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AROUND THE WORLD WITH SULLIVAN

The New York Times v. Sullivan Rule and its Universal Applicability

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I. Introduction

In most of the democratic states the level of protection of political speech is higher than the 'average' level of free speech protection. The legislators and the courts accepted that free discussion of political and public matters "is at the very core of the concept of a democratic society".[1] Explicitly or not, they created a special category of political speech, which enjoys a higher degree of free speech guarantee.[2] The question about the boundaries of this enhanced protection arises most explicitly in defamation cases. Every state has developed its own doctrine to balance between free political speech and reputation rights. In this process, one particular decision by the US Supreme Court, the New York Times v. Sullivan[3] was vastly influential. In this paper I am trying to make an effort to summarize the main points of the Sullivan doctrine and compare it to the solutions of three Commonwealth jurisdictions, England, Australia, and New Zealand.

II. The Law of Defamation in the United States

1. The New York Times v. Sullivan Rule

The case that is in the focus of our examinations in this paper is probably the most well-known one the US Supreme Court has ever decided. It altered radically the law

[1] Handyside v. United Kingdom (1976) 1 EHRR 737. para. 42.

[2] For a brief overview on the justifiability of this privilege see IVAN HARE: Is the Privileged Position of Political Expression Justified? In JACK BEATSON – YVONNE CRIPPS (eds.): *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams*. Oxford: Oxford University Press, 2000. 105.

[3] 376 U.S. 254 (1964)

of defamation in the US, modified the whole 'central image' of the First Amendment, and influenced many other jurisdictions.

The Sullivan case arose out of the struggle of the civil rights movements, which fought for the abolition of the racist segregation in the Southern states of the US. On the 29th March, 1960, the New York Times carried a full-page advertisement that charged the police of Montgomery, Alabama with carrying out 'a wave of terror' against Martin Luther King and other civil rights demonstrators. Although the advertisement's main points referring to particular occasions of protest turned out to be true, it contained several minor and some potentially significant errors. For example, when the protesting students staged a demonstration on the stairs of the State Capitol, they sang the National Anthem and not "My Country, 'Tis of Thee", as the advertisement alleged. Although nine students were expelled from the university, this did not happen because they were leading the demonstrations, but because they demanded service at a lunch counter in the Montgomery County Courthouse. Not the entire student body, but most of it protested the expulsion. The campus dining hall was not padlocked so as to 'starve' the protestors. The police did not 'ring' the campus. King had only been arrested four times, instead of the alleged seven.

L. B. Sullivan was the elected Montgomery Commissioner, who supervised the Police Department. Though his name had not been mentioned in the advertisement, ha claimed that it had been defamatory of him, because readers assumed that he had been responsible for the alleged acts. Under the common law strict liability rule, the New York Times should have proved that the allegations were true which it failed to do. The trial jury awarded Sullivan the large sum of $500.000 in damages, and this conclusion was upheld by the Alabama Supreme Court.

The US Supreme Court reversed the judgment. All nine judges concluded that the Alabama laws and decision violated the First Amendment. The Court could have taken the 'narrow path' and reversed the judgment for a handful of reasons.[4] First, they could have said that Sullivan was not identifiable from the advertisement as it only referred to a group (the 'police'), which consisted of hundreds of individuals. Secondly, a huge amount of punitive damages were entered without any proof of actual damages. Some suggest that Sullivan's reputation in Alabama in 1960 was more likely to have been enhanced by allegations of his hostility towards the civil rights movement.[5] Finally, only 35 copies of the paper were distributed in Montgomery, where the plaintiff was known.

The Supreme Court, however, took the other path. The majority opinion written by William Brennan J. became a legal classic since. He pointed to the analogy between the civil litigation in libel based on the contemporary common law and the criminal prosecutions for sedition in the past, namely the Sedition Act 1798. According to him none of them should have been allowed, as any restraint imposed upon criticism of government and public officials was inconsistent with the right to free speech.

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[4] RICHARD A. EPSTEIN: Was New York Times v. Sullivan Wrong? (1986) *University of Chicago Law Review* 782. at 793–794.

[5] FREDERICK SCHAUER: Social Foundation of the Law of Defamation: A Comparative Analysis. (1980) 1 *Journal of Media Law and Practice* 3. at 5.

The 'informed citizenship' required the opportunity to disseminate and receive any information or ideas about political matters.

The Alabama law was a highly effective tool to 'chill' political speech. "It is often difficult to prove the truth of the alleged libel in all particulars. And the necessity of proving truth as a defense may well deter a critic from voicing criticism, even if it be true, because of doubt whether it can be proved or fear of the expense of having to do so."[6]

To reduce the possibility of this 'chilling effect', the Court introduced a new "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[7]

It is not an exaggeration to say that the Court decided more than it needed to: possibly influenced by the heat of the historic moment of the great desegregation conflict,[8] it reformulated not only a significant part of the law of defamation, but the whole 'central meaning' of the First Amendment. The words of Brennan J. became conceivably the most often quoted part of any Supreme Court decisions: according to them, the United States has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open…"[9] This principle replaced the former 'clear and present danger' rule as the basic paradigm of the First Amendment.[10] This change ("an occasion for dancing in the streets",[11] at least according to Alexander Meiklejohn, whose works partly shaped the opinion of Brennan J.[12]) put the freedom of speech on the basis of a democratic commitment to receive, impart and distribute information concerning the public sphere (or self-government) without any fear of punishment. But, to reach this goal, the 'actual malice' doctrine, which in the Sullivan case only covered public officials, should have been expanded.

2. Further Developments in US Defamation Law

The "dialectic progression" that Harry Kalven supposed[13] started shortly after the Sullivan decision. In Rosenblatt v. Baer the doctrine was expanded from elected to

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[6] 376 U.S. 254 (1964) at 279.

[7] *Ibid*., at 279–280.

[8] Lee C. Bollinger: *Images of a Free Press*. University of Chicago Press: Chicago, 1991. 4.

[9] 376 U.S. 254 (1964), at 270.

[10] See the predictions by Harry Kalven: The New York Times Case: A Note on „The Central Meaning of the First Amendment". (1964) *Supreme Court Review* 191. at 204-210., and 213–214.

[11] *Ibid*., at 221.

[12] See Alexander Meiklejohn: *Political Freedom – The Constitutional Powers of the People*. New York: Oxford University Press, 1965 [2nd edition]. 3–89. Although Meiklejohn was not mentioned in the judgment, his influence was acknowledged later in an article by Brennan. See William J. Brennan: The Supreme Court and the Meiklejohn Interpretation of the First Amendment. (1965) 78 *Harvard Law Review* 1., at 14–20.

[13] Kalven (n. 10 above), 221.

appointed officials.[14] The Court further expanded its principle from public officials to public figures in the two libel cases decided jointly in 1967. In the Butts case the plaintiff was an athletic director of a state university in Georgia, who in a newspaper article was accused of helping to effect a betting swindle; in the Walker case the plaintiff was a retired military officer who was allegedly involved in racially motivated civil disorder following his retirement.[15] As Warren CJ stated, "Public figures […] often play an influential role in ordering society […] uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'".[16] The decision in Rosenbloom v. Metromedia, Inc.[17] further expanded the Sullivan rule. The Court applied it in a case which involved a private figure because the libellous statements concerning him were matter of general public interest (namely a report about a magazine distributor's arrest on obscenity charges). Although at this point one could have reasonably expected that the doctrine would be expanded to cover both 'public' and 'private' plaintiffs, the tendency was halted. In Gertz v. Robert Welch, Inc.,[18] which is generally considered to be the second most important case in US defamation law, the majority ruled that Gertz, a prominent Chicago lawyer was not a public figure. He, while representing the family of a person murdered by a policeman, had been called a 'Communist-fronter' in a right-wing publication. Powell J., writing for the Court, stated: "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of public controversies…".[19] Gertz did not fall into this category.

The decision in Gertz ruled that the cases with private plaintiffs were not free from any constitutional restraints: the common law's strict liability did not give the desirable protection to free speech. The states were free to impose their own standards in cases involving private figures, provided that it did not meet the common law standard. The showing of some kind of fault (negligence) on the defendant's side became the lowest common requirement in these cases. Secondly, the claimant should prove actual loss or injury. Recovery for presumed or punitive damages was only allowed when the plaintiff proved the defendant's actual malice.

In Time, Inc. v. Firestone[20] the Court upheld its doctrine in Gertz and rejected the claim that a wealthy socialite, whose divorce was falsely reported in the magazine, was a public figure.

The Court qualified its decision in Gertz in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.[21] It ruled that presumed and punitive damages could be recovered

[14] 383 U.S. 75 (1966)
[15] Curtis Publishing Co v. Butts, Associated Press v. Walker 388 U.S. 130 (1967)
[16] *Ibid*., at 164.
[17] 403 U.S. 29 (1971)
[18] 418 U.S. 323 (1974)
[19] *Ibid*., at 345.
[20] 424 U.S. 448. (1976)
[21] 472 U.S. 749. (1985)

without the showing of actual malice, when the speech involved in the case was purely a private matter.

Summarizing all these, the complex American law of defamation has three tiers: one for public plaintiffs (Sullivan's actual malice rule), another one for private plaintiffs defamed in connection with a public issue (the Gertz rule, so that at least negligence is required for the liability) and a third one is for private plaintiffs defamed in private issues, where the common law liability still applies.[22]

Though the Sullivan and the Gertz decisions did not say anything about the shifting of the burden of proof from the defendant to the plaintiff, it was generally presumed that this shift in fact did happen. Practically, the proof of the truth was usually a prerequisite of proving actual malice (the knowledge of the falseness or reckless disregard of falsity) or negligence. Nevertheless, in Philadelphia Newspapers, Inc. v. Hepps[23] the Court explicitly shifted the burden of proving falsity to the plaintiffs, but that does not apply to the above mentioned third tier.

3. Critiques of the Current System

It is not easy to assess all the criticism related to the complex system of US defamation law, but some main points could be highlighted.

First, the philosophical foundation under the Sullivan rule, which provided the new basic paradigm of the First Amendment, is harshly criticized, claiming that the 'democratic theory' of freedom of speech is underprotective and misleading. Many authors, advocating several different theories as foundations of the First Amendment, have reached this conclusion. Ronald Dworkin says that the instrumental justification in Brennan's opinion offers only a limited protection. According to him the only correct foundation is the people's "intrinsic moral right to say what they wish"[24] (a version of the so-called autonomy theory). Lee Bollinger emphasizes the function of free speech in a society's moral development,[25] while Vincent Blasi identifies the "checking value" of free speech, as the core of the First Amendment: society must have an effective control over the government's conduct.[26]

The specific rulings concerning libel law are also widely criticized. Some say, as the three concurring opinions in Sullivan, that the actual malice rule is underprotective of free speech. The three judges would have gone further, and would have protected all speech about public officials, being malicious or not. According to this argument, the rule in its present form is still capable of 'chilling' some speech.[27]

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[22] David A. Anderson: An American Perspective. In Simon Deakin – Basil Markesinis – Angus Johnston: *Tort Law*. Oxford: Clarendon Press, 2003 [5th edition]. 729.

[23] 475 U.S. 767. (1986)

[24] Ronald Dworkin: *Freedom's Law. The Moral Reading of the American Constitution*. Oxford, New York: Oxford University Press, 1996. 200.

[25] Lee C. Bollinger: *The Tolerant Society*. New York, Oxford: Oxford University Press, 1986.

[26] Vincent Blasi: The Checking Value in First Amendment Theory. (1977) *American Bar Foundation Research Journal* 521.

[27] Among many others, this is the opinion of Ronald Dworkin, see Dworkin (n. 24 above), 209–213.

Others claim the opposite, saying that the Sullivan rule is much too overprotective of speech. Jerome Barron finds it ironical that the Sullivan decision (the "lost opportunity") creates a new imbalance in the communication process exactly in the name of the uninhibited, robust, and wide-open debate. According to him, the actual effect of the rule is to perpetuate the freedom of the few who are working in the press.[28] We can refer to the infamous Ocala Star-Banner Co. v. Damron[29] case here, where a newspaper mistakenly published a highly defamatory report about a candidate for a local office, when in fact it was his brother who had been accused of perjury. The candidate did not succeed in the election, but the paper could not be held liable under the Sullivan rule.

Others argue that the lack of protection for the reputation can cause what could be called a 'reversed chilling effect': it can deter some sensitive people from entering public life.[30] Perhaps a more powerful argument the one which claims that without effective protection of reputation, in the absence of legal restraints, the press in the long term could lose its credibility, since the public would have no guarantee that its reports are accurate.[31]

In Lee Bollinger's opinion the Court should not have established a general rule based on the particular facts of Sullivan. It was not a representative libel case. Given the particular historical circumstances of the case, Sullivan was not a highly sympathetic plaintiff for the Court. As Bollinger suggests, the desire for his 'punishment' could have played a role in the judgment. Thus the "human costs involved [may have been] distorted by the peculiar facts".[32] Though the previous rules of defamation were possibly undemocratic restrictions on free speech, the court failed to discuss the very complex issues that arose. "The result is a major opinion that portrays the issue as fairly one-sided, with an evil party (the government), a good party (the 'citizens'), and the press as the people's representative with full 'autonomy' from government regulation."[33]

III. Around the World with Sullivan

1. England

The Derbyshire County Council v. Times Newspapers Ltd.[34] case demonstrated the willingness of the House of Lords to give stronger protection to free political speech

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[28] JEROME A. BARRON: Access to the Press – A New First Amendment Right. (1967) 80 *Harvard Law Review* 1641., at 1656–1657.

[29] 401 U.S. 295. (1971)

[30] HARRY H. WELLINGTON: On Freedom of Expression. (1979) 88 *Yale Law Journal* 1105., at 1113-1115.

[31] ERIC BARENDT: *Freedom of Speech*. Oxford: Oxford University Press, 2005 [2nd edition]. 202.

[32] BOLLINGER (n. 8. above), 25.

[33] LEE C. BOLLINGER: The Future and the First Amendment. (1989) 18 *Capital University Law Review* 221., at 226.

[34] [1993] AC 534.

than the common law of defamation did before. In this case the Court held that government authorities could not sue for libel. The decision, though highly significant, left open the question whether the libel actions by public officials should be restricted.[35]

The response to that question was Reynolds v. Times Newspapers Ltd.[36] The Sunday Times published a story about the recently resigned Irish Prime Minister, Albert Reynolds. The article alleged that Mr. Reynolds had previously misled the Irish Parliament and his coalition colleague by suppressing some information concerning the appointment of the President of the High Court. The version of the story that appeared in the Irish edition of the paper included Mr. Reynolds's explanation, while the UK version did not cover that.

The House of Lords upheld the previous decision of the Court of Appeal which ruled that the qualified privilege could not be applied in this case. The leading judgment, written by Lord Nicholls, recognized the importance of free political speech. Both Courts held that the qualified privilege, whose application had formerly been very restricted, should have been broadened to cover the communication of inaccurate information by the media in matters of general public interest. The House of Lords rejected the claim to introduce a new, separate, 'generic' privilege, which would have protected all communication in public matters regardless of the circumstances of the publication, as the Supreme Court did in the Sullivan case. As Lord Nicholls concluded, it would not provide sufficient protection to reputation rights. The majority insisted on the 'balancing' approach, taken by the European Court of Human Rights, under which balancing between freedom of speech and reputation rights in the light of all relevant facts is necessary. Contrary to Sullivan, this approach does not protect speech on the basis of its category, but requires an ad-hoc, case-by-case balancing.

Rejecting the 'circumstantial test' developed by the Court of Appeal, the Court turned to the old 'duty-interest' test of qualified privilege.[37] According to this, in the context of media, the publisher should have a moral or social duty to publish the material in question and the public should have an interest to receive that information. Lord Nicholls offered some guidelines about the relevant factors taken into account when determining whether the duty-interest test was satisfied. These were: 1. The seriousness of the allegation; 2. The nature of the information (the extent to which it is a matter of public concern); 3. The source of the information; 4. The steps taken to verify the information; 5. The status of the information; 6. The urgency of the matter; 7. Whether comment was sought from the plaintiff; 8. Whether the plaintiff's side of the story was covered; 9. The tone of the article; 10. The circumstances of the publication including the timing.[38] On the basis of these it can be determined, whether qualified privilege applies and the standards of the 'responsible journalism' have been met.[39]

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[35] Eric Barendt: Libel and Freedom of Speech in English Law. (1993) *Public Law* 449., at 453.

[36] [2001] 2 AC 127.

[37] [2001] 2 AC 127., at 195. See Deakin – Markesinis – Johnston (n. 20 above), 680.

[38] [2001] 2 AC 127., at 205.

[39] A term used by Lord Nicholls in the case, see [2001] 2 AC 127., at 202.; Also see Barendt (n. 31 above), 220.

The expansion of the privilege and the specific remarks made in the judgment which suggest that freedom of speech should always be taken into account, and the uncertainties should be resolved in favour of it, show Reynolds' significance. Though not without serious criticism – many argued in favour of a broader, more Sullivan-like protection[40] – Reynolds offered the possibility of a generally more open 'public debate' in the media.

Though approximately 20 major libel cases were tried since Reynolds, only three of them succeeded on the basis of the expanded privilege. Sensational publications, publications without reliable source or without serious attempts to verify the story, publications which did not cover the plaintiff's version all failed to meet the standards of Reynolds.[41]

It soon became clear, that the privilege was not limited to political matters. In Al-Fagih v. HH Saudi Research and Marketing (UK) Ltd.[42] the dispute was within the Saudi-Arabian community. In that case the Court held that the 'neutral reporting', if all sides were covered in the publication, are within the protection of Reynolds, even when there were no attempts to verify the story. In Bonnick v. Morris[43] the Privy Council upheld the qualified privilege defense, stating that the journalist could not be held responsible for a different understanding of her article, that was expanded beyond the usual interpretation.

More fundamentally, there was some dispute about the test in Reynolds. In Loutchansky v. Times Newspapers (No. 2),[44] the Court of Appeal allowed the appeal from the High Court on the ground that it applied the test too restrictive. Gray J., the High Court judge of the case applied the duty-interest test, and asked the paper if it was under a duty to publish the story.[45] The Court of Appeal said that this test was too restrictive, and only the 'responsible journalism' test should have been applied. Lord Phillips stated that it would be wrong for the Courts to maintain a standard of journalism which was too high. But Eady J. in the Jameel v. The Wall Street Journal Europe (No. 2)[46] claimed that the House of Lords in Reynolds did not want to replace the duty-interest test with the standards of responsible journalism; therefore the Loutchansky decision is inconsistent with Reynolds. On appeal[47] the Court of Appeal agreed that responsible journalism did not constitute the sole test for the privilege: "the subject matter of the publication must be of such a nature that it is in the public interest that it should be published".[48]

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[40] One example is IAN LOVELAND: *Political Libels: A Comparative Study.* Oxford, Portland, Oregon: Hart Publishing, 2000. 171–184.

[41] For example: Grobbelaar v. News Group Newspapers Ltd. [2001] 2 All ER 437, CA; Galloway v. Telegraph Group, Ltd. [2006] EWCA Civ. 17.

[42] [2002] EMLR 215, CA

[43] [2002] EMLR 827.

[44] [2002] 1 All ER 652.

[45] [2001] EMLR 898.

[46] [2004] EMLR 196. para 20–34.

[47] Jameel v. The Wall Street Journal Europe (No. 3) [2005] EMLR 377.

[48] *Ibid*., para 87. On the judgment see: D. BROWNE: Libel and Publication in the Public Interest. (2005) www.5rb.com, 5–8.

Although creating some uncertainties and being a far cry from Sullivan, "with strong protection for journalists' sources, a flexible approach to meaning and the recognition of some neutral reportage, Reynolds privilege appears to offer journalists meaningful benefits, while requiring professional journalistic conduct".[49]

2. Australia[50]

In Australian Capital Television Pty. v. Commonwealth of Australia[51] (a case concerning political advertising) the High Court of Australia recognized – while lacking a constitutional Bill of Rights – an implied freedom of political expression in the Constitution.

The first major libel case after this recognition was Theophanous v. The Herald and Weekly Times Limited in 1994.[52] Andrew Theophanous, who was a member of the Australian House of Representatives, alleged that a letter to the editor, published in the defendant's newspaper, defamed him by accusing him of bias in favour of Greek immigrants and some other foolish action regarding immigration issues. The High Court held that the implied right in the Constitution needed to be expanded to cover all political discussions. The law of defamation should give way as far as – broadly interpreted – political discussion or discourse was concerned. The judgment cited Eric Barendt: "political speech refers to all speech relevant to the development of public opinion in the whole range of issues which an intelligent citizen should think about."[53] This marked an adoption of a 'Sullivan-like', separate constitutional privilege for free speech, though much narrower in every aspect.[54] Unlike the Sullivan–Gertz doctrine, the scope of this newly created privilege did not exceed 'political speech'. The Court rejected the import of Sullivan's actual malice rule and formulated a new constitutional rule, under which the privilege only applied if the defendant could show his 'reasonableness': that he was not reckless, was not aware of the falsity of the allegations, the publication was reasonable and some steps were taken to verify its accuracy.[55]

These rulings were restated in Stephens v. West Australian Newspapers Ltd.[56] It seemed that a new constitutional doctrine was established.[57]

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[49] Andrew T. Kenyon: Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice. (2004) 28 *Melbourne University Law Review* 406., at 414.

[50] For a comparative treatise of Australian defamation law, see Michael Chesterman: *Freedom of Speech in Australian Law*. Aldershot: Ashgate, Dartmouth, 2000. ch. 2–4.

[51] (1992–93) 177. CLR 106.

[52] (1994–95) 182. CLR 104.

[53] *Ibid*., at 124., citing Eric Barendt: *Freedom of Speech.* Oxford: Clarendon Press, 1985. 152.

[54] Adrienne Stone: Case Note: Lange, Levy and the Direction of the Freedom of Political Communication Under the Australian Constitution. (1998) 21 *University of New South Wales Law Journal* 117., at 118.

[55] (1994–95) 182. CLR 104., at 137.

[56] (1994) 68. ALJR 765.

[57] Leonard Leigh: Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia. In Ian Loveland (ed.): *Importing the First Amendment. Freedom of Expression in American, English and European Law*. Oxford: Hart Publishing, 1998. 51., at 65.

The subsequent case, Lange v. Australian Broadcasting Corporation[58] has brought about major modifications. In that case, the action was brought by David Lange, the former Prime Minister of New Zealand, in respect of an allegedly libellous documentary broadcast by ABC. At the time of the broadcast he was still the Prime Minister; the documentary claimed that he was unfit to hold public office and that he had abused his office.

The High Court – though formally did not reverse Theophanous and Stephens – de facto overturned its previous decisions.[59] It accepted that the common law of defamation must conform to the implied freedom of political expression in the Constitution, but that did not create a positive right – it only served to invalidate conflicting laws and did not confer rights on individuals.[60] The conformity should have been reached by the expansion and the restatement of common law's qualified privilege defense and not by the fashioning of a new, constitutional privilege.

The Court remodelled the common law of defamation by developing the qualified privilege defense, to make it consistent with the freedom of political expression.[61] The scope of the defense was restricted to cover only speech concerning "what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution"[62] – as opposed to Theophanous, which covered all matters of social importance. Balancing between society's interest in free political discussion and the individuals' interests in protecting their reputation, the Court held that the publication only fell under the privilege, if it was reasonable. This 'reasonableness' requirement, similarly to the one in Theophanous, included that the defendant had reasonable grounds for believing that the published allegations were true, had taken proper steps to verify the accuracy of the material, and sought a response from the defamed person.[63] On the other hand, the Court rejected the 'recklessness' requirement of Theophanous (this was largely subsumed by the 'reasonableness' test[64]), but malice ("spite or ill-will"[65]) would obviously defeat the privilege.

The Court ruled that the allegations of ABC could not be brought under the qualified privilege defense. Lange and later cases appear to have narrowed the scope of the protected political speech, at least compared to Theophanous.[66]

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[58] (1997) 189. CLR 520.

[59] LOVELAND (n. 40. above), 147.

[60] (1997) 189. CLR 520., at 560.

[61] LESLIE ZINES: Freedom of Speech and Representative Government. In JACK BEATSON – YVONNE CRIPPS (eds.): *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams*. Oxford: Oxford University Press, 2000. 35., at 44.

[62] (1997) 189. CLR 520., at 561.

[63] The Court generally accepted the reasonableness test of New South Wales' *Defamation Act* 1974. s. 22., see (1997) 189. CLR 520., at 572-3.

[64] STONE (n. 54. above), 125.

[65] (1997) 189. CLR 520., at 574.

[66] RUSSELL L. WEAVER – DAVID F. PARTLETT: Defamation, the Media and Free Speech: Australia's Experiment with Expanded Qualified Privilege. (2004) 36 *George Washington International Law Review* 377., at 387.

3. New Zealand

The leading defamation case in New Zealand is Lange v. Atkinson.[67] The action was brought by the same plaintiff as in the Lange v. ABC case, namely David Lange, the former Prime Minister of the country. He claimed that a newspaper article and an accompanying cartoon were defamatory of him, suggesting that he was irresponsible, dishonest, insincere, manipulative, and lazy.

The Court of Appeal, endorsing the methodology of the previous High Court decision, altered and expanded the common law of political defamation.[68] In its judgment it emphasized the recent changes in the statutory framework concerning the protection of human rights[69] and conducted a wide survey among the leading authorities in different jurisdictions, including the Sullivan rule. It held that the qualified privilege should apply to "generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities".[70] The publication should be in the public interest.[71] As we have seen, the scope of this defense is narrower than Reynolds or the Australian rule.

The publisher does not have to prove reasonableness or any other appropriate conduct, though malice would destroy the defense. This ruling seemed to have created a 'generic' privilege, similar to Sullivan, only restricted by malice, though much narrower in range.

On appeal, the Privy Council considered the case in the light of the recently decided Reynolds case. Though it refrained from any intervention and referred the case back to the New Zealand Court of Appeal, it suggested that Reynolds should be taken into account.

The Court of Appeal mainly reaffirmed its earlier decision,[72] rejecting this suggestion and the introduction of the responsible journalism standard, but in some points it qualified the 1998 decision. The Court claimed that in the previous judgment, it had not meant to point out that the circumstances of the publication should be disregarded in determining whether qualified privilege could be applicable or not.[73] The public interest in the publication did not exist on all occasions,[74] some circumstances should be taken into account, and "those circumstances will include such matters as the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information."[75] Some

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[67] [1998] 3 NZLR 424.

[68] Loveland (n. 40 above), 162.

[69] Bill of Rights Act 1990, Electoral Act 1993, Official Information Act 1982.

[70] [1998] 3 NZLR 424., at 468.

[71] *Ibid*., 442.

[72] Lange v. Atkinson (No. 2.) [2000] 3 NZLR 385.

[73] *Ibid*., at 391.

[74] *Ibid*., at 394.

[75] *Ibid*., at 391.

commentators still insist that these changes did not remove the 'generic' characteristic of the New Zealand doctrine, as it still balances between free speech and reputation rights on the basis of rules to be applied in a mechanistic way,[76] others say that in its redefined version, the New Zealand solution – in this aspect – does not really differ from Reynolds.[77]

The Court defined the meaning of malice as well.[78] The defendant cannot rely on the qualified privilege, if he was predominantly motivated by ill-will against the plaintiff or otherwise takes improper advantage of the occasion of publication. The common law test for malice still applied. Genuine belief in the truth of the statement and the lack of recklessness was needed. Though the Court still refused to introduce any reasonableness requirement, "the privilege may well be lost if the defendant takes what in all the circumstances can fairly be described as a cavalier approach to the truth of the statement."[79]

IV. Comparing the Different Systems

The universal importance of New York Times v. Sullivan is doubtless, though its underlying rationale is not as widely shared as its practical consequences. Though – as I mentioned briefly – the Sullivan rule itself had seemed to place the democratic theory ("robust public debate") of speech into the centre of the constitutional right to free speech, its extensions put all major justifications under the same roof. The Sullivan–Gertz doctrine incorporates not only the democratic, but also the marketplace, autonomy, and 'distrust of government' theories, thus creates a strong basis for the First Amendment. It means that freedom of speech is not only seen as the proper way to decide the difficult problems and resolve the complex questions in a democracy, but it is also an effective tool for 'truth' to emerge in the open public discussion, as well as an opportunity for individual self-fulfilment, and an effective check on government's possibly 'suspicious' conduct.

Other jurisdictions, though influenced by Sullivan–Gertz, have not embraced its complex justification. 'Individualism' has different emphasis in the US, and elsewhere.[80] The main idea behind the reforms of the different libel laws was the recognized need for protecting the free discussion about political or other public matters.

The approaches taken to reform the laws were different. The US Supreme Court in Sullivan (and in its further rulings) introduced a new, generic, constitutional privilege. It gave up the traditional common law approach of case-by-case balancing between the interest of free speech and reputational interests. According to that

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[76] BARENDT (n. 31. above), 225–226.

[77] W. R. ATKIN: Defamation Law in New Zealand 'Refined' and 'Amplified'. (2001) 30 *Common Law World Review* 237., at 246–247.

[78] Lange v. Atkinson (No. 2.) [2000] 3 NZLR 385., at 399–401.

[79] *Ibid*., at 401.

[80] CHESTERMAN (n. 50. above), 174–175.

approach, the value and importance of the publication should be balanced in every case against the damage it made to the plaintiff's reputation.[81] Instead, the Court laid down some rules, under which libel cases should be resolved. These rules created different categories (public/private figures, public/private matters); the speech should be weighed according to which category it belongs to.[82] If the speech concerns a public figure or a public matter, it is strongly protected, the privilege applies to all communications except those made with 'actual malice'. Obviously, inside the different categories there is still a need for balancing, the facts and the circumstances of the case should be assessed – the application of the law cannot be only mechanical. One commentator called this approach "definitional balancing".[83] Though this solution protects free speech very strongly, and the judicial decisions are more predictable, it does not place due emphasis on the harmed reputation of the plaintiff. To put it differently: the American individualism, present in the doctrine, is only recognized from the aspect of free speech, and not from the plaintiff.

The Australian and the New Zealander system can be regarded as mixed solutions, as both extend the qualified privilege to cover political discussion, thus formulating a fairly new privilege, but both require the examination of the particular facts of the case (in Australia the requirement is 'reasonableness', in New Zealand it is only an option for the Court to assess the circumstances of the publication). The English rule – though it gives considerably more weight to free speech interests than it did before – has not modified the common law case-by-case balancing requirement. This approach is preferable, if we do not consider free speech as being superior in every case to the right to reputation. "[…] creating rigid constitutional categories that did not permit the court to fully analyze the circumstances of the publication plainly seems contrary to the established rationale for granting privilege to certain defamatory facts: the common convenience and welfare of society. Although some may criticize [the balancing] approach for introducing uncertainty into the law and for giving judges too much power, the gain in flexibility seems to offset that price. Ultimately, the question of what defamatory publications should be permitted despite their harm to reputation is a delicate balancing test, based on the public interest of a society."[84]

The scope of the protected speech is different in the various jurisdictions. Originally, the Sullivan rule only covered speech concerning elected public officials. This was extended to all public officials, to political and public figures, and to all matters of public interest. Now all communications about any public figure or public matter are protected under the doctrine. There is some criticism of this extension. No one can deny that it is justified to extend the principle to all public officials. It would

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[81] Barendt (n. 31. above), 205.

[82] See Frederick Schauer: Categories and the First Amendment: A Play in Three Acts. (1981) 34 *Vanderbilt Law Review* 265.

[83] Melville B. Nimmer: The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy. (1968) 56 *California Law Review* 935.

[84] Susanna F. Fischer: Rethinking Sullivan: New Approaches in Australia, New Zealand and England. (2002) *George Washington International Law Review* 101., at 189.

also be desirable to extend it to all, who have any 'power' to seriously influence public matters. But, under the doctrine, those, who are not present at the public sphere, but still have significant power, fall outside of it, as they are not public figures (wealthy businessmen, for example). The other weakness of the 'public figure' category is that it covers every person with considerable fame, like celebrities. The original justification of Sullivan, namely the robust public debate, which let democracy flourish, is hardly recognizable in this extension.[85]

Only government and political matters are within the scope of protected speech in Australia, under Lange. The protection is even more limited in New Zealand, as it covers only communication about present, former or potentially future members of Parliament. It seems hard to justify these limitations, as they do not recognize the importance of the open discussion about all public matters, besides narrowly defined politics. Nevertheless, the possibility to extend the principle is open in both systems.

Under Reynolds, though there is no generic principle, any discussion about any matters of public interest can claim protection, provided it meets the required standards. This solution is much broader and more flexible than those adapted in Australia and New Zealand, and is able to avoid the weaknesses of Sullivan.

The levels of protection are also different. Though the three concurring judges in Sullivan and one in Theophanous argued for abolishing any limits on potentially defamatory speech, this was not adopted in either jurisdiction. Nevertheless, the level of protection under the Sullivan rule is very high; the speech does not enjoy protection, only if the defendant knew that the publication was false or behaved with reckless disregard. Proving actual malice is extremely difficult – not many libel plaintiffs succeed in the US. The New Zealander rule is similar to this, as it does not require any reasonableness, but it leaves the possibility open for the court to examine the particular circumstances of the publication; malice is definitely not protected. There are some other problematic practical issues in these tests. Although the idea of robust public debate is heavily emphasized in the relevant decisions, truth itself is considered as having only secondary importance. Though, since Hepps, plaintiff should prove that the published allegations were untrue, it is more important for them to prove the defendant's malicious or reckless conduct. "[…] truth and falsity have very little to do with libel litigation […] It is now the defendant's conduct, rather than the plaintiff's reputation, that is on trial".[86]

The Australian rule calls for reasonableness, Reynolds in England requires courts to scrutinize all relevant circumstances under the duty-interest test. These standards both advance the idea of 'responsible journalism', and – though not expressly – leave potentially little room for malice to be considered.[87] It is very difficult to imagine that someone can prove reasonableness or responsible behaviour if behaved maliciously.

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[85] FREDERICK SCHAUER: Public Figures. (1984) 25 *William and Mary Law Review* 905.

[86] L. A. POWE: *The Fourth Estate and the Constitution: Freedom of the Press in America*. Berkeley: University of California Press, 1991. 121–125.

[87] See Loutchansky, [2002] 1 All ER 652., paras. 33–34., and GKR Karate (UK) Ltd. v. Yorkshire Post Ltd. [2001] 1 WLR 2571., at 2580.

The formerly used malice test is likely to be subsumed under the new test. The flexibility of these tests is more helpful in the balancing process – which leads greater uncertainty in the decisions, one can say. They may chill the freedom of speech, "but that might be a desirable chill".[88]

It is difficult to assess, how influential the Sullivan and its progeny were on other legal systems. The mere fact that all major cases mention Sullivan several times does not mean that the judges relied heavily on its particular solutions. Though the later de facto overruled Theophanous decision created a new, Sullivan-like, though narrower constitutional defense, none of the three Commonwealth jurisdictions accepted Sullivan in its entirety. Its influence is possibly stronger on the theoretical level; although a greater part of the underlying theory of the US doctrine was also implicitly rejected in the decisions, the idea of free political discussion became a paramount consideration in all systems.

We need to take a closer look at other influences as well: the Human Rights Act 1998 in the United Kingdom, the case law of the European Court of Human Rights,[89] and New Zealand's Bill of Rights Act 1990 all shaped the emerging new form of qualified privilege in the various countries. We need to consider the natural development of common law, possibly also an important factor in the decisions. As a conclusion we may say that Sullivan was, still is, and will be an important and influential decision, both on theoretical and practical level.

[88] Barendt (n. 31. above), 213.

[89] The Strasbourg Court's case law also follows the balancing approach, and it gives greater consideration to the matter of the publication, than the status of the plaintiff. Any matter of public concern can be protected. The key cases are: Lingens v. Austria (1986) 8 EHRR 407., Thorgeirson c. Iceland (1992) 14 EHRR 843., Bladet Tromsö v. Norway (2000) 29 EHRR 125., Bergens Tidende v. Norway (2001) 31 EHRR 16. See: Barendt (n. 31. above), 222-24.