Loyola of Los Angeles International and Comparative Law Review

Volume 26 | Number 3 Article 7

3-1-2004

Bite Your Tongue in Europe: The European Court of Human Rights Strikes a Blow to the Freedom of Expression

Jessica Alexandra Van Der Kar Levinson

Bite Your Tongue in Europe: The European Court of Human Rights Strikes a Blow to the Freedom of Expression

I. INTRODUCTION

"[D]ebate on public issues should be uninhibited, robust, and wide-open . . .[it] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[1] With this proclamation in *New York Times v. Sullivan*, the U.S. Supreme Court committed itself to shaping a legal framework that placed individual freedom of expression and freedom of expression of the press at the forefront of democratic society. Despite this sweeping decree, the U.S. Supreme Court has manipulated the free speech doctrine in order to achieve desired legal outcomes.[2] While the United States's commitment to freedom of expression is broader than any other country's jurisprudence,[3] the European Court of Human Rights ("Court") similarly manipulates the freedom of expression doctrine in order to obtain desired legal outcomes.

In 1959, the Court was created to implement the European Convention for the Protection of Human Rights ("Convention").[4] The Council of Europe, formed as a reaction to the war crimes and human rights atrocities of World War II, established the Convention in 1950 to give effect to the United Nation's Universal Declaration of Human Rights.[5] The purpose of the Court is to

---

1. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

2. *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1530 (2003).

3. Elissa A. Okoneiwski, Yahoo!, Inc. v. LICRA: *The French Challenge to Freedom of expression on the Internet*, 18 AM. U. INT'L L. REV. 295, 302 (2002).

4. Willi Fuhrmann, *International Law and Religion Symposium Article: Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights*, 2000 BYU L. REV. 829, 829 (2000) (describing the history and purpose of the ECHR).

5. *Id;* Keturah A. Dunne, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental*

review the decisions of the Contracting States. In this way, the Court ensures that each Contracting State upholds the "democratic belief that certain fundamental rights and freedoms of the individual should not be subordinated to the power or narrow political convenience of the State."[6]

Article 10 of the Convention sets forth the parameters of the freedom of expression rights.[7] Article 10(1) enumerates those fundamental freedom of expression rights protected under the Convention.[8] Article 10(2) lists the limits that may be placed on those fundamental rights.[9] The article states:

> (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.[10]

To determine whether there has been a violation of an applicant's Article 10 rights, the Court must first establish whether there has been an interference with the applicant's Article 10(1) rights. If the Court finds interference, then pursuant to Article 10(2) it must determine whether the interference is prescribed by

---

Freedoms, 30 CAL. W. INT'L L.J. 117, 128 (1999). *See generally* Helen Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 N.Y.U. ENVTL. L.J. 136, 138 (2002).

6. Dunne, *supra* note 5, at 129 (quoting the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222, 230).

7. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222, 230.

8. *Id.*

9. *Id.*

10. *Id.*

law, has a legitimate aim, and is necessary in a democratic society.[11] With respect to the latitude given to judges under Article 10(2), the Court held that the restrictions contained in Article 10(2) "must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[12]

Despite this declaration of judicial restraint, the Court created an inconsistent analytic framework for its freedom of expression jurisprudence. Specifically, the Court's standards of review for freedom of expression cases vary based on who is speaking and who is listening.[13] The defining factor in the Court's decision to apply either a loose or strict level of scrutiny to freedom of expression cases is the decision of the person against whom the speech is aimed to purposefully avail herself or himself of the public arena by running for election. An examination of case precedent reveals that the Court applied a low level of scrutiny in cases involving speech by private individuals against unelected law enforcement officials.[14] In these cases, the Court ruled that while there was interference with an applicant's freedom of expression under Article 10(1), that interference fell within the list of valid restrictions set forth in Article 10(2) such that there was no Article 10 violation. In contrast, the Court generally employed a high level of scrutiny in cases involving speech by the press against elected politicians or legislators.[15] In these cases, the Court ruled that there was infringement of the applicant's Article 10(1) rights, but found that the interference did not come within the list of valid restrictions contained in Article 10(2) such that there was a violation of an applicant's Article 10 rights. The

---

11. Amit Mukherjee, *International Protection of Journalists, Problem, Practice, and Prospects*, 11 ARIZ. J. INT'L & COMP. LAW 339, 374 (1994).

12. Elena Yanchukova, *Criminal Defamation and Insult Laws*, 41 COLUM. J. TRANSNAT'L L. 861, 876 (2003) (quoting The Observer and Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 30 (1992)).

13. *E.g.*, Pedersen v. Denmark, ¶ 81 (Eur. Ct. Hum. Rts., June 19, 2003), *at* http://www.echr.coe.int; Skalka v. Poland, 38 Eur. H.R. Rep. 1, 10 (2004); Lesnik v. Slovakia, ¶ 52 (Eur. Ct. Hum. Rts., Mar. 11, 2003), *at* http://www.echr.coe.int; Ninkula v. Finland, 2002-II Eur. Ct. H.R. 291, 312 (2002); Krone Verlag GMBH & Co. KG v. Austria, ¶ 37 (Eur. Ct. Hum. Rts., Feb. 26, 2002), *at* http://www.echr.coe.int; Unabhangige Initiative Informationsielt v. Austria, 2002-I Eur. Ct. H.R. 271, 284 (2002); Dichand v. Austria, ¶ 51 (Eur. Ct. Hum. Rts., Feb. 26, 2002), *at* http://www.echr.coe.int.

14. *Pedersen*, ¶ 83, *at* http://www.echr.coe.int; *Skalka*, 38 Eur. H.R. Rep. at 10; *Lesnik*, ¶ 53, *at* http://www.echr.coe.int; *Nikula*, 2002-II Eur. Ct. H.R. at 310.

15. *Krone*, ¶ 37, *at* http://www.echr.coe.int; *Unabhangige*, 2002-I Eur. Ct. H.R. at 284; *Dichand*, ¶ 51, *at* http://www.echr.coe.int.

divergence of the Court's standards of review rests on its treatment of the "necessary in a democratic society" requirement found in Article 10(2). Under both classes of cases, the category of the speaker is of secondary importance to the category of the affected listener, or person against whom the speech is directed.

This Note will argue that the Court should apply a uniform standard of review in freedom of expression cases, rather than the bifurcated standard of review that the Court currently employs. Specifically, the Court should consistently apply the stricter standard of review that it uses in cases of speech aimed at elected legislatures. By using different standards of review in freedom of expression cases, the Court makes a value judgment as to the worth of certain speech, and the importance of protecting certain classes of affected listeners. The Court holds that the unelected public officials' right to be protected from critical speech is more important than the elected legislators' rights to be protected from such speech. In addition, the Court's desire to protect unelected civil servants as members of the judiciary machine eclipses any importance it may give to the status of the speaker. The result of the Court's decision to apply a high level of scrutiny in cases where speech is directed at elected legislators is that the limits of acceptable criticism are wider in such cases. Conversely, with the Court's application of a lower standard of review in cases where speech is directed at unelected public officials, less can be said in such instances.[16] This bifurcated framework thus embodies the Court's personal preferences and opinions for protecting certain persons at the cost of chilling the speech of others and acts to erode the fundamental rights contained in Article 10.

II. *PEDERSEN'S* BACKDROP: PREVIOUS ARTICLE 10 CASES

In 2003, the Court rendered a decision in *Pedersen v. Denmark* that broke new ground as it represented the merger of the two classic classes of freedom of speech cases. Unlike the more common classes of cases in which the press directs its speech toward elected legislators, or an individual directs her or his speech toward unelected officials, in *Pedersen*, the press directed its speech toward unelected members of the judicial machine.[17]

16. Yanchukova, *supra* note 12, at 882–83.
17. *Pedersen*, ¶ 83, *at* http://www.echr.coe.int.

The Court's decision in *Pedersen* falls within its traditional analytical framework of treating the status of the affected listener, not the speaker, as the dispositive factor in determining which level of scrutiny to apply. The Court thus analyzed this case under the looser freedom of expression standard that it utilizes where the speech of private individuals is directed towards law enforcement officers.[18]

In *Pedersen* the Court erroneously held that the Danish court's conviction of two television producers for defamation of a police chief did not violate those individuals' rights to freedom of expression under Article 10 of the Convention.[19] Specifically, the Court ruled that the applicants' claim of a violation of their Article 10 rights satisfied Article 10(1) because there was interference with their freedom of expression.[20] However, the Court held that the applicants' case could not succeed because the applicants' did not disprove that the interference was "necessary in a democratic society" under Article 10(2).[21]

As stated, the difference between the two levels of scrutiny that the Court employs is rooted in its reading of Article 10(2), and specifically the requirement that interferences with expression are "necessary in a democratic society." Two recent cases, *Skalka v. Poland* and *Lesnik v. Slovakia*, demonstrate the mechanics of the lower freedom of expression standard of review. In *Skalka*, the Court found that there was a violation of the applicant's Article 10 rights because the applicant's conviction was not "necessary in a democratic society" under Article 10(2).[22] The Court's ruling, however, rested solely on the severe nature of the applicant's eight-month sentence, not on the fact that the applicant was convicted of a crime.[23] Indeed, the Court explicitly stated that a shorter sentence would satisfy the requirement of the restriction on expression being "necessary in a democratic society."[24] The Court's analysis in this case is therefore instructive in defining the parameters of its lower standard of review, which is fixed by its treatment of what is "necessary in a democratic society."

---

18. *Id.* ¶ 61.
19. *Id.* ¶ 62.
20. *Id.*
21. *Id.* ¶ 83.
22. *Skalka*, ¶ 38 Eur. H.R. Rep. at 10.
23. *Id.* ¶ 39.
24. *Id.* ¶ 42.

In *Skalka*, the applicant, a private individual, was convicted by the Sosnowiec District Court of proffering insults against a state authority at his or her headquarters or in public.[25] The applicant wrote a letter to the President of the Katowice Regional Court, a judge, complaining about another unidentified judge to whom he referred alternatively as a "cretin" or a "bully."[26] The applicant advised the President of the Katowice Regional court that the unidentified judge should release his aggressions on his dog or mistress, but not on the applicant.[27] The Austrian court found that the applicant, "had acted with the firm intention of insulting the Regional Court as a judicial authority" as opposed to insulting a judge in his private capacity.[28] Particularly, the Austrian court ruled that "the impugned letter had . . . exceeded the limits of acceptable criticism and was directly aimed at lowering the court in the public esteem."[29]

The Court held that the applicant's criminal conviction was an interference with his freedom of expression under Article 10(1).[30] Nevertheless, the Court found that the conviction was prescribed by law, pursued a legitimate aim by upholding the authority of the judiciary, and that the interference was not necessary in a democratic society merely because of the length of the sentence, not because the sentence was imposed.[31] The Court concluded that judges required the confidence of the public in order to fulfill their role as the guarantors of justice.[32]

In *Lesnik v. Slovakia*, the Court found that there was an infringement of the applicant's freedom of expression, but that the infringement was prescribed by law and necessary in a democratic society.[33] Hence, the Court held that there was not a violation of Article 10.[34] The Slovakian courts convicted the applicant for insulting an unelected public official.[35] The national authority found that the applicant wrote letters to the public prosecutor,

25. *Id.* ¶¶ 11-12.
26. *Id.* ¶ 10.
27. *Id.*
28. *Id.* ¶ 14.
29. *Id.*
30. *Id.* ¶ 33.
31. *Id.* ¶ 42.
32. *Id.* ¶ 34.
33. *Id.* ¶ 45, 48, 64.
34. *Id.* ¶ 65.
35. *Lesnik*, ¶ 25, 31, *at* http://www.echr.coe.int.

later published by a third party.[36] The national authority deemed the letters to be defamatory, grossly offensive, and unsubstantiated in their allegations that the prosecutor behaved abusively and unlawfully.[37]

By contrast, *Krone v. Austria* demonstrates the mechanics of the stricter freedom of expression standard of review, as applied to cases in which the press directs its speech against elected public officials. In *Krone*, the applicant appealed from a permanent injunction prohibiting the applicant, a newspaper publisher, from publishing a picture of the plaintiff, a member of the Austrian National Assembly and the European Parliament, with text alleging that the plaintiff received certain salaries unlawfully.[38] The Austrian court considered the injunction necessary because the plaintiff was not known to the public, and his picture had "no information[al] value [and] . . . was irrelevant to the question whether the content of the articles was true."[39]

The Court held that there was a violation of the applicant's Article 10 rights.[40] The Court found that there was an interference with the applicant's freedom of expression under Article 10(1).[41] Further, under Article 10(2) the Court ruled that the interference was prescribed by law, as it had a legal basis in Austrian law, and pursued the legitimate aim of the protection of the rights and reputation of others.[42] Consistent with its higher judicial standard in such cases, however, the Court found that the interference was *not* "necessary in a democratic society."[43]

In its conclusion that the interference was not "necessary in a democratic society," the *Krone* Court began by stating that while Contracting States should be given a sizable margin of appreciation, the Court ultimately has the power to make the final decision in such determinations.[44] The Court next repeated the bifurcated standard within which it decides Article 10 cases, and stated that "there is little scope for restrictions on political speech

36. *Id.* ¶ 31.
37. *Id.* ¶¶ 32–33.
38. *Krone*, at ¶¶ 3, 10, 14, *at* http://www.echr.coe.int.
39. *Id.* ¶ 14.
40. *Id.* ¶ 39.
41. *Id.* ¶ 21.
42. *Id.* ¶¶ 25, 28.
43. *Id.* ¶ 39..
44. *Id.* ¶ 33.

or questions of public interest."[45] *Krone* involved the criticism of a politician on a matter of public concern.[46] Hence, the Court found that the plaintiff had willingly entered the public arena, and an injunction against printing a photograph of him with text alleging that he had unlawfully received his salary was *not* necessary in a democratic society.[47] Having examined the Court's bifurcated freedom of expression standard, one is equipped to analyze the *Pedersen* decision.

III. THE *PEDERSEN* CASE

A. The Facts

As stated, *Pedersen* represents the convergence of the two standards that the Court employs in its freedom of expression jurisprudence. In this case, two Danish nationals, Mr. Jorgen Pedersen and Mr. Sten Kristian Baadsgaard, ("applicants") claimed that the Supreme Court of Denmark violated their freedom of expression rights under Article 10 of the Convention by convicting them of defaming the personal honor of the Chief Superintendent.[48] Specifically, the Supreme Court of Denmark convicted the applicants of making allegations which would belittle the Chief Superintendent in the eyes of his fellow citizens.[49]

The applicants were employed as producers at Danmarks Radio, one of the two national television stations in Denmark.[50] In 1990, the applicants produced two television programs, entitled "Convicted of Murder" and "The Blind Eye of the Police," in which they claimed that in a murder trial an individual was wrongly convicted of killing his wife by the High Court of Western Denmark, and that the police undertook a "scandalously bad" investigation of the allegedly guilty individual.[51] The applicants' television programs claimed that the police suppressed evidence, including witness statements, which tended to prove the individual's innocence.[52] In the latter program, the applicants

45. *Id.* ¶ 35.
46. *Id.* ¶ 10.
47. *Id.* ¶¶ 36–39.
48. *Pedersen*, ¶ 2, *at* http://www.echr.coe.int.
49. *Id.* ¶ 30.
50. *Id.* ¶ 9.
51. *Id.* ¶¶ 9–10.
52. *Id.* ¶¶ 10, 14, 15, 18.

posed the questions: "Was it [the named Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defense, the judges and the jury?"[53] The applicants posed these questions while posting a picture of the Chief Superintendent across the television screen.[54] In the wake of these television programs, the Special Court of Revision granted the individual a retrial, which led to the individual's acquittal.[55] The Prosecutor General also began an inquiry into the police investigation of the individual's case.[56]

In 1991, the Chief Superintendent reported the television station and the applicants for defamation.[57] In 1993, the Chief Constable in Gladsaxe decided to charge the applicants with defamation against the Chief Superintendent.[58] In 1995, the City Court of Gladsaxe held that the questions that the applicants posed about the named Chief Superintendent in their two television programs were equivalent to defamatory allegations.[59] The City Court of Gladsaxe, however, also found that the applicants had reason to believe that their allegations against the Chief Superintendent were true.[60] Accordingly, it did not sentence the applicants to jail time.[61] The applicants appealed this judgment.[62] In 1997, deciding the matter on appeal, the High Court convicted the applicants of "violating the personal honour of the Chief Superintendent by making and spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, under art 267, sub-s 1 of the Penal Code."[63] The applicants were ordered to pay the Chief Superintendent compensation.[64]

In 1997, the applicants sought and were granted leave from the Appeal Board to appeal to the Supreme Court.[65] The next

---

53. *Id.* ¶ 18.
54. *Id.*
55. *Id.* ¶¶ 22, 23.
56. *Id.* ¶ 22.
57. *Id.* ¶ 20.
58. *Id.* ¶ 25.
59. *Id.* ¶ 28.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* ¶ 30.
64. *Id.*
65. *Id.* ¶ 31.

year, in 1998, the Supreme Court upheld the High Court's judgment that the applicants were guilty of defamation, and increased the amount of compensation to be paid to the Chief Superintendent.[66] The Supreme Court held that the applicants "made allegations against the named Superintendent which were intended to discredit him in the eyes of his peers, as described under Article 267, subsection 1 of the Penal Code."[67] With respect to the identity of the affected listener, the Supreme Court further stated, "[e]ven though being in the public eye is a natural part of a police officer's duties, consideration should also be given to his good name and reputation."[68] With reference to the other factor, the identity of the affected listener, the Supreme Court stated that "[t]he applicant's intentions, in the programme, of undertaking a critical assessment of the police's investigation were proper as part of the role of the media in acting as a public watchdog, but this does not apply to every charge."[69] The applicants subsequently filed a complaint with the Court, asserting that their convictions constituted a violation of their freedom of expression rights under Article 10 of the convention.[70]

B. The Parties' Contentions

In *Pedersen*, the Court began its discussion by stating that both parties conceded that the conviction by the Danish Supreme Court constituted an interference with the applicants' rights to freedom of expression under Article 10(1).[71] The Court also stated that both parties agreed that per Article 10(2), the interference was prescribed by law and pursued the legitimate aim of the protection of the reputation or rights of the Chief Superintendent.[72] Thus, the only issue for the Court to decide was whether the Danish Supreme Court's conviction of the applicants was "necessary in a democratic society."[73]

---

66. *Id.* ¶ 34.
67. *Id.*
68. *Id.* ¶ 34..
69. *Id. See also* Stephanie Farriro, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech,* 14 BERKELEY J. INT'L L. 3, 70 (1996).
70. *Pedersen,* ¶ 47, *at* http://www.echr.coe.int.
71. *Id.* ¶ 48.
72. *Id.*
73. *Id.* ¶ 49.

The applicants made a number of assertions in support of their position that their convictions were *not* "necessary in a democratic society." The applicants first contended that the questions that they posed in their programs concerning the Chief Superintendent were not factual statements that required proof of their truthfulness, but "merely implied a range of possibilities."[74]

The government countered the applicants' assertions by stressing three main points surrounding the circumstances of the case.[75] First, the government demonstrated that the applicants were convicted of making unsubstantiated allegations of fact against a named individual, not of expressing strong criticism against the police.[76] The government further claimed that the Danish Supreme Court appropriately balanced the competing interests defined in prongs one and two of Article 10.[77] Second, the government pointed out that the applicants were not convicted for publicizing a witness's statements, but for alleging that the Chief Superintendent committed a criminal offense by suppressing evidence.[78] Third, the government argued that despite applicants' claims, the questions posed by the applicants' programs were not mere value judgments, but were statements of fact.[79] Being factual in nature, such statements required justification which the applicant did not offer.[80]

The Danish Union of Journalists also interceded on behalf of the applicants.[81] It submitted comments stressing the idea that self-censorship is the most fitting limitation on the press's right to freedom of expression.[82] Furthermore, the Danish Union of Journalists contended that limitations on their right to freedom of expression should be interpreted as narrowly as possible so as to uphold the critical functioning of the press.[83] The Danish Union of Journalists additionally asserted that there should be no limits of the press's freedom of expression when the press disseminates information about the police and the judiciary who may have

74. *Id.* ¶ 50.
75. *Id.* ¶¶ 53–58.
76. *Id.* ¶ 53.
77. *Id.*
78. *Id.* ¶ 54.
79. *Id.* ¶ 56.
80. *Id.*
81. *Id.* ¶ 59.
82. *Id.*
83. *Id.* ¶ 59.

performed a miscarriage of justice.[84] This view supports the idea that the Court should consistently employ its heightened standard of review. This stance, however, is antithetical to the Court's use of a lower level of scrutiny in cases where speech is directed against unelected public officials such as the police and judiciary, opposed to the higher level of scrutiny it utilizes in cases where speech is directed against elected legislatures.

C. The Court's Analysis: Application of the Looser Standard

The Court began its assessment by defining the test employed to determine whether an interference with an applicant's freedom of expression under Article 10(1) is outweighed by a necessity in a democratic society under Article 10(2).[85] Under the test laid out in *Sunday Times*[86] the Court assessed whether, "the interference complained of corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient."[87] Under this test the Court serves its supervisory function by reviewing the findings of the national court in question, while giving an appropriate level of discretion to the national authority.[88]

The Court went on to discuss the importance that it gives to the status of the affected listener in determining which standard of review to employ. The Court analyzed the varying standards of permissible criticism with respect to individuals, civil servants, and politicians.[89] The Court found 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 . . . ."[90] Hence, as stated above, the Court held that the defining distinction between the status of various classes of affected listeners is a decision to purposefully avail oneself to the public arena.[91] The Court went on to stress the importance of protecting civil servants from criticism:

---

84. *Id.* ¶ 60.
85. *Id.* ¶ 63.
86. Sunday Times (no. 1) v. UK, 38 Eur. Ct. H.R. 4 (1980).
87. *Pedersen*, ¶ 63, *at* http://www.echr.coe.int (internal quotations omitted).
88. *Id.* ¶ 63 (citing Fressoz and Roire v. France, 1999-I Eur. Ct. H.R. 1, 19 (1999)).
89. *Id.* ¶ 66.
90. *Id.*
91. *Id.*

> [C]ivil servants 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. Public prosecutors and superior police officers are civil servants whose task is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term. It is in the general interest that they, like judicial officers, should enjoy public confidence. It may therefore be necessary for the State to protect them from accusations that are unfounded.[92]

In its application of the above stated principles, the Court agreed with the Danish Supreme Court's finding that the applicants' introduction of a sequence of questions concerning the Chief Superintendent amounted to an allegation that he committed a criminal offense, the suppression of evidence.[93] Additionally, the Court agreed that the allegation was a factual statement asserted by the applicants themselves.[94]

The Court next embarked on an inquiry as to whether the applicants complied with the obligations that flow from making a factual statement. To this end, in setting the standard of review, the Court laid out the balancing act inherent in the two prongs of Article 10: "[A]rt 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern."[95] Instead, the press is limited by "'duties and responsibilities' which come into play when. . .there is a question of attacking the reputation of a named individual and infringing the 'rights of others.'"[96] With these considerations in mind, the Court found that the applicants' research could not adequately support their allegations against the Chief Superintendent.[97] The Court based this finding on the fact that the statements by a witness featured prevalently in the applicants' programs might not have been trustworthy.[98] Moreover, the Court noted that the Chief Superintendent was in

92. *Id.*
93. *Id.* ¶¶ 69–70.
94. *Id.* ¶¶ 71–72.
95. *Id.* ¶ 72.
96. *Id.*
97. *Id.* ¶ 82.
98. *Id.* ¶ 78.

actuality prevented from commenting on the programs, and that the program aired at a high viewing hour on a national television station dedicated to impartiality.[99]

Finally, the Court examined the way in which the national authority determined whether the interference with the applicants' freedom of expression was "necessary in a democratic society."[100] The Convention grants national authorities a great deal of discretion in their final determination as to what is "necessary in a democratic society."[101] With this margin of appreciation in mind, the Court concluded that the Danish Supreme Court had accurately identified the two sides of the interests at stake, the right of the press to disseminate information in its role as "public watchdog," and the need to protect the reputation and rights of others.[102] After balancing the competing claims, the Supreme Court had held that the applicants did not have a sufficient basis to launch their claims against the named Chief Superintendent.[103] The Court agreed and, in turn, found that while there was an interference with the applicants' freedom of expression rights, that interference was prescribed by law and "necessary in a democratic society." It thus concluded that there was no violation of applicants' Article 10 rights.[104]

IV. CRITICAL ANALYSIS OF *PEDERSEN* AND FUTURE ARTICLE 10 CASES

A. The Court Should Employ a Higher Level of Review

While intended to protect unelected officials from critical attacks, the loose judicial standard of review employed by the Court in *Pedersen*, and other cases where speech is directed at unelected public officials, has the perverse effect of failing to protect a speaker's fundamental right to freedom of expression. Practically speaking, under this low standard of scrutiny the Court is unlikely to ever find a violation of an applicant's Article 10 freedom of expression rights.

---

99. *Id.* ¶¶ 80–81.
100. *Id.* ¶ 84.
101. Mukherjee, *supra* note 11, at 374–75.
102. *Pedersen*, ¶ 83, *at* http://www.echr.coe.int.
103. *Id.* ¶¶ 83–84.
104. *Id.* ¶ 84.

Since the Court's application of its loose standard virtually makes it a forgone conclusion that the Court will not find a violation of an applicant's Article 10 rights, the Court simply rubber stamps the judgment of the Contracting States when it employs its lower standard of scrutiny. In this way the Court fails to perform its supervisory function over the national authorities and gives Contracting States carte blanche authority in their rulings on certain Article 10 cases. Contracting States can rest assured that the decisions of their highest courts will be upheld in such cases.

Additionally, the Court's use of the lower standard of review that it employed in *Pedersen* infringes on the fundamental importance of the ideals set forth in Article 10 of the convention. First, despite the Court's decision that the status of the speaker is less essential than the status of the affected listener, the rights of private individual speakers are no less important than the rights of the press. In a free and democratic society the two are inextricably linked. The press is merely a conglomeration of individuals with their own biases and agendas. With the advent of the Internet age, it is difficult to distinguish between individuals and the press. The line distinguishing the two may be permanently blurred.

Second, in making the status of the affected listener the dispositive factor in its analysis, the Court over protects unelected public officials from critical remarks. An unelected member of the government consciously decides to assume the responsibility of upholding the laws of the nation. While their employment activities are often more private than the well publicized conduct of elected members of the legislature, discussion of their activities should not be given a heightened level of protection. The very fact that the conduct of unelected public officials occurs in private dictates that there is an even greater need for publication and thus accountability for their activities.

In this way, the need to promote free and robust public discourse concerning matters of public concern can only be served if elected and unelected public officials are subject to the same level of criticism. Specifically, the risk of government overstepping its bounds and infringing on individuals' rights to freedom of expression is no less dangerous in the case of unelected officials. Yet the Court consistently argues that it is an elected official's decision to enter the public arena that is the dispositive factor in its bifurcated framework. The key factor should not be whether a

public official has willingly entered the public sphere, but rather the importance of free public discourse concerning the public official's activities.

B. Guideposts for Future Article 10 Decisions

This Note argues that the Court can and should uniformly employ a heightened standard of review in all Article 10 cases. In looking for guidance on this path, the U.S. Supreme Court's jurisprudence on freedom of speech challenges to convictions based on defamation law is instructive. It should be noted that the U.S. Supreme Court's jurisprudence on the topic of freedom of speech is far from consistent. Like the Court, the U.S. Supreme Court acknowledges a distinction between speech aimed at public officials and figures, versus private figures. In freedom of speech challenges to convictions based on defamation, however, the U.S. Supreme Court generally employs a strict level of review.[105] The standard the Supreme Court applies to cases concerning public officials and figures is akin to the one advocated in this Note and the one used by the Court in cases in which speech is directed towards elected public officials.

Per the U.S. Supreme Court's milestone decision in *New York Times v. Sullivan*, the U.S. Supreme Court stated that the common law tort of defamation is not outside the reach of the First Amendment, and that the two interests must at all times be balanced against each other.[106] In this case the U.S. Supreme Court enunciated the "actual malice standard."[107] Under this standard a public official can only recover for damages based on defamation concerning his official conduct if "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."[108] The Court should ennunciate a similar standard.

Although like the Court, the U.S. Supreme Court delineates between public and private persons, this Note advocates that the uniformity of application to public persons, and rationale behind the "actual malice" standard, make it an ideal guidepost from

---

105. *See* Victor C. Romero, *Restricting Hate Speech Against "Private Figures,"* 33 COLUM. HUMAN RIGHTS L. REV. 1, 20 (2001).

106. 376 U.S. at 254; *see also* Allan Ides & Christopher N. May, *Constitutional Law: Individual Rights* § 8.3.4, at 329-31 (2004).

107. *Sullivan*, 376 U.S. at 279.

108. *Id.* at 279–80.

which the Court may chart its new path of applying a consistently stricter standard to all of its Article 10 cases. The U.S. Supreme Court articulated the rationale behind the actual malice standard as recognizing the need for uninhibited, robust, and wide-open public debate in a democratic society.[109] A looser standard would impermissibly limit the fundamental right to freedom of expression and dangerously chill the public discourse.[110]

V. CONCLUSION

In the words of Justice Cardozo, freedom of expression is the "matrix, the indispensable condition, of nearly every other form of freedom."[111] In this way, "freedom of expression acts as a gatekeeper to the additional freedoms that benefit the citizen."[112] This freedom, however, must be balanced against the rights of individuals to protect themselves and their reputations against unwarranted attacks. The law of defamation seeks to serve that purpose. Defamation law and the freedom of expression thus pursue opposite aims; "Unlike defamation law, which seeks to limit harmful statements, freedom of expression encourages public discourse."[113] The *New York Times* actual malice standard serves as a compromise for these two valid interests by protecting against the ramifications of suppressing too much expression while protecting elected or unelected officials from unfair attack.

Speech against an unelected public official is no less important than speech against an elected legislator, and should not be granted a lower level of judicial review. Such differing standards of review erode the fundamental importance of freedom of expression in democratic societies. In future years, the Court must strike an effective balance between these two opposing rights. To this end, the Court should adopt the higher standard of review that it utilizes in cases concerning politicians, and use the U.S. jurisprudence as a guidepost in shaping its analytical framework.

---

109. *Id.* at 270.
110. *Id.*
111. Palko v. Connecticut, 302 U.S. 319, 327 (1937).
112. Yanchukova, *supra* note 12, at 875.
113. Bonnie Docherty, *Defamation Law: Positive Jurisprudence,* 13 HARV. HUM. RTS. J. 263, 266 (2000).

*By Jessica Alexandra Van Der Kar Levinson**

* J.D. Candidate May 2005. B.A. English, LMU, 2001. For their guidance, support, friendship, and always caustic remarks, I would like to thank; Professor Allan Ides, Professor Laurie Levenson, Professor Christopher May, Professor Florrie Roberts, Larry Payne, Eileen Poole, Liriel Higa, Stephen Lonseth, Casey Massman, Dana O'Connor, and Jordan Tabach-Bank, my wonderful parents, Fay and Mark Levinson, and my Oma, Dolly Van Der Kar.