Defamation Actions as Weapons against Political Speech in Europe

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Abstract: In its 1964 decision, *New York Times Co. v. Sullivan*, the United States Supreme Court held that, in order for defamation against a public official to be found, "actual malice" had to be established – that is, "that the statement was made ... with knowledge that it was false or with reckless disregard of whether it was false or not". The clear and readily applicabile actual malice standard from *Sullivan* stands in contrast to the vaguer standards of analysis embodied in the jurisprudence of the European Court of Human Rights (ECtHR). This article aims to show certain limitations of that ECtHR jurisprudence by considering some of its most notable decisions. Considering cases of both civil and criminal defamation, it suggests that, had a standard similar to Sullivan been applied, these would have been decided differently, leading to better protection of the freedoms of authors and publishers.

Keywords: Defamation; *New York Times Co. v. Sullivan*; actual malice; European Court of Human Rights; proportionality.

1. *Introduction*

Defamation lawsuits involving public officials or public figures are difficult to win in the United States. One of the heaviest burdens on plaintiffs stems from the United States Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*[1]. Under the exacting "actual malice" standard established in that decision, a plaintiff must prove that the allegedly libelous factual statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"[2].

Internationally, the actual malice standard places the United States is a unique position regarding defamation lawsuits. As a justice of the High Court of Australia remarked years ago, "Most countries employ a balancing test of one sort or another, but the United States is extreme"[3]. This extremity is embodied in the clear and readily applicable requirement from *New York Times Co. v. Sullivan*.

As such, the actual malice standard stands in contrast to the vaguer standards of analysis embodied in the jurisprudence of the European Court of Human Rights (ECtHR) applying article 10 of the European

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. *New York Times Co. v. Sullivan*, 376 U.S. at 280.

3. This paraphrases a quote by a justice of the High Court of Australia who toured Chicago more than a decade ago. It remains a good summary. See Michael Kirby (Justice of the High Court of Australia), *The High Court of Australia and the Supreme Court of the United States: A Centenary Reflection*, 31 University of Western Australia Law Review 171, 195 (2003): "Most Australians, and most Australian judges (although not the Australian media) consider that the balance struck by United States judicial authority on [the] subject [of protections for free expression] is somewhat extreme", citing *Dow Jones Inc. v. Gutnick*, HCA 56 (2002) as an example of the difference between the two legal systems.

Convention on Human Rights (ECHR). Over many years, the ECtHR has decided many defamation cases involving criticism of public officials about their public actions. These include criminal prosecutions of reporters, editors, and newspapers. By considering some of this jurisprudence, this article aims to show certain of its limitations as compared to *New York Times Co. v. Sullivan*.

2. New York Times Co. v. Sullivan

In order to fully understand the differences between ECtHR and U.S. case law on defamation lawsuits involving public officials or public figures, it is necessary to first understand the Supreme Court's decision in *New York Times Co. v. Sullivan*.

Sullivan concerned the publication in *The New York Times* of a full-page "editorial" advertisement under the headline *Heed Their Rising Voices*, paid for by various civil rights activists supporting Martin Luther King Jr.'s campaign. The advertisement sought financial support on behalf of the African American right-to-vote movement and student movement. A Commissioner of the City of Montgomery, Alabama, L.B. Sullivan, brought a civil libel lawsuit against *The New York Times* as well as African American and Alabama clergymen whose names appeared in the advertisement[4].

The suit alleged various inaccuracies in the publication, such as the number of times King had been arrested (four, not seven)[5], the allegation that "truckloads of police ... ringed the Alabama State College Campus after [a] demonstration on the [Alabama] State Capitol steps"[6] (whereas police "had been 'deployed near' the campus, but had not actually 'ringed' it"[7]), and the claim that the dining hall of many protesting students "was padlocked in an attempt to starve them into submission"[8] (while in reality only a few students had been barred from entry[9]).

4. *New York Times Co. v. Sullivan*, 376 U.S. at 256–258.
5. *Id.* at 258–259.
6. *Id.* at 257.
7. *Id.* at 289.
8. *Id.* at 257.
9. *Id.* at 259.

While the plaintiff Commissioner was not named in the advertisement, he claimed that the reference to police referred to him as Commissioner of Public Affairs with responsibility for supervision of, *inter alia*, the Police Department, and thus the statements in the advertisement were made "of and concerning" him[10]. Both the governor of Alabama and the plaintiff Commissioner requested a retraction, but *The New York Times* only published a retraction regarding the governor. In response to the Commissioner's request, the *Times* wrote him a letter asking why he thought he was implicated by the advertisement. There was no response to this letter[11].

The jury was instructed that the statements were libelous *per se* – that is, the jurors did not have to decide on their truthfulness – and that liability could be found if they were published and "of and concerning the plaintiff"[12], as "falsity and malice [were] presumed, general damages [did not] need [to] be alleged or proved, but [were] presumed" and while "[a]n award of punitive damages ... apparently require[d] proof of actual malice under Alabama law ... the judge ... refused to charge, however, that the jury must be convinced of malice, in the sense of actual intent to harm or gross negligence and recklessness"[13].

The jury returned a verdict in favor of the Commissioner, awarding $500,000 in damages even though no attempt had been made to demonstrate actual pecuniary harm. Approximately 394 copies of the edition of the *Times* containing the advertisement were circulated in Alabama, about 35 of which in Montgomery County[14]. A second jury in another case also returned a verdict of $500,000 against the *The New York Times*[15]. The Supreme Court of Alabama affirmed the award; it found actual malice based on failure by the *Times* to publish a retraction regarding the plaintiff, even though the newspaper's own files demonstrated that some of the allegations were untrue[16].

10. *Id.* at 256. To establish common law libel, the plaintiff was required to allege that (i) something was published, (ii) it was of and concerning him, (iii) it was false, and (iv) it tended to lower his reputation. *Ibidem*.

11. *Id.* at 261.

12. *Id.* at 262.

13. *Id.* at 262 (quotation marks and citations omitted).

14. *Id.* at 260 fn. 3.

15. *Id.* at 278 fn. 18. Four other lawsuits had been filed against the *Times* by other Montgomery City Commissioners and by the Governor of Alabama. *Ibidem*.

16. *Id.* at 263–264.

The United States Supreme Court found that the constitutional protections of freedom of speech and of the press were applicable[17]. Quoting its decision in *Beauharnais v. Illinois*[18], it observed that it "retain[ed] and exercise[d] authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel; for public men are, as it were, public property, and discussion cannot be denied, and the right, as well as the duty, of criticism must not be stifled"[19].

The court went on to state: "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks of government and public officials"[20]. It noted that "[t]he present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection"[21].

Most importantly, the court found that such protection was not forfeited by the falsity of some of the factual statements, unless the plaintiff could establish that "the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not"[22]. Thus, holding that the state court's decision violated the First Amendment, the Supreme Court announced a rule requiring that, for defamation against a public official[23] to be established, actual malice had to be demonstrated.

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17. *Id.* at 264. The court rejected an argument that an earlier decision, *Valentine v. Chrestensen*, 316 U.S. 52 (1942), regarding commercial speech, applied, because the court found that the "advertisement" at issue in *Sullivan* was not a commercial advertisement but a protest against official action.

18. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

19. *New York Times Co. v. Sullivan*, 376 U.S. at 268 (quotation marks and citations omitted).

20. *Id.* at 270.

21. *Id.* at 271.

22. *Id.* at 279–280. Three justices would have gone further than requiring actual malice, advocating absolute immunity for the press when it criticizes public officials fulfulling their public duties. See *id.* at 295 (concurring opinion of Justices Black and Douglas) and 298 (concurring opinion of Justices Goldberg and Douglas).

23. Later expanded to cover public figures including "limited public figures". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The practical reality is that this actual malice standard is very difficult to meet in the real world. When applying the new standard in *Sullivan*, the court found no duty on the part of the publisher to search through its records to ensure the accuracy of the specific factual statements made in the advertisement.

3. *Article 10 ECHR*

ECtHR jurisprudence mandates that actions in defamation must comply with the requirements of article 10 of the European Convention on Human Rights (ECHR), which states that:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

When applying article 10 ECHR, a court must consider, in order, (i) whether there was an interference with the applicant's right to freedom of expression, (ii) whether such interference was justified as being prescribed by law, (iii) whether it pursued one or more of the legitimate aims set out in paragraph 2 of article 10 ECHR, and, finally, (iv) whether it was necessary to achieve those aims in a democratic

society. When examining (iv), the court must consider proportionality and the justification provided for sanctioning the statement at issue[24].

4. *A Typical Case of Civil Defamation Suit against the Press*

A recent ECtHR case showing how a defamation suit was employed by a public figure against the press and other critics is *Falzon v. Malta*[25]. The case started with offensive emails regarding Michael Falzon, the deputy leader of the Malta Labour Party (MLP)[26]. Falzon identified the emails as threatening[27], but a journalist described them in an article as innocuous[28]. Another journalist also published an article describing these emails as "trivial and unimportant", and criticizing Falzon for involving police forces in the MLP's internal squabbles[29].

Libel proceedings were brought against the applicant, who authored one of the articles, and the newspaper editor[30]. The Court of Magistrates entered judgments against both the applicant and the editor, awarding damages of 2,500 euros and 1,000 euros against each respectively, along with costs. The Court of Appeal affirmed the judgment, finding that the applicant's assumptions could not be considered fair comment, made in good faith and balanced[31]. The editor's testimony before the Court of Appeal that a speech given in Parliament by Falzon suggested that the police was pressured into investigating the matter was deemed inadequate justification.

Subsequently, the applicant commenced proceedings in a civil court complaining that the judgements in the libel proceedings

24. See, for example, *Pedersen and Baadsgaard v. Denmark (No. 2)*, 42 EHRR 486 (2006).

25. *Falzon v. Malta*, ECHR 259 (2018).

26. *Id.* para. 7.

27. *Id.* para. 8.

28. *Ibidem.* That journalist later described the emails as innocent in a published article. *Id.* para. 9.

29. *Id.* para. 10.

30. *Id.* para. 12. The court found that the applicant had failed to prove that Falzon had manipulated and offended the police department for his own political gain. *Id.* para. 12.

31. *Id.* para. 21.

constituted a breach of article 10 ECHR[32]. The claim was dismissed, as was an appeal to the Constitutional Court[33].

The ECtHR held that the libel proceedings violated article 10 ECHR. The court first considered whether the libel suit was an interference with the plaintiff's right to free to expression, concluding that this was the case[34]. The court then turned to to examine whether the interference was necessary in a democratic society[35]. The court distinguished between matters involving private life and matters involving public life[36], more deference being due to matters not implicating private life. In this case, the matter was not related to private life, but public affairs. The court found that inadequate deference was paid to the right to comment on public life, particularly considering the preeminent role of the press in a state following the principles of the rule of law[37]. The press, the court noted, must play its role as public watchdog, particularly when disseminating information about matters of public interest[38].

Moreover, the court found that many of the factual statements were true. These included that an email had been sent and that "there was a certain ease in filing the complaint directly with the [Commissioner of Police] instead of at the local police station, and that there was a certain familiarity between them – enough for them to be on first name terms, as noted in the article"[39].

The court did also distinguish between value judgments and statements of facts. The Constitutional Court had found that the opinionated piece contained declarations presented as fact which had not been proved, and factual assertions in the form of a question which had not reflected real facts[40]. The ECtHR, however, found that the "opening paragraphs of the article contained an implied comparison of the claimant's actions with the plot of the film there mentioned,

32. *Id.* para. 22.
33. *Id.* para. 29.
34. *Id.* para. 50. This issue was uncontested.
35. *Id.* para. 52.
36. *Id.* para. 58.
37. *Id.* para. 53.
38. *Ibidem*.
39. *Id.* para. 59, 63.
40. *Id.* para. 61.

thus constituting a value judgement"[41]; and that, "[f]urthermore, the impugned expressions, although sarcastic, remained within the acceptable degree of stylistic exaggeration employed to express the applicant's value judgement"[42].

The ECtHR went on to note: "[T]he Court's case law has shown a broad and liberal interpretation of 'value judgments' when it comes to journalistic freedom on matters of public interest, particularly concerning politicians ... In the Court's view, by using a style which may have involved a certain degree of provocation, it is plausible that the applicant was raising awareness as to the possibility of any abuse being perpetrated by the deputy leader of the party in opposition, and that he was calling for action by the minister in charge"[43].

The court observed that the proportionality of an interference with article 10 ECHR "may depend on whether there exists a sufficient faculty basis for the impugned statement, since even a value judgement without any factual basis to support it may be excessive"[44]. In the instant case the court found the factual basis at issue in the deputy leader's own speech, which he made in public[45].

The court further noted that without any concrete finding of an effect upon Falzon's private life, the order by the domestic court awarding damages of 2,500 euros (as well as costs of 6,340 euros[46]) could have a chilling effect[47]. This would have been compounded by the fact that the case took, from the beginning to the end, over eleven years[48].

In contrast to the decision in *Falzon*, in the United States under the *Sullivan* doctrine such a case would likely have been disposed of by a decision on a preliminary motion for failure to demonstrate that the speech involved contained factual matter that the publisher knew or should have known was false. Nothing in *Falzon* comes even close to such a showing.

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41. *Id.* para. 62.
42. *Ibidem.*
43. *Id.* para. 64–65.
44. *Id.* para. 65.
45. *Ibidem.*
46. *Id.* para. 72, 75.
47. *Ibidem.*
48. The speech by the deputy leader was delivered on May 6, 2007, and the libel suit was filed on July 17, 2007. The ECtHR delivered its judgment on March 20, 2018. *Id.*

5. *Criminal Libel Prosecutions*

In an earlier criminal libel decision, *Cumpănă and Mazăre v. Romania*[49], the ECtHR applied more expansive legal analysis from that in *Falzon*, to require (i) that the conviction was "prescribed by law", (ii) pursued a legitimate aim (protection of the rights of another), and finally (iii) that the interference was "necessary in a democratic society"[50]. Moreover, the Court examined the specific sanctions applied in the case and "the accompanying prohibitions imposed", finding that they "were manifestly disproportionate in their nature and severity"[51].

The events in *Cumpănă* began with the publishing of an article, written by two journalists, on the awarding of public contract for the towing of improperly parked cars in the city of Constanța. The towing company, Vindalex, was given unilateral authority to decide which cars were improperly parked – "in other words, to treat citizens and their property with contempt", according to the article[52]. Statutorily required procedures for the awarding of the contract were not followed. The statute required a prior decision by the local city council with a two-thirds majority authorizing the contract, and before this was signed it had to be reviewed by a local council's specialist committee. None of this was done. The article stated that "the former deputy mayor ... received backhanders from the partner company and bribed subordinates, including [Ms. R.M.], or forced them to break the law"[53]. It went on to state that Vindalex made considerable profits, but never demonstrated that it had adequate means to impound illegally parked vehicles, which explained why large numbers of privately owned vehicles had been damaged. The newspaper article was based on an unreleased audit report which was confidential at the time; the report, later made public, confirmed that the contract was awarded illegally[54],

49. *Cumpănă and Mazăre v. Romania*, 41 EHRR 200 (2005).

50. *Id.* para. 85, 87.

51. *Id.* para. 120.

52. *Id.* para. 20.

53. *Ibidem.* The council had gone through this process several times before, so they could not claim of ignorance of the law. *Id.* para. 97.

54. *Id.* para. 108.

but contained no allegations of bribery or dishonesty[55]. Revealing it as a source in the judicial proceedings could have led to sanctions for the authors and/or their sources[56]. That may explain why the defendants submitted no evidence in their behalf in the first several levels of judicial proceedings.

According to the ECtHR, prescription by law means that the offense has to have been specifically identified in domestic law. In *Cumpănă* the offences complained of were insult and defamation[57]. The ECtHR found that the domestic courts had adequately described the alleged offences as "prescribed by law", particularly with reference to Ms. R.M., who was a city council official at the time of the events, and a judge on the date of the publication[58]. She had complained that a cartoon accompanying the article had depicted her as a woman in a miniskirt, on the arm of a man with a bag full of money and with certain intimate parts emphasized[59].

With respect to the legitimate aim test, the court found that the article "mainly contained information about the management of public funds by local elected representatives and public officials and ... certain irregularities allegedly committed in the signing of a partnership contract"[60]. These were held to be matters of general interest to the public, which was entitled to receive information about it[61]. The court noted, however, that the article was couched in "virulent terms, as demonstrated by the use of forceful expressions such as 'scam' and 'series of offences' ... 'intentional breach of [the law]', 'backhanders' ... and 'bribed'"[62]. As a result of this evaluation, and considering the distinction between facts and value judgments, the ECtHR decided that it was appropriate to sanction the author of the articles.

The court went on to consider whether or not the particular sanctions applied were justifiable. This consideration was pursuant to the doctrine of proportionality. Besides an order to pay Ms. R.M. for

55. *Ibidem.*
56. *Id.* para. 106.
57. *Id.* para. 25.
58. *Id.* para. 86.
59. *Id.* para. 25.
60. *Id.* para. 94.
61. *Id.* para. 96.
62. *Id.* para. 97.

non-pecuniary damage (a little over 2,000 euros), the applicants had been sentenced to seven months' immediate imprisonment, as well as prohibited from exercising certain civil rights and from working as journalists for one year[63].

The ECtHR stated that prison sentences for journalists exercising journalistic freedom of expression would only be appropriate in exceptional circumstance, "notably when other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence"[64]. In the instant case, no justification for a prison sentence was found, as the facts concerned a debate on matters of legitimate public interest[65]. The Court similarly found that the sanctions of deprivation of civil rights and prohibition from working as a journalist for a year were excessive[66]. Recognizing that "the press must be able to perform the role of a public watchdog in a democratic society"[67], it observed that "the criminal sanction and the accompanying prohibitions imposed ... were manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants' conviction for insult and defamation"[68]. In line with its reasoning, however, the ECtHR declined to order reimbursement of the sum that the national courts required to be paid to Ms. R.M. for non-pecuniary damage[69].

Prosecution for libel in Europe stands in sharp contrast to the United States With the assistance of the Supreme Court's decision in *Ashton v. Kentucky*[70], issued only two years after *Sullivan*, the criminal

63. *Id.* para. 112.
64. *Id.* para. 115
65. *Id.* para. 116.
66. *Id.* para. 117–118.
67. *Id.* para. 119.
68. *Id.* para. 120.
69. *Id.* para. 129. The court declined to award any costs for failure of the applicants to document their costs. *Id.* para. 134. The court also concluded that no non-pecuniary damages would be awarded, finding that the decision in the case was sufficient satisfaction. *Id.* para. 121. For a somewhat similar case see *Dalban v. Romania*, ECHR 6 (1999). In *Dalban*, the ECtHR awarded non-pecuniary damages of 20,000 French francs for a violation of article 10 ECHR in connection with a criminal libel sentence although the defendant had passed away and was effectively exonerated by post-death domestic court findings.
70. *Ashton v. Kentucky*, 384 U.S. 195 (1966).

version of libel law has largely passed into desuetude in the United States. In *Ashton*, the Supreme Court held that Kentucky's common law criminal libel law was so indefinite and uncertain that it could not be enforced as a penal offense consistently with the First Amendment of the U.S. Constitution[71].

6. *Proportionality and Necessity in a Democratic Society*

The crux of ECtHR defamation decisions frequently turns upon considerations of proportionality in assessing whether the concerns of acceding States and their national courts are adequately justified as necessary in a democratic society.

6.1. *Proinsias de Rossa*

In this respect, the ECtHR decision in *Independent News and Media and Independent Newspapers (Ireland) Ltd. v. Ireland*[72] is particularly disturbing; it resulted in a judgment of 300,000 Irish pounds against a newspaper, the *Sunday Independent*, for raising a matter clearly of public concern.

On December 13, 1992 an article was published in the *Sunday Independent*, written by a well-known journalist and entitled *Throwing Good Money at Jobs is Dishonest*. The article commented, *inter alia*, on a recently discovered letter (dated September 1986) to the Central Committee of the Communist Party of the Soviet Union. The letter had been signed by two persons, one of whom was Proinsias de Rossa, a very well-known politician. The letter referred to "special activities" that had previously met shortfalls in the funding of the Workers' Party, a political party of which Mr. de Rossa had been leader. At the time of publication, Mr. de Rossa was the leader of another political party (the Democratic Left) and a member of parliament. Moreover,

71. For a more complete discussion of criminal libel speech see Allen E. Shoenberger, *Connecticut Yankee Speech in Europe's Court: An Alternative Vision of Constitutional Defamation Law to* New York Times Co. v. Sullivan*?*, 28 Quinnipiac Law Review 431 (2010).

72. *Independent News and Media Plc. and Independent Newspapers (Ireland) Ltd. v. Ireland*, ECHR 402 (2005).

he was engaged in post-election negotiations about his party's participation in government.

The reference to "special activities" in the newspaper article was to armed robberies and forgery of currency used to fund the Workers' Party in the very recent past. Mr. de Rossa was allegedly aware of what was going on. According to the article, "Mr. de Rossa's political friends in the Soviet Union were no better than gangsters. They ran labour camps. They were anti-Semitic"[73].

Two trials against the first applicant produced no decision. The third trial ended with a jury verdict for Mr. de Rossa in the amount of 300,000 Irish pounds[74].

The only matter raised on appeal was the award[75]. The ECtHR examined whether the jury's verdict was disproportionate and necessary in a democratic society[76]. The 300,000 pound verdict was measured against historical awards in Ireland. Counsel for the government argued that "[e]ven applying the applicants' defective test, the present award was not exceptionally high" compared to libel awards in certain precedents.

The ECtHR pointed out that Irish law included a requirement of proportionality. That aspect was considered by the Irish Supreme Court, which took into account a number of relevant factors, including the gravity of the libel, the effect on Mr. de Rossa (a leader of a political party) and on his negotiations to form a government at the time of publication, the extent of the publication, the conduct of the first applicant newspaper and the consequent necessity for Mr. de Rossa to endure three long and difficult trials. Having assessed these factors, the Supreme Court concluded that the jury would have been justified in going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation. While 300,000 Irish pounds was a substantial sum, it noted that the libel was serious and grave, with an imputation that Mr. de Rossa was involved in or tolerated serious crime and personally supported anti-Semitism and

73. *Id.* para. 12.

74. *Id.* para. 19. This substantial verdict brings to mind the $500,000 award originally ordered against *The New York Times* in *New York Times Co. v. Sullivan* (see section 2).

75. *Id.* para 20.

76. *Id.* para. 110.

violent Communist oppression. "Bearing in mind that a fundamental principle of the law of compensatory damages is that the award must always be reasonable and fair and bear a due correspondence with the injury suffered and not be disproportionate thereto", the Supreme Court was not satisfied that the present jury award went beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded. It therefore considered the verdict "not disproportionate to the injury suffered by the Respondent"[77]. By a vote of six to one, the ECtHR accordingly found no violation of article 10 ECHR[78].

Under *New York Times Co. v. Sullivan*, this award could not have been awarded for the alleged defamation, because the plaintiff would have been required to prove that the publisher knew or should have known that the allegations about tolerating serious crime and so forth were untrue[79].

6.2. *Danish Police Officers*

In another defamation case, *Pedersen and Baadsgaard v. Denmark*[80], the ECtHR, in a Grand Chamber proceeding (with seventeen judges presiding) and by a vote of nine to eight, sustained a finding of criminal defamation and associated penalties despite the fact that the television programs involved resulted in retrial and acquittal of an individual who had previously been convicted and served more than a decade in prison. The ECtHR stated: "[T]he Court must determine whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was 'proportionate to the legitimate aims pursued'"[81]. The narrow vote of the ECtHR reprises the three-to-two decision by the

77. *Id.* para. 129.

78. *Id.* para. 132.

79. The actual malice required by the Supreme Court in *Sullivan* is almost impossible to prove and none of the facts recounted in the instant case hint that such knowledge existed or that there was any reckless disregard for the facts. The underlying document, the letter to the Central Committee of the Communist Party of the Soviet Union, is arguably quite shocking.

80. *Pedersen and Baadsgaard v. Denmark*, ECHR 12 (2004).

81. *Id.* para. 70.

Danish Supreme Court affirming the convictions and increasing the criminal sentences.

The case started with the airing of two television programs, one entitled *Convicted of Murder*, and the second, *The Blind Eye of the Police*. Television journalists had examined 4,000 pages of reports about a person (X) who supposedly murdered his wife between 11:30 am and 1:00 pm on a particular day. The journalists interviewed a taxi driver who maintained to them that he had followed X and X's son in a car during that period of time. However, the police report of the taxi driver contained no such information. The taxi driver had never seen the written report of his statement. This was not in accordance with proper police procedure, and thus he expressed surprise when the journalists (nine years later) showed him the report without any such information. The investigation revealed many instances in which police statements had not been reviewed by witnesses[82].

Each program began with a statement of the premises on which it had been prepared. "We shall show that a scandalously bad police investigation, in which the question of guilt was prejudged right from the start, and which ignored significant witnesses and concentrated on dubious ones, led to X being sentenced to twelve years' imprisonment for the murder of his wife"[83].

The most serious references to the police superintendent were contained in a series of rhetorical questions. In one such instance, the pictures of two police officers – the named chief superintendent and the chief inspector of the flying squad, were shown on the screen simultaneously and parallel with this question: "Was it [the named chief superintendent] who decided that the report should not be included in the case file? Or did he and the chief inspector of the flying squad conceal the witness's statement from the defense, the judges and the jury?"[84].

With respect to proportionality, the ECtHR stated: "In the instant case, the applicant journalists were each sentenced to twenty day-fines of 400 Danish kroner (DKK), amounting to DKK 8,000 (equivalent

82. *Id.* para. 25. An inquiry conducted by the Regional State Prosecutor found that this non-compliance was not limited to the case involving Mr. X and that no reference to this non-compliance occurred in Mr. X's case.

83. *Id.* para. 11.

84. *Id.* para. 21.

to approximately 1,078 euros (EUR)) and ordered to pay compensation to the estate of the deceased chief superintendent of DKK 100,000 (equivalent to approximately EUR 13,469). The Court does not find these penalties excessive in the circumstances or to be of such a kind as to have a 'chilling effect' on the exercise of media freedom ... Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued, and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others"[85].

While the criminal sentence did not rise to the level of the *Independent News* 300,000 pound verdict, the sentence was still substantial. Given the finding of the first court, the City Court, that the defendants had reason to believe the statements were true, it is clear that under the *New York Times Co v. Sullivan* decision, neither a finding of defamation, nor any criminal sentence, would have been permissible. The single-judge majorities in both the Danish Supreme Court and the ECtHR highlight how fragile the proportionality test may be in practice. By the narrowest of margins, the court found the penalty appropriate; the chilling effect is rather apparent.

6.3. *The King of Spain*

The ECtHR has decided multiple cases involving heads of state. For example, in a 2011 decision concerning the King of Spain, the ECtHR ultimately held that criminal libel prosecution could not be classified as necessary in a democratic society.

In the case in point[86], a criminal action was brought against an individual – actually a spokesperson for a parliamentary group – for

85. *Id.* para. 93–94.

86. *Otegi Mondragon v. Spain*, ECHR 4 (2011). For the facts of the case see *id.* para. 6–10: "At a press conference ... the applicant, as spokesperson for the [Basque] Sozialista Abertzaleak parliamentary group, outlined his group's political response to the situation concerning the newspaper *Euskaldunon Egunkaria* [which had been ordered closed by the authorities on account of alleged links with the terrorist organization

"serious insult" against the King, pursuant to articles 490(3) and 208 of the Spanish Criminal Code[87].

The applicant was found not guilty by the Basque Country High Court of Justice, although the court observed that the remarks had been "clearly offensive, improper, unjust, ignominious and divorced from reality"[88]. The High Court viewed the criticism as "of a constitutional institution ... made in a public, political and institutional setting ... therefore unconnected to the innermost core of individual dignity protected by law from any interference by third parties"[89].

On appeal to the Supreme Court on points of law, the lower court's judgment was set aside. The Supreme Court "sentenced the applicant to one year's imprisonment, suspended his right to stand for election for the duration of the sentence and ordered the payment of costs and expenses"[90].

An *amparo* appeal to the Constitutional Court was declared inadmissible as manifestly devoid of constitutional content[91].

ETA]. Replying to a journalist he said, with reference to the King's visit to the Basque Country [on the same day], that 'it [was] pathetic', adding that it was 'a genuine political disgrace' for the President of the Autonomous Community of the Basque Country to be inaugurating [an electric power] project with Juan Carlos of Bourbon and that 'their picture [was] worth a thousand words'. He went on to say that inaugurating a project with the King of the Spaniards, who was the Supreme Head of the Civil Guard (*Guardia Civil*) and the Commander-in-Chief of the Spanish armed forces, was 'absolutely pitiful'. Speaking about the police operation against the newspaper *Euskaldunon Egunkaria*, he added that the King was in charge of those who had tortured the persons detained in connection with the operation. He spoke in the following terms: 'How is it possible for them to have their picture taken today in Bilbao with the King of Spain, when the King is the Commander-in-Chief of the Spanish army, in other words the person who is in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence?'. *Id.* para. 10.

87. *Id.* para. 11.

88. *Id.* para. 13.

89. *Id.* para. 14.

90. *Id.* para. 15–16.

91. "The Constitutional Court noted at the outset that the right to freedom of expression did not encompass a right to proffer insults. It pointed out in that connection that the Constitution did not prohibit the use of hurtful expressions in all circumstances. However, freedom of expression did not protect vexatious expressions which, regardless of their veracity, were offensive and ignominious and were not pertinent for the purpose of conveying the opinions or information in question. The Constitutional Court considered that the weighing of the competing rights at stake

The ECtHR considered that the interference at issue was "prescribed by law" within the meaning of article 10(2) ECHR and was invoked to protect the reputation of the King of Spain. Singling out the King of Spain as head of state, however, was deemed improper, since in its case law "the Court ha[d] already stated that providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention"[92].

The court then moved on to the issue of whether the criminal conviction was "necessary in a democratic society". The court recognized that "[t]here is little scope under Article 10 paragraph 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest ... [T]he limits of acceptable criticism are wider as regards a politician as such than as regards a private individual"[93]. By contrast, "[t]he Supreme Court ... considered that the impugned remarks had directly targeted the King in person and the institution he embodied and furthermore it considered them overstepping the limits of permissible criticism"[94]. In that connection, the court noted that the applicant was speaking in his capacity as an elected representative and spokesperson for parliamentary group, so that his comments were a form of political expression[95]. In this regard, the Court stated that it "[could not] but emphasize that freedom of expression is all the more important when it comes to conveying ideas which offend, shock or challenge the established order"[96].

As to proportionality, the court found nothing in the case to justify the imposition of such a prison sentence, which "by its very nature, [would] inevitably have a chilling effect, notwithstanding the fact that

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had been carried out in an appropriate manner by the Supreme Court, as the latter had concluded that the impugned remarks had been disproportionate ... In the Constitutional Court's view, there was no denying the ignominious, vexatious and derogatory nature of the impugned remarks, even when directed against a public figure. That finding was all the more valid with regard to the King, who, by virtue of Article 56 § 3 of the Constitution, was 'not liable' and was a 'symbol of the unity and permanence of the State' ... occup[ying] a neutral position in political debate". *Id.* para. 20–21.

92. *Id.* para. 55.
93. *Id.* para. 50.
94. *Id.* para. 52.
95. *Id.* para. 51.
96. *Id.* para. 56.

enforcement of the applicant's sentence was stayed"[97]. The remarks did not concern the private life of the King or his personal honour, nor amounted to a gratuitous personal attack, but were made "in a public and political context unconnected to the innermost core of individual dignity"[98]. The words employed were provocative, even though when considering the respect for reputation of others, a degree of exaggeration or even provocation is permitted[99]. The remarks, however, did not advocate violence, nor were they considered hate speech[100]. Moreover, they "were made orally during a press conference, so that the applicant had no possibility of reformulating, refining or retracting them before they were made public"[101].

The conviction, being disproportionate to the aim pursued, was not necessary in a democratic society, and therefore amounted to a violation of article 10 ECHR[102].

Even though the applicant was vindicated, it should be noted that more than eight years passed between the initiation of criminal proceedings and the exoneration before the ECtHR. The court's recognition of the chilling effect of the prosecution, moreover, should not be ignored, for both the applicant and other journalists were likely impacted.

6.4. *Jean-Marie Le Pen*

A different outcome was reached by the ECtHR in two criminal cases – consolidated before the court – concerning Mr. Le Pen, then president of the National Front (*Front National*), and originated, respectively, by a book published in August 1998 and an article published in November 1999[103].

97. *Id.* para. 60.
98. *Id.* para. 57 (quotation marks omitted).
99. *Id.* para. 54.
100. *Ibidem*.
101. *Ibidem*.
102. *Id.* para. 61.
103. *Lindon, Otchakovsky-Laurens and July v. France*, ECHR 836 (2007).

In the first case[104], the author and the chairman of the publishing house were sentenced by the Paris Criminal Court to pay a fine of 15,000 French francs (equivalent to approximately 2,300 euros) and damages amounting to 25,000 French francs (3,800 euros) to each of the civil parties, namely, the Front National and Mr. Le Pen. In the second case, before the same court and connected to an article concerning the convictions in the previous case, the author was found guilty of criminal defamation and sentenced similarly to the first and second applicant[105].

The novel, a piece of fiction albeit based upon real events, portray both the National Front and Mr. Le Pen throughout. Offending remarks are made by fictional characters, illustrating Le Pen as the "chief of a gang of killers" and "a vampire who thrives on the bitterness of his electorate and the blood of his enemies", using the death of a victim "to transform other lost youths into puppets who will have their lives and deaths manipulated by this ruthless puppeteer"[106].

The Paris Criminal Court found "of no consequence that the crime of 'Ronald Blistier' is not real, because the author's intention is not to write a satire about an impossible event but, on the contrary, to make the reader believe that, given Jean-Marie Le Pen's ideology, such a scenario is quite plausible and that he would be accountable for it"[107]. The court found the text "capable of harming the honour and reputation

104. For the facts of the case see *id.* para. 10–13 and 18: "The first applicant is the author of a book presented as a novel under the title *Le Procès de Jean-Marie Le Pen* ("Jean-Marie Le Pen on Trial"), published in August 1998 ... The novel recounts the trial of a *Front National* militant, Ronald Blistier, who, while putting up posters for his party with other militants, commits the cold-blooded murder of a young man of North African descent and admits that it was a racist crime ... The novel is based on real events and in particular the murders, in 1995, of Brahim Bouaram, a young Moroccan who was thrown into the Seine by skinheads during a Front National march, and of Ibrahim Ali, a young Frenchman of Comorian origin who was killed in Marseilles by militants of the same party. Those militants were convicted in June 1998 after a trial in the Assize Court during which Front National leaders, Mr Le Pen included, declared that the case was no more than a provocation and a put-up job through which the party's enemies sought to harm it". *Id.* para. 10–11.

105. Note that both a fine and a civil judgment were assessed in these cases, although both cases were criminal ones. This is not unusual in a civil law country; it is rare to combine both awards in in Anglo-American jurisprudence.

106. *Id.* para. 14.

107. *Ibidem*.

of the civil parties" and the precision of the offending facts "sufficient to constitute defamation against the civil parties and ... susceptible of proof"[108]. The conviction was sustained in the appellate court[109], and the subsequent appeal was dismissed by the Court of Cassation.

After deciding that the case was admissible, the ECtHR court addressed whether the norm was "prescribed by law". At issue was not the existence of statutory provisions on defamation, but whether these could be applied to "a work of fiction when the individual who claims to have been defamed is referred to in a clear manner"[110]. The French government argued that while case law was scant, a judgment of the Paris Court of Appeal of March 8, 1897 supported the prosecution[111]. The ECtHR concurred, on account of fact that the applicants, "being professionals in the field of publishing" should have "apprise[d] themselves of the relevant legal provisions and case-law in such matters, even if it meant taking specialized legal advice"[112].

The court then found that the prosecution pursued one of the legitimate aims of article 10(2) ECHR, namely the protection of "the reputation of rights of others"[113], that is, Mr. Le Pen and the National Front.

The court then went on to consider whether the prosecution could have been considered necessary in a democratic society and to verify that the criteria applied by the Paris Court of Appeal complied with article 10 ECHR. It observed that "novelists – like other creators

108. *Ibidem*.

109. *Id.* para. 25. The appellate court held that "[t]he polemical aim of a text cannot absolve it from all regulation of expression, especially when, far from being based merely on an academic debate, its line of argument is built around reference to precise facts. There was therefore an obligation to carry out a meaningful investigation before making particularly serious accusations such as incitement to commit murder, and to avoid offensive expressions such as those describing Mr Le Pen as the 'chief of a gang of killers' or as a vampire. The defence of good faith cannot be admitted". *Ibidem*.

110. *Id.* para. 42.

111. *Id.* para. 29. This constitutes a rather extreme example of how far the European legal system has shifted from the civil law stem of jurisprudence towards the Anglo-American system of justice in which case law, not just statutory law, has consequences. See Allen E. Shoenberger, *Change in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Preecedent into the Civil Law System*, 55 Loyola Law Review (New Orleans) 5 (2009).

112. *Id.* para. 42.

113. *Id.* para. 44.

– and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities'"[114].

The court acknowledged that "the limits of acceptable criticism are wider as regards a politician – or a political party – such as Mr. Le Pen and the *Front National* – as such, than as regards a private individual. This is particularly true in the present case as Mr. Le Pen, a leading politician, is known for the virulence of his speech and his extremist views, on account of which he has been convicted a number of times on charges of incitement to racial hatred, trivialising crimes against humanity, making allowances for atrocities, apologia for war crimes, proffering insults against public figures and making offensive remarks. As a result, he has exposed himself to harsh criticism and must therefore display a particularly high degree of tolerance in this context"[115].

Nevertheless, the court considered that "the [Paris] Court of Appeal made a reasonable assessment of the facts in finding that to liken an individual, though he be a politician, to the 'chief of a gang of killers', to assert that a murder, even one committed by a fictional character, was 'advocated' by him, and to describe him as a 'vampire who thrives on the bitterness of his electorate, but sometimes also on their blood', 'oversteps the permissible limits in such matters'"[116].

Lastly, the court considered whether the conviction of a crime and the associated penalty were proportionated to the offence, and determined both were. In that regard "the amount of the fine imposed on the applicants was moderate [and] the same finding has to be made as regards the damages they were ordered jointly and severally to pay to each of the civil parties"[117].

Four Judges dissented from this decision of the court, stating inter alia: "[W]e believe that it is excessive and inaccurate to claim that the novel in question constitutes an appeal to violence or hatred. The work

114. *Id.* para. 51.
115. *Id.* para. 56.
116. *Id.* para. 57.
117. *Id.* para. 59.

criticises a politician who is himself inclined to make comments of such a nature, as shown by the convictions pronounced against him. In the present case, the expressions 'the chief of a gang of killers' and 'a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood' cannot be taken literally; their intention is to convey the message that this politician, through his discourse, encourages his followers to engage in acts of extreme violence, especially against minorities, as [an actual] case itself showed. In this sense, these expressions are also value judgments which have an established factual basis"[118].

7. *Concluding Remarks*

Review of these decisions of the European Court of Human Rights suggests that the *New York Times Co. v. Sullivan* "actual malice" rule may promote free speech than does the actual application of the European Convention of Fundamental Rights. Even when the ECtHR stepped in to recognize violations of the freedom of speech, several years had passed after the facts, during which those sanctioned and likely far more individuals were negatively impacted.

From that perspective, it is hard to support the idea that criticism of a sitting public official should subject an author, newspaper, or television statement to costly defamation actions. Under the *Sullivan* rules, most such actions would be stopped at an early stage on a motion to dismiss or motion for summary judgment. Under the protective umbrella of *New York Times Co. v. Sullivan*, more vibrant political speech, even if excessive, can receive substantial protection.

118. *Lindon, Otchakovsky-Laurens and July v. France*, ECHR 836 (2007), joint partly dissenting opinion by Judges Rozakis, Bratza, Tulkens, and Šikuta. In addition, the dissenting judges not only rejected the idea that the sentence was symbolic and complained about the lack of review of the proportionality of the sanction; they raised the question of whether it was consistent in the twenty-first century to punish damage to reputation under outdated statutes. The dissent cited a recommendation by the Parliamentary Assembly of the Council of Europe, observing that "The media legislation in some [west European] countries is outdated (for instance the French press law dates back to 1881) and although restrictive provisions are no longer applied in practice, they provide a suitable excuse for new democracies not willing to democratise their own media legislation". *Ibidem*.

By contrast, a primary problem with ECtHR jurisprudence is the application of rather vague balancing tests, such as proportionality, which are only performed years after the publication. Delay means substantial chilling of the willingness of writers and publishers to criticize entrenched public officials. In such a context, the risk that major political figures may increasingly employ governmental instruments, even using the threat or actuality of criminal prosecutions, should not be underestimated.