



**DEFAMATORY SPEECH AGAINST PUBLIC OFFICIALS: THE
STANDARD OF PROTECTION IN THE LAW AND PRACTICE OF THE
UNITED STATES OF AMERICA, THE EUROPEAN COURT OF HUMAN
RIGHTS, AND BELARUS**

by Alena Karaliova

LL.M. HUMAN RIGHTS THESIS
PROFESSOR: Michael Hamilton, Dr.
Central European University
1051 Budapest, Nador utca 9,
Hungary

Table of Contents

Introduction	1
I. Literature Review	4
1. Introductory Remarks.....	4
2. Defamation of Public Officials in the Main Theories of Free Speech	4
2.1. Argument from Truth.....	5
2.2. Argument from Democracy	11
2.3. Argument from Tolerance.....	17
2.4. Argument from Human Dignity.....	18
2.5. Argument from Suspicion of Government	24
3. Conclusions	25
II. Defamation of Public Officials in the USA	27
1. Introductory Remarks.....	27
2. Early Period: Criminalization of Defamation of Public Officials.....	28
3. New York Times v. Sullivan: a New Standard in Operation.....	29
3.1. Importance of Free Debate on Public Issues.....	31
3.2. ‘Actual Malice’ Standard of Proof.....	31
3.3. Correlation with the Main Theories	32
4. Further Developments of the Standard.....	34
4.1. Clarification of the ‘Actual Malice’ Standard of Proof	34
4.2. From Public Officials to Public Figures	36
4.3. Imaginative Expression and Statements of Opinion.....	38
5. Criminal Libel after Sullivan.....	39
6. Conclusions	41

III. Defamation of Public Officials in the Case-Law of the European Convention on Human Rights.....	43
1. Introductory Remarks.....	43
2. Lingens v. Austria: a European Sullivan?.....	44
3. Further Developments of the Standard.....	46
3.1. Extension of the Circle of Possible Plaintiffs	46
3.1.1. Government	46
3.1.2. Civil Servants and Judges	47
3.2. Standard of Proof	49
3.3. Facts and Value-Judgments	50
3.4. Importance of the press	51
4. Criminal Libel under the ECHR.....	52
4.1. Criminal Sanctions for Defamation of Heads of State.....	53
5. Conclusions	55
IV. Defamation of Public Officials in Belarus	57
1. Introductory Remarks.....	57
2. Defamation in Belarus: General Overview	58
2.1. Laws	58
2.2. Practice.....	61
2.2.1. <i>Mazheika and Markevich</i> : Belarusian Standard of Proof.....	62
2.2.2. <i>Ivashkevich</i> : an Attempt Is Also a Crime	65
2.2.3. Recent Developments: the Case of <i>Pochobut</i>	67
3. Conclusions	68
Conclusion.....	70
Bibliography.....	72

Executive Summary

A tension has always existed between defamation laws and freedom of speech. Such laws are designed to protect the right to reputation, even if this requires some interference with the right to freedom of expression. Every state solves this tension in its own way, by affording a greater degree of protection to one or the other right.

An especially sharp conflict between the two rights arises in cases of defamatory statements directed against public officials, since restrictions on this kind of speech may seriously curtail free discussion on matters of public concern.

The aim of this work is to identify, evaluate, and compare the standards of protection for defamatory speech against public officials established in the law and practice of the USA, the European Convention on Human Rights, and Belarus, focusing specifically on existing defenses and criminal sanctions for defamation.

By using this comparative method combined with the Belarusian case study and normative research, it will be shown that the standards which have emerged under American and the ECHR case-law sufficiently protect free speech, though have some shortcomings, while the Belarusian system is obviously overprotective for the right to reputation of public officials.

Introduction

A tension has always existed between defamation laws and freedom of speech. It is explained by the fact that the mentioned laws, designed to protect the right to reputation, often entail interferences with the right to freedom of expression.

The concept of the right to reputation appeared centuries ago and has been acknowledged in national laws and philosophical doctrines.¹ At the same time, the right to freedom of speech has followed a lengthy path in order to achieve its recognition in international legal instruments and national practice. Only in 1789, the right to free speech was fully recognized in the French Declaration of the Rights of Man and of the Citizen.²

Nowadays, the importance of freedom of speech is unquestionable. It is a fundamental right prescribed by the main international human rights treaties.³ However, it does not have an absolute character and is subject to limitations in case of conflict with other individuals' or state interests. The right to reputation is among such limitations.⁴ The importance of this right is also recognized in a number of legal documents,⁵ and *a priori* freedom of speech and the

¹ In Roman law, for example, individual's reputation was protected by the delict of *iniuria*. See Justinian, *Institutes* 4.4 (1994). For an example of a theoretical justification for the right to reputation see Hugo Grotius, *The Jurisprudence of Holland* 471 (1926), where Grotius recognizes honor as a protected individual's interest.

² Declaration of the Rights of Man and of the Citizen, art. 11 (1789), available at <http://www.hrcr.org/docs/frenchdec.html> (last visited 28.10.2011).

³ See, e.g., Universal Declaration of Human Rights, art. 19 (1948), available at <http://www.un.org/en/documents/udhr/index.shtml> (last visited 28.10.2011); International Covenant on Civil and Political Rights, art. 19 (1966), available at <http://www2.ohchr.org/english/law/ccpr.htm> (last visited 28.10.2011); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10 (1953), available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited 28.10.2011).

⁴ See *id* restrictive clauses of the aforementioned articles.

⁵ See *id.*, e.g., Universal Declaration of Human Rights, art. 12; International Covenant on Civil and Political Rights, art. 17 (1). Moreover, the European Court of Human Rights held that “the right to protection of one's reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life.” *Radio France and Others v. France* § 31, no. 53984/00 (Mar. 30, 2004). See also *Pfeifer v Austria* § 35, no. 12556/03 (Nov. 15, 2007): “The Court considers that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life. Article 8 therefore applies.”

right to reputation are given equal value. An especially serious conflict is present in case of infringement on the right to reputation of those belonging to the ruling elite.

The right to reputation of public officials has, for a long time, had a privileged protection, compared with that enjoyed by the ordinary people.⁶ But in the course of history, this approach was changed in most countries, and freedom of expression gradually obtained a greater degree of protection.

In a wealth of theoretical works, strong justifications for such special protection of speech are provided. However, there is no universal solution on how to regulate defamatory speech against public officials. Therefore, every state tends to establish its own standard. The main peril in the course of balancing freedom of speech against the right to reputation lies in overprotection of the latter. In such a case, defamation laws become the means of restriction of the freedom of press not only against intrusion upon individuals' private life, but also in order to prevent criticism of the conduct of public officials. Thus, careful balancing is needed in order to protect both rights.

The aim of this work is to identify, evaluate, and compare the standards of protection for defamatory speech against public officials established in the law and practice of the USA, the European Convention on Human Rights, and Belarus, focusing specifically on existing defenses and criminal sanctions for defamation.

It will be shown that the standards that have emerged under American and the ECHR case-law sufficiently protect free speech (albeit in different ways and with some

⁶ For example, in 13th century, the notion of *scandalum magnatum* – defamation of powerful people, such as judges, peers, or state officials - existed in England: “Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called scandalum magnatum, are held to be still more heinous; and, though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury: which is redressed by an action on the case founded on many ancient statutes; as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained.” See 3 William Blackstone, *Commentaries on the Laws of England* 123–24 (1768).

shortcomings), while the Belarusian system is manifestly overprotective of the right to reputation of public officials.

For achieving the purpose of this thesis, a comparative method combined with a case study and normative analysis will be used. The following structure of the work was chosen in order to carry out the analysis.

Chapter I (Literature Review) provides a theoretical framework for the research. The main arguments for special protection of freedom of speech are put together, by discussing them from the point of their applicability to regulation of defamatory speech against public officials. The research in this Chapter will show that the specific question of protection of defamatory speech against public officials is not widely discussed in most of the philosophical works.

Chapter II gives an insight into the establishment and development of the USA standard of protection. This standard is evaluated from the standpoint of the main theories justifying free speech, and the chapter concludes that the American approach mostly encompasses Meiklejohn's argument from democracy. In Chapter III, the approach of the ECHR is examined and compared with the American standard. A number of similarities and differences are noted. The last chapter of the thesis evaluates Belarusian laws and practice. It will be found that the Belarusian standard of protection of defamatory speech against public officials considerably differs from the ones established under American and European case-law. General conclusions summarizing the issue will be provided at the end of the research.

I. Literature Review

1. Introductory Remarks

The aim of this literature review does not consist in giving a full and comprehensive analysis of all existing justifications for freedom of speech. There are plenty of books on this topic, and it would be too broad for the purposes of this thesis to analyze all these works in details.

The goal is rather to provide a theoretical framework for my further research and to put together the main arguments for special protection of freedom of speech, by discussing them from the point of their applicability to regulation of defamatory speech against public officials.

2. Defamation of Public Officials in the Main Theories of Free Speech

Considerable work has been carried out on the topic of justifications for freedom of speech, and many authors have developed their own theories and explanations. Some systematization of the main theories is therefore needed in order to determine the main reasons for the protection of defamatory statements against public officials. This literature review provides for such systematization.

Five main arguments in favour of the protection of freedom of speech will be analyzed from the standpoint of their utility for providing justifications for limitations for defamatory speech relating to public officials. The first one in this list is the argument from truth.

2.1. Argument from Truth

According to this argument, the importance of free speech accounts for its significant role in the discovery of truth.⁷ Such perception of freedom of speech as a precondition for the establishment of truth is generally associated with the name of British philosopher John Stuart Mill.

The essence of his theory can be summarized as follows: expression of all ideas, even of false ones, should be allowed because there are no *completely* true or *completely* false statements. In particular, Mill found that:

[...] the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.⁸

Therefore, even if there is an error in some opinion, it should not be silenced, but it can be better understood and lead to the emergence of a greater truth in the course of discussion.⁹

Furthermore, Mill unfolded his famous ‘infallibility argument’ which can be best expressed by the following citation: “To refuse a hearing to an opinion, because they [those who desire to suppress an opinion – *A. K.*] are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.”¹⁰ Since no one can claim their infallibility and know for sure what is the truth, silencing of any opinion is misguided, according to Mill.

⁷ 1 Larry Alexander, *Freedom of Speech* 4-6 (2000).

⁸ John Stuart Mill, *On Liberty* 10 (1869).

⁹ *Id.*

¹⁰ *Id.*

In 1919, in American case-law appeared a new theory which can be considered as a continuation of the Millian argument from truth. According to dissenting opinion of Justice Holmes in the case of *Abrams v. United States*, regulation of freedom of speech shall be carried out by the same principles as regulation of free markets: “[...] the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹¹ In other words, ‘free trade of ideas’ leads to automatic disappearance of wrong opinions and domination of true ones.¹²

Later, in concurring opinion of Justice Brennan in *Lamont v. Postmaster General*, this rationale for freedom of speech was given its name: the ‘marketplace of ideas’ theory.¹³ Since then, this argument became an important feature of the American First Amendment Doctrine.

However, this justification of free speech is not as unambiguous as it may seem. The argument from truth (both in Millian and in the ‘marketplace of ideas’ interpretation) has been the subject of sharp criticism and revision by many contemporary authors.

Thus, for example, Professor Eric Barendt postulates in relation to Mill’s theory that it is not right to overvalue the relevance of public discussion by asserting that even expressly false speech must be protected. Since such speech is able to provoke disturbances or public disorder, it is necessary to weight carefully the long-term interests in free discussion against immediate damage which can occur.¹⁴

Barendt also disagrees with the absolute character of the Millian argument. In particular, he notes that if protection of every statement, even of those that are possibly false, would be regarded as the highest public good, then protection of other values would

¹¹ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

¹² *Id.*

¹³ *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (Brennan, J., concurring).

¹⁴ Eric Barendt, *Freedom of Speech* 8-11 (2d ed. 2005).

lose its sense.¹⁵ At the same time, there are many legal systems that prefer to protect other values,¹⁶ and it is hard to disagree with this affirmation of competing interests. Indeed, it is difficult to imagine stable, strong, and just society in which there are no restrictions at all as regards ideas that might be harmful to others. Such restrictions are provided in all contemporary democracies in case of a threat to national security and public order or infringement of the rights of others. And, as Barendt (referring to Chin L. Ten) states, if the imposition of such restrictions may be freely debated, then the interests of truth are protected.¹⁷

Continuing this logic, Professor Wojciech Sadurski generally doubts that the presence of falsity has a less pervasive effect on people's minds than the less-than-full presence of the truth. He considers that "the only [...] plausible explanation for [...] a choice of risk of error is by appeal to politics, not to the truth."¹⁸ He illustrates this assertion using the example of defamation in relation to public officials. According to Sadurski, underprotection of politicians in such a case is better than overprotection because "democratic polity needs free, undeterred public criticism and perceptive, investigative media."¹⁹ But, as this scholar underlines again, such an assertion may have little to do with the 'search for truth' and cannot be applied as a general rule to all kinds of speech.

Mill's 'infallibility argument' was also criticized. Sadurski, in the same work, emphasizes that if this argument is to be logically extended, it would undermine the legitimacy of any restrictions on any human freedom.²⁰ This supposition he supports by

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* See also Chin L. Ten, *Mill on Liberty* 131-32 (1980).

¹⁸ Wojciech Sadurski, *Freedom of Speech and Its Limits* 12 (1999).

¹⁹ *Id.*

²⁰ *Id.* at 14.

reference to Professor Tom Campbell: “if we take the assumption of fallibility seriously, then we are not going to be in a position to interfere in the conduct of any harm-causing person because we may be wrong to allege that the conduct causes harm.”²¹ Of course, it would be absurd if some societies followed such a rule.

However, not all contemporary scholars agree with the aforementioned criticism. For instance, Professor Jonathan Riley presents quite an interesting and unfamiliar view, which derives from his analysis not only of the essay *On Liberty*, but also of some of Mill’s other works. Riley infers that the Mill’s theory does not represent such absolutism as some suggest. Instead, he assures that Mill’s liberal doctrine of free expression is about general *laissez-faire* policy that should apply to speech, but certainly with some exceptions, which include time, place, and manner restrictions. And these restrictions are imposed by society.²²

The ‘marketplace of ideas’ theory has also led to propositions to impose certain restrictions on speech. As Barendt points out, the main difficulty of this theory lies in the biased character of the market. It always can happen that some ideas will occupy a favorable position on the market, and that will lead to their monopoly in the future.²³ Therewith, certain ideas sometimes appear at the edge of the market not because they are wrong or false, but because their proponents do not have enough money or power to promote it.²⁴ The mass media plays a great role in the dissemination of different ideas; that

²¹ Tom Campbell, *Rationales for Freedom of Communication* in *Freedom of Communication* 26-27 (Tom Campbell & Wojciech Sadurski ed., 1994).

²² Jonathan Riley, *Mill, Liberalism and Exceptions to Free Speech* in *Freedom of Expression: Counting the Costs* 197 (Glen Newey ed., 2007).

²³ Barendt, *supra* at 12-13.

²⁴ *Id.*

is why special attention must be paid to regulations of its work. Accordingly, some restrictions and interventions on the part of the state are justified.²⁵

A similar disapprobation of this theory was earlier proposed by Professor Owen M. Fiss, who has confirmed that “a market, even one that is working perfectly, is itself a structure of constraint.”²⁶ Such constraints on the presentation of matters of public interest are usually evident in two ways: firstly, by privileging certain groups of people (which consist of owners of the media sources, controllers of advertising budgets, and consumers); and secondly, by trying to make more profit from broadcasting (which leads to representation of information in accordance with the settled societal point of view).²⁷ All this, of course, does not favour the discovery of truth and contrasts with democratic needs of the electorate.²⁸

Professor Edwin Baker also finds that the ‘marketplace of ideas’ theory is not persuasive because of “oligopolistic control of the media, lack of access for disfavored or impoverished groups, overwhelmingly pervasive participation by favored groups, techniques of behavior manipulation, irrational responses to propaganda, and the non-existence of value-free, objective truth.”²⁹ He emphasizes that the ‘marketplace of ideas’ theory protects a single value of discovering truth, and finds this scope too limited.³⁰ He proposes a replacement of this theory by what he calls the ‘liberty model’. According to this new model, free speech must protect not a market-place but an arena for individual

²⁵ *Id.*

²⁶ Owen M. Fiss, *Why the State*, 100 Harv. L. Rev. 781, 787-88 (1987).

²⁷ *Id.*

²⁸ *Id.*

²⁹ C. Edwin Baker, *Human Liberty and Freedom of Speech* 4-5 (1989).

³⁰ *Id.* at 47.

liberty from certain types of governmental restriction.³¹ However, the author does not expressly consider the utility of this model for the regulation of defamatory speech.

In contrast with the aforementioned authors, W. Sadurski offers some justification for the restriction of defamatory statements. In his opinion, demonstrably false statements can hardly be protected under the ‘search for truth’ rationale, and citizens, being each in isolation and not having sufficient resources to test the veracity of each of the statements, endow their governments with the power of testing the truthfulness on their behalf and restricting the publication of false ads.³² This situation Sadurski calls the ‘market failure’ and applies it both to false advertisements and defamatory statements (but only for those expressed in relation to private persons).³³

In order to recapitulate the analysis carried out above, it is necessary to highlight some important points. First of all, there seems to be general agreement among contemporary free speech philosophers (Barendt, Sadurski, Campbell, Fiss, Baker) on the fact that both Mill’s justification for free speech and the ‘marketplace of ideas’ theory are too extensive and potentially biased in favour of certain kinds of speech. They obscure the fact that open discussion does not always lead to the discovery of truth (Fiss, Barendt). As a result, some authors (Barendt, Riley, Sadurski) support the imposition of certain restrictions on speech in order to protect other values. From this, an assumption can be made that defamatory speech against public officials should be restricted with the purpose of protecting other values and interests (e.g., reputation). However, this is not explicitly articulated by these scholars. In any case, the question of how to balance the interest in free speech against other values remains beyond this theoretical discussion.

³¹ *Id.* at 4-5.

³² Sadurski, *supra* at 9-10.

³³ *Id.*

W. Sadurski is the only author from those discussed above who seems to explain why the underprotection of public officials is better than overprotection, but he ties such a choice to politics and not to the ‘search for truth’. Therefore, a general conclusion seems to be that the argument from truth fails to provide protection for potentially defamatory statements against public figures. And the reason for this failure can be found in the work of Professor Dario Milo, who underlines that Mill’s theory is predominantly directed to opinions, while “the extent to which the argument from truth applies to false factual statements – the nerve of much defamation law – is uncertain.”³⁴

Thus, there is a need to evaluate whether other popular justifications for free speech might be more suited to discerning the proper degree of protection that should be afforded to the defamation of public officials. The next in the list is the argument from democracy.

2.2. Argument from Democracy

The main developer of this argument is political philosopher Alexander Meiklejohn, who, in one of his works, suggested that democracy lies in self-government of people and in order to make this model workable, an informed electorate is needed.³⁵ An original (and narrow) version of Meiklejohn’s theory divides speech into its private and public components. The latter sphere has the highest degree of protection and includes merely political utterances, upon which constraints (in accordance with Meiklejohn) may affect the choice of the electorate, and usually in a bad way. That is why such constraints should not be permitted.³⁶

³⁴ Dario Milo, *Defamation and Freedom of Speech* 57 (2008).

³⁵ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 3-9 (2004).

³⁶ *Id.*

Further, Meiklejohn expanded his argument and created an improved version of his theory, according to which not only mere political speech during the electoral process is to be protected. He extended his argument to other spheres because he believed that “there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, the ballot should express.”³⁷ The list of such spheres includes education, literature, arts, philosophy, sciences, and public discussion of public issues.³⁸ However, Meiklejohn insisted that speech on the aforementioned topics must necessarily be connected with voters’ rights or people’s self-government.³⁹

Furthermore, in his work Meiklejohn made a point that is of particular importance for the present analysis. He distinguished between private and public defamation and argued that in case of private defamation the utterance should not be entitled to protection of the First Amendment, but if “the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment.”⁴⁰ Just after this statement, Meiklejohn concluded that political or seditious libel cannot be the subject of legislative control. Hence, defamation of public officials, according to this theory, is fully protected from any restriction. However, this approach to the protection of defamation has been widely criticized.

For example, Cass Sunstein, an American legal scholar, uses in his works logic that is very consonant with Meiklejohn’s explanation of the importance of freedom of speech.

³⁷ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 256.

³⁸ *Id.* at 257.

³⁹ *Id.*

⁴⁰ *Id.*

But the originality of this author is in his peculiar evaluation of this model of protection. Sunstein underscores that contemporary interpreters of the American Constitution have significantly departed from the original view of the First Amendment ‘father’, political theorist James Madison, on purposes of freedom of speech.⁴¹ Sunstein reiterates that, in accordance with Madison, the main aim of free speech lies in political deliberation. At the same time, in case when speech does not further this objective, government has a ‘reasonably broad power’ to regulate it.⁴² This power of the government can be applied, among other kinds of private speech, in relation to libelous statements.⁴³

It seems that this very system of regulation of free speech was established in the United States. However, on Sunstein’s view, the test which is used in present American case-law in order to define whether speech deserves special protection would not stand Madisonian criticism because it is both overprotective and underprotective.⁴⁴ In other words, Sunstein claims that acceptance of defamatory statements in relation to celebrities brings nothing to political discussion, while some persons who are not famous, but have a great influence on matters of public concern, are overprotected against potential harms to their reputation. The solution, which Sunstein suggests, is to take into account “whether the speech is intended and received as a contribution to political deliberation, not whether it has political effects and sources.”⁴⁵

Another quite interesting view on Meiklejohn’s argument can be found in one of Edwin Baker’s works. He questions whether “the more influential version of the political speech theory” [i.e. Meiklejohn’s explanation of freedom of speech – *A.K.*] “offers a

⁴¹ Cass R. Sunstein, *Democracy and the Problem of Free Speech* 122 (1993).

⁴² *Id.*

⁴³ *Id.* at 124.

⁴⁴ *Id.* at 161.

⁴⁵ *Id.* at 154.

plausible alternative to the dominant marketplace of ideas theory.”⁴⁶ He concludes that it does not because it “relies on the same premises as the marketplace of ideas theory; and that it merely amounts to an unprincipled restricted formulation of the marketplace theory.”⁴⁷ Accordingly, Baker attributes to Meiklejohn’s argument the same disapproval that he has expressed earlier in relation to the ‘marketplace of ideas’ theory.

Moreover, to support his criticism, Baker argues that “the existence of democracy cannot depend on full information”⁴⁸ and that people always exercise self-government in at least partial ignorance, without knowing of some opinions. Therewith, Baker urges that some limitations, such as those concerning confidentiality of judicial deliberations or privacy protection, are consistent with the notion of democracy.⁴⁹

Although it is not clear whether, according to Baker, such restrictions can be applied to defamatory speech, I will assume that it can, taking into account his explanations about coercive speech.⁵⁰ However, in the next chapters of his work Baker focuses only on blackmail and espionage, which are not protected under his theory of free speech.

Edwin Baker is not the last critic of the argument from democracy. Although Eric Barendt insisted that this argument is “probably the most easily understandable, and certainly the most fashionable, free speech theory in modern Western democracies,”⁵¹ it was widely attacked by other numerous opponents. Probably, the most provocative among them is Professor Vincent Blasi. He challenges the whole idea of democratic self-government by questioning whether an individual citizen in our age of mass

⁴⁶ Baker, *supra* at 25.

⁴⁷ *Id.*

⁴⁸ *Id.* at 29.

⁴⁹ *Id.*

⁵⁰ *Id.* at 59.

⁵¹ Barendt, *supra* at 18.

communications wants to participate in public discussion and subsequent decision making. He arrives at the conclusion that the media has replaced the public, and this makes Meiklejohn's initial model not descriptive of today's democracy.⁵²

But even if we suppose that Blasi's assumption is not true and that the public strives for participation in political discussion, it is still not clear why such discussion must necessarily affect the choice of people in a good way and lead to the establishment of the best government. As the practice of many countries shows, it can be a contrary occasion. And Belarus is a good example of that: initially, our current authoritarian President had been chosen in the course of free elections of 1994, which were preceded by deliberate public discussion with plurality of opinions.⁵³

Another point of criticism of the argument from democracy was proposed in a collaborative work of Prof. Jerome A. Barron and Prof. C. Thomas Dienes, where they admit that Meiklejohn's explanation "although [...] intensely absolutist, it is also unusually narrow". In the opinion of these scholars, Meiklejohn originally defined a very narrow category of public speech, which concerns political debate directly or indirectly; and only later he improved his theory by recognizing that speech about philosophy, literature, science, etc. can also be important for the purposes of self-government.⁵⁴

Similarly, Professor David A. J. Richards observes that Meiklejohn's original theory is unduly restrictive because it provides for protection of political speech only.⁵⁵ On the other hand, he remarks that Meiklejohn's theory is too broad because it tends to include every

⁵² Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 (3) Am. B. Found. Res. J. 521 (1977).

⁵³ See IISEPR, *Presentations. Election Campaign in Belarus: Chronology and Prehistory*, *Belarusian Business Newspaper*, No.7, Jan., 1995 (in Russian) [NISEPI, *Prezentacii. Predvybornaja kampanija v Belorusi: hronologija i predystorija*, *Belorusskaja delovaja gazeta*, No. 7, janv. 1995].

⁵⁴ Jerome A. Barron & C. Thomas Dienes, *First Amendment Law in a Nutshell* 12 (4th ed., 2008).

⁵⁵ David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45, 68-69 (1974).

speech into the category of ‘political’, even those that are not so much connected to the political process.⁵⁶

An additional critical view, which Lee C. Bollinger articulates in one of his books, holds that self-government does not always require strong protection of speech. On the contrary, in some cases it may call for restrictions, especially if an appropriate decision was adopted by the public. As Bollinger acknowledges, “if the people themselves, acting after full and open discussion, decide in accordance with democratic procedures that some speech will no longer be tolerated, then it is not ‘the government’ that is depriving ‘us’, the citizens, of our freedom to choose but we as citizens deciding what the rules of conduct within the community will be.”⁵⁷

In this light, are defamation laws such decisions adopted by citizens in the course of full and open discussion? Can they be considered admissible self-restraints? Bollinger does not provide an answer to this question. And I assume that, taking into account the nature of representative democracy, it is quite hard to distinguish which restrictions were adopted by citizens themselves in open discussion and which were imposed on them with the help of the media, propaganda, etc.

Summing up, I would like to underscore that Meiklejohn’s theory presents quite a clear and consistent standard of protection for defamatory speech made in the course of political discussion. However, the problem is that all the mentioned contemporary authors (Barron & Dienes, Richards, Shiffrin, Baker, Baker, Sunstein, Bollinger) attack this argument in one way or another, e.g., by the reason that it is either too narrow or broad (Barron & Dienes, Richards, Shiffrin), or is just a limited version of the ‘marketplace of ideas’ theory

⁵⁶ *Id.* See also Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 47-56 (1990).

⁵⁷ Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 50 (1986).

(Baker), or is not descriptive of today's democracy (Blasi, Bollinger, Baker). Some of them (Baker, Sunstein, Bollinger) also accept restrictions on speech that are consistent with the notion of democracy, though these authors do not specify whether such restrictions might be applicable to defamatory speech against public officials.

In addition to this, Sunstein admits that the test existing in present American case-law is both too extensive and too narrow, as a result of which much many public figures who might be regarded as unimportant in terms of the political process (e. g., celebrities) are left unprotected, when others, who really affect the political process, albeit while standing in the shadows, are unreasonably overprotected.

Thus, there remains a question about whether Meiklejohn's theory may be fully applicable in practice for the protection of defamation in a political context. The answer to this question may be found in the case-law of particular states (which will be analyzed in the next chapters of the thesis). Now, however, the next argument in favor of protection of free speech will be examined.

2.3. Argument from Tolerance

The main proponent of this argument is Lee Bollinger, who maintains that "the tolerance principle [...] is intended and designed to perform a self-reformation function for the general community and not [...] to offer a shield of protection either for the majority against the government or for minorities against unfair treatment at the hands of the majority."⁵⁸ In other words, freedom of speech requires its protection not for the speakers'

⁵⁸ Bollinger, *supra* at 134.

or the government's sake, but rather with the purpose to promote the right attitudes of tolerance among the audience.⁵⁹

The main flaw in this theory, which Sadurski concedes, lies in arbitrary justifications for the protection of some kinds of speech while restricting others.⁶⁰ Sadurski also contends that Bollinger's arguments are either radical but implausible or plausible but not very original.⁶¹

I am not going to make a detailed analysis of the literature on this theory because it seems to me that the argument from tolerance can be best articulated from the standpoint of allowing/disallowing extremist speech, rather than defamatory statements against public officials (because tolerance usually is interpreted as indulgence of other opinions which differ from one's own, and not as indulgence of falsehood). This argument would be more useful for the purposes of this thesis if tolerance should have been expressed not by the audience, but rather by speakers themselves in relation to false statements expressed in their address, in case such speakers are politicians or public officials engaged in discussion of issues of public concern. To illustrate the point, both American and the ECHR case-law approves that a greater degree of tolerance shall be expected from such persons. This case-law will be discussed in Chapters II and III of this thesis, while now I will examine the next argument often used to justify the protection of speech.

2.4. Argument from Human Dignity

This argument explains free speech through its recognition as one of the aspects of human dignity. As D. Milo notes, there are two versions of the argument from human dignity: the

⁵⁹ *Id.*

⁶⁰ Sadurski, *supra* at 32.

⁶¹ *Id.*

first respects speech as an integral part of the self [e.g., self-development, self-fulfillment, etc.] while another draws attention to the value of autonomy.⁶² In this part of my analysis I will examine the interrelation and interchangeability of these two strands of the argument from dignity, as one common explanation of freedom of speech, because self-development (or self-fulfillment, etc.) is hardly imaginable without autonomy.

As Professor Susan J. Brison noticed, “the autonomy defense of free speech is arguably the one most commonly used by liberal legal and political theorists, and it appears to be gaining in popularity.”⁶³ Among the variety of adherents of this explanation for free speech there is Professor Thomas Scanlon, who maintains that “the harm of coming to have false beliefs is not one that an autonomous man could allow the state to protect him against through restrictions on expression.”⁶⁴ But, as he further states, this principle is too hyperbolized, and we may expect from the state to protect us against some false beliefs and advocacy to crime.⁶⁵ However, his theory does not unfold whether defamatory statements related to public officials shall be included in such a category of ‘false beliefs’.

A slightly different standpoint from Scanlon’s was expressed by Edwin Baker, who in his ‘liberty model’ regards self-realization as a key value of the First Amendment. He argues that all speech is protected as long as it defines, develops, or expresses personality of an individual and does not involve violence or coercion of another. At the same time, “speech used to influence another person may be coercive if the speaker manifestly disrespects and attempts to undermine the other’s person will and the integrity of the other person’s mental processes.”⁶⁶ Although the author does not mention whether potentially defamatory

⁶² Milo, *supra* at 77-78.

⁶³ Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 (2) *Ethics* 312, 312-13 (1998).

⁶⁴ Thomas Scanlon, *A Theory of Freedom of Expression*, 1 (2) *Phil. Pub. Aff.* 204, 217 (1972).

⁶⁵ Thomas Scanlon, *Freedom of Expression and Categories of Expression*, 40 *U. Pitt. L. Rev.* 519, 532 (1979).

⁶⁶ Baker, *supra* at 59.

statements belong to such category of coercive speech, I suppose that Baker's argument might be well used in cases when defamatory speech substantially undermines someone's reputation because it also may entail the infringement of the integrity of person's mental processes.

Professor Martin Redish criticizes Baker's 'liberty model' by asserting that this version is narrow and truncated. In contrast to Baker, he posits that "individuals may develop their personal and intellectual faculties by *receiving*, as well as by *expressing*."⁶⁷ At the same time, Redish similarly makes self-realization the core aspect of freedom of speech and puts all competitive values, such as the 'marketplace of ideas', on the place of subvalues.⁶⁸ He makes quite interesting analysis of some American cases related to defamation (such as *Sullivan* and *Gertz*) and concludes that comments about private individuals can be relevant for others, just like information about public figures; thus, the self-realization principle might justify the protection of even wholly private defamations.⁶⁹ Under a balancing concept, he proposes to "accept on a theoretical level the equal value of different types of speech, yet still decide that the different areas of expression may be treated differently."⁷⁰ However, the basis for such different treatment – 'external considerations'⁷¹ – seems to be of arbitrary character.

Eric Barendt, similarly to the previous authors, asserts that every individual is born with an unalienable right to self-development and self-fulfillment. Restrictions on both access to and the imparting of information inhibit our ability to grow and develop.⁷² Barendt's particularity is in that he adds, making references to the work of T. Campbell, that the

⁶⁷ Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 620 (1982).

⁶⁸ *Id.* at 596-619.

⁶⁹ *Id.* at 644.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Barendt, *supra* at 13.

development of more reflective and mature persons benefits society as a whole.⁷³ This too is an interesting and less frequently cited interpretation of the argument from human dignity. However, this interpretation does not bring any explanations about the place of defamatory communications in such a reflective and mature society.

Further analysis of the literature regarding the argument from human dignity shows some flaws and shortcomings of this theory. For example, Professor Gerald Dworkin in one of his works observes that autonomy can be undermined by misinformation or lack of information.⁷⁴ This premise leads to some controversy: if to restrict, for example, expression of defamatory statements on the ground that this is misinformation which undermines autonomy of the listeners, then, how simultaneously not to restrict autonomy of the speaker to express such statements? How to weight interests of both the audience and the speakers? In this situation, as Brison rightly admits, there is a flaw in the theory, because it is not clear what to do in case of conflict of interests.⁷⁵

Eric Barendt warns about the similar problem. He asserts that if to extend this approach not only to freedom of speech, but also to other rights and freedoms, then it becomes unclear where to draw a line between self-fulfillment of one individual and harm to others.⁷⁶ As regards specifically defamation, the reason for such unsolvable conflict of interests is, as D. Milo implies, in that “when balancing freedom of speech and reputation, we are engaged in balancing dignity interests on both sides.”⁷⁷ Hence, it is notoriously difficult to strike a balance. However, pointing to this difficulty does not necessarily absolve from having to

⁷³ *Id.*

⁷⁴ Gerald Dworkin, *The Theory and Practice of Autonomy* 15 (1988).

⁷⁵ Brison, *supra* at 324.

⁷⁶ Barendt, *supra* at 13-14.

⁷⁷ Milo, *supra* at 78.

strike this balance because in the contrary case, if this Barendt's argument is to be logically extended, it would undermine the legitimacy of any restriction on any human freedom.⁷⁸

Another objection to this approach to freedom of speech arrives in one of the works of Sadurski. He points out that the main problem of this explanation is that "as a rationale, it is incapable of supplying the reasons for subjecting speech to a more lenient system of legal control than many other aspects of individual behavior which may also be essential to one's self-expression and self-realization."⁷⁹ He illustrates such self-expressive behavior by an example of punching another person's nose or driving 120 km per hour through a school district and convincingly argues that prevention of such behavior is justified even in case if self-respect of the doer will be damaged as a result.⁸⁰ Accordingly, from here can be made a conclusion that some kinds of harmful speech should also be restricted, notwithstanding that it will undermine the right of the speaker to autonomy and self-realization.

After evaluating the autonomy-based arguments advanced by different authors, Susan J. Brison expresses a rather unexpected view. She draws the conclusion that none of those authors have clarified why hate speech should be protected.⁸¹ However, it seems to me, the same thing also can be said in relation to defamatory speech: from the aforementioned explanation it is not totally clear why such speech ought to be protected. Is it really for autonomy and self-fulfillment of the speaker? Yet, as W. Sadurski rightly observes, "we may wish to protect the right of journalists to defame public figures (within limits) but we will not advance our cause by appealing to a journalist's need for self-expression."⁸²

⁷⁸ Thus, this Barendt's standpoint is susceptible to the same criticism as it was expressed by Sadurski in relation to Mill's 'infallibility argument' (on p. 7 of this thesis).

⁷⁹ Sadurski, *supra* at 18.

⁸⁰ *Id.*

⁸¹ Brison, *supra* at 338.

⁸² Sadurski, *supra* at 17.

In addition to all objections mentioned above, it remains unclear for me why unrestricted free speech must necessarily favour individual self-development and self-fulfillment. As it was in the case of the development of society in the course of open and uninhibited public discussion, the dissemination of some ideas may be more harmful than useful for the self-development of some people. And defamation generally is one such category of speech. That is why, as Barendt reiterates, even autonomous people can allow the government, after careful and deliberate reflection, to impose some limitations to particular kinds of speech which, in their opinion, cannot be tolerated.⁸³

Notwithstanding all the criticism expressed above, the argument from human dignity can be useful in helping determine the degree of protection for potentially defamatory statements against public officials because, as D. Milo informs, it helps to rationalize the importance of malice in defamation law.⁸⁴ According to the argument of autonomy and self-fulfillment, a deliberate lie cannot be protected because it undermines autonomy in many ways: “that of the audience, who might act in ways they would not have chosen in the absence of the false statements, that of the victim of the speech whose options and choices are restricted as a result of the reputational harm suffered, and that of the speaker, who expresses viewpoints that do not reflect his convictions.”⁸⁵ Thus, from here it becomes clear that intentionally false statements against public officials cannot be protected under the argument from human dignity.

This useful observation made by Milo, however, does not supply with a thorough answer on the question of degree of protection accorded for defamatory speech against public officials. The analysis of literature shows that most of the authors (Sadurski, Dworkin,

⁸³ Barendt, *supra* at 17.

⁸⁴ Milo, *supra* at 79.

⁸⁵ *Id.*

Barendt, Brison) accept that there are flaws in theories which purport to explain the importance of free speech from the standpoint of autonomy or self-fulfillment.

First of all, a lot of authors (Sadurski, Dworkin, Barendt, Brison) acknowledge that it is not clear how to balance autonomy of the speaker against the interests of the audience and other values. Secondly, such authors as Scanlon, Baker, and Sadurski, believe that some restrictions on free speech are permissible in case of false beliefs or harm to others. However, from their explanations it is not clear whether defamatory statements against public officials are among such false beliefs. Moreover, there is no common agreement on standard applicable in case of restrictions on defamatory speech. While Milo speaks about ‘actual malice’, most of the authors concentrate their attention on harm to others (Baker, Sadurski, Scanlon), and Redish, at the same time, proposes something similar to *ad hoc* balancing which is dependent on uncertain ‘external considerations’.

An overall impression from the analysis is that there is no common agreement on how to treat potentially defamatory communications against public officials in the framework of the argument from human dignity. Hence, further research and systematization are needed.

2.5. Argument from Suspicion of Government

Suspicion of government is the last argument which deserves mentioning in this literature review because it has some ties with the aspect of defamation of public officials. The main developer of this argument is Professor Frederic Schauer, who in one of his works postulates that “freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and

falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of government power in a more general sense.”⁸⁶

Eric Barendt agrees that the argument from suspicion of government is a strong one; and all the aforementioned theories often use it ‘to bolster their own case’.⁸⁷ However, he doubts the suitability of this theory by posing two questions: why precisely government should be less trusted and why this particular sphere of free speech must arouse special concern.⁸⁸

Although this criticism of Barendt is well founded, the argument from suspicion of government is worth mentioning here because it adds one particular point to the analysis. In case of prohibition or restriction of defamatory speech against governmental officials, it is always necessary, as Schauer suggests, to express “a distrust of governmental determinations of truth and falsity”⁸⁹ because the real reason for limitations often tends to prevent the criticism of government, rather than to protect reputation of the officials. The evidences for this allegation will be present in the next chapters.

3. *Conclusions*

In this literature review five different arguments in favour of protection of freedom of speech were explored. The most of them (from truth, human dignity, tolerance and suspicion of government) do not set any clear and consistent standard of regulation of defamatory speech in relation to public officials.

Meiklejohn’s argument from democracy seems to require full protection for defamation of public officials together with the imposition of restrictions on what might be regarded as

⁸⁶ Frederic Schauer, *Free Speech: a Philosophical Enquiry* 86 (1982).

⁸⁷ Barendt, *supra* at 21.

⁸⁸ *Id* at 22.

⁸⁹ Schauer, *supra*.

private libels. However, the critics of this argument are convinced that such a standard of protection of free speech cannot be fully implemented in practice because of its too extensive and, at the same time, narrow character.

Therefore, from this theoretical discussion the degree of protection which must be generally afforded to defamatory speech about public officials remains unclear. Presented scholarly views on this subject are mainly of a fragmentary, controversial, and inchoate character. Hence, there is a need for grounding these explanations through analysis of relevant case-law of the chosen countries and tracing these back to the establishment and development of the standards of protection for defamatory statements against public officials. This is what I will attempt to do in the subsequent chapter.

II. Defamation of Public Officials in the USA

1. *Introductory Remarks*

As analysis of the theoretical materials on the topic of free speech justifications have shown, there is no common view among the authors on the standard of protection that should properly be accorded to defamatory speech against public officials. Therefore, the aim of this chapter is to analyze the principal decisions of the US Supreme Court on that issue and to identify an approach which is used in this jurisdiction for protection of this kind of speech, with the further purpose of comparison of this standard with those established in Europe and Belarus.

The aim of this chapter does not consist in giving a full and complete overview of establishment and development of libel law in the US. There is a wealth of decisions on this topic, and analysis of all of them would be too broad for the purposes of this thesis. My goal is rather to highlight the most important legal rules and cases which are relevant for determination of the aforementioned standard.

The jurisdiction of the United States of America was chosen on the ground that this country is a leading proponent of protection of freedom of speech in the world. In 1791, there was adopted the First Amendment, which provides that “Congress shall make no law [...] abridging the freedom of speech, or of the press [...]”.⁹⁰

However, as analysis will show, this short and unspecified text of the Amendment does not give full and unconditional protection to any kind of speech, including defamation. The Supreme Court has a great role in interpretation of this provision of the Constitution, and its rulings not always so obvious and plain as it may seem.

⁹⁰ U.S. Const. amend. I (1787).

As regards defamatory speech against public officials, from the first sight the standard of protection of such speech in the United States appears to be low, since criminal sanctions for defamation still exist in this country. Let us see, however, if such allegation might be true.

2. Early Period: Criminalization of Defamation of Public Officials

Leaving aside the regulation of defamatory speech against public officials in colonial America,⁹¹ I will start this chapter with the period of independence. At that time, seven years after the adoption of the US Constitution, in 1798, the Sedition Act was introduced in the United States. This statute was named later “one of [the] sorriest chapters” of American history⁹² and was clearly contrary to the right to free speech established by the First Amendment.

According to this Act, any publication of ‘false, scandalous and malicious’ writings against the Government, the Congress or the President, with intent to defame or bring them into contempt or disrepute, was considered as ‘seditious libel’, which had to be punished by a fine or imprisonment.⁹³ Although, in 1800, President Jefferson pardoned all those convicted under this Act, Congress cancelled their fines,⁹⁴ and in the following year this Act expired, it cannot be said that criminal responsibility for defamation of public officials in the USA automatically became unconstitutional.

⁹¹ The reason for that lies in the fact that libel law in colonial America was not really ‘American’, but rather corresponded to English laws on libel. However, you might *see on this issue* Larry Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America 1607-1700*, 39 (3) Am. J. Legal Hist. 337 (1995).

⁹² *See Watts v. United States*, 394 U.S. 705, 710 (1969).

⁹³ 1 Stat. 596, sec. 2 (1798).

⁹⁴ John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* 231 (1951).

The US Supreme Court, for a long time, was silent on this question: till the 1950's it addressed the issue of criminal responsibility for libel only indirectly and usually by affirming lawfulness of such practice.⁹⁵ It is interesting that at the same time some of the State courts were practicing totally different approach and admitted in their decisions that the Sedition Act has to be generally considered unconstitutional as regards prohibition of defamatory speech against government.⁹⁶

Therefore, it can be concluded that there was no common standard of protection of defamatory speech in the USA during 19th – mid-20th century. The crime of 'seditious libel' could be punished, according to the established law and practice; however, in some court's opinions, it was considered unconstitutional. This controversial situation changed only in 1964 by introducing of a new standard of protection for defamatory speech against public officials.

3. New York Times v. Sullivan: a New Standard in Operation

It is necessary to note that such unclear rules concerning criminal libel can be easily explained: defamation was absolutely excluded from the scope of protection of the First Amendment till 1964. As the Supreme Court ruled in the *Chaplinsky* case, the prevention and

⁹⁵ See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931), where the Supreme Court held that "[t]he law of criminal libel rests upon that secure foundation" that was "not abolished by the protection extended in our constitutions"; or *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940), where the Supreme Court stated that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument"; or *Beauharnais v. Illinois*, 343 U.S. 250, 255-256 (1952), where the Supreme Court agreed that criminal libel law has at its basis firm constitutional foundations.

⁹⁶ See, e. g., *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923): "...in so far as it [the Sedition Act] punished those who advocated resistance to law or rendered aid to a foreign foe, it was, of course, constitutional, but in so far as it sought to make criminal any defamation of the government or of the administration in power it has been generally considered to be unconstitutional".

punishment of the libelous words “has never been thought to raise any constitutional problem.”⁹⁷

However, this approach was completely changed by introducing a significantly different standard in *New York Time v. Sullivan*. This famous decision shows the protection that is afforded to defamatory statements against public officials in the USA nowadays.

Meiklejohn’s argument from democracy played not the least role in the establishing of this standard; and it is notable that the philosopher himself named this decision “an occasion for dancing in the streets”,⁹⁸ while his influence on the decision was also recognized in one of the works of Justice Brennan,⁹⁹ the judge who was the author of the majority opinion in *New York Time v. Sullivan*.

As to the facts, a plaintiff in this case was an elected official L. B. Sullivan, who brought a libel action against the New York Times Company and four black clergymen which had published an advertisement describing actions of the police against civil rights protesters and containing inaccurate criticism of these actions. Although Sullivan was not named in this advertisement, he considered such inaccurate criticism of the police as defamation since he was a commissioner and had duties of supervision of Montgomery’s police department; thus, the readers would assume that he was responsible for the acts of police described in the advertisement.¹⁰⁰

The decision of the Alabama courts, which found the defendants liable and awarded to Mr. Sullivan damages of \$500,000, was reversed by all nine judges of the Supreme Court on the ground that it constitutes a violation of the First Amendment.

⁹⁷ *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942).

⁹⁸ See footnote 125 at Harry Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 Sup. Ct. Rev. 221.

⁹⁹ William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 14-20 (1965).

¹⁰⁰ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Several important rules setting the standard of protection of defamatory speech against public officials were established by this decision.

3.1. Importance of Free Debate on Public Issues

First of all, particular importance of free debate on public issues was stressed by the Supreme Court: “debate on public issues should be uninhibited, robust, and wide-open, and [that it] may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁰¹

It would be wrong to maintain that the importance of free debate and discussion on political issues was not acknowledged in earlier decisions of the Supreme Court.¹⁰² For instance, in his concurring opinion to *Whitney v. California* Justice Brandeis remarked that “those who won our independence believed (...) that public discussion is a political duty; and that this should be a fundamental principle of the American Government.”¹⁰³ However, only in the *Sullivan* case this principle was for the first time tied with defamatory statements against public officials.

3.2. ‘Actual Malice’ Standard of Proof

Secondly, a completely new standard of proof was established in United States defamation law. Starting from *Sullivan*, common law strict liability¹⁰⁴ was exchanged for the

¹⁰¹ *Id* at 270.

¹⁰² See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1, 895 (1949) and *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

¹⁰³ *Whitney v. California*, 274 U.S. 375 (1927) (Brandeis, J., concurring).

¹⁰⁴ Under strict liability standard, the falsity of a defamatory statement was presumed; and in order to recover damages, the plaintiff only had to prove the existence of a published defamatory statement made about him. See

‘actual malice’ standard. It means that, in order to win a defamation lawsuit, a public official has to prove that speech was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁰⁵

The judges explained the establishment of such a standard by the fact that “[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable ‘self-censorship’. Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.”¹⁰⁶

Therefore, the burden of proof was implicitly shifted to the plaintiff, according to *Sullivan*, while in the subsequent case of *Philadelphia Newspapers, Inc. v. Hepps*, this standard of proof was established explicitly. The Supreme Court held that “[t]o ensure that true speech on matters of public concern is not deterred, the common law presumption that defamatory speech is false cannot stand.”¹⁰⁷ It meant that the defendant would never from this time “bear the burden of proving truth.”¹⁰⁸ This was a novelty for US defamation law, which now set a much higher standard of protection, in comparison with the English common law ‘strict liability’ rule.

3.3. Correlation with the Main Theories

Considering the theoretical justifications for freedom of speech discussed in Chapter I, it becomes evident that the case of *Sullivan* was mainly built on Meiklejohn’s argument from

further on strict liability standard: Paul Mitchell, *The Making of the Modern Law of Defamation* 101-113 (2005).

¹⁰⁵ *Sullivan, supra.* at 280.

¹⁰⁶ *Id* at 279.

¹⁰⁷ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U. S. 767, 1559 (1986).

¹⁰⁸ *Id* at 776.

democracy. Such strong protection is afforded to defamatory communications because criticism of official conduct of public officials is a part of the process of self-government. While making its decision, the Court relied on “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”¹⁰⁹ and supports its reasoning by citations from a number of cases which explicitly reformulate Meiklejohn’s argument on importance of public discussion for realization of people’s self-government.¹¹⁰

Along with the argument from Meiklejohn’s theory, the Court adds to its reasoning some strands of the argument from truth, while reiterating that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they “need [. . .] to survive.”¹¹¹ Hence, the Court also recognizes that in order to obtain truth in the course of free debate, erroneous statements should not be prohibited.

The ‘actual malice’ requirement is also arguably inherently suspicious of government, because it presumes that governmental officials, among other public figures, ought to expect closer scrutiny of their behavior.

Although the standard of protection of defamatory speech against public officials seems to be quite high, some of Justices (Black, Douglas, Goldberg) in their concurring opinions voted for “an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.”¹¹² They grounded this proposition on the assertion that libel on the official conduct of the governors can be equated to libel on

¹⁰⁹ *Sullivan, supra* at 270.

¹¹⁰ *Id.* See citations from different cases, *e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931), *etc.*

¹¹¹ *Id.* at 272.

¹¹² *Id.* (Goldberg, J., concurring).

government, which is prohibited in America nowadays.¹¹³ Moreover, they highlighted that the press has an essential role in democracy, thus, it must be protected from any restrictions in the course of fulfillment of its duties.¹¹⁴

It must be noted that such an approach interprets Meiklejohn's theory more fully because, as it was explained in Chapter I, this philosopher strongly supported absolute protection of free speech. However, such an absolutist point of view was not widely supported by the majority of Justices, and the standard of protection of defamatory speech against public officials generally remained the same as established in the *Sullivan* case, though with some modifications and additions which came in the subsequent decisions of the Supreme Court.

4. Further Developments of the Standard

There are several Supreme Court decisions which modified, supplemented and clarified the *Sullivan* doctrine of protecting non-malicious defamatory speech against public officials. In this part of the analysis I will discuss only those which are the most important for my further comparative research.

4.1. Clarification of the 'Actual Malice' Standard of Proof

The first such modification is related to the 'actual malice' standard, which was considered by some judges as "an elusive, abstract concept, hard to prove and hard to

¹¹³ *Id.*

¹¹⁴ "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell". *Id.* (Black, J., concurring).

disprove.”¹¹⁵ In *Curtis Publishing Co. v. Butts*, the criteria for establishing actual malice in relation to the press was clarified. In particular, it was stated that in order to establish actual malice of a journalist, it must be taken into account whether there were some attempts on his part to check the veracity of the story and the credibility of the sources.¹¹⁶

Further, in *Amant v. Thompson*, the Supreme Court, referring to the standard established in *Butts*, clarified the criteria of ‘reckless disregard’.¹¹⁷ The Court admitted that although “[r]eckless disregard...cannot be fully encompassed in one infallible definition” and must be decided on case-by-case basis,¹¹⁸ its presence surely must be acknowledged in case when information was published with doubts in its truth or falsity.¹¹⁹

Some useful clarifications on the standard were also given in a footnote to *Herbert v. Lando*, where it was explained that:

[t]he existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration.¹²⁰

Furthermore, in the case of *Gertz v. Robert Welch* it was added that actual malice shall be shown with ‘clear and convincing proof’,¹²¹ which is higher standard than ‘preponderance of the evidence’.¹²²

¹¹⁵ *Sullivan, supra* (Black, J., concurring).

¹¹⁶ *Curtis Pub. Co. v. Butts*, 288 U.S. 130, 169 (1967).

¹¹⁷ ‘Reckless disregard’ is one of the components of the ‘actual malice’ standard: “with knowledge that it was false or with reckless disregard of whether it was false or not”. See *Sullivan, supra*. at 279.

¹¹⁸ *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

¹¹⁹ *Id* at 731.

¹²⁰ *Herbert v. Lando*, 441 U.S. 153 fn. 12 (1979).

¹²¹ *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974).

¹²² “Clear and convincing evidence [the same as ‘clear and convincing proof’ – *A. K.*] - evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of

Therefore, from these clarifications of the Court it can be inferred that ‘actual malice’ standard not only requires from the plaintiff to present clear and convincing evidence of the defendant’s knowledge or reckless disregard of falsity of his statements, but also, if it is possible, to present this evidence in the context, such as threats, prior or subsequent defamations, subsequent statements of the defendant, etc.

4.2. From Public Officials to Public Figures

Another development of the standard of protection of defamatory speech against public officials is connected with clarification and extension of the circle of persons to whom the ‘actual malice’ rule should be applicable.

First of all, in *Rosenblatt v. Baer* the definition of ‘public official’ was clarified by the Court’s affirmation that “the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”¹²³

Further, in the *Butts* case, the scope of the ‘actual malice’ rule was extended to public figures: “a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”¹²⁴ Together

the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials”. *Black’s Law Dictionary* (9th ed. 2009), evidence.

¹²³ *Rosenblatt v. Baer*, 383 U. S. 75 (1966).

¹²⁴ *Butts*, *supra* at 155.

with that, a 'public figure' necessarily had to be involved in issues in which the public has a justified and important interest.¹²⁵

Such a rule logically led to even greater broadening of the standard, which in *Rosenbloom v. Metromedia* became applicable to all matters of 'public or general concern'.¹²⁶ However, this approach was immediately criticized,¹²⁷ and in the subsequent decision of the Supreme Court (*Gertz v. Robert Welch*) the *Rosenbloom* decision was overruled.¹²⁸ Accordingly, the higher standard of protection for defamatory speech remained only in cases where the plaintiffs were public officials and figures: "Those who, by reason of notoriety of their achievements or vigor and success with which they seek public's attention, are properly classed as public figures and those who hold governmental office may recover from broadcasters and publishers for injury to reputation only on clear and convincing proof that defamatory falsehood was made with knowledge of its falsity or with reckless disregard for truth."¹²⁹

The Court explained this extension of the scope of the 'actual malice' standard by noting that "public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."¹³⁰ Thus, attention was paid not only to the degree of influence which an individual may have on matters of public concern, but also to his/her possibility to get access to media.

¹²⁵ *Id* at 139.

¹²⁶ *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 43-44 (1971).

¹²⁷ *Id* (Marshall, J., dissenting).

¹²⁸ *Gertz, supra* at 345.

¹²⁹ *Id*.

¹³⁰ *Id* at 344.

4.3. Imaginative Expression and Statements of Opinion

Speaking about defamation, it is necessary to remark that not only factual statements expressed in a serious tone can injure someone's reputation. That is why the Supreme Court paid particular attention to clarification of the *Sullivan* standard towards defamation in the form of imaginative expression and opinion.

The first case on that issue was *Greenbelt Cooperative Publishing Association v. Bresler*, where the Court concluded that rhetorical hyperbole cannot be considered as defamation of public figures in case "even the most careless reader [...] perceived that the word was no more than rhetorical hyperbole."¹³¹

Further, in *Hustler v. Falwell*, this rule was also extended to parody. The Court held that if a publication is characterized by such metaphorical language which cannot be reasonably believable, then such publication cannot be interpreted as a defamatory statement of fact and, consequently, there is no liability for its expression even if it was made with an intention to inflict emotional distress of a public figure.¹³²

This decision in *Hustler* was clearly inspired by the aforementioned ruling of the Court as regards rhetorical hyperbole. However, the issue about statements of facts had already been addressed in the famous *Gertz* holding, according to which "under the First Amendment there is no such thing as a false idea."¹³³ Owing to this assertion, which expressly came from Millian argument from truth, a division on opinions and factual statements was established. Only factual statements, according to this rule, could lead to potential liability for alleged defamation, while opinions were excluded from the scope of legal prosecution.¹³⁴

¹³¹ *Greenbelt Cooperative Publishing Assn. Inc. v. Bresler*, 398 U.S. 6, 14 (1970).

¹³² *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46 (1988).

¹³³ *Id.* at 338.

¹³⁴ *Id.*

However, in *Milkovich v. Lorain Journal Co.* this rule was changed by Chief Justice Rehnquist, who held that “[s]tatements of belief or opinion are like hyperbole [...] in that they are not understood as actual assertions of fact about an individual, but they may be actionable if they *imply* the existence of false and defamatory facts.”¹³⁵ Thus, supposition of the existence of false and defamatory facts, either in opinions or in imaginative expression, deprives them of protection under an ‘opinion’ privilege.

However, under this decision it remained unclear how to distinguish which statements do imply an assertion of false and defamatory facts and which are not. The Court proposed to use “the same solicitous and thorough evaluation that [...] in [...] determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts.”¹³⁶ That is why some of the State courts tried to clarify this issue by establishing their own criteria. For example, the Supreme Court of Illinois established a three-step system of assessment: whether the statement has a precise and readily understood meaning, whether the statement is verifiable, and what the statement’s literary or social context is.¹³⁷ However, there is no common test applicable in this situation.

5. *Criminal Libel after Sullivan*

It is also interesting to retrace how the *Sullivan* case changed the attitude to criminal libel, which had been discussed just at the beginning of this Chapter.

¹³⁵ *Milkovich v. Lorain Journal Co.*, 497 U. S. 1, 25 (1990).

¹³⁶ *Id* at 26.

¹³⁷ *Rose v. Hollinger Intern., Inc.*, 383 Ill.App.3d 8, 889 N.E.2d 644, 652-54 (2008).

The constitutionality of the Sedition Act was explicitly challenged by the decision of the Court in *Sullivan*, where it stated that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”¹³⁸

In its later decision in *Garrison v. Louisiana*, the Supreme Court approved its earlier views by establishing that a criminal libel statute is considered unconstitutional if it imposes a penalty for making a true statement about a public official.¹³⁹ In other words, the standard from *Sullivan* was extended to criminal libel, and from now, in order to prosecute under a criminal libel statute, it was necessary to prove both falsehood of the statement and actual malice of the speaker.

Moreover, Justice Brennan stated in the majority opinion in this case that “under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can be hardly urged that the maintenance of peace requires criminal prosecution for private defamation.”¹⁴⁰ Thus, the main justification for criminal libel – maintenance of peace – was struck down by a clear proposition for public officials to refer their cases to court if they suffer damages from a falsehood expressed in their address.

The standard established in *Garrison* was later approved by the lower courts,¹⁴¹ and was reaffirmed in the subsequent decision of the Supreme Court in the *Ashton* case.¹⁴²

Since then, the frequency of prosecutions under criminal libel statutes dramatically declined.¹⁴³ As for now, there are no federal laws proposing punishment for criminal

¹³⁸ *Sullivan, supra* at 276.

¹³⁹ *Garrison v. Louisiana*, 379 U. S. 64, 209 (1964).

¹⁴⁰ *Id.* at 213.

¹⁴¹ See, e.g., *Walker v. Pulitzer Pub. Co.*, 394 F. 2d 800 (1968): “[s]tate power to impose criminal sanctions for criticism of official conduct of public officials is limited to situations of malice, that is statements made with knowledge of their falsity or with reckless disregard of whether they are false or not.”

¹⁴² See *Ashton v. Kentucky*, 384 U.S. 195 (1966).

¹⁴³ See and compare statistics, e.g., by Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 Tex. L. Rev. 985 (1956) and George E. Stevens, *Criminal Libel after Garrison*, 68 Jour. Q. 523 (1991).

defamation of public officials. However, there are seventeen states and two territories which had criminal defamation law as of 2005.¹⁴⁴

6. Conclusions

Thus, from the analysis it appears that the USA has progressed from the existence of the infamous Sedition Act to the elaboration of an uncommon standard of protection for defamatory speech against public officials. This standard derives mainly from Meiklejohn's philosophical argument on democracy and self-government and highlights the utmost importance of free debate on public issues; however, it does not represent the absolutist standpoint of the philosopher on protection of free speech.

Defamatory statements against public officials are protected not to their full extent, and the standard leaves open the possibility of protecting the reputation of a public official if he/she is able to prove the speaker's actual malice. It seems to me that this approach affords a high level of protection for speech on issues of public concern, and this is, undoubtedly, its great advantage.

However, the supporters of the right to human dignity may find the American standard underprotective of the reputation of public figures. Such lack of protection, as a consequence, may deter persons from entering into the public sphere, and this may have an implicit negative impact on free and uninhibited public discussion.

Moreover, there are a lot of controversies in defining the main concepts of this standard (e. g., it is not clear what is an exact definition of a 'public figure', 'matters of public concern', 'statements of opinion implying existence of false facts', etc). These controversies

¹⁴⁴ OSCE, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve* 171-72 (2005).

are decided by the courts on a rather subjective basis, which makes the results of a lawsuit totally unpredictable.

Hence, the American standard is not an ideal, and its advantages and shortcomings can be better evaluated in comparison with other approaches. For this purpose, it is necessary to become familiar with the system of protection which has emerged under the case-law of the European Court of Human Rights. This is the topic of the next chapter of the thesis.

III. Defamation of Public Officials in the Case-Law of the European Convention on Human Rights

1. Introductory Remarks

In 1950, the European Convention on Human Rights (ECHR) was adopted with the purpose to create a uniform system of protection of human rights on the territories of all State-Parties. It entered into force in 1953. As for today, 47 members of the Council of Europe (CoE) have ratified the Convention and are bound to the decisions of the European Court of Human Rights (ECtHR).

The purpose of this Chapter is to identify and compare the European standard of protection with the American one.

Article 10 of the ECHR is dedicated to the protection of free speech, and it read as follows:

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁴⁵

Although in Section 1 of this Article it is affirmed that everyone has the right to freedom of expression, this right is subject to limitations, according to Section 2. “The protection of the reputation or the rights of others” can be found in the list of justifications for limiting the

¹⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10 (1953), available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited Nov. 10, 2011).

right to free speech, and precisely this justification is usually given in case of restricting defamatory speech directed against public officials. Thus, it seems to be that Article 10 of the ECHR provides a clear basis for restriction of speech, in comparison with the US Constitution, where the freedom of speech seems to be an absolute right, but in practice it is restricted.

However, the notions of the ‘reputation’ and ‘the rights of others’ are not explained in the Convention, and the ECtHR assesses the circumstances of every particular defamation case on an *ad hoc* basis. A violation of Article 10 can be found in cases when one of the following conditions is not fulfilled: a restriction must be prescribed by law, have a legitimate aim to pursue and be necessary in a democratic society.¹⁴⁶

In the course of this *ad hoc* balancing of the right to free speech against the right to reputation, the ECtHR has developed its own standard of protection for defamatory speech directed against public officials. I will attempt to identify the main features of this standard in the following parts of this Chapter.

2. Lingens v. Austria: a European Sullivan?

The *Lingens* case is a landmark decision of the ECtHR, which by its importance is similar to *Sullivan*. It sets the standard relying on which all the subsequent defamation cases were decided. The main question on this stage of the analysis is whether there are substantial similarities between the standards of protection of defamatory speech in American and European jurisprudence. In order to answer this question, it is necessary, first of all, to examine the facts of the *Lingens* case.

¹⁴⁶ See Council of Europe, *The Margin of Appreciation*, available at http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp (last visited Nov. 10, 2011).

Mr. Lingens was an Austrian journalist who in two of his articles commented alleged attempts of Mr. Kreisky, the retiring Chancellor and President of the Austrian Socialist Party, to form a coalition with the Freedom Party, the leader of which was a former Nazi. Referring to the acts and words of Mr. Kreisky, the journalist wrote the following phrase: “had they been made by someone else this would probably have been described as the basest opportunism.”¹⁴⁷ Mr. Lingens was fined for defamation of Mr. Bruno Kreisky under the Austrian Criminal Code.

The ECtHR stated in its decision that the reputation of others, within the meaning of Article 10(2), must be protected in relation to all individuals, even as regards politicians who are not acting in their private capacity. However, in such a case “the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”¹⁴⁸ After such weighing, the Court found a violation of Article 10 and affirmed that the restrictions imposed on Lingens’ speech were unnecessary in a democratic society. The most significant phrase of this ruling is the following:

The limits of acceptable criticism are accordingly 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 he must consequently display a greater degree of tolerance.¹⁴⁹

Thus, the ECtHR, in the same manner as the US Supreme Court in *Sullivan*, puts free discussion on political issues on the central place. But, in contrast to *Sullivan*, the European Court does not establish such strict standard of proof as ‘actual malice’ and proposes to *balance* the right to reputation in relation to the interest of open discussion of political issues. However, the features of this balancing test remain unclear.

¹⁴⁷ *Lingens v. Austria* §12, no. 9815/82 (July 8, 1986).

¹⁴⁸ *Id* at 42.

¹⁴⁹ *Id*.

Another difference is related to definitions. The ECtHR in the *Lingens* case mentions ‘a politician’, while the American Supreme Court in *Sullivan* focuses its attention on ‘public officials’ (and later, on ‘public figures’ in the *Butts* case). A completely dissimilar approach to setting the categories of plaintiffs is hidden behind this for the first sight minor difference in definitions. And this issue will be regarded in the following part of the Chapter.

3. Further Developments of the Standard

The principle of protection established in *Lingens* was considerably clarified and amplified by some new details in the next ECHR cases. And the main of these clarifications is related to the extension of the circle of possible plaintiffs in defamation proceedings.

3.1. Extension of the Circle of Possible Plaintiffs

3.1.1. Government

Castells v. Spain is the second remarkable decision after *Lingens*. Here the Court added a new type of plaintiffs to the initial category of politicians. The ECtHR found that a criminal conviction against Mr. Castells, the applicant in this case who had been accused in insulting the government, violates Article 10. Particularly, the Court stated:

[i]n a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.¹⁵⁰

¹⁵⁰ *Castells v. Spain* § 46, no. 11798/85 (Apr. 23, 1992).

That is why the Court held that “[t]he limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.”¹⁵¹ Thus, the Court afforded a greater degree of protection for defamatory speech directed against governmental officials, in comparison with the one related to usual politicians. However, the circle of possible plaintiffs continued to extend in the subsequent decisions of the Court.

3.1.2. Civil Servants and Judges

In the following years, the ECtHR adopted a new approach as regards protection of civil servants from defamatory allegations made in their address. It started with the *Barfod* case, where the Court for the first time mentioned a particular role of judges in the maintenance of the authority of the judiciary.¹⁵²

Further, in the case of *Prager and Oberschlick v. Austria*, the Court held:

[r]egard must [...] be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying.¹⁵³

The special protection of the judiciary was extended in the subsequent decisions to prosecutors and top police officers, i.e. ‘judicial machinery’.¹⁵⁴

Furthermore, in the decision of *Janowski v. Poland*, the ECtHR established a higher level of protection in relation to general civil servants. In particular, the Court held that civil servants are afforded a lesser degree of protection than private persons because the former are

¹⁵¹ *Id.*

¹⁵² *Barfod v. Denmark* § 31, no. 11508/85 (Feb. 22, 1989).

¹⁵³ *Prager and Oberschlick v. Austria* § 34, no. 15974/90 (Apr. 26, 1995).

¹⁵⁴ See, e. g., *Perna v. Italy* § 41, no. 48898/99 (July 25, 2001); *Lesnik v. Slovakia* § 54, no. 35640/97 (Mar. 11, 2003); *Pedersen and Baadsgaard v. Denmark* § 66, no. 49017/99 (June 19, 2003), etc.

acting in their official capacity similarly to politicians. But together with that, the European Court admitted that “it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions.”¹⁵⁵

Accordingly, civil servants are placed between private persons and politicians, if to speak about their protection from defamatory allegations. This principle was reaffirmed in the subsequent cases of the ECtHR.¹⁵⁶

Another reason why civil servants deserve a higher level of protection of their reputation is that they “must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.”¹⁵⁷ Thus, the arguments for special protection of the judiciary and civil servants are similar – successful performing of their duties.

It must be noted, however, that in the aforementioned cases the ECtHR did not define precisely who can be included in the category of civil servants. It can be only implicitly inferred from the subsequent case-law on that issue. For example, in *Busuioc v. Moldova*, the ECtHR ruled that the *Janowski* principle should not be extended to “all persons who are employed by the State or by State-owned companies”¹⁵⁸ and did not apply it to several employees of the State Administration of Civil Aviation. But notwithstanding this decision, a

¹⁵⁵ *Janowski v. Poland* § 33, no. 25716/94 (Jan. 21, 1999).

¹⁵⁶ See, e.g., *Thoma v. Luxembourg* § 47, no. 38432/97 (Mar. 29, 2001); *Nikula v. Finland* § 48, no. 31611/96 (Mar. 21, 2002); *Pedersen and Baadsgaard v. Denmark* § 80, no. 49017/99 (Dec. 17, 2004); *July and SARL Liberation v. France* § 74, no. 20893/03 (Feb. 14, 2008), etc.

¹⁵⁷ *Janowski v. Poland*, *supra*.

¹⁵⁸ *Busuioc v. Moldova* § 64, no. 61513/00 (Dec. 21, 2004).

borderline between different categories of plaintiffs (politicians, civil servants, private figures) still remains quite blurred.

Therefore, from this part of the analysis it can be noted that there is a considerable distinction between the ECtHR approach and the American standard. Under the ECHR system, there is a division of all non-private plaintiffs into four categories (government, politicians, civil servants and the judiciary). The least degree of protection from defamation is afforded to government and the greatest – to civil servants and judiciary. In the USA there are only two categories of non-private plaintiffs – public officials and public figures; they are equally not protected from defamatory allegations made in their address unless they prove the actual malice of the speaker. However, this is not the last distinction between these two approaches.

3.2. Standard of Proof

The standard of proof in defamation proceedings also differs in the USA and Europe. In the USA it is the aforementioned ‘actual malice’ standard with the *onus probandi* lying on the plaintiff who has to prove defamatory character of speech by clear and convincing evidences.

In most European countries usual standard is the balance of probabilities.¹⁵⁹ The ECtHR found this standard compatible with the right to free speech under Article 10.¹⁶⁰ Together

¹⁵⁹ Balance of probabilities (or preponderance of the evidence) – “[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be”. *Black’s Law Dictionary, supra*, preponderance of the evidence.

¹⁶⁰ See, e. g., *McVicar v. UK* § 88, no. 46311/99 (May 7, 2002); *Steel and Morris v. UK* § 93, no. 68416/01 (Feb. 15, 2005), etc.

with this, the Court has affirmed that there is no need to establish complete truthfulness of statements; it is enough to prove that statements were not completely untrue in order to render protection to defamatory allegations.¹⁶¹

Thus, if the defendant fails to show at least partial truth of his/her allegations, then the right to reputation of the plaintiff will be protected. However, there is no need in proving defendant's knowledge of falsity, as it is in the USA. It must be noted, moreover, that in the process of determining truthfulness of the statement the ECtHR pays a particular attention to the distinction between facts and value-judgments.

3.3. Facts and Value-Judgments

For the first time this differentiation was established in the *Lingens* case, where the Court ruled that "a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof".¹⁶² According to this rule, the ECtHR recognized that Lingens' statements were value judgments protected by Article 10. This principle was reaffirmed in a number of subsequent cases.¹⁶³

Since "article 10 protects not only the substance of the ideas and the information expressed, but also the form in which they are conveyed",¹⁶⁴ the Court highlights that journalists in the course of exercising their right to freedom of speech can use some degree of

¹⁶¹ See, e.g., *Dalban v. Romania* § 50, no. 28114/95 (Sept. 28, 1999).

¹⁶² *Lingens v. Austria*, *supra* § 46.

¹⁶³ See, e.g., *Oberschlick v. Austria* § 63, no. 11662/85 (May 23, 1991); *Schwabe v. Austria* § 34, no. 13704/88 (Aug. 28, 1992); *Lindon, Otchakovsky-Laurens and July v. France* § 55, nos. 21279/02 and 36448/02 (Oct. 22, 2007); *Flux v. Moldova* § 29, no. 28702/03 (Nov. 20, 2007); *Koprivica v. Montenegro* § 63, no. 41158/09 (Nov. 22, 2011), etc.

¹⁶⁴ *Oberschlick v. Austria*, *supra* § 57.

exaggeration, hyperbole or even provocation.¹⁶⁵ However, they must act in good faith.¹⁶⁶ This rule relates not only to statements of fact but also to value-judgments,¹⁶⁷ which makes them similar to the notion of ‘fair comment’¹⁶⁸ under English libel law.

This requirement of good faith in relation to value-judgments also reminds the American rule of protection of opinions (opinions are protected till they do not imply the existence of false facts).¹⁶⁹ But, at the same time, there is a considerable distinction: value-judgments under the ECHR must have a sufficient factual basis; otherwise they might be regarded excessive.¹⁷⁰ Such requirement in relation to opinions is absent in the US system.

3.4. Importance of the press

It must also be pointed out that in its subsequent decisions the ECtHR (similarly to Justice Black in his concurring opinion in *Sullivan*) repeatedly highlights the importance of the press in a democratic society.

Namely, the Court reiterates that a democratic society has an interest in imparting information of public concern, and the press exercises the role of ‘public watchdog’ by providing such information.¹⁷¹ Imposition of excessive restrictions on the right to free speech

¹⁶⁵ See, e. g., *Bladet Tromsø and Stensaa* § 59, no. 21980/93 (May 20, 1999); *Prager and Oberschlink v. Austria*, *supra* § 38; *Perna v. Italy*, *supra* § 39; *Lindon v. France*, *supra* § 62, etc.

¹⁶⁶ See, e.g., *Pedersen and Baadsgaard v. Denmark*, *supra* § 78; *Fressoz and Roire v. France* § 54, no. 29183/95 (Jan. 21, 1999); *Stoll v. Switzerland* § 103, no. 69698/01 (Dec. 10, 2007), etc.

¹⁶⁷ *Prager and Oberschlink v. Austria*, *supra* § 37.

¹⁶⁸ “Fair comment –a statement based on the writer's or speaker's honest opinion about a matter of public concern. Fair comment is a defense to libel or slander”. *Black's Law Dictionary*, *supra*, fair comment.

¹⁶⁹ Cf *Gertz v. Welch* at 338 and *Milkovich v. Lorain Journal* at 25.

¹⁷⁰ See, e.g., *Jerusalem v. Austria* § 43, no. 26958/95 (Feb. 27, 2001); *Turhan v. Turkey* § 24, no. 48176/99 (May 19, 2005); *Shabanov and Tren v. Russia* § 41, no. 5433/02 (Dec. 14, 2007), etc.

¹⁷¹ See, e. g., *Perna v. Italy*, *supra* § 39; *Dalban v. Romania*, *supra* § 49; *Pedersen v. Denmark*, *supra* § 65; *Stoll v. Switzerland*, *supra* § 58; *July and SARL Liberation v. France*, *supra* § 64, etc.

in order to protect the reputation of public officials prevents the press from performing its vital function. Later, in Chapter IV, it will be shown how this approach to the role of the press in society differs from the one established in Belarus.

And now, the last question remains for the present analysis, and it concerns the possibility to impose criminal sanctions for defamatory speech directed against public officials. The answer to this question will help to put a final point in the comparison of the two systems.

4. *Criminal Libel under the ECHR*

As it was noted by Ronald St. John McDonald, a judge of the ECtHR, a European minimal threshold below which it would be unjustifiable under Article 10 to impose a criminal sanction for defamatory expression has not been established by the ECtHR.¹⁷²

The analysis of case-law confirms this allegation. In the case of *Radio France v. France*, the ECtHR states that “in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued.”¹⁷³ Thus, the ECtHR relies on the margin of appreciation of the states in deciding on admissibility of criminal sanctions for defamatory speech.

However, it must be noted that the Court usually concedes proportionate only non-excessive fines or costs imposed under criminal law on defamation.¹⁷⁴ In case of

¹⁷² Ronald St. John MacDonald, *The Margin of Appreciation in Protecting Human Rights: The European Dimension, Essays in Honour of Gerard J. Wiarda* 368 (Matscher, Franz & Petzold, Herbert, Eds., 2nd ed., 1990).

¹⁷³ *Radio France and Others v. France* § 40, no. 53984/00 (Mar. 30, 2004). See also *Lindon v. France*, *supra* § 59; *Długolecki v. Poland* § 47, no. 23806/03 (Feb. 24, 2009), *etc.*

¹⁷⁴ See, e.g., *Constantinescu v. Romania* § 77, no. 28871/95 (June 27, 2000); *Chauvy and Others v. France* § 80, no. 64915/01 (June 29, 2004); *Prager and Oberschlick v. Austria*, *supra* § 38; *Rumyana Ivanova v. Bulgaria* § 69, no. 36207/03 (Feb. 14, 2008); *Europapress Holding d.o.o. v. Croatia* § 73, no. 25333/06 (Oct. 22, 2010), *etc.*

imprisonment the approach of the judges changes, and they condemn such kind of criminal sanctions for their excessive character.¹⁷⁵ In addition to this, the Court warns against a deterrent effect of a criminal sanction on free debate.¹⁷⁶ But notwithstanding this all, the ECtHR does not expressly strike down criminal liability for defamation of public officials. And such kind of liability still exists in national laws of most of the CoE member states (for example, in Austria, Bulgaria, Azerbaijan, Sweden, Denmark, and other countries).

In this framework, it is of particular interest for my further research to examine the European approach to criminal responsibility for defamation of heads of state, since in Belarus in the majority of cases this problem will arise. In order to make a thorough analysis of Belarusian standard of protection for defamatory speech against public officials, it is necessary now to pay some attention to the aforementioned issue.

4.1. Criminal Sanctions for Defamation of Heads of State

The approach of the ECtHR in this regard is rather unaccomplished because it is built at large on a single decision, namely, *Colombani v. France*. The second and recent case on this issue - *Çolak v. Turkey* – does not present any practical inferences.¹⁷⁷

The case of *Colombani v. France* concerns alleged defamation of the King of Morocco. In particular, Mr. Colombani, the editor-in-chief of *Le Monde*, and Mr. Incyan, a journalist, published an article about drug-trafficking in Morocco. This article casted doubt on King's

¹⁷⁵ See, e.g., *Dalban v. Romania*, *supra* § 52; *Cumpana and Mazare v. Romania* § 120, no. 33348/96 (Dec. 17, 2004); *Mahmudov and Agazade v. Azerbaijan* § 53, no. 35877/04 (Dec. 18, 2008), etc.

¹⁷⁶ *Giniewski v. France* § 55, no. 64016/00 (Jan. 31, 2006).

¹⁷⁷ In the case of *Colak v. Turkey*, 29515/03 (July 10, 2003), the complaint of the applicant under article 10 of the ECHR concerned his criminal conviction (imprisonment for 10 month with subsequent conditional release) and his dismissal from civil service by reason of the contents of the message he sought to communicate to the Head of State (namely, referring to him as to one of 'dishonorable men'). The case was struck from the ECtHR list on 15 December 2009 due to absence of response on the part of the applicant. Thus, no view of the ECtHR on the issue was expressed.

Hassan II's entourage and named Morocco 'the world's leading hashish exporter'. The Paris Court of Appeal held that the allegations of the applicants were made in bad faith because of their failure to check the accuracy of information. The applicants were convicted under criminal law of insulting a foreign Head of State and, consequently, sentenced to a fine and ordered to pay damages. They filed a complaint to the ECtHR.

Some interesting points can be noted concerning the approach of the European Court to defamation of heads of state.

First of all, the Court ruled that the Section in the national law which provides for criminal prosecution for insults against foreign heads of state "amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions."¹⁷⁸ In other words, this section creates for heads of state a shield from criticism solely on the basis of their functions, disregarding the fact whether the criticism itself was justified.¹⁷⁹ The existence of such kind of immunity, moreover, definitely goes contrary to Meiklejohn's argument from democracy on which the American and European standards of protection for defamatory speech are mainly built.

Furthermore, the Court highlighted the fact that the applicants were unable to rely on truth of their allegations, as they could under the ordinary law of defamation; therefore, they could not escape liability on the charge of insulting a foreign head of State. The ECtHR found it disproportionate with the legitimate aim of protection of the reputation of other persons.¹⁸⁰

¹⁷⁸ *Colombani and Others v. France* § 68, no. 51279/99 (June 22, 2002).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*, § 66.

As a result, the Court ruled that “the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any ‘pressing social need’ capable of justifying such a restriction.”¹⁸¹

Thus, from this case it can be inferred that criminal sanctions for defamation of heads of state are not allowed in accordance with the ECHR case-law. As regards American jurisprudence, there were no cases on this particular issue.

5. *Conclusions*

The analysis of the American and European approaches to the protection of defamatory speech against public officials has shown that there are substantial similarities and considerable differences in the aforementioned systems. In general, it can be said that the European system reflects the US approach in a number of cases. Although it does not go so far as to establish uncommon ‘actual malice’ standard, it is based on the same premises. The following similarities and distinctions between the American and European approaches can be found.

First of all, the both of them put free debate on issues of public concern on the central place, basing the reasoning mainly on Meiklejohn’s argument from democracy. The role of the press in holding public officials accountable is highlighted both in the USA and Europe.

Secondly, in both systems lesser protection is provided to reputation of public persons. However, there is a considerable difference in setting categories of such persons in defamation proceedings. It seems to be that the ECHR approach is more careful in distinguishing different groups of plaintiffs. It sets a hierarchy of defamatory speech, the level of protection of which is dependent on the status of the plaintiff. The American division

¹⁸¹ *Id.*, § 69.

on public officials and public figures does not recognize different causes for protection of the right to reputation (such as performance of duties, maintenance of the judiciary, etc.) and in some cases makes a person subject to close scrutiny merely on the basis of his/her public status (as, for example, in case with celebrities).

Thirdly, both approaches divide all defamatory speech to statements of facts and opinions/value judgments. However, value judgments in interpretation of the ECtHR do not amount to statements of opinion under the US standard because the former should be supported by some factual basis.

Fourthly, in both systems criminal libel exists. However, the distinction is that there is really insignificant amount of criminal prosecutions for defamatory speech in the USA, whereas in the ECHR case-law almost every second case is about criminal libel. Both of the systems did not explicitly strike down criminal prosecution for defamation.

Finally, the most important distinction lies in the standard of proof. The ‘actual malice’ standard remains a particular feature only for the American system, while under the ECHR approach proving is based on the balance of probabilities. In Europe, an allegation must be at least partially true in order to afford protection to the rights of the speaker; in the USA, even totally false statements about public figures can be expressed if made without actual malice.

Hence, the American standard is more favorable to the protection of the freedom of speech, while the ECHR case-law shows greater adherence to the right to reputation and to its careful balancing against the interest in free speech. It cannot be said, however, that the one of the approaches is better than another. The both of them provide for strong degree of protection for defamatory speech against public officials and can be taken as a model for some other countries.

IV. Defamation of Public Officials in Belarus

1. *Introductory Remarks*

The Belarusian standard of protection of defamatory speech against public officials arises from the Constitution. Article 34 of this fundamental law stipulates that “[c]itizens of the Republic of Belarus shall be guaranteed the right to receive, store, and disseminate complete, reliable, and timely information on the activities of state bodies and public associations.”¹⁸² Together with this, Article 79 implies that “[t]he President shall enjoy immunity, and his honor and dignity shall be protected by the law.”¹⁸³

Even from these provisions it can be inferred that the right to reputation of public officials has a predominant position in Belarusian society (citizens are guaranteed to receive *reliable* information on the activities of state bodies (i. e. officials), which arguably implies that defamatory statements against them are not allowed). Moreover, for some reason there is a special emphasis on the protection of the President’s honor and dignity. In order to better understand what these provisions of the Constitution conceal, it is necessary to analyze specific Belarusian laws on defamation.

The aim of this Chapter is to determine the degree of protection for defamatory speech against public officials in Belarus and to compare it with the standards established in the USA and Europe.

¹⁸² Constitution of the Republic of Belarus, art. 34 (15.03.1994, as amended 17.10.2004), *available in English at* <http://president.gov.by/en/press19330.html#doc> (last visited 20.11.2011).

¹⁸³ *Id.*, art. 79.

2. Defamation in Belarus: General Overview

2.1. Laws

In Belarus there is a three-level system of regulation of potentially defamatory speech directed against public officials. First of all, a number of restrictions are imposed under civil laws, such as, for example, Article 153 of the Civil Code (a general provision on protection of individual honor and dignity)¹⁸⁴ or Article 5 of the Law on Press and Other Mass Media which prohibits the publication of the information damaging the honor or dignity of the President or high-ranking public officials.¹⁸⁵ Violation of this Article can lead to the closure of a media outlet.¹⁸⁶

Secondly, defamation is regulated under the Code on Administrative Offences. In Article 9.2 of this Code it is stated that defamation, i.e. dissemination of deliberately false fabrications discrediting another person, is punishable by a fine.¹⁸⁷ The following article of the Code concerns an offense of insult (i.e. deliberate humiliation of honor and dignity expressed in an unseemly manner) and presupposes the same kind of punishment.¹⁸⁸ Nothing special is contained in these provisions, therefore, I move to the third level. And the most interesting articles regulating defamatory speech directed against public officials can be found there.

¹⁸⁴ Civil Code of the Republic of Belarus, art. 153, N 218-3, 7.12.1998, as amended 18.05. 2007) (in Russian) [Grazhdanskiy kodeks Respubliki Belarus', st.153, N 218-3, 7.12.1998, v red. 18.05.2007]. According to this article, the *onus probandi* is placed on the defendant who must prove truthfulness of his/her allegations which were discrediting in relation to the plaintiff.

¹⁸⁵ Law on Press and Other Mass Media, art. 5, N 3515-XII, 13.01.1995, as amended 29.06. 2006 (in Russian) [Zakon o pechati i drugih sredstvakh massovoj informacii, st. 5 N 3515-XII, 13.01.1995, v red. ot 29.06.2006].

¹⁸⁶ *Id.*, art. 16.

¹⁸⁷ Code of the Republic of Belarus on Administrative Offences, art. 9.2, N 194-3, 21.04. 2003, as amended 20.07. 2007 (in Russian) [Kodeks Respubliki Belarus' ob administrativnyh narushenijah, st. 9.2, N 194-3 (21.04.2003, v red. ot 20.07.2007)].

¹⁸⁸ *Id.*, art. 9.3.

First of all, under Article 188 (1) of the Criminal Code, dissemination of defamatory statements which occurs within one year after the imposition of administrative penalties for defamation or insult shall be punished by community service, or a fine, or corrective labour for up to one year, or arrest for up to three months, or restraint of liberty for up to two years.¹⁸⁹ The following part of the Article provides:

Defamation contained in a public speech, or in a printed or publicly performed work, or in the media or coupled with the accusation of committing a serious or especially serious crime shall be punished by a fine, or corrective labor for up to two years, or imprisonment for up to six months, or restraint of liberty for up to three years.¹⁹⁰

This provision, without distinguishing the circle of persons to whom it applies, creates a contradiction. On the one hand, larger penalties imposed for public defamation of private persons seem to be justified. On the other hand, application of this rule in relation to public officials creates a 'chilling effect' on the media.

Since public officials knowingly stepped into the public arena, they must expect that their conduct may be criticized publicly.¹⁹¹ Such criticism may occasionally contain defamation. Of course, the protection of reputation of public officials is needed, but imposition of larger penalties for defamation expressed publicly, or by the use of media, leads to deterrence of those who would like to criticize some actions of the authorities. And especially it deters the media which must perform the role of 'public watchdog' in a democratic society.¹⁹² Thus, although a privileged status of public officials is not explicitly mentioned, indirectly it is implied by Article 188 (2) of the Criminal Code.

¹⁸⁹ Criminal Code of the Republic of Belarus, art. 188 (1), N 275-3, 9.07.1999, as amended 20.07. 2007 (in Russian) [Kriminal'nyj kodeks Respubliki Belarus', st. 188 (1), N 275-3 (9.07.1999, v red. ot 20.07.2007)].

¹⁹⁰ *Id*, art. 188 (2). The same rules are applicable to insult under Article 189.

¹⁹¹ *Cf Lingens v. Austria* §12.

¹⁹² *Cf Perna v. Italy* § 39.

The following reading of the Belarusian Criminal Code, however, makes it clear that the legal contradiction in the aforementioned article was not an omission of the legislator. A privileged status for public officials is exactly what was supposed to be granted by the articles on defamation in the Criminal Code. And evidences of this allegation are in Articles 367, 368, and 369, according to which separate crimes of defamation and insult of public officials are created. These articles read as follows:

Article 367. Defamation of the President of the Republic of Belarus

1. Defamation of the President of the Republic of Belarus contained in a public speech, or in a printed or publicly performed work, or in the media shall be punished by a fine, or corrective labor for up to two years, or restraint of liberty for up to four years, or imprisonment for the same term.

2. The same action committed by a person previously convicted of defamation or insult or coupled with the accusation of committing a serious or especially serious crime shall be punished by restraint of liberty for a term not exceeding five years or imprisonment for the same term.¹⁹³

Article 369. Insult of a representative of the authority

Public insult of a representative of the authority in view of performance of his duties shall be punished by community service, or a fine, or corrective labor for up to two years, or imprisonment for up to six months, or restraint of liberty for up to three years.¹⁹⁴

Hence, according to the Belarusian law, public officials, and especially the President, have a privileged status and are afforded a higher degree of protection of their reputation. The punishment for defamation of the President is the highest (imprisonment for up to five years) among all the penalties for crimes of the same nature and is comparable with the punishment, e.g., for a deliberate infliction of grievous bodily harm or smuggling.¹⁹⁵ This fact by itself

¹⁹³ *Id.*, art. 367. The same rules are applicable to public insult of the President under Article 368 (but with slight difference in the length of a term of imprisonment).

¹⁹⁴ *Id.*, art. 369.

¹⁹⁵ *Id.*, art. 147 (1) and 228 (1) respectively.

suggests that the standard of protection for defamatory speech against public officials in Belarus considerably differs from the ones established in the USA and Europe.

However, it is early to draw conclusions because, for instance, in Germany, which is considered a country with a free press,¹⁹⁶ there is also a provision in the Criminal Code according to which public disparagement of the Federal President is punishable by imprisonment for up to five years.¹⁹⁷ In order to evaluate the impact of such kind of provisions on free debate, it is necessary to analyze not only laws themselves, but also the practice. This is what will be done concerning Belarus in the next part of this Chapter.

2.2. Practice

Before starting the analysis of the Belarusian practice of regulating defamatory speech against public officials, I would like to cite Vladimir Rusakevich, the former Belarusian Minister of Information, who very interestingly explained the necessity of the aforementioned criminal provisions related to defamation of public officials. Namely, he stated:

In the course of time, when political culture of the society becomes much higher, the need for such kind of sanctions will disappear. But it will be not soon. I take human dignity most seriously. If someone wants to shamelessly insult a person, he must be responsible for that. This is a good job to criticize the government [...]. But a journalist's work, above all, must be constructive.¹⁹⁸

Obviously, such an insight on the work of the press in Belarus significantly differs from American or European understanding of the media's role.¹⁹⁹ 'Constructive journalism' is a

¹⁹⁶ Freedom House, *Freedom of the Press 2011: Signs of Change amid Repression*, Selected Data from Freedom Houses's Annual Press Freedom Index 13 (2011), available at <http://www.freedomhouse.org/uploads/fop11/FOTP2011Booklet.pdf> (last visited 20.10.2011).

¹⁹⁷ German Criminal Code, I Federal Law Gazette 945, 3322 (1998), available in English at http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf (last visited 20.10.2011).

¹⁹⁸ *Will prosecutions of journalists for defamation continue*, *Komsomolskaja Pravda* (Feb. 17, 2005), available in Russian at <http://kp.by/daily/23463/138043/> (last visited 20.10.2011) [*Komsomol'skaja pravda, Zhurnalistov po-prezhnemu budut sazhat' za klevetu?* (Feb. 17, 2005)].

¹⁹⁹ *Cf Sullivan* (Black, J., concurring) and *Perna v. Italy* § 39; *July and SARL Liberation v. France* § 64.

very interesting notion; its meaning becomes completely clear after the acquaintance with some cases decided under the aforementioned provisions of the Criminal Code. The most famous of them are cases of *Mazheika and Markevich*, *Ivashkevich*, and the most recent case of *Pochobut*.

It must be noted that it is hard to analyze Belarusian case-law on this issue due to the lack of information. The hearings of the majority of cases were held in camera; therefore, the reasoning of the courts remains a secret for general public and journalists. I managed to obtain only one full reasoning of the court (in *Mazheika and Markevich*), since it was the sole case tried openly. The case of *Pochobut* will be analyzed only on the basis of operative part of the sentence. The case of *Ivashkevich* will be examined with references to an article containing some extracts from attorney's reasoning.

2.2.1. *Mazheika and Markevich*: Belarusian Standard of Proof

Mikola Markevich was the editor of *Pahonia*, a newspaper having a critical stand towards the government. Pavel Mazheika was a journalist writing for the aforementioned newspaper. In 2001, just before the presidential elections in Belarus, *Pahonia* printed series of articles criticizing one of the candidates to the presidential post, namely, the current President Alexander Lukashenka. The author of one of these articles was Pavel Mazheika. The issue of the newspaper containing these materials was never published because it had been confiscated from a print shop by public prosecution bodies; however, the information was put up in the Internet, on a website of *Pahonia*.

The Leninsky District Court of Grodno found that the articles contained “fabrications known to be false [and] defamatory, offending the honor and dignity of Lukashenka, together with accusations of crimes of a particularly serious nature – murder, genocide and the

creation of or membership in a criminal organization” in such phrases of the articles as “he fights with his opponents by murdering them”, “he is an ill person [who] exterminates the people”, as well as in the line of an anonymous satirical verse which can be translated as follows: “I promised the people that the mafia will disappear. You can congratulate me: I decided to become the chief of the mafia!”²⁰⁰

Mazheika and Markevich were sentenced, respectively, to two and two-and-half years of restraint of liberty under article 367 of the Belarusian Criminal Code. Later, the sentence was reduced to one year for both of them, in accordance with the Law on Amnesty. However, the courts of higher instances upheld the decision of the Leninsky District Court of Grodno.

There are some important points in this case which help to understand the Belarusian approach to the protection of defamatory speech directed against public officials.

First of all, the part of allegedly defamatory texts did not refer specifically to Lukashenka. Namely, in the verse there was no mentioning of his name or of the word ‘president’. Notwithstanding this, the court ruled that “on the basis of specific knowledge and experience” it can be understood that this verse is about Lukashenka.²⁰¹ In order to prove this allegation, the court relied solely on a testimony of a worker of the print shop who expressed her personal opinion that the verse was about Lukashenka.

It must be noted, however, that in the Belarusian criminal law the standard of proving is ‘beyond a reasonable doubt’.²⁰² Personal opinions, according to this standard, are suppositions and cannot be assumed as a basis of proof. All suppositions, by turn, must be

²⁰⁰ Verdict of the Leninsky District Court of Grodno, criminal case of *Mazheika and Markevich* No 0102504/0852, June 24, 2002 (in Russian) [Prigovor suda Leninskogo rajona Grodno, ugodovnoe delo Mazhejki i Markevicha No 0102504/0852, 24.06.2002].

²⁰¹ *Id.*

²⁰² “Reasonable doubt - the doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty”. *Black's Law Dictionary, supra*, reasonable doubt.

interpreted in behalf of the defendant.²⁰³ The court ignored this procedural norm and, actually, it is not clear which standard of proof it used in order to determine the guilt of the defendants. Obviously, this is neither the American ‘actual malice’ standard nor the ECtHR test based on the absence of a reasonable doubt. The Belarusian court emphasized that the defendants had knowingly disseminated in the aforementioned verse false information about the President. However, such assertions seem to be groundless, since there is a reasonable doubt about mentioning exactly of Lukashenka in this verse.

Furthermore, the defendants claimed figurative language of their statements. The results of a philological expertise had shown that the phrases of “he fights with his opponents by murdering them” and “he [...] exterminates the people” can be equally understood either in a figurative or literal sense. The court, by some unexplained reasons, gave its preference to the latter interpretation. Thus, the standard of proof ‘beyond reasonable doubt’ had not been followed again. Together with this, satirical language of the statements, as well as an exaggerated manner of expression, had not been taken into account.²⁰⁴

Finally, it is notable that the present case was not regarded by the court in the context of pre-electoral controversy that requires open public debate on issues of public concern. On the contrary, it seems that the upcoming presidential elections motivated the Belarusian judiciary to take a tougher stance on defamation of the President. And the following case only approves this allegation.

²⁰³Code on Criminal Procedure of the Republic of Belarus, art. 16 (3,4), N 295-3, 16.07.1999, as amended 11.07.2007 (in Russian) [Ugolovno-processual'nyj kodeks Respubliki Belarus', st. 16 (3,4), N 295-3, 16.07.1999, v red. ot 11.07.2007].

²⁰⁴ Compare to the reasoning used in *Hustler v. Falwell*, *supra* at 46; *Greenbelt v. Bresler*, *supra* at 14 or *Lindon v. France*, *supra* § 62; *Prager and Oberschlink v. Austria*, *supra* § 38.

2.2.2. *Ivashkevich: an Attempt Is Also a Crime*

This case appeared shortly after Mazheika's and Markevich's conviction, and this bout it was tried in camera. Notwithstanding the fact that the case was heard by another court of a different city (namely, by the Pervomaisky District Court of Minsk), the decision is of striking resemblance with the previous one.

Viktor Ivashkevich was the editor of *Rabochy*, a newspaper having a critical stand towards the government. In 2001, just before the presidential elections in Belarus, Ivashkevich prepared for publishing a special issue of the aforementioned newspaper, in which he placed an article entitled "*The Thief Must Go to Prison*". This article contained assumptions that the President of Belarus, Alexander Lukashenko, was involved in high-level corruption, as well as in illegal trading of weapons. The issue of the newspaper containing the article was never published because it had been confiscated from a print shop by public prosecution bodies.

Ivashkevich was sentenced to two years of restraint of liberty for defamation and insult of the President under article 367 (2) and 368 (1) of the Criminal Code. Later, he benefited from general amnesty, and his sentence was reduced to one year. However, the courts of higher instances upheld the decision of the Pervomaisky District Court of Minsk.²⁰⁵

As it can be seen from the facts, this case is almost identical to *Mazheika and Markevich*: there is again a newspaper criticizing the government, criminal law on defamation, and the damage to the President's reputation. However, there is one particular point which must be underlined. By the present case, a new crime of 'an attempt of public insult of the President' was for the first time established in the Belarusian legal practice.

²⁰⁵ The facts of the case, the verdict, some extracts from the reasoning of Ivashkevich's attorney, as well as legal analysis of the decision can be found in Michael Pastukhov & Yuri Toporashev, *Independent Journalists Before Criminal Court: Collected Materials and Documents* (2002), available in Russian at http://www.library.cjes.ru/online/?a=con&b_id=523&c_id=6160 (last visited 20.10.2011) [Mihail Pastuhov, Jurij Toporashev, *Nezavisimye zhurnalisty pered ugolovnym sudom: sbornik materialov i dokumentov* (2002)].

Since the issue of the newspaper containing allegedly defamatory and insulting speech was not published, the element of dissemination of the information was absent in this case. By turn, without such an element, it was impossible to approve the existence of public insult or defamation, according to Articles 367 (1) and 368 (1). In order to protect the reputation of the Head of state, the court applied Article 14 of the Criminal Code²⁰⁶ in conjunction with Article 368 (1).

Hence, by creation of an ‘attempted insult’, the court implicitly endorsed the practice of prior restraints and censorship. From this moment, confiscations of journalistic materials (which, actually, had already been quite widespread in Belarus) have become legally justified by the reason of prevention of an attempted crime. It is needless to say that such practice of confiscations and imposition of punishments for merely an attempt to defame or insult creates a strong ‘chilling effect’ on the media, albeit perfectly protects the right to reputation of public officials. Therefore, the case of *Ivashkevich* added to an unclear and biased standard of proof, used in *Mazheika and Markevich*, a possibility to impose criminal sanctions for just an attempt to defame or insult the President or a public official.

In subsequent years, similar cases have repeatedly appeared before the Belarusian courts and frequently were decided under criminal law.²⁰⁷ The most recent case of *Pochobut* shows that the attitude of the Belarusian courts in defamation cases related to public officials was not changed, but became even tougher.

²⁰⁶ “An attempt to commit a crime is a deliberate action or omission aimed directly at committing a crime, if the crime was not accomplished for reasons beyond control of the guilty person”. Belarusian Criminal Code, *supra*, art. 14.

²⁰⁷ See, e. g., Article 19, *Pressure, Politics and the Press: the State of Media Freedoms in Belarus, Moldova and Ukraine* 112-13 (Oct. 2003); OSCE, *Libel and Insult Law*, *supra* at 26 (2005).

2.2.3. Recent Developments: the Case of *Pochobut*

Andrzej Pochobut is a journalist of *Gazeta Vybarcha*, a Polish newspaper. Shortly after the presidential elections of 2010, Pochobut published series of his articles in the aforementioned periodical, as well as in *Belarusian Partisan*. The articles contained the allegations that Lukashenka had closed independent media and defeated his opponents by means of force and propaganda, as well as that he is constantly suppressing human rights activists and totally controls Belarusian Parliament. The Leninsky District Court of Grodno found these allegations to be defamatory and discrediting as regards the Belarusian President. Pochobut was punished under Article 367 of the Criminal Code by a three years' imprisonment with a two-year suspension sentence.

The reasoning of the court in this case remains unknown, since the hearings were held in camera. But, taking into account the verdict, it can be assumed that the principles applied by the court were similar to the ones from the previous cases.

It is interesting that the court, apart from defamation, found in the aforementioned articles “negative informative characteristics which create in readers’ mind only a negative image of the President of the Republic of Belarus, thereby discrediting him”.²⁰⁸ It is noteworthy that the court does not acknowledge the fact that discrediting tactics are usually used against politicians and public officials by their opponents in the course of free public debate. Why the Belarusian President should be an exception remains unclear.

It is also necessary to underline that Pochobut was convicted just after the presidential elections, which had spilled into the mass protests with the subsequent crackdown. The situation at the end of 2010 - beginning of 2011 was unstable and unfavorable for the present

²⁰⁸ Verdict of the Leninsky District Court of Grodno, criminal case of *Pochobut* No 1102519/0007, July 5, 2011(in Russian) [Prigovor suda Leninskogo rajona Grodno, ugovnoe delo Pochobuta No 1102519/0007, 5.07.2011].

government, and any criticism was strongly undesirable. This confirms an assumption that Pochobut's prosecution was made mostly with the purpose to stop the criticism of the President and to deter other journalists from expressing any disapproving statements in his address.

3. Conclusions

Therefore, the analysis of the Belarusian law and practice has shown that defamatory speech directed against public officials is insufficiently protected. Although in the Constitution it is affirmed that the right to free speech is guaranteed to every individual, in reality this is not the case if the allegations concern the conduct of public officials and, especially, of the President.

It must be pointed out that even mere existence of criminal sanctions for defamation of public officials is able to have a 'chilling effect' on the press and individuals critical to the authorities. In the light of Belarusian case-law, such sanctions obviously are equivalent to deterrence of journalists and independently thinking people.

It is notable that in Belarus even an attempt to defame or insult the President can be punished under the Criminal Code. Taken together with the vague and biased standard of proof and a general tendency of the courts to interpret the facts of the case in favor of powerful plaintiffs, it creates a situation absolutely disadvantageous to discussion on political issues. This situation, certainly, is inconsonant with the American and European approaches to public debate on matters of public concern, as well as with Meiklejohn's argument from democracy, on which the aforementioned approaches are basically built. The Belarusian approach to regulation of defamatory speech directed against public officials might be consistent only with the notion of 'constructive' press which is meant to be a tool for

dissemination and intrusion of dominant governmental viewpoints on the matters of public concern.

International human rights organizations have already given well-founded recommendations on improving the situation with protection of the right to free speech in Belarus, including numerous recommendations on amendments of defamation laws.²⁰⁹

In 2003, the Belarusian Association of Journalists submitted an appeal to the Belarusian Constitutional Court asking for the constitutionality of articles 367, 368 and 369 of the Criminal Code. The Constitutional Court admitted that “the practice of allocating specific offenses along with general formulations, due to the importance of the object of abuse, takes place not only in Belarus but also in other states”,²¹⁰ and such practice also relates to defamation. In result, the Court proposed to amend the Code and to set the elements of the crime in order to free from criminal sanctions the criticism of the authorities which is not associated with defamation or insult. However, even these amendments of the Code have never been introduced, and the recent case of *Pochobut* has shown that it is possible to be sentenced to three years of prison for the criticism of the authorities in Belarus.

²⁰⁹ See, e. g., Article 19, *Pressure, Politics and the Press*, *supra* at 109-127 and general recommendations in OSCE, *Ending the Chilling Effect: Working to Repeal Criminal Libel and Insult Laws* 86-88, Proceedings of the Round Table “What Can Be Done to Decriminalize Libel and Repeal Insult Laws”, Paris, Nov. 24-25, 2003 (ed. by Ana Karlsreiter & Hanna Vuokko, Vienna, 2004).

²¹⁰ Press Center of the Constitutional Court, *On the Constitutionality of the Norms of Amnesty Laws and Their Application* (2003), available in Russian at <http://www.kc.gov.by/main.aspx?guid=8313> (last visited 20.10.2011) [Soobwenie press-centra Konstitucionnogo Suda Respubliki Belarus' O konstitucionnosti norm zakonov ob amnistii i praktiki ih primenenija (2003)].

Conclusion

The research has revealed that the tension between free speech and the right to reputation is solved differently in the law and practice of the USA, the ECHR, and Belarus.

The American approach to the protection of defamatory speech is based on the ‘actual malice’ standard which is applicable not only to public officials but also to public figures. Taken together with the special treatment of opinions and imaginative expression, it affords a very high level of protection for defamatory speech directed against public officials. However, such strong safeguards may lead to an adverse effect on freedom of speech because underprotection of the right to reputation is able to hold individuals back from stepping into the public arena and involvement in debates on public issues.

The ECHR standard of protection seems to be more balanced. The main distinguishing feature of this approach is in establishing different levels of protection of potentially defamatory speech, depending on the status of the plaintiff. It appears that the ECtHR tends to give more attention to the protection of the right to reputation. The less stringent standard of proof – a balance of preponderance – only highlights this allegation.

It is evident that the common roots of these two approaches lie in Meiklejohn’s argument from democracy. The importance of free and uninhibited discussion on issues of public concern is therefore in the center of attention of both American and European judges, and by this reason a special role of the press in a democratic society is underlined. However, mere existence and imposition of criminal sanctions for defamation of public officials in the national laws of most European countries might have a deterrent effect on the media and undermine public discussion, albeit the ECHR does not allow excessive fines or imprisonment for such kind of ‘crime’. In spite of this minor criticism, it can be said that both

of the aforementioned standards give an essential protection to critical statements about the conduct of public officials.

In Belarus the existing controversy between freedom of speech and the right to reputation of public officials is manifestly solved in favor of the latter. The Belarusian approach is enormously underprotective of free speech on political issues. By using an unclear standard of proof and trying to interpret the evidences in behalf of influential plaintiffs, the Belarusian courts apply harsh criminal sanctions even for an attempt to defame a public official. Criminal prosecution for critical statements directed against the President is a widespread practice. All this has a strong deterrent effect on the press and tends to prevent journalists and independently thinking individuals from criticism of the authorities. Thus, revisions of the current law and practice are strongly recommended in order to adjust the Belarusian approach to the requirements of the ECHR or American standard.²¹¹

²¹¹ Article 19, *Pressure, Politics and the Press*, *supra* at 117. This report contains a comprehensive list of recommendations which would help to amend the Belarusian law in order to provide a sufficient degree of protection for speech on matters of public concern and to assure the ‘public watchdog’ function of the press in a democratic society.

Bibliography

LEGAL SOURCES:

United States of America

Legislation:

1 Stat. 596 (1798);
U.S. Const. amend. I (1787).

Case-law:

Abrams v. United States, 250 U.S. 616 (1919);
Ashton v. Kentucky, 384 U.S. 195 (1966);
Beauharnais v. Illinois, 343 U.S. 250 (1952);
Cantwell v. Connecticut, 310 U.S. 296 (1940);
Chaplinsky v. New Hampshire, 315 U. S. 568 (1942);
City of Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86 (1923);
Curtis Pub. Co. v. Butts, 288 U.S. 130 (1967);
De Jonge v. Oregon, 299 U.S. 353 (1937);
Garrison v. Louisiana, 379 U. S. 64 (1964);
Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974);
Greenbelt Cooperative Publishing Assn. Inc. v. Bresler, 398 U.S. 6 (1970);
Herbert v. Lando, 441 U.S. 153 (1979);
Hustler Magazine, Inc. v. Falwell, 485 U. S. 46 (1988);
Lamont v. Postmaster Gen., 381 U.S. 301 (1965);
Milkovich v. Lorain Journal Co., 497 U. S. 1 (1990);
Near v. Minnesota, 283 U.S. 697 (1931);
New York Times v. Sullivan, 376 U.S. 254 (1964);
Philadelphia Newspapers, Inc. v. Hepps., 475 U. S. 767 (1986);
Rose v. Hollinger Intern., Inc., 383 Ill.App.3d 8, 889 N.E.2d 644 (2008);
Rosenblatt v. Baer, 383 U. S. 75 (1966);
Rosenbloom v. Metromedia, Inc., 403 U. S. 29 (1971);
Roth v. United States, 354 U.S. 476 (1957);
St. Amant v. Thompson, 390 U.S. 727 (1968);
Stromberg v. California, 283 U.S. 359 (1931);
Terminiello v. City of Chicago, 337 U.S. 1 (1949);
Walker v. Pulitzer Pub. Co., 394 F. 2d 800 (1968);
Watts v. United States, 394 U.S. 705 (1969);
Whitney v. California, 274 U.S. 375 (1927);

Europe

Legislation:

Convention for the Protection of Human Rights and Fundamental Freedoms (1953), available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

Case-law:

Barfod v. Denmark, no. 11508/85 (Feb. 22, 1989);
Bladet Tromsø and Stensaas, no. 21980/93 (May 20, 1999);
Busuioc v. Moldova, no. 61513/00 (Dec. 21, 2004);
Castells v. Spain, no. 11798/85 (Apr. 23, 1992);
Chauvy and Others v. France, no. 64915/01 (June 29, 2004);
Colak v. Turkey, 29515/03 (July 10, 2003);
Colombani and Others v. France, no. 51279/99 (June 22, 2002);
Constantinescu v. Romania, no. 28871/95 (June 27, 2000);
Cumpana and Mazare v. Romania, no. 33348/96 (Dec. 17, 2004);
Dalban v. Romania, no. 28114/95 (Sept. 28, 1999);
Dlugolecki v. Poland, no. 23806/03 (Feb. 24, 2009);
Europapress Holding d.o.o. v. Croatia, no. 25333/06 (Oct. 22, 2010);
Flux v. Moldova, no. 28702/03 (Nov. 20, 2007);
Fressoz and Roire v. France, no. 29183/95 (Jan. 21, 1999);
Giniewski v. France, no. 64016/00 (Jan. 31, 2006);
Janowski v. Poland, no. 25716/94 (Jan. 21, 1999);
Jerusalem v. Austria, no. 26958/95 (Feb. 27, 2001);
July and SARL Liberation v. France, no. 20893/03 (Feb. 14, 2008);
Koprivica v. Montenegro, no. 41158/09 (Nov. 22, 2011);
Lesnik v. Slovakia, no. 35640/97 (Mar. 11, 2003);
Lindon, Otchakovsky-Laurens and July v. France, nos. 21279/02 and 36448/02 (Oct. 22, 2007);
Lingens v. Austria, no. 9815/82 (July 8, 1986);
Mahmudov and Agazade v. Azerbaijan, no. 35877/04 (Dec. 18, 2008);
McVicar v. UK, no. 46311/99 (May 7, 2002);
Nikula v. Finland, no. 31611/96 (Mar. 21, 2002);
Oberschlick v. Austria, no. 11662/85 (May 23, 1991);
Pedersen and Baadsgaard v. Denmark, no. 49017/99 (June 19, 2003);
Pedersen and Baadsgaard v. Denmark, no. 49017/99 (Dec. 17, 2004);
Perna v. Italy, no. 48898/99 (July 25, 2001);
Pfeifer v. Austria, no. 12556/03 (Nov. 15, 2007);
Prager and Oberschlick v. Austria, no. 15974/90 (Apr. 26, 1995);
Radio France and Others v. France, no. 53984/00 (Mar. 30, 2004);
Rumyana Ivanova v. Bulgaria, no. 36207/03 (Feb. 14, 2008);
Schwabe v. Austria, no. 13704/88 (Aug. 28, 1992);
Shabanov and Tren v. Russia, no. 5433/02 (Dec. 14, 2007);
Steel and Morris v. UK, no. 68416/01 (Feb. 15, 2005);
Stoll v. Switzerland, no. 69698/01 (Dec. 10, 2007);
Thoma v. Luxembourg, no. 38432/97 (Mar. 29, 2001);
Turhan v. Turkey, no. 48176/99 (May 19, 2005).

Belarus

Legislation:

- Civil Code of the Republic of Belarus, art. 153, N 218-3, 7.12.1998, as amended 18.05. 2007) (in Russian) [Grazhdanskij kodeks Respubliki Belarus', st.153, N 218-3, 7.12.1998, v red. 18.05.2007];
- Code of the Republic of Belarus on Administrative Offences, N 194-3, 21.04. 2003, as amended 20.07. 2007 (in Russian) [Kodeks Respubliki Belarus' ob administrativnyh narushenijah, N 194-3 (21.04.2003, v red. ot 20.07.2007)];
- Code on Criminal Procedure of the Republic of Belarus, N 295-3, 16.07.1999, as amended 11.07.2007 (in Russian) [Ugolovno-processual'nyj kodeks Respubliki Belarus', N 295-3 (16.07.1999, v red. ot 11.07.2007)];
- Constitution of the Republic of Belarus (15.03.1994, as amended 17.10.2004), *available in English at* <http://president.gov.by/en/press19330.html#doc>;
- Criminal Code of the Republic of Belarus, N 275-3, 9.07.1999, as amended 20.07. 2007 (in Russian) [Kriminal'nyj kodeks Respubliki Belarus', N 275-3 (9.07.1999, v red. ot 20.07.2007)];
- Law on Press and Other Mass Media, N 3515-XII, 13.01.1995, as amended 29.06. 2006 (in Russian) [Zakon o pečati i drugih sredstvah massovoj informacii, N 3515-XII (13.01.1995, v red. ot 29.06.2006)].

Case-law:

- Verdict of the Leninsky District Court of Grodno, criminal case of *Mazheika and Markevich* No 0102504/ 0852 (June 24, 2002) [Prigovor suda Leninskogo rajona Grodno, ugolovnoe delo Mazhejki i Markevicha No 0102504/ 0852, 24.06.2002];
- Verdict of the Leninsky District Court of Grodno, criminal case of *Pochobut* No 1102519/0007, July 5, 2011(in Russian) [Prigovor suda Leninskogo rajona Grodno, ugolovnoe delo Pochobuta No 1102519/0007, 5.07.2011].

Other Legal Sources:

- Declaration of the Rights of Man and of the Citizen (1789), *available at* <http://www.hrcr.org/docs/frenchdec.html>;
- German Criminal Code, I Federal Law Gazette 945, 3322 (1998), *available in English at* http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf;
- International Covenant on Civil and Political Rights (1966), *available at* <http://www2.ohchr.org/english/law/ccpr.htm>;
- Universal Declaration of Human Rights (1948), *available at* <http://www.un.org/en/documents/udhr/index.shtml>.

BOOKS:

- Alexander, Larry, *Freedom of Speech* vol. 1 (Ashgate, 2000);
- Baker, Edwin C., *Human Liberty and Freedom of Speech* (Oxford University Press, 1989);
- Barendt, Eric, *Freedom of Speech* (Oxford University Press, 2d ed. 2005);

- Barron, Jerome A. & Dienes, C. Thomas, *First Amendment Law in a Nutshell* (Thomson/West, 4th ed., 2008);
- Blackstone, William, *Commentaries on the Laws of England* vol. 3 (1768);
- Bollinger, Lee C., *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, 1986);
- Campbell, Tom, *Rationales for Freedom of Communication in Freedom of Communication* (Aldershot: Dartmouth, Tom Campbell & Wojciech Sadurski ed., 1994);
- Dworkin, Gerald, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988);
- Grotius, Hugo, *The Jurisprudence of Holland* (Clarendon Press, Oxford 1926);
- Justinian, *Institutes* (Duckworth, London, 1994);
- MacDonald, Ronald St. John, *The Margin of Appreciation in Protecting Human Rights: The European Dimension, Essays in Honour of Gerard J. Wiarda* (Germany, Carl Heymanns Verlag KG, Matscher, Franz & Petzold, Herbert, Eds., 2nd ed., 1990);
- Meiklejohn, Alexander, *Free Speech and Its Relation to Self-Government* (The Lawbook Exchange, 2004);
- Mill, John Stuart, *On Liberty* (Longmans, 1869);
- Miller, John C., *Crisis in Freedom: The Alien and Sedition Acts* (New York; Little Brown and Company, 1951);
- Milo, Dario, *Defamation and Freedom of Speech* (Oxford University Press, 2008);
- Mitchell, Paul, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005);
- Riley, Jonathan, *Mill, Liberalism and Exceptions to Free Speech in Freedom of Expression: Counting the Costs* (Cambridge Scholars Publishing, Glen Newey ed., 2007);
- Sadurski, Wojciech, *Freedom of Speech and Its Limits* (Kluwer, 1999);
- Schauer, Frederic, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, 1982);
- Shiffrin, Steven H., *The First Amendment, Democracy, and Romance* (Harvard University Press, 1990);
- Sunstein, Cass R., *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993); Ten, Chin L., *Mill on Liberty* (Clarendon Press: Oxford, 1980).

ARTICLES IN JOURNALS:

- Blasi, Vincent, *The Checking Value in First Amendment Theory*, 2 (3) Am. B. Found. Res. J. 521 (1977);
- Brennan, William J., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965);
- Brison, Susan J., *The Autonomy Defense of Free Speech*, 108 (2) Ethics 312 (1998);
- Eldridge, Larry, *Before Zenger: Truth and Seditious Speech in Colonial America 1607-1700*, 39 (3) Am. J. Legal Hist. 337 (1995);
- Fiss, Owen M., *Why the State*, 100 Harv. L. Rev. 781 (1987);
- Kalven, Harry, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191;
- Leflar, Robert A., *The Social Utility of the Criminal Law of Defamation*, 34 Tex. L. Rev. 985 (1956);
- Meiklejohn, Alexander, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245;
- Redish, Martin *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982);
- Richards, David. A. J., *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974);
- Scanlon, Thomas, *A Theory of Freedom of Expression*, 1 (2) Phil. Pub. Aff. 204 (1972);

- Scanlon, Thomas, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979);
- Stevens, George E., *Criminal Libel after Garrison*, 68 Jour. Q. 523 (1991).

OTHER SOURCES:

- Article 19, *Pressure, Politics and the Press: the State of Media Freedoms in Belarus, Moldova and Ukraine* (Oct. 2003);
- *Black's Law Dictionary* (9th ed. 2009);
- Council of Europe, *The Margin of Appreciation*, available at http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp;
- Freedom House, *Freedom of the Press 2011: Signs of Change amid Repression*, Selected Data from Freedom Houses's Annual Press Freedom Index (2011), available at <http://www.freedomhouse.org/uploads/fop11/FOTP2011Booklet.pdf>;
- IISEPR, *Presentations. Election Campaign in Belarus: Chronology and Prehistory*, *Belarusian Business Newspaper*, No.7 (Jan., 1995) [NISEPI, Prezentacii. Predvybornaja kampanija v Belorusi: hronologija i predystorija, Belorusskaja delovaja gazeta, No. 7, janvar' 1995];
- *Komsomolskaja Pravda*, *Will prosecutions of journalists for defamation continue* (Feb. 17, 2005), available in Russian at <http://kp.by/daily/23463/138043/> (last visited 20.10.2011) [*Komsomol'skaja pravda*, *Zhurnalistov po-prezhnemu budut sazhat' za klevetu?*(Fev. 17, 2005)];
- OSCE, *Ending the Chilling Effect: Working to Repeal Criminal Libel and Insult Laws*, Proceedings of the Round Table "What Can Be Done to Decriminalize Libel and Repeal Insult Laws", Paris, Nov. 24-25, 2003 (ed. by Ana Karlsreiter & Hanna Vuokko, Vienna, 2004);
- OSCE, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve* (2005);
- Pastukhov, Michael & Toporashev, Yuri *Independent Journalists Before Criminal Court: Collected Materials and Documents* (2002), available in Russian at http://www.library.cjes.ru/online/?a=con&b_id=523&c_id=6160 [Mihail Pastuhov, Jurij Toporashev, *Nezavisimye zhurnalisty pered ugolovnym sudom: sbornik materialov i dokumentov* (2002)];
- Press Center of the Constitutional Court, *On the Constitutionality of the Norms of Amnesty Laws and Their Application* (2003), available in Russian at <http://www.kc.gov.by/main.aspx?guid=8313> (last visited 20.10.2011) [*Soobwenie press-centra Konstitucionnogo Suda Respubliki Belarus' O konstitucionnosti norm zakonov ob amnistii i praktiki ih primenenija* (2003)].