develop a legal framework for safeguarding online freedom of expression and the right to access the Internet, especially since its usage has become everyday practice for new generations of Russians. Russia needs to revise its policies for the media and media-like services. There are still no specific statutes on broadcasting and on public service media in Russia. The legal rules concerning "extremist materials" must be revised,

not only because they have been used to restrict political expressions but also because they have been mostly ineffective in stopping hate and terror speech or expressions inciting violence. Russia also needs to establish adequate legal policies against media concentration and monopoly.

However, reforms of media legislation could hardly be sufficient to ensure media freedom in Russia. More than 25 years after the breakup of the USSR, Russia still needs large-scale democratic reforms to realize this aim. These reforms should focus on creation of institutions that can counteract non-democratic tendencies, as was needed in early 1990s. Judicial independence and power should be ensured. Self-regulation bodies should be established and encouraged. Russia should also create a genuinely independent media regulation authority and public service broadcaster. However, Russia's needs for democratisation are still underestimated by the Russian authorities and, more importantly, perhaps by most journalists and most of society. While many scholars tend to lay the responsibility for the lack of media independence solely on the political regime, the problems of media freedoms in Russia are more complex and deeply-rooted. Given the social support for Russian censorship, the change of political regime does not necessarily change the social attitudes toward freedom of expression, the rule of law, democracy, or the international organizations protecting human rights. A considerable limitation of this study is that it only examines social understanding and expectations on the media freedom and freedom of speech briefly while focusing on legal visions in Russia.

Although this dissertation centres on Russian media policies, its results are extremely important for understanding the role of international standards in the fight against the de-universalisation of the right to freedom of expression in the modern world. The concept of freedom of speech has historically been developed as a universal right. However, there have been many attempts at the national level to invest nationalist meaning in the concept of the right to freedom of speech and freedom of the press,depending on the political, social, religious, or cultural background. This doesn't necessarily mean that freedom of speech and media freedom cannot be implemented as universal values at national levels or prevent these rights from working under very particular social, economic, and political conditions, nor does it mean that international organisations are always ineffective or that the system of international protection of human rights should be abolished.

It is important to note that international law does not prevent member-states from paying attention to their respective national cultural traditions in their media policies if it

does not conflict with the right to freedom of expression per se. Verpeux's (2010) study of the constitutional concepts on freedom of expression in several European states showed that these concepts always incorporate both international and national visions, which is not in contradiction to the universality of the right to freedom of expression. In contrast, any national attempt at de-universalisation of this right going beyond the ECtHR's doctrine of "margin of appreciation" inevitably leads to its violation and excessive government interference, which serves to isolate the country, as the case of Russia shows.

The realisation of freedom of expression doubtlessly requires certain conditions. This right per se is likewise a prerequisite for the development of democracy and the realization of many other rights and freedoms. It has been shown that support for the idea of freedom of speech and press among Soviet journalists and society in the late 1980s led to substantial democratic changes in the country despite the lack of any legal guarantees or experience in the implementation of such changes and despite efforts by the Party's nomenclature to resist the process of democratisation. Freedom of expression, necessary in order to achieve favorable conditions for its further institutionalisation, has mostly failed in Russia; therefore, the implementation of this right has become problematic.

It is worth noting that many of Russia's problems with media and speech policies seem to be global issues today. The development of information and communication technologies has created many obstacles to the maintenance of power by ruling elites and has caused restrictive policies under various pretexts in various countries, including developed democracies. Russia's case serves to illustrate how restrictive policies and strategies for their justification are becoming more sophisticated, which complicates their assessment and how to properly address them. The Russian instance also demonstrates how inefficient or inadequate restrictive policies may be to protect society from the spread of violent and hateful ideas. Therefore, policies restricting media freedom are often underpinned by populist theories challenging the ideas of freedom of speech, the rule of law and democracy, rather than the government approach toward implementing them. These trends seem to be particularly alarming. The more Internet technologies penetrate our lives, the more important become the issues of access and exchange of information. Therefore, it is very important to properly resist censoring attempts of de-universalisation of freedom of expression and other human values. It is recommended that further research be undertaken to compare the Russian strategies and policies with those of other states, especially to determine the range and distinction of interpretations and to better elaborate measures to address them.

The results of this dissertation should not be interpreted as an argument for the meaninglessness of international organisations, nor does it imply that Russia should be pressed to leave the CoE because of the troublesome situation with freedom of expression in the country. Most likely, the termination of Russia's membership in the CoE would lead only to a worsening of the condition of human rights in the country. This research suggests that, against the backdrop of modern challenges to peace, democracy, and human rights, international organisations should remain as the platform for peaceful collaboration between nations and support continued dialogue as the best tool for tackling modern challenges. At the same time, this study shows that the system for international protection of human rights needs reforming nevertheless, so that it can serve freedom of expression and media freedom around the world.

There is need for international organisations to elaborate new tools and mechanisms and to advance the existing ones to make the international system of human rights more effective. Criticism and calls for reforms, cannot trigger the necessary changes if they are not desired by the reigning political establishment. However, methods of political pressure with regards to human rights may be effective if they provide some benefits for the member states in other areas, such as in economics, technologies, and other fields.

International organisations should improve their international courts so that more applicants can obtain protection more promptly. Although the ECtHR case law did not sufficiently impact the Russian media policies in Russia, the very opportunity to challenge unlawful decisions of the Russian courts in the ECtHR may resist restrictive trends in Russia. With their double role to deliver justice on concrete cases and to create standards on actual issues, the international courts have also become more important. The ECtHR case law also creates certain patterns for democratically oriented judges, journalists, human rights activists, or citizens who strive for media freedom in Russia. Therefore, the CoE should ensure accessibility by publishing ECtHR decisions in multiple languages, most particulary in the language of the country which is concerned. The lack of unavailability in Russian remains a huge problem, since few people possess adequate knowledge of official CoE languages.

It is recommended for the international organisations to provide more legal assistance to the countries that are willing to undergo changes. CoE also missed important opportunities to contribute to this process. They failed to provide Russia requirements or conditions regarding freedom of expression and media policies. Despite many challenges that Russia faced in 1990s, the political agenda as well as social settings were mainly pro-

democratic. Russia did not reject the universal standards on freedom of expression, however, the CoE failed to provide Russia with any assistance or recommendations for their implementation. The role of traditions and their steadiness was underestimated. It was extremely important for the CoE to consider the fact that the Russian media and speech in general had been under strict governmental control for decades and that market conditions would most likely bring new challenges for the media independence in Russia. Traditions can be changed but it takes longer time and more efforts for that.

Further research would study social and media perspectives on the issue of de-universalisation of freedom of expression. It would be useful to identify the degree of awareness particularly among Russians on the role of the CoE, its values and principles, on the role and meaning of the ECHR and ECtHR, as well as on the international system of human rights protection in general. It is important to examine the main sources of information about the CoE standards in Russia. It would be interesting to study how the media in Russia contributes to the strategy of de-universalisation of freedom of expression; what public discourse exists in Russia on the right to freedom of expression; and how the media influences attitudes toward the CoE standards on freedom of expression, in particular, toward the ECtHR case law against Russia. It is also important to further explore the legal culture in Russia to better understand the phenomena of Russian "legal nihilism" and its drivers. Given the debates surrounding Russia's membership in the CoE, more in-depth legal research needs to be done to establish the degree of impact the CoE standards have on other human rights.

While existing tools of political and legal pressure on governments are not always effective in the protection of human rights in some countries, like Russia, it could be recommended that international organisations increase their efforts in enlightening society, lawyers, and journalists about the universal values, the ways of protecting them, and the very role of such organisations in order to become more effective. It could also be suggested that international organisations foster legal consciousness and increase a universal legal culture in their member countries. For instance, they could establish educational projects in collaboration with various Russian institutions, such as universities, courts, media companies, and NGOs. It is very important for society to resist the proliferation of legal nihilism and the tendencies of de-universalisation of freedom of expression particularly among the new generations. It is imperative to understand how restrictive media policies and practices can be not only ineffective but dangerous and how

important freedom of expression is for society in general, and for every individual, regardless of country.

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Esta Tesis Doctoral ha sido defendida el día ____ d_____ de 201__

En el Centro_____

de la Universidad Ramon Llull, ante el Tribunal formado por los Doctores y Doctoras abajo firmantes, habiendo obtenido la calificación:

Presidente/a

_____

Vocal

_____

Vocal *

_____

Vocal *

_____

Secretario/a

_____

Doctorando/a

(*): Sólo en el caso de tener un tribunal de 5 miembros