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Freedom of Expression and Hate Speech on the Internet

Rules of responsibility in Norway in light of international human rights law

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1 Introduction

1.1 Topic and perspective of the thesis

The topic of this paper is freedom of expression and hate speech on the Internet, particularly the rules of responsibility in Norway in light of international human rights law. The paper will focus on the material rules and circumstances in Norway, and it will address the balancing of the rights of freedom of expression and the protection against hate speech. In addition, the paper will look at the rules of responsibility when hate speech is set forth on the Internet. In this regard, the possible responsibility for third-party content on the Internet is of particular interest.

Through this paper, I want to look at the state of law regarding the topic; which rules apply and how they are balanced against each other. Towards the end, I will present some critical reflections regarding the subject matter.

The Internet provides a space to divulge points of view to a large audience. It is fast and cheap to use, and state borders are usually not an obstacle. Moreover, practically everyone can join in the public debate, both in a positive manner enlightening the debate with different points of view, and in a negative manner spreading hate speech and damaging propaganda.

Regarding the question of responsibility, the responsibility for third-party content on the Internet is of interest in this paper. The responsibility due to technical facilitation in relation to the function of the Internet Service Providers (ISP) is to a large extent solved through the implementation of the European Union E-Commerce Directive, where one is exonerated from responsibility if neither having had knowledge nor control over the information transmitted or stored.[1] What remains, is a form of editor-responsibility where the problem is whether and to what extent an Internet intermediary could be held liable for third-party content on its portal. This is a novel problem, and the question will relate to whether the Internet intermediary may be regarded as a complicit or in any other way be held liable for this content.

1.2 Actuality

The international society is experiencing a globalization and an ever-augmenting interaction between people. This entails both positive and negative effects for our communities, where

[1] E-Commerce Directive, in paras. 42–43.

one effect is the emergence of a new platform to express hatred. As a starting point, one may consider that the evolvement of technology and the appearance of a platform like the Internet, constitute a great improvement. The extension of this medium of communication to become something «everyone» can make use of, is a big enhancement as for the conditions to secure the enjoyment of the right to freedom of expression. This is crucial in relation to several aspects of the organizing of our societies, and it is fundamental for democracy and the securing just implementation and enjoyment of other human rights. The fact that everyone can participate is an enrichment for society in the way that we get a more versatile and broad debate, where several different views may be taken into consideration and discussed.

Even so, this evolvement in technology also creates new possibilities to share information and views with a damaging content. It is easier to share information with an increasing number of persons, and one can do so while staying at home and even being anonymous. Hence, it is much easier to forward expressions that would be considered as hate speech or that in some other way would infringe a right of another person. Small groups of people with controversial and damaging views can easier find each other and encourage each other to harmful behaviour. A poor sense of criticism towards sources of information and a need to encounter some kind of community, can sometimes lead to conspiracy theories, spreading of false information, a distorted perception of reality, alienation and xenophobia.

A study analyzed by the Norwegian Police Academy, shows that hate speech is very much present on the Internet, and it provides empirical proof of that hate speech on the Internet contributes to radicalization of xenophobic extremists.[2] This is problematic for a functioning democracy and calls for regulation. The reasoning behind the provisions against hate speech addresses the danger that dissemination of such ways of thinking signifies for our societies. The characteristics of the Internet affects this purpose directly, as it implies a big potential of proliferation.

There are several recent expressions in the public debate that could serve as examples of speech that contributes to a more polarized debate climate, one being the Facebook-post published in March 2018 by the Norwegian Minister of Justice at the time. The post contained a photo of heavily armed and masked warriors and a text saying that the Norwegian Labor Party «believes that the rights of the terrorists are more important than national security». Even though the expression was not hate speech as such, it clearly contributed to a polarization of the political debate.[3] Furthermore, in November a prominent politician

[2] ECRI CRI(2015)2 p. 17.

[3] Equality and Anti-Discrimination Ombud, CERD 2018, p. 15 (my translation).

experienced harassment in different Internet-based media after having shared the news that she was expecting a child.[4]

The evolvement towards a more hostile debate climate have a deteriorating effect on the public sphere, as people choose to abstain from participating. This actualizes the question of whether it is necessary to restrict freedom of expression to secure a decent public debate, and how free speech and the prohibitions of hate speech are to be balanced, as these two important values seems to collide.

1.3 Scope

This paper will focus on the provisions regarding freedom of speech in national and international law relevant in the Norwegian context, as well as the provisions applicable in Norwegian law that provides protection against «hate speech». The understanding of the term «hate speech» could be applied in a broader term than what follows from the narrow legal definitions. This will be further explained in chapter 6. In relation to this, there are a lot of expressions that are forbidden by law, although not included under the protection of the «hate speech»-provisions. In this paper, the Norwegian Penal Code (straffeloven) §185 is of particular relevance. This provision is understood to implement obligations due to article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). A provision in the Penal Code that touches upon the content of § 185, is § 183 about incitement to a criminal offence. Furthermore, provisions such as §§ 265 and 266 could be applied in relation to § 185. Due to the limited scope of the paper, these provisions will not be addressed. Neither will § 13 of the Equality and Anti-Discrimination Act (likestillings- og diskrimineringsloven) that prohibits harassment be discussed, nor the accessory protection against discrimination in Article 14 of the European Convention on Human Right. Furthermore, offences of defamation, privacy violations and blasphemy will not be addressed to any significant degree.

Regarding the different kinds of responsibilities for being held criminally liable, complicity is relevant in relation to the topic and it will be addressed. Attempt to conduct a criminal offense will not be discussed in the paper. Furthermore, liability for damages and criminal liability of enterprises will not be addressed. Overall, the paper will focus on the conditions leading to responsibility, and not the possible sanctions emanating from the lack of compliance with this responsibility.

[4] NRK (2018).

Norway has ratified the additional Protocol to the Convention on Cybercrime of 2003, albeit made reservations to the articles that are of particular interest regarding the topic.[5] I understand these reservations as signifying that Norway's ratification of the protocol does not include any further obligations than what already follows from existing obligations in Norwegian law. Therefore, the protocol will not be further addressed in this paper.

1.4 Methodology and sources of law

1.4.1 Introduction

This section concerns the methodology and sources relevant for the topic of the paper. It is somewhat extensive, as the subject in this case requires further explanation to give a proper background for the rules and discussions that will be presented in the following chapters.

In Norwegian law, the Constitution (Grunnloven) § 100 about freedom of expression is central. Furthermore, the paper will address § 185 in the Penal Code that makes «hate speech» illegal. The Constitution is lex superior, meaning that if there is a conflict of law, the provisions in the Constitution will prevail over other law. Some international conventions are given priority in a «semi-constitutional» level. Relevant for this paper is the provision in § 3 of the Human Rights Act (menneskerettsloven), that states that the conventions incorporated in that law should prevail over other Norwegian law. Independently of this provision, there is a principle in Norwegian law that it is presumed to be in accordance with Norway's obligations due to international law. This means that national law should be interpreted in harmony with the international obligations.[6]

In international law, there are particularly three conventions that are of interest regarding the topic of this paper: The International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights (ECHR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The enforcement of international law is of another character than in national law, as there is no «Supra-state», or legitimate enforcement body on the top of a hierarchy. In contrast, the State is legitimized to use force in its territory to ensure the compliance with the rules implemented by the Parliament. State sovereignty is characteristic in international relations, and international law is merely the body of rules which the states considers to be binding in their intercourse with

[5] ETS No. 189. Details of Treaty No. 189.

[6] NOU 2002: 12 p. 108.

one another.[7] Except in the case of customary international law and jus cogens, the states choose whether they will be obliged by a convention.

1.4.2 The relation between Norwegian law and international law

The Human Rights Act § 2 makes certain international conventions applicable as Norwegian law. Due to § 3 of the Act, these conventions shall prevail over other Norwegian law if harmony cannot be obtained through interpretation. The incorporation applies not only for the wording as such, but for the entire legally binding content of the conventions. Thus, Committee practice regarding the conventions should play the same role in the interpretation of the convention provisions that are incorporated in Norwegian law, as it does in public international law. The Supreme Court has indicated the same understanding.[8] Hence, a convention incorporated in Norwegian law should be interpreted according to principles of interpretation of public international law.[9]

The ECHR is one of the conventions that are incorporated into Norwegian law through the Human Rights Act § 2. The decisions of the European Court of Human Rights (ECtHR) are binding on the states that are parties in the case. This follows from the European Convention on Human Rights Article 46. As the Court's case-law is highly relevant in the interpretation of the Convention, the case-law will have legal significance for non-parties to a case, although without any binding effect. The national courts should implement an independent interpretation of the Convention, but they should use the same methods as the ECtHR, as it is the Court that should develop the Convention. If they have doubt regarding how to balance the interests in a case, the national courts can look to priorities in national law.[10] The ECtHR fall under the scope of ICJ Statute Article 38 letter d «judicial decisions», hence its case-law is to be considered as a subsidiary means in the theory of legal sources in international law.

The ICCPR is another convention incorporated through the Human Rights Act § 2. In contrast to the binding effect of the ECtHR's decisions, the views of the UN Human Rights Committee, the surveillance body of the ICCPR, enjoy only a formal position. Even so, the treaty body often promote a certain interpretation of the treaty in their «General Comments» and «Views». The legal status of these documents is contested. The decisions of individual complaints of the UN Human Rights Committee are not legally binding on the contracting

[7] Craven and Parfitt (2018) p. 179.

[8] Bårdsen (2017) p. 18.

[9] Ot.prp. nr. 33 (2004–2005) p. 56.

[10] Rt. 2005 s. 833, in para. 45.

state, but can they cannot be ignored, and they are often described as authoritative.[11] The International Court of Justice (ICJ) has indicated about the Committee's practice of interpretation of the ICCPR that it should ascribe «great weight» to it.[12] The Court emphasize that the Committee is established to supervise the application of the treaty. Hence, even though the statements of the Human Rights Committee are not legally binding, they do have legal significance. The European Court of Human Rights have considered the practice of the UN Human Right Committee and its General Comments in many judgements.[13]

The practice of the Human Rights Committee was first commented in a Norwegian Supreme Court judgement in 2008. The Supreme Court stated that similar considerations as for practice from the ECtHR apply for the relation between the ICCPR and Norwegian law. Seemingly it did not make a sharp difference between the significance of the two. Furthermore, the Supreme Court stated that it is «clear» that an interpretation of the ICCPR by the Human Rights Committee has «significant weight» as a legal source.[14] The statement about the Human Right Committee practice is considered to be an established principle in the method of identifying applicable law. Even so, the wording «significant weight» contains a reservation, as this would mean that there is an option to consider another interpretation than what established by the Committee. This would have to be justified in accordance with principles of treaty interpretation in international public law.[15]

The ICERD is incorporated in Norwegian law through § 5 in the Equality and Anti-Discrimination Act.[16] It is stated in the preparatory work that incorporation would ensure a more loyal compliance with the provisions in the convention, as there is established an organ of surveillance that develops and clarifies the obligations. It could be concluded from this that the tribunals should attain great weight to the Committee on the Elimination of Racial Discrimination's (CERD) interpretation of the convention.[17] The Equality and Anti-Discrimination Act does not have a provision establishing superiority over Norwegian Law, in contrast to the conventions incorporated in the Human Rights Act. Therefore, the obligations due to the ICERD apply on the same level as ordinary Norwegian law.

Norway is considered to have a dualist system in implementation of international law. Still, as there is a system of sector-monism in Norwegian penal law due to § 2 of the Penal Code, the

[11] Roberts (2018) pp. 113–114.

[12] Republic of Guinea v. Democratic Republic of the Congo, in para. 66.

[13] Bårdsen (2017) pp. 3 and 15.

[14] Rt. 2008 s. 1764, in paras. 76–81 (my translation). Example inspired by Bårdsen.

[15] Bårdsen (2017) pp. 21 and 24.

[16] Prop.81 L (2016–2017) p. 311.

[17] Ot.prp. nr. 33 (2004–2005) p. 62 and Bårdsen (2017) p. 26.

point of departure is that ICERD will prevail if there is a conflict of law. Thus, the § 185 of the Penal Code should be interpreted in light of the ICERD. Nonetheless, the principle of legality set forth in § 96 paragraph 1 of the Constitution, constitutes a restriction regarding wider interpretations than what the wording in that provision covers, and this restriction will apply independently of whether the CERD has implemented a wider understanding of the convention.[18]

1.4.3 The relation between different sources of international law

Article 38 of the Statue of the International Court of Justice (ICJ) is considered to be an expression for the sources of law in international public law, although it does not provide an exhaustive list.[19] As for the interpretation of treaties, the point of departure is the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties that is considered to be international customary law.[20] Neither of these provisions does explicitly mention statements of UN Committees in cases of individual complaints.

According to Article 38 letter d of the ICJ Statue, judicial decisions are considered to be «subsidiary means for the determination of rules of law», meaning that it is suited to use in the interpretation of the sources which are international conventions, international custom and general principles of law (ICJ Statutes Article 38 letters a, b and c). It seems from literature of international public law, that Committee-views are included under a wide interpretation of letter d, but it is not obvious.[21] Even so, it seems like most states agree on that one should strive to comply with the Committees' interpretation of the conventions and the Committees themselves usually adhere to the interpretations in their practice.[22]

A difference between the Human Rights Committee and the ECtHR on one side and the CERD on the other, is the scope of the conventions that they are given the task to monitor. The first two are in charge of the surveillance of Conventions that include a broad range of central rights that must be balanced against each other, whereas the latter watches over a particular interest, namely the right to not be racially discriminated. The fragmentation within international human rights law could create conflicts of jurisprudence as general and specialized human rights institutions possibly interpret human rights guarantees in a different

[18] Bårdsen (2017) p. 27.

[19] Roberts (2018) p. 89.

[20] Fitzmaurice (2018) p. 153.

[21] Bårdsen (2017) p. 10 (my translation).

[22] Ibid. pp. 10–12.

manner. The institutional dimension of the fragmentation debate recognizes that the surveillance bodies monitoring the specialized human rights treaties are inclined to favor their own disciplines. They may «exhibit a structural bias with regard to 'their' human right issue as opposed to other human rights concerns». This may prove to be relevant when there has to be struck a balance between different human rights issues, as for example a balancing between freedom of expression as a general human rights concern, and the prevention of racist speech, as a specific concern.[23]

1.4.4 Human Rights in the Norwegian Constitution

The Constitution § 92 states that the authorities should respect and secure the human rights as set forth in the Constitution as well as in human rights conventions binding on Norway. The provision does not contain reservations of any kind and the wording places the human rights in the Constitution and the human rights in the conventions in the same position.[24]

Even so, this does not signify that all human rights that Norway has undertaken to comply with enjoy the same position as the provisions in the Constitution, as lex superior. If that was the case, the Human Rights Act and the remaining human rights in the Constitution would be excessive and the implementation of § 92 would have changed the current state of law in a way that was not intended by the Parliament. The Supreme Court stated that «it is clear that §92 of the Constitution should not be interpreted as a provision of incorporation, but rather as an instruction to the courts to enforce the human rights on the level they are implemented in Norwegian law».[25]

In addition to this, the Supreme Court has stated that the interpretation of human rights in the Constitution should use the convention provision as a point of departure.[26] It does not seem like there is made a distinction between the human rights that recently were incorporated due to the reformation in 2014, and the already existing provisions. The Court has to a large extent used the international case-law in a similar manner as the corresponding surveillance bodies, although it does not find itself bound to the same extent by future practice of the international enforcement bodies.[27] It is clear from this that international practice have significance in the interpretation of the human rights in the Constitution, albeit it is the Supreme Court, and not

[23] Payandeh (2015) pp. 299 and 310–311.

[24] Bårdsen (2017) p. 16.

[25] HR-2016-2554-P, in paras. 69–70 (my translation). Inspired by Bårdsen.

[26] Ibid. in para. 81.

[27] Bårdsen (2017) pp. 31–32.

the international enforcement bodies, that carries the responsibility to «interpret, clarify and develop» the human rights provisions in the Constitution.[28] Therefore, the principle of presumption of conformity between Norwegian law and Norway's obligations due to international law should be a basis of interpretation and the content of the human rights in the Constitution should be determined in light of the international conventions and the practice related to them.[29]

1.5 Presentation of following chapters

The right to freedom of expression will be presented in chapter 2 and the relevant provisions on hate speech will be presented in chapter 3. Following this, chapter 4 will address the balancing between the right to freedom of expression and the provisions prohibiting hate speech. Moreover, there will be given a brief presentation of some cases where the enforcement bodies that surveil and implement the provisions assess the balancing of the two. In chapter 5, hate speech on the Internet and the rules of responsibility of unlawful speech on Internet platforms will be addressed. Finally, in chapter 6 there will be made some remarks on hate speech as a concept in the public debate and a short reference to some studies that reflect the challenges concerning this kind of utterances in the public debate. Comments on questions of de lege ferenda and my own reflections regarding these questions will only be addressed in chapter 6.

2 Freedom of Expression

2.1 Freedom of expression as a human right

Freedom of expression is a human right that is fundamental for the functioning of democracy. An important consequence of the enjoyment of the right is that one can participate in the public debate. Furthermore, freedom of expression is of utter importance pursuant to securing the media and the rest of the population the function of public watchdog. With freedom of expression, one has the basis to protest when something is wrong, and therefore the basis to protect and secure the enjoyment of other rights.

[28] Rt. 2015 s. 93, in para. 57 (my translation).

[29] Bårdsen (2017) pp. 29–30.

Freedom of expression will to a large extent contribute to a society's prosperity in the way that it creates a ground for discussions were different kinds of opposing views could be considered, and one could find better solutions for the society as a whole. Even so, it is not an absolute right and it has to be balanced against other human rights to make sure that these rights are not infringed. This right is also among the most violated. There has always been tension regarding freedom of expression, and this tension has been invigorated with the evolvement of communication technologies.[30]

Liu Xiabo wrote about freedom of expression on the eve of his imprisonment that: «[f]reedom of expression is the basis of human rights, the source of humanity and the mother of truth. To block freedom of speech is to trample on human rights, to strangle humanity and to suppress truth».[31] In every society there is a need for a minimum of freedom of expression for that society to be free. If freedom of expression is not given priority or it is being deprived from the people, the organization of society will move towards totalitarianism.[32]

The right to freedom of expression has legal basis in several international instruments and in national law. The Universal Declaration of Human Rights states in its Article 19 that «[e]veryone has the right to freedom of opinion and expression». Although this declaration is not formally binding on its member states, it is considered to be an expression of international customary law generally binding on all states, and the declaration has served as a point of departure for other human rights provisions and treaties.[33] In the following I will mention some central instruments in international law which set forth this right, as well as examine how this right is implemented in Norwegian law.

2.2 International law

2.2.1 ICCPR

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) states in paragraph 2 that «[e]veryone shall have the right to freedom of expression» and in paragraph 3 in which situations this right may be restricted. The right is interpreted to encompass «every

[30] O'Flaherty (2012) pp. 631–632.

[31] Coonan (2010). Inspired by O'Flaherty.

[32] NOU 1999: 27 p. 26.

[33] Rodley (2018) pp. 778–780.

form of subjective ideas and opinions capable of transmission to others».[34] In this way, Article 19 provide a broad protection of freedom of expression; it covers both political and commercial speech and it includes all verbal and artistic expression.[35]

According to paragraph 3, restrictions has to be provided by law, necessary and pursue one of the purposes enlisted in the article, namely the respect of rights or reputation of others or public order issues. Furthermore, the least restrictive means required to achieve the purported aims should be implemented.[36]

2.2.2 ECHR

The European Convention on Human Rights (ECHR) sets forth in its Article 10 paragraph 1 that: «Everyone has the right to freedom of expression». For a restriction to be compatible with Article 10 of the ECHR, the measure has to be provided for by law and in pursuance of a legitimate aim mentioned in Article 10. Furthermore, it has to be «necessary in a democratic society».[37]

The term «law» covers both written and unwritten rules of law. It is required that this law is accessible, predictable and precise. For a restriction to be «necessary», it has to correspond to a pressing social need, and the restriction has to be proportionate to the legitimate aim pursued. The restriction has to be justified and the reasons that the national authorities give have to be relevant and sufficient. Moreover, the State Parties enjoy a certain margin of appreciation depending on the character of the expression in question. There is usually given a higher degree of protection to expressions concerning public interest, whereas the margin of appreciation of the states is wider regarding commercial expressions or expressions concerning morality.[38] The margin of appreciation applies in a combination with European supervision by the Court.[39]

[34] Ballantyne et al. v. Canada, para. 11.3.
[35] O'Flaherty (2012) pp. 636–637.
[36] La Rue (2011) in para. 24.
[37] Cucereanu (2008) p. 145.
[38] Perinçek v. Switzerland, in para. 197 and The Norwegian Ministry of Culture (2018) p. 29 (my translation).
[39] Nilsen and Johnsen v. Norway, in para. 43.

2.3 National Norwegian law

The Constitution establishes that there shall be freedom of expression in its § 100. The reasoning and justification behind freedom of expression is connected to the existence of the public sphere. The idea is that this sphere should function as a room for sharing views, and that attitudes and points of view would be modified and made decent through conversation and criticism. Historically it is evident that societies with a high degree of freedom of expression have experienced less discrimination than societies where freedom of expression is severely restricted or non-existent.[40] The same view was presented in a Supreme Court decision from 1978.[41]

The word «expression» is used as a common term for any kind of message, statement or dissemination of data, including text, speech, music, signals, images and movements that are suited to convey a message.[42] An expression can be made both orally and written, and actions conveying a message are included.[43]

The freedom of expression is supposed to secure the search for truth, democracy and the free formation of the individual's opinion. The protection in the Constitution is «platform-neutral». It includes the right to make statements, to access information, to keep silence and a positive obligation on the authorities to contribute to the establishment of channels in the public sphere where the inhabitants can exercise their freedom of expression.[44] This obligation is founded in Paragraph 6 of § 100. It is considered to be a guideline and not an enforceable right, but it still provides an important perspective on the role of the state as necessary to ensure the infrastructure needed to enable free speech.[45]

As mentioned in chapter 1, the rights in ECHR and ICCPR are incorporated through the Human Rights Act § 2 and they apply as Norwegian Law.

[40] NOU 1999: 27 pp. 203–204.

[41] Rt. 1978 s. 1072, p. 1076.

[42] Bing (2008) p. 22 (my translation).

[43] Matningsdal (2018) note 1228.

[44] The Norwegian Ministry of Culture (2018) p. 27.

[45] Kierulf (2009) pp. 54–55.

3 «Hate Speech»

3.1 Introduction

Hate speech is usually based on negative stereotypes, prejudices and stigma and the expressions often refer to fear of what is different, ideas of natural hierarchies and a rhetoric based on exclusion.[46] There is no common definition of «hate speech», but there are still various common denominators that one can find in most attempts on a definition. This is speech that promotes hatred based on «race, colour, ethnicity, gender, nationality, religion, sexual preference or disability».[47]

Usually the term hate speech is used about expressions that are discriminatory or hateful directed against a certain minority group, hence the basis the expression concerns is important. Hate speech directed towards a particular person affects the rest of the group and the audience, as it strengthens prejudices and communicates a certain perception of the group in question.[48] Therefore, the purpose of the provisions prohibiting hate speech is to protect groups and it is the public expressions of hatred that are unlawful. Whatever the motivation behind an expression, is not decisive as for whether it constitutes hate speech. What really matters is how the expression normally can be understood considering the context where it is presented.[49]

In the following, I will look at relevant provisions in international and Norwegian law that are applied as restrictions on freedom of expression on the basis of hate speech, and how the term «hate speech» is being used. It is important to emphasize that the provisions mentioned below are not the only legal provisions that provides protection against what is understood as «hate speech» in the public debate (as could be for example § 102 of the Constitution or ECHR Article 8). Due to the scope of this paper, only provisions regarding the legal definition of hate speech will be addressed.

[46] Equality and Anti-Discrimination Ombud (2018) p. 39.

[47] Akdeniz (2009) p. 7.

[48] Nadim (2016) pp. 18 and 20.

[49] Equality and Anti-Discrimination Ombud (2018) p. 7.

3.2 International law

3.2.1 UN ICERD

According to the International Convention on the Elimination of Racial Discrimination (ICERD) Article 4 letter a, the State parties shall «declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts». The relevant bases of discrimination are race, colour and ethnic origin. Even so, practice makes it clear that it also includes descent-based discrimination.[50]

The ICERD does not mention the term «hate speech». As a point of departure, it would not be possible with a strict interpretation of the text as there is not consensus about what the term «hate speech» covers. Even so, the Committee on the Elimination of Racial Discrimination (CERD) frequently uses Article 4 to address and condemn actions of racist hate speech. The Committee regards this speech as «a form of other-directed speech, which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society».[51]

Article 4 is understood as having a preventive effect. The reason for its creation is that racist discourse comes with a danger of stirring up hatred and generating an environment of hostility. Banalization of discourses of racial inferiority could be seen in relation to a climate of oppression, and in last extent it could be understood as discourses of dehumanization, characteristic elements of genocidal processes.[52] Due to article 4, the subjects of responsibility are the State Parties, and they have an obligation not only to enact appropriate legislation, but also the effective implementation of such provisions.[53]

The duty to prohibit racial hate speech is modified by the «due regard»-clause in Article 4, where it is stated that the States have to take «due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of [the] Convention». The «due regard»-clause is understood by most States, including Norway, to signify that the states have to balance freedom of expression with the duties according to article 4 letter a. In preparatory work ahead of the implementation of this article in Norwegian law, it is stated that «it is presumed that the states are obliged to criminalize expressions that

[50] Thornberry (2016) pp. 282–284.

[51] Ibid. pp. 267–268.

[52] Ibid. pp. 281 and 303.

[53] Gelle v. Denmark, in para. 7.3.

in an offensive matter express ideas regarding racial hatred, expressions that incite discrimination and expressions that incite violence towards certain races or ethnic groups». On the other hand, the department considered that the States were not obliged to forbid the expressions of opinions regarding ideas of racial superiority.[54]

3.2.2 UN ICCPR

The International Covenant on Civil and Political Rights is considered to address hate speech in its Article 20 paragraph 2. According to this paragraph the parties shall prohibit by law «[any] advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence». Consequently, incitement to hatred against for example women or homosexuals is not included. The use of the word «hatred» is considered to signify that the expression has to be of a manifestly offensive character to trigger a duty for the State to prohibit them.[55]

The United Nation's Human Rights Committee has stated that articles 19 and 20 complement each other. What distinguishes the acts addressed, is that for the acts under Article 20 the Covenant requires a specific response, namely to implement their prohibition by law. In this matter, Article 20 may be considered as lex specialis with regard to Article 19. Anyhow, where the State implements restrictions on freedom of expression, this has to be justified in conformity with Article 19.[56]

The practice of the Human Rights Committee seems to suggest that the text of Article 20 paragraph 2 should not be interpreted as exclusively imposing a duty to prohibit utterances that incite violence. Neither should it be interpreted too wide, as for example including racial discriminating expressions that do not incite discrimination. The correct interpretation should be that the states have a duty to prohibit racial discrimination and hate speech that incite to discrimination, hostile or violent actions.[57]

The Committee has stated that Article 20 of the ICCPR is not a justiciable right. Article 20 «is designed to give specific recognition to the prohibition of discrimination set forth in Article 26 of the Covenant, by identifying a limitation that States parties must impose on other enforceable Covenant rights, including the principle of freedom of expression under Article 19». Followingly, the purpose of the article is to secure the right of individuals and members

[54] NOU 2002: 12 pp. 188–190 (my translation).

[55] Ibid. p. 187.

[56] Human Rights Committee General Comment No. 34, paras. 50–52.

[57] NOU 2002: 12 p. 188 (my translation).

of groups to be free from hatred and discrimination. To ensure that other rights in the Covenant are not infringed, this article is crafted narrowly. The Committee emphasized that the requirement «prohibited by law», does not mean that the law has to prescribe criminal penalties, but the penalties may also be civil and administrative. Except from in the circumstances regarded in Article 20 paragraph 2, blasphemy laws or other prohibitions of expressions showing a lack of respect for a religion, are incompatible with the Covenant.[58]

3.2.3 ECHR

The European Court of Human Rights has maintained that «speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention».[59] Followingly, hate speech is not considered to be protected under the Convention. The ECtHR does not include a definition of these expressions and it does not consider itself bound by the definitions set forth in other conventions.[60] In its case-law the Court usually refers to the definition of The Committee of Ministers of the Council of Europe that defines «hate speech» as covering:

> «all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin».[61]

In the assessment of compatibility of a restriction, the ECtHR has to balance freedom of expression with other rights in the Convention. Particularly relevant in this regard, is the right to respect for private life in ECHR Article 8, that for obvious reasons often is in conflict with the right to freedom of expression.

The legality of a restriction due to Article 10 is often assessed together with Article 17, entitled «[p]rohibition of abuse of rights». The effect of the article is that it can negate the Convention right in question if the activity means destructing or limiting to a greater extent than provided for, any of the other rights of the Convention. In its case-law, the Court has stated that Article 17 of the Convention is only applicable on an exceptional basis and in extreme cases. Concerning Article 10, Article 17 should only be resorted to when it is clear

[58] Rabbae v. The Netherlands, in paras. 9.7 and 10.4.

[59] Delfi AS v. Estonia, in para. 136.

[60] Nadim (2016) p. 31.

[61] Committee of Ministers Recommendation No. R (97) 20, in the appendix.

that the freedom of expression was used for ends clearly contrary to the values of the Convention. This overlaps with the question of whether an interference is «necessary in a democratic society» and the assessment has to be done taken account of both articles together.[62] As the effect of appliance of article 17 is that the right is negated all together, the Court's assessment may not give much guidance as to the exact limit between lawful and unlawful expressions.

Even so, as examples of speech that is not compatible with the Convention, the Court mention expressions that manifest Holocaust-denial, justification of Nazi policy, linking all Muslims with grave acts of terrorism or the portraying the Jews as the source of evil.[63] Hence, expressions of a certain character will not be protected under the Convention.

Nonetheless, there should be a broad range of expressions that is accepted under the Convention. The Court has expressed that Article 10 protects also expressions that offend, shock or disturb, as the existence of a democratic society demands for certain pluralism, tolerance and broadmindness. Furthermore, it has been emphasized that there is little scope under Article 10 paragraph 2 for restrictions on political expressions or debate of public interest.[64]

3.3 National Norwegian law

The Penal Code (straffeloven 2005, in force 2015) does certain expressions punishable in § 185 (as in the former § 135a of the Penal Code of 1902). For an expression to be punishable according to this rule, three conditions have to be met. First, the expression has to be made publicly. Second, it has to discriminate someone because of skin color or national or ethnic origin, religion or life stance, homosexuality, lifestyle or orientation or reduced functional capacity. Third, the expression has to be threatening or insulting a person or inciting hatred or persecution of or contempt for anyone on one of the bases mentioned above. Finally, the provision in the Penal Code has to be interpreted restrictively in accordance with the right to freedom of expression.[65]

There should be given a spacious margin for unfortunate and untasteful expressions and it is only expressions of a «manifestly offensive character» that will be affected.[66] In a judgement

[62] Perinçek v. Switzerland, in paras. 114–115.

[63] Delfi AS v. Estonia, in para. 136.

[64] Nilsen and Johnsen v. Norway, in paras. 43 and 46.

[65] Ot.prp. nr. 8 (2007–2008) p. 247. The General Civil Penal Code is consulted for translation purposes.

[66] Matningsdal (2018) note 1228.

from 1978, the Supreme Court stated that in the public debate, there will always be made statements about how some groups receive benefits on the expense of others. Every group in society has to put up with this kind of attacks even though the presentation is misleading or non-objective.[67]

Regarding the requirement that the expression is made public, § 185 refers to § 10 of the Penal Code where it is stated that an action is considered to be done publicly if it is likely to reach a sizeable number of persons.[68] It is expressly stated in the preparatory work that expressions made on the Internet will be considered public.[69] Furthermore, it is stated that by using the word «public» the law refers to an audience of minimum 20–30 persons.[70] The requirement is not that the expression actually has reached that number of persons, but rather that it is able to reach an audience of that size. This means that «closed» web portals, as for example groups on Facebook and private Facebook-pages, will be included if enough people can access the page.[71]

There is an alternative that the expression is made «in the vicinity of others» to a person affected by it, and this could include semi-public and private surroundings. This alternative is considered less harmful as the utterance is not made public, and it was included as a compensation for the discontinuing of the provision concerning defamation.[72]

Before 2005, the requirement of culpability to incur in penal liability was that the person put forth the expression willfully. In 2005, the requirement was lowered to also include offences made by gross negligence. The reasoning was that it would provide a more extensive protection against hate speech and make it easier to prove the existence of an offence.[73] This means that is has become easier to incur in liability.

The principle of legality means that the law should clearly state what is punishable and that the words used in the legal text should be interpreted strictly. Still, the protection is somewhat wider than what follows from § 185 alone, as some expressions included under a broader understanding of the term «hate speech» will possibly be included under other more general rules of penal law.[74]

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[67] Rt. 1978 s. 1072, p. 1077.

[68] The General Civil Penal Code is consulted for translation purposes.

[69] NOU 2002: 4 p. 208.

[70] Ot.prp. nr. 90 (2003–2004) p. 409.

[71] Nadim (2016) p. 35.

[72] Ot.prp. nr. 22 (2008–2009) p. 399.

[73] Innst. O. nr. 69 (2004–2005) p. 20.

[74] Nadim (2016) p. 154.

To determine the content of an expression it has to be interpreted, and this is a matter were the Supreme Court have full competence. The decisive point is how the common listener perceive the utterance in the context that it was made. The point of departure is that nobody should be assigned opinions that are not expressly pronounced, unless this content could be deduced from the situation with a reasonably degree of certainty.[75] As freedom of expression includes actions conveying a message, so does § 185 of the Penal Code. In the *Ku Klux Klan-judgement* (Rt. 1994 s. 768) a man was convicted for a combination of vandalism and written words, as the vandalism were considered to enhance the element of threat.

It should be taken note of that § 185 in the Penal Code includes all the relevant bases in the rules concerning discrimination, except from gender and sexual identity.[76] Several actors have demanded for these categories to be included, and currently there is being held a hearing to discuss these suggestions. Gender-based discrimination continues to be a systematic and structural problem in the society. Since the purpose of § 185 is to protect exposed groups and not minorities as such, gender should be included. It is further suggested that the wording «homosexual orientation» be replaced with «sexual orientation».[77]

The commitment due to ICERD Article 4a is understood in the way that it does not require the State to implement strict liability. In the case that it did require something more than what is stated in § 185 of the Penal Code, there are some other rules that are considered covering a potential void. Together with the rule in § 183 of the Penal Code that penalises the inciting others to execute an offence and the general rule of liability on the grounds of complicity in § 15, Norwegian law is considered to comply with the commitment due to the ICERD.[78]

The CERD has expressed concern regarding the absence of the category «race» when Norway has incorporated the obligations stemming from the ICERD. This is explained in that the State language is a vehicle for social integration and participation, and as this concept has strong negative connotations, the Government did not want to use this kind of language in a statute.[79]

[75] HR-2018-674-A, in para. 12.

[76] Nadim (2016) p. 18 and 134.

[77] Larsen (2016) pp. 67–72 and Amnesty International (2018).

[78] Ot.prp. nr. 8 (2007–2008) p. 251.

[79] Thornberry (2016) p. 118.

4 Balancing freedom of expressions and the protection against hate speech

4.1 Introduction

The protection against hate speech for an individual or a group of people has to be balanced against the right to freedom of expression of the person making the particular statement. In the following I will look at some examples of practice from the bodies responsible for the surveillance of the conventions presented above and the Norwegian Supreme Court, to shed light on how they balance freedom of expression with the protection against hate speech.

4.2 International level

4.2.1 CERD

The CERD has been perceived as a strict regulatory model not generous in regard of freedom of expression. With its General Recommendation 35 this position seems re-evaluated in the way that the standards should be seen as complementary more than as a zero-sum game. The protection against hate speech is also a manner of ensuring the freedom of expression of the groups protected, as this kind of utterances potentially deprive the victims of their right to free speech.[80]

In the case *Gelle v. Denmark* (34/20004), a Danish citizen with Somali background claimed a breach of the Convention on the grounds that a Danish politician had compared Somali people with rapists and paedophile in a newspaper article about female circumcision. The CERD noted that the remarks could «be understood to generalize negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions regarding the subject of female genital mutilation». The fact that the statements were made in the context of political debate did not absolve the State from its obligation to investigate whether the concerned expressions amounted to racial discrimination.[81]

[80] Thornberry (2016) pp. 297 and 301.

[81] Gelle v. Denmark, in paras. 2.1 and 7.4–7.5.

As a point of departure, serious discussions of racial questions are not in conflict with Article 4, and academic and political speech should be protected from being supressed, as long as it does not amount to incitement.[82] In the case Poem and Fasm v. Denmark (22/2002), the state party argued that Article 4 does not impugn «scientific theories put forward on differences of race, nationality or ethnicity». On occasion, also statements of this kind made as part of an objective debate would be considered to fall inside an area of impunity.[83]

In relation to dissemination, there should be drawn a line between informing about racist arguments and the endorsement of them. In many cases this is a fine line. Moreover, the CERD has underlined that expression of opinions about historical facts should not be prohibited.[84]

4.2.2 UN Human Rights Committee

The UN Special Rapporteur reiterates that expression of views that offend, shock or disturb is included under freedom of expression. There should not be applied restrictions on the discussion of political debate, other government affairs, the reporting of human rights or the expression of religion and beliefs.[85]

As for the list of restrictions in Article 19, it seems as they could be able to unravel the protected right. The Committee has stated that «public morals differ widely. There is no universally applicable common standard. Consequently, … a certain margin of discretion must be accorded to the responsible national authorities».[86] Furthermore, the Committee has expressed that restrictions «must be shown as necessary and proportionate to the goal in question and not arbitrary».[87] The State must demonstrate the precise nature of the threat posed by the exercise of freedom of expression by an individual and the necessity and proportionality of the action taken. Whether this explanation is considered sufficient due to the Covenant is for the Committee to decide. [88]

In relation to the denial of certain historical events such as genocides and Holocaust, the European Court of Human Rights has referred to a UN General Assembly report in its

[82] Thornberry (2016) p. 298.

[83] Poem and Fasm v. Denmark, in para. 4.10. Inspired by Thornberry.

[84] Thornberry (2016) pp. 286 and 299.

[85] La Rue (2011) in para. 37.

[86] Hertzberg et al. v. Finland, in para. 10.3.

[87] Gauthier v. Canada, in para 13.6.

[88] Human Rights Committee General Comment No. 34, in paras. 35–36 and O'Flaherty (2012) p. 641.

interpretation of the Covenant. The report states that historical events should be open to discussion and that prohibitions in law of such expressions are incompatible with the ICCPR.[89] Therefore, as a starting point the expression of opinions regarding historical facts are protected under the freedom of expression and not to be considered as hate speech.

In the Committee's case *Zündel v. Canada* (No. 953/2000) it was not considered to raise issues under Article 19 that a holocaust denying journalist were not given access to a press conference in a parliamentary building. One does not have a right to express oneself in any particular location, and the Committee held that «the author remained at liberty to hold a press conference elsewhere».[90] This could be seen in relation to Internet-platforms, and that freedom of expression does not provide a right to express oneself on a particular platform. The reason of the denial were the character of the views the journalist purported, and it is claimed that the non-violation should have been argued with recourse to the limitation provisions to the article.[91]

The case *Rabbae v. The Netherlands* (No. 2124/2011) was based on a complaint of that the government had failed to convict Geert Wilders, a Member of Parliament and founder of the extreme right-wing political party «Party for Freedom». The basis of the trial was hundreds of reports about insults and incitement to discrimination, violence and hatred against Muslim immigrants.[92] The Committee concluded that the State party had complied with its obligations by having implemented a legislative framework that prohibited statements envisaged in Article 20 paragraph 2 of the Covenant, and that gave the offended the possibility to trigger prosecution.[93]

The Committee reiterated that any restriction on freedom of expression must be construed narrowly, and it emphasized that this freedom includes «even expressions that may be regarded as deeply offensive». Furthermore, it recalled that prohibitions on displays of lack of respect towards religion are incompatible with the Covenant except in the specific cases of Article 20 paragraph 2 and stated that «such prohibition must not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith». Moreover, such restrictions must comply with the requirements of Article 19 paragraph 3.[94] It could be concluded from this that expressions regarding religion, at least expressions made in

[89] UN General Assembly A/67/357 (2012) in para. 55 and Percinek v. Switzerland in para. 72.

[90] Zündel v. Canada, in para. 8.5. Inspired by O'Flaherty.

[91] O'Flaherty (2012) p. 638.

[92] Rabbae v. The Netherlands, in paras. 2.1, 2.2 and 2.6.

[93] Ibid. in paras. 9.3, 10.7 and 11.

[94] Ibid. in para. 10.4.

a political context, enjoy a certain protection as even deeply offensive expressions are permitted.

4.2.3 ECtHR

To determine whether an expression is considered unlawful, the European Court of Human Rights has stated that it will look at the words used and the context in which the statements were made public, in the light of the case as a whole. Whether an expression was presented orally will have relevance, as this could reduce the possibilities to reformulate or retract the statement before making it public.[95]

The Court has emphasized several factors in its assessment of whether interferences in the freedom of expression were «necessary in a democratic society». A tense political or social background has usually led the Court to accept interference. Moreover, the Court considers whether the context of the statement could be interpreted as a direct or indirect call for violence or hatred, and the possibility or capacity of the statement to lead to harmful consequences. In most cases, the Court has made its assessment based on an interplay of various factors and the approach is considered to be highly context-specific.[96] Therefore, it could be difficult to find general guidelines in the Court's assessment of the limit between which speech that is considered unlawful and which is not to be restricted.

Because of the media's role in democracy as public watchdogs, it enjoys further protection under Article 10 of the Convention than the individuals regarding expressions.[97] This could lead to situations where the media is free of responsibility although the expressions isolated could be seen as illegitimate.[98]

In the case *Gündüz v. Turkey* (App. No. 35071/97) the applicant was found guilty in having breached the Criminal Code by making statements on a tv-programme that incited to hatred based on differences in religious views. The Court referred to its case-law and stated that «there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention».[99] Nonetheless, the Court emphasized that the applicant was invited to the tv-

[95] Nilsen and Johnsen v. Norway, in para. 48.

[96] Perinçek v. Switzerland, in paras. 204–208.

[97] Jersild v. Denmark, in para. 31.

[98] The Norwegian Ministry of Culture (2018) p. 29.

[99] Gündüz v. Turkey, in para. 41.

programme in question as the leader of a sect and that the topic was widely debated in Turkish media and considered to be of general interest. Therefore, this was a sphere where any restrictions had to be interpreted strictly. Furthermore, the Court argued that the views presented in the programme would counterbalance each other, and that the expressions were made on live television, without the possibility to reformulate or refine the statements before making them public. As for constituting hate speech, the applicant did not call for violence to establish his point of views and the Court concluded that the applicant's conviction was an infringement of ECHR Article 10.[100]

Statements concerning historical issues are generally perceived as close to matters of public interest and therefore entitled to strong protection against interferences. In the case *Perinçek v. Switzerland* (App. No 27510/08) the Court considered that statements denying the genocide on Armenian people by the Ottoman empire did not constitute expressions of hate speech, and that the interference was a breach of Article 10. In spite of the virulent character of the statements, they did not call for violence, hatred or intolerance towards the Armenians. There was made a comparison with cases of Holocaust-denial, were the Court on several occasions has confirmed that interference is in concordance with Article 10 of the Convention.[101]

The facts in the case did not amount to the same degree of danger as in the Holocaust-denial cases, as these cases entails the historical context in the State where the expressions are denied. In states that experienced the Nazi horrors, expressions of Holocaust-denial could be seen as implying an antidemocratic ideology or anti-Semitism, and they have a special moral responsibility to distance themselves from the atrocities perpetrated. Moreover, the Court argued that CERD had put forth in its recommendation that public denials of genocide should be declared as offences punishable by law if they «clearly constitute incitement to racial violence or hatred», but at the same time that expression of opinions about historical facts should not be prohibited or punished.[102]

Hence, it can be concluded that the context of the statement is important in the assessment of whether it was illegitimate. If the statement is set forth as part of a public debate on a subject of public interest, and with the possibility to balance the point of view, it is likely to be legitimate. If the statement calls for violence it is likely to be illegitimate. In any case, the Court makes a concrete assessment of the facts.

[100] Gündüz v. Turkey, in paras. 43–53.

[101] Perinçek v. Switzerland, in paras. 209–220.

[102] Ibid. in paras. 243–244 and 261.

4.3 National level

4.3.1 The state of law before 2002

The interpretation of § 185 and the former § 135a of the Penal Code has changed towards an improved protection of hate speech after Norway received criticism regarding the Supreme Court's decision in the Boot Boys-case in 2002.

A central decision of the Supreme Court before this development is the *White Election Alliance-case* (Rt. 1997 s. 1821), where the leader of a political party was convicted for having distributed a party program that contained racist expressions. Twelve judges voted for conviction whereas five judges voted for acquittal. The party program was based on that every person considered to be foreign should be deported. Among the expressions were that all adoptive (foreign) children in Norway should be sterilized, couples of mixed races should separate, or the foreign party had to be sterilized and in the case of a pregnancy the fetus should be aborted. From the context, it was clear that the expressions concerned people of dark skin, a minority group in the Norwegian society.

The majority stated that the party program and the measures suggested amounted to a serious violation of the human dignity of the persons affected. Furthermore, they emphasized that the expressions were of a political character and that they were presented as part of the public debate on immigration. Such utterances are considered to be in the core of the area of protection due to § 100 of the Constitution, hence the possibility to implement restrictions are limited. Nevertheless, the majority concluded that the expressions were illegal and that they could not be upheld referring to § 100 of the Constitution, as they were considered to be expressions of ethnic cleansing and extreme violations of integrity towards people of dark skin. The political character of the expressions or the fact that they were implemented in a party program could not alleviate this.[103]

The dissenting judges had a different view regarding the political character of the utterances and the balancing with § 100 of the Constitution. They emphasized the Constitution's position as lex superior and considered that the government should not impose punishment on political expressions, as it is the fundament of democracy and the party in this case had not incited to illegal actions.[104] The judgment caused a lot of controversy, and there was disagreement

[103] Rt. 1997 s. 1821, pp. 1827 and 1831–1833.

[104] Ibid. pp. 1834–1836.

among publicist and scholars as to whether the majority or the minority had made the correct assessment.[105]

4.3.2 The Boot Boys-case

The *Boot Boys-case* (Rt. 2002 s. 1618) concerned expressions made by the neo-Nazi group Boot Boys on an illegal demonstration in 2000. The leader made a speech where he proclaimed that: «every day, immigrants rob, rape and kill Norwegians, every day our people and country are being looted and destroyed by the Jews that empties our land of wealth and replaces it with immorality and un-Norwegian thoughts». The accused admitted that by immigrants he meant people of dark skin. The speech referred to Adolf Hitler and Rudolf Hess as heroes, and that the group should follow in their footsteps and fight for what they believed in, with a clear reference to National Socialism.[106] The verdict was pronounced with a majority of 11 against 6 judges, and the conclusion was acquittal.

The Supreme Court considered that the prohibition against hate speech only affects the expressions that are of a «manifestly offensive character». This could be expressions that amounts to or incites violations of integrity, and it should be considered whether the expressions imply a gross underestimation of the human dignity and value of a group of people. Moreover, the Court referred to the White Election Alliance-case and said that for expressions to constitute hate speech, there is no requirement that anybody has been exposed for any damage due to the expressions made.[107] Finally, it considered that the expressions had to be understood as an approval of extreme violation of the Jews' integrity as a group, although not serious enough to be affected by the rule in the Penal Code and therefore that the freedom of expression should not be restricted.[108]

The dissenting judges considered that the majority had attained too much weight to freedom of expression, at the expense of the need to protect against discriminating utterances. They stated that the provision against hate speech should not be limited too extensively, as the human rights obligations require that there is given a real protection. Compared to the White Election Alliance-case, this case did not in the same way include a political element, as it was

[105] Skjerdal (1998) p. 182.

[106] Rt. 2002 s. 1618, p. 1618 (my translation).

[107] Rt. 2002 s. 1618, p. 1624 and Rt. 1997 s. 1821, p. 1828.

[108] Rt. 2002 s. 1618, p. 1629.

not in the same way part of the political debate. In its context, the utterances about the Jews had to be understood as racist utterances of a manifestly offensive character.[109]

After the decision in the Supreme Court, a complaint was filed to the Committee on the Elimination of Racial Discrimination (CERD) by representatives from the Jewish communities in Norway and the Norwegian Antiracist Centre (No. 30/2003). The authors held that the Supreme Court had underestimated the danger of the Nazi rhetoric and they argued that in accordance with the Supreme Court's decision, the Penal Code does not give a satisfactory standard for protection against racism. The authors further argued that the purpose of the due regard-clause in Article 4 is to make sure that the media can exercise its role in imparting information on issues of public importance. Not prohibiting the speech in this case would be understood as an acceptance and approval of the violence against the Jews during the Nazi era, and they noted that the judgment already was making precedence.[110] The CERD supported the authors views as it stated that

> «[w]hilst the contents of the speech are objectively absurd, the lack of logic of particular remarks is not relevant to the assessment of whether or not they violate article 4… The Committee considers these statements to contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and 'footsteps' must in the Committee's view be taken as incitement at least to racial discrimination, if not to violence».[111]

The CERD stated that the prohibition of ideas based on racial superiority or hatred is compatible with the right to freedom of expression. Furthermore, the speech was of a manifestly offensive character and the acquittal constituted a violation of Article 4 of ICERD.[112]

4.3.3 Later development

In the aftermaths of the Boot Boys-case and its revision in the CERD, there has been an evolvement in the threshold for protection against racial hate speech. In the preparatory work of § 185 in the Penal Code it is referred to that the Committee's opinion has legal significance in Norwegian law. Furthermore, it is referred to several changes made after the CERD opinion; there has been a revision of § 100 of the Constitution, there has been made changes

[109] Rt. 2002 s. 1618, pp. 1631–1637.

[110] The Jewish community of Oslo et. al. v. Norway, in paras 3.9, 3.10 and 9.4.

[111] Ibid. in para. 10.4.

[112] Ibid. in para. 10.5.

in the Penal Code and the ICERD has been implemented in Norwegian law through the Equality and Anti-Discrimination Act.[113]

Regarding the changes in the § 100 of the Constitution, it was stated that racial expressions could be punished to a larger extent than before.[114] This could be seen in relation to a lowering in the threshold of what is to be considered hate speech, but also that the requirement of culpability changed in 2005 from demanding the willful execution of the offence, to also include acts committed by gross negligence.

Not to mention, it was included in the preparatory work of the Equality and Anti-Discrimination Act that the threshold for what should be considered as expressions of manifestly offensive character could seem quite high (my translation) and that the change towards a stricter enforcement of prohibitions against racist speech was positive.[115] Moreover, it was considered that it may be natural to give the context of the expression more significance than earlier as to how the expression is to be interpreted.[116]

After the incorporation of the ICERD in the Equality and Anti-Discrimination Act § 5, these obligations pertaining to international law should be applied directly by the national courts. On this background, the changes add up to a stricter protection against racial expressions and the department considers that the result of the Boot Boys-case no longer is an expression for applicable law.[117] After this, it is without doubt that the threshold for an expression of racial superiority or hatred to be punishable in Norwegian law is lower than what was established in the Boot Boys-case. The change in the threshold has been considered in the following practice of Norwegian courts.

In the *Vigrid- case* (Rt. 2007 s. 1807), a man was convicted for having presented expressions of a manifestly offensive character in an interview in a national newspaper. Among the expressions were that Vigrid, a Nazi group, wanted to «cleanse» the country of Jews, the Jews were referred to as the «main enemy» and «evil murderers», and that they had «killed our people». Furthermore, the group gave their members weapons and weapon-training. Even though the expressions were considered to be absurd and the accused did not directly incite to violence against the Jews, the expressions had to be seen as a threat. On this basis, the Court unanimously concluded that the expressions were of a manifestly offensive character and

[113] Ot.prp. nr. 8 (2007–2008) p. 248.

[114] St. meld. nr. 26 (2003–2004) pp. 72–73.

[115] Innst. S. nr. 270 (2003–2004) p. 22.

[116] Ot.prp. nr. 33 (2004–2005) pp. 189 and 214.

[117] Ot.prp. nr. 8 (2007–2008) p. 249.

therefore that it constituted a breach of § 135a of the Penal Code. The Court did not find any reason to comment on the critique of the Boot Boys-case in CERD, as it had concluded that the expressions in this particular case were of a character that anyhow were punishable in accordance with the interpretation in the former case. In contrast to the Boot Boys-case, the expressions contained concrete measures against the Jews, and the threat of violence and other violations of integrity could be read directly from the text with a high degree of certainty of the message.[118] The Supreme Court did not discuss the fact that the ICERD is not implemented with priority over Norwegian law, but rather stated that Norway has undertaken a «clear obligation» to protect against racial discrimination through the implementation of ICERD.

In the *Bouncer judgement* (Rt. 2012 s.536), the accused was found guilty of breaching § 135a in the Penal Code on the grounds that he had announced that a bouncer was unqualified for his job based on the colour of his skin. The Supreme Court stated that an expression should not be interpreted to include in its content what is not clearly expressed, nor any more than what could be deduced from the context with a considerable degree of certainty. The Supreme Court emphasized that in the evaluation of what is an expression of «manifestly offensive character» it is decisive whether the expression is a gross underestimation of the human dignity of a group and that underestimations based on ethnicity or the color of skin clearly falls within this category. The Court stated that the present situation was not included under the core values of freedom of expression, namely securing the free debate. Moreover, this was an area of society were the occurrence of racial expressions was presumed to be frequent, and the protection would be significantly weakened if it not were to be given effective implementation in these cases. The Supreme Court added that even though the threshold for an expression to be punishable would not have been changed, its conclusion would have been the same.[119]

In the case HR-2018-674-A, a man was convicted for repeatedly having called a Somalian immigrant «jævla neger», which translate to «fucking negro». The expressions were made publicly. The Supreme Court did not agree that the reference to skin color had the same function as any other insult. In the context it was made, the expression had to be understood as a gross underestimation of the offended due to his skin color. The Court refers to the assessment in the Bouncer-judgement and that the purpose of the expression was harassment in both cases. Expressions of harassment are outside of the core of the protection of freedom of expression and correspondingly, the threshold for punishment is lower.[120]

[118] Rt. 2007 s. 1807, in paras. 3, 40–42 and 44–46 (my translation).

[119] Rt. 2012 s. 563, in paras. 20, 29 and 38–40 (my translation).

[120] HR-2018-674-A, in paras. 11, 13 and 16–17.

4.4 Summarizing remarks

In conclusion, cases concerning pure harassment will more easily fall inside the scope of prohibitions against hate speech, whereas the restrictions on expressions concerning politics, opinion or religion enjoy a wider protection.[121] The balancing between the right to freedom of expression and the protection against hate speech is more demanding when the expression carries a political message, as the starting point is that political expressions should not be limited. It is these assessments that usually could be legally challenging. On the contrary, the assessment of expressions of pure harassment is an easier exercise. These expressions do not enjoy protection as they do not fulfil the purpose of enlightening the public debate.

The lack of logic of an utterance is irrelevant for whether it may amount to hate speech. Only the expressions of a manifestly offensive character can be prohibited as hate speech in concordance with the right to freedom of expression, and an expression should not be interpreted as to include anything that cannot be deduced from the expression and the context with a high degree of certainty.

The ICERD, as an instrument implemented particularly for the protection against racial discrimination, seems to propose the most extensive protection. As mentioned above, the CERD has held that the states have an obligation to investigate whether the concerned expressions amount to racial discrimination. Similarly, expressions that constitute racist hate speech enjoy a modest protection according to ECHR and the ICCPR and the states have a quite wide discretionary margin when intervening in expressions with a racist content. As for journalists redistributing racist hate speech could be protected due to the public interest in society to know about the existence of these kind of views.[122]

As the existence of «hate speech» could depend on the context where the expression is made, the local circumstances with its particular history will influence in what counts as «hate». Also, different cultures have different views on what is acceptable, and even the most liberal have their «taboos». There is a possibility then, that the perception of freedom of speech as the marketplace of ideas, may speak only to certain kinds of society.[123]

[121] Nadim (2016) p. 132.
[122] NOU 2002: 12, p. 194.
[123] Thornberry (2016) pp. 302–303.

5 Hate speech on the Internet

5.1 The Internet as a platform for expressions

5.1.1 Relevant characteristics of the Internet

With the arrival of the Internet as a means of communication, one can reach nearly anyone, all over the world. The possibilities of self-expression are immense, as one can easily create content to share with a great number of persons. In addition, the use of Internet is cheap.[124] Therefore, Internet provides a great platform to exercise one's freedom of expression, as it combines the elements of low costs and wide range.

In addition, the information on the Internet does not immediately have any restrictions on where and when someone can access it. State boarders does not necessarily constitute an obstacle and neither does time, as one can access the information day and night. Also, the use of Internet opens up for exchange of opinions and feedback, in contrast to earlier when information most often were transmitted only one way.[125] This is a much more valuable form of communicating, as people add different perspectives to the debate. Hence, it provides a basis for clarifying ambiguous expressions and modifying strong beliefs.

The possibility to be anonymous could on one side contribute to that more people decide to listen and to express themselves, and it could be necessary to reveal blameworthy conditions of public interest .[126] On the other side, it could make hidden impact easier, a trait that could have a lot of negative consequences.[127] Furthermore, the arrival of social media has made it possible to spend time together without being physically in the same place, permitting social needs to be met in a new way.[128]

The right to freedom of expression is an enabler of a range of other rights and hence the Internet, by acting as a catalyst for the exercise of freedom of expression, facilitates the realization of several other human rights.[129]

[124] Cucereanu (2008) pp. 138–139.
[125] Ibid. p. 139.
[126] Ibid. p. 141.
[127] The Norwegian Ministry of Culture (2018) p. 17.
[128] Sunde (2013) pp. 51–52.
[129] La Rue (2011) in para. 22.

5.1.2 Particular challenges

The European Court of Human Rights has stated that «[d]efamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online».[130] The content and communications on the Internet pose a higher risk of harm to the enjoyment of other human rights than content published by the press, as the potential for dissemination is particularly prominent.[131] This is directly linked to the purpose of the prohibitions against hate speech, as they require an expression to be made publicly.

The Internet as a complex and multinational environment, gives rise to the question of how to control the information that is disseminated. It cannot be regulated in a satisfactory and effective manner at the national level, as there is no national legislation that exercise power over the Internet. Furthermore, fewer professional requirements and low cost make the boundaries between private and public communication less clear.[132] Accordingly, the responsibility of rule-making may preferably be divided between both public and private players and levels of governance.[133]

The social media create a possibility for mobilization and it permits extremists to gain contact with persons they can recruit or enemies they want to influence. Furthermore, the use of Internet can make extremism mainstream, as the broadcasting in several portals may create a perception that the conceptions presented are widely accepted. This could have a legitimizing effect on the content, and it is argued that this may be the reason behind the increasing number of people that join in conspiracy thinking.[134]

People usually find it comfortable to participate in discussions or read information that reflect their own views. The possibilities of filtering information and individualized marketing on the Internet create what is often referred to as «echo chambers» and «ideological greenhouses».[135] Groups of like-minded people that discuss with each other will typically end up with their original views, but in a more extreme form. This phenomenon is called group polarization and it shows that each group becomes more homogenized.[136] Theories of biased assimilation suggest that people tend to interpret balanced views in a way that supports their own initial

[130] Delfi AS v. Estonia, in para. 110.
[131] Ibid. in para. 133.
[132] UN General Assembly A/51/301(1996) p. 20 and Committee of Ministers Recommendation (2013) in para. 5.
[133] Akdeniz (2009) p. 23.
[134] Sunde (2013) pp. 26, 43 and 95–96.
[135] Ibid. p. 55 (my translation).
[136] Sunstein (2018) p. 68.

views. Consequently, it will be better if people do not isolate themselves from opposing views.[137] In the worst-case scenario, this practice will lead to an increase in political polarization and a weakening of democracy.[138]

Some studies suggest that the participants are less civilized in a debate where it is possible to be anonymous. Anonymity makes it easier for individuals to remain hidden behind fake profiles on social media and other web pages.[139] It seems to be a common perception that it is easier to express controversial or even offensive views on the Internet as compared to when meeting people face to face.

5.2 Presence of hate speech on the Internet

The use of the Internet to incite hatred and disseminate racist or other discriminatory views is not a new phenomenon and the use of computers to spread this kind of content have been documented as far back as the mid 1980s.[140] The UN Secretary-General in 1996 stated that «[a] growing trend has been observed among racist organizations to use electronic mail or the Internet to spread racist or xenophobic propaganda».[141] In 1997, the Special Rapporteur expressed that there should be put emphasis on use of Internet in relation to incitement to racial hatred and xenophobia, as there was an evident trend in spreading of racist messages.[142]

Today, the Internet is being used openly to disseminate extremist views and for hidden communication between extremists. The platform used to proliferate the attitudes may be neutral although the content disseminated is considered to be extremist. The Kripos, the national police unity working with organized crime, reported that on a request to the public they had received 1310 tips on racial expressions on the Internet from 1.1.2010 till 1.5.2013.[143]

[137] Sunstein (2018) pp. 92 and 97.
[138] Aalen (2013) p. 135.
[139] Nadim (2016) pp. 82 and 86.
[140] Akdeniz (2009) p. 8.
[141] UN General Assembly A/51/301 (1996) p. 19.
[142] Glélé-Ahanhanzo (1997) p. 4.
[143] Sunde (2013) pp. 28 and 60.

5.3 Regulation of responsibility

5.3.1 Introduction

This section concerns legal liability for hate speech on the Internet. The starting point is that the person making the utterance is responsible for its content. There is a special need for predictability when it comes to penal liability, and the point of departure is that any such responsibility has to be based on a clear provision in law according to the principle of legality.

The different service providers are usually referred to as «Internet intermediaries», a broad term covering a lot of different actors that could be answering to different legal frameworks and regimes of responsibility.[144] In the following, the question is whether the Internet intermediaries could be held liable for third-party content on their Internet portals, and in that case, what the criteria are to establish this kind of liability.

5.3.2 Internet Governance

The rules of responsibility were to a large extent made prior to the development of communicating media content on the Internet.[145] There are different regulatory models at the national level that include legislation, jurisprudence, customs, self-regulation, co-regulation, regulation through software and campaigns of education and awareness.[146] Even so, Internet data passes through multiple jurisdictions and it is difficult to reconcile differences in law and sanctions cross national boarders, as well as deploying law enforcement recourses.[147]

Most of the media houses have discovered the potential in user-generated content, where the users actively participate in the dissemination of information. In this way, traditional media has a function of mediator, much in the same way as social media does. The relation between the editor and the user is closer, the division between edited and non-edited media it less clear, and the question of liability for illegal expressions has become more complicated.[148]

A common response to controversial online content is the use of filtering software. Lacking transparency as to what has been filtered and why, constitutes a problem of public

[144] The Norwegian Ministry of Culture (2018) p. 163 (my translation).
[145] Ibid. p. 95.
[146] Akdeniz (2009) p. 25.
[147] Dutton (2011) pp. 51 and 58.
[148] The Norwegian Ministry of Culture (2018) pp. 96–97.

accountability.[149] Furthermore, it constitutes a problem regarding the principle of «net neutrality», a principle enhancing the concept of Internet freedom: The Internet should be free from discrimination in the way that all content must be treated the same way and move at the same speed over the Internet.[150] This is important in regard to freedom of expression and the right to access information.

In the end, the challenge is how to balance the securing freedom of expression while avoiding the use of the Internet to spread and breed hate speech, without having to rely on censorship as this tends to suppress freedom of expression.[151]

5.3.3 International law

International instruments in the field manifest a development where there is a distinction in the legal principles regulating media operations on the Internet on one side, and the more traditional print and audiovisual media on the other side. The responsibilities conferred on an Internet news portal and a traditional publisher will therefore to some degree be different.[152]

In the case Jersild v. Denmark, the European Court of Human Rights stated that «it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media»[153]. This is referred to as radio and television and the Court has stated that the possibilities to correct or comment any statement made in these media are limited.[154] In this way, it could seem like written expressions could be regulated more strictly than for example live-videos. Even so, there are a lot of «instant sharing» of written expressions on the Internet, and these may not be easily corrected or deleted, as it may have been disseminated in an extensively matter in seconds. Hence, it can be argued that the characteristics of the Internet make regulation particularly important.

Article 4 of the ICERD obliges the states both to implement legislation prohibiting racial discrimination as well as to secure an effective enforcement of the rules.[155] Hence, also regarding the sharing of expressions on the Internet, there should be taken measures to avoid racial discrimination.

[149] Dutton (2011) p. 48.
[150] Newman (2008) pp. 160–161.
[151] Dutton (2011) p. 61.
[152] Delfi AS v. Estonia, in para. 113.
[153] Jersild v. Denmark in para. 31.
[154] Purcell and Others v. Ireland.
[155] Thornberry (2016) pp. 280–281.

The Human Rights Committee has stated that restrictions on the operation of websites, blogs or other Internet-based, electronic information dissemination systems has to be compatible with ICCPR Article 19 paragraph 3. Generic bans on the operation of certain sites and systems will not be compatible with the Covenant, but the restriction should be content-specific.[156]

Article 10 of the ECHR imposes on the states an obligation to implement regulation that secure effective protection of the freedom of expression on the Internet.[157] In relation to this, it is important to make sure that these actors have safeguards against interference, so that the freedom of expression is not restricted too extensively through self-censorship.[158] The Committee of Ministers has held in their recommendations that «[s]tates should ensure, in law and in practice, that intermediaries are not held liable for third- party content which they merely give access to or which they transmit or store».[159]

A similar approach has been taken by the European Union. The E-Commerce Directive passed in 2000 limits liability for Internet service providers where their activity is merely technical and passive, giving access to a communication network where information by third-parties is transmitted or temporarily stored, without the provider having knowledge or control over the information. In order to benefit from this exception of liability, the service provider of an information society has to expeditiously remove or disable the access to the information in question upon obtaining actual knowledge or awareness of the illegal activities. In removing the content, there has to be taken due regard to the principle of freedom of expression.[160] As an example of regulation, Germany has implemented a controversial law, «The Network Enforcement Act», that obliges digital platforms as Facebook to remove hate speech from their platforms. The law has been criticized for censuring important voices in the public debate, as the platforms could censure too strictly due to the fear of being held economically liable.[161]

The ECtHR has addressed liability for Internet intermediaries of user-generated content in several cases. The case *Delfi AS v. Estonia* (App. No. 64569/09) is perhaps the most central in this discussion. In this case, the applicant company was owner of one of the largest Internet

[156] Human Rights Committee General Comment No. 34, in para. 43.

[157] Editorial Board of Pravoye Delo and Shtekel v. Ukraine, in paras. 64 and 66.

[158] Committee of Ministers Recommendation (2013) in paras. 4 and 7.

[159] Committee of Ministers Recommendation (2018), appendix in para. 1.3.7.

[160] E-Commerce Directive, in paras. 42–46.

[161] Equality and Anti-Discrimination Ombud (2018) p. 22.

news portals in Estonia and it had been held liable for third-party comments on this portal. On this basis, the plaintiff company alleged violation of its freedom of expression.[162]

The Court emphasized that the case concerned a large, commercial and professionally managed news portal and that the controversial nature of the comments the portal attracted were a known public concern. The unlawful nature of the impugned comments did not require any analysis as the comments were «on their face manifestly unlawful» and constituted hate speech including acts that incited violence.[163]

In the analysis, the Court identified four relevant aspects which has been applied in later case-law, namely "the context of the comments, the measures applied by the applicant company …, the liability of the actual authors of the comments…, and the consequences of the domestic proceedings for the applicant company».[164]

The Court considered that the applicant company exercised a substantial degree of control over the comments published on its news portal, the company could delete comments, and hence that it had an involvement in making the comments public that went beyond a passive, purely technical service provider. Furthermore, it was foreseeable that a media publisher that had an Internet news portal with an economic purpose could be held liable for the uploading of clearly unlawful comments on its Internet page.[165]

In conclusion, the imposition of liability on the applicant company was not a breach of Article 10 of the Convention.[166] Fifteen judges voted for liability, whereas two judges dissented. The dissenting judges point at the incentives to discontinue offering a comments feature that this kind of liability could provoke, as well as the concern that fear of liability may lead to additional self-censorship by the operators.

In the case *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt (MTE and Index) v. Hungary* (App. No. 22947/13), the ECtHR used the same criteria for its assessment as in the Delfi-case. The Hungarian courts had established an objective liability on Internet websites for users' content.[167] Notwithstanding the similarities with the Delfi-case, the most important difference, and the main reason for the Court concluding opposite as in the Delfi-case, was

[162] Delfi AS v. Estonia, in paras. 3 and 11.

[163] Ibid. in paras. 115, 117.

[164] Ibid. in para. 142.

[165] Ibid. in paras. 128 and 145–146.

[166] Ibid. in para. 162.

[167] MTE and Index v. Hungary, in paras. 29 and 69. Inspired by the Consultation Memorandum of the Norwegian Ministry of Culture.

that the expressions in the present case did not constitute clearly unlawful speech. In this regard, the Court made an assessment of the context and content of the comments. Although the expressions were offensive and vulgar, it did not amount to hate speech or incitement to violence. Moreover, the Court stated that «where third-party user comments take the form of hate speech…, the rights and interests of others … might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments without delay». The instant case concerned value judgements or opinions about a commercial conduct, in contrast to defamatory statements of fact. In addition, the Court argued that liability in this case could result in that commenting spaces could be closed altogether and so have a chilling effect on freedom of expression. That could be particularly detrimental for a non-commercial website, as one of the plaintiff companies was in this case.[168]

In the case *Phil v. Sweden* (App. No 74742/14), the Court clarified to some extent when operators of websites or online platforms containing defamatory user-generated content have limited liability. The applicant, a private person, accused the Swedish authorities for not having imposed liability on an Internet platform with a blog containing defamatory comments about him. The blog in question was small and run by a non-profit association, and the comments, although offensive, did not amount to hate speech. In contrast to the Delfi-case, the comments were not likely to be widely read, and they were removed quicker, in about nine days as opposed to six weeks in the Delfi-case. The Court further referred to the MTE and Index-case and its statement that liability for third-party comments may have a chilling effect on freedom of expression via Internet, especially regarding non-commercial websites. The Court concluded that the domestic courts had struck a fair balance between the Convention rights.[169] After this decision of the Court, is seems like small, non-profit associations enjoy limited liability.

Following this, it seems like the state of law is not yet clarified. One commentator has noted that the case-law implies that Internet intermediaries will be held liable for illegal hate speech posted on their platforms, and that the only way to prevent this is to implement practices of pre-monitoring. After the decision in Phil v. Sweden, where the Court expressly emphasized the small size of the association, the exoneration of liability for defamatory comments may be limited to the small, non-commercial websites. This narrowing on part of the Court, leaves a broad opening for the member states to impose liability on all other platforms.[170] Another commentator has noted the novelty of the area and that the judgment Phil v. Sweden can be

[168] MTE and Index v. Hungary, in paras. 64, 72–76, 86 and 91.

[169] Phil v. Sweden, in paras. 3, 30–32, 35 and 37.

[170] Voorhof (2017).

criticized for not referring to the content of the comment, as was done in the assessment in the MTE and Index-case. By emphasizing that the comments did not constitute hate speech, it gives the impression that there is an established distinction between hate speech and all other speech.[171] Despite the unclarities, it seems to be possible to conclude that an Internet intermediary will be held liable if not promptly removing «clearly unlawful» speech on its portal, at least when it is a large association with an economic purpose. If the content is not «clearly unlawful» and the association is non-profit, there might not be imposed liability. Ultimately, it does not seem quite clear how the question of liability will be solved for clearly unlawful content on small, non-commercial websites.

5.3.4 National Norwegian law

The point of departure in Norwegian law, is that the person making the expression is responsible for the content. Still, most rules concerning illegal expressions include both the person making the expression and the redistributor.[172]

The Penal Code § 185 makes the person who puts forth or communicates an expression liable. This could signify that the originator of the expression or another person further communicating or publishing the expression is liable, for example an editor or a journalist.[173]

Complicity, both physically and psychologically, is punishable due to § 15 of the Penal Code, independently whether the principal actor to a crime could be punished. Due to this rule, one could be held liable for the redistribution of hate speech. Moreover, one might be held liable if consciously leaving a comment constituting hate speech on a medium where one has the control to delete comments. This could be on one's Facebook-page, or a news paper's web page.[174]

In the preparatory work for § 100 of the Norwegian Constitution, it was stated that the point of departure is that the liability should be exclusive and that the mediators of Internet communication should not have successive responsibility as this could force them into a role as a private censor.[175]

[171] Overman (2017).

[172] Equality and Anti-Discrimination Ombud (2018) p. 18.

[173] The Norwegian Ministry of Culture (2018) pp. 25 and 34.

[174] Nadim (2016) p. 39 and The Norwegian Ministry of Culture (2018) p. 38.

[175] The Norwegian Ministry of Culture (2018) p. 16 (my translation).

Currently, a suggestion to implement a new Media Liability Act is being revised. The Ministry suggests certain responsibilities for the editor to be implemented through legislation, namely a duty to keep user-generated and editorial content clearly separated and a duty to inform users about whether the content is pre-edited and which rules apply for the use of the forum. In addition, there should be given information on how to report illegal content. Similar duties are not included in current legislation and the purpose with these duties for the editor is to support the ethical rules of the press. The function that these media have in the public debate suggests that they should have responsibilities regarding user-generated content on their platforms. The Ministry does not want to recommend any stricter responsibility for the editors for user-generated content than what already follows from ordinary principles of responsibility. This is argued on the basis that it is not quite clear how international obligations put restraints on the regulation.[176]

The penal lability of the editor is a secondary foundation of responsibility, as usually the editor will be held responsible directly from the provisions in the Penal Code as the main executor or a complicit. It is only in the cases where the editor does not have actual knowledge of the publishing that it is necessary to go to the particular responsibility. The exceptions from the natural regime of responsibility are connected to edited content, and not the user-generated content. Even so, the suggestion includes a rule about conditional exoneration from liability of user-generated content.[177] The suggestion is to continue the already existing liability of the editor in § 269 of the Penal Code, with the modification that it should be platform-neutral. Furthermore, to be exonerated from liability, the editor should remove illegal user-generated content in their forums, without undue delay. This solution could mean that the editors will take a responsibility of monitoring the content on their portals.[178] The Norwegian editorial association stresses the point that user-generated content is per definition not pre-censored and they want to add that user-generated content should be «clearly» unlawful for it to generate liability if it is not removed without undue delay.[179] This could be seen in correlation with the case-law of the ECtHR.

The suggestion corresponds with the rule of exoneration of responsibility for service providers due to § 18 paragraph 2 of the E-Commerce Act (ehandelsloven).[180] This Act is an implementation of the rules in the E-Commerce Directive of the European Union.[181] The case-law of the ECtHR shows that a system of notice-and-take-down, as predicted in the E-

[176] The Norwegian Ministry of Culture (2018) p. 169–171.

[177] Ibid. p. 205–206.

[178] Equality and Anti-Discrimination Ombud (2018) p. 22.

[179] Norsk Redaktørforening (2018), in para. 9.

[180] The Norwegian Ministry of Culture (2018) p. 174.

[181] Ot.prp. nr. 31 (2002–2003) p. 11.

Commerce Directive, might not always give due protection of ECHR article 8. Large, professional portals that invites their readers to comment on their articles may have a particular responsibility regarding dissemination of hate speech in that they sometimes would have to go further than implementing a system of notice to be exonerated from liability. Apparently, there could be a conflict between case-law of the ECtHR and the limitations in responsibility set forth in the E-Commerce directive, as it will be difficult for the Internet intermediary to prevent manifestly offensive utterances to be posted on the portal in the first place without establishing a system of pre-monitoring all the utterances. Such a general rule to actively be searching for circumstances indicating illegal activity will not be compatible with article 15 of the E-Commerce Directive and correspondingly § 19 of the E-Commerce Act (ehandelsloven).[182]

It is noted about the MTE and Index- and Delfi-cases that they might not limit the discretionary margin for the member states to implement this kind of legislation to any significant degree. The conclusions were based on the character of the comments, and this is problematic as the point of user-generated is that one cannot know beforehand what its content is when one does not pre-monitor. It is stated that this is an obvious flaw in the Court's practice and something that might be clarified in future practice. Currently, that means that there is clearly a national discretionary margin concerning regulation of responsibility.[183]

The Ministry argues that stricter responsibility for the editor would lead to a general duty to surveil the content of user-generated comments, a duty that cannot be founded in case-law of the ECtHR. The Court has stated that a system of notice-and-take-down, in many cases will be sufficient, and the Council of Europe has advised the state parties not to impose general obligations of surveillance on the platforms. Such responsibilities could lead to the disappearance of user-generated forums, pushing the debate away from the edited sphere. According to the Ministry it would be better for the debate climate if the discussions could be held in forums open to everyone, where the possibility to public and social control is bigger that in the small or closed forums.[184]

The correlation between the E-Commerce Directive and ECtHR case-law has yet not been assessed by the ECtHR. This is in line with what the Court views as its position regarding the principle of subsidiarity. Independently of which regulation is implemented, this will have to

[182] The Norwegian Ministry of Culture (2018) p. 167.

[183] Norsk Redaktørforening (2018), in para. 16.

[184] The Norwegian Ministry of Culture (2018) p. 171–172.

be interpreted in light of possible future clarifications on part of the ECtHR.[185] It is still not clear what impact the ECtHR's decision in the Delfi-case will have for the liability of Norwegian editors. Regardless, the Ministry of Culture seems to have considered this case as they have made proposals that correspond with the Court's practice on the area.[186]

Relevant in relation to this topic and in the Norwegian context is the *Høiness-case* (App. No. 43624/14), where Norway is being accused of breaching its human rights obligations. The case has been communicated to the ECtHR and is waiting to be assessed. The Court will decide upon the question whether it amounted to a breach of the applicant's right under article 8 of the ECHR that the Internet portal Hegnar Online were not imposed liability in relation to defamatory comments about the applicant on the webpage. The High Court did not examine the nature of the comments, but decided on the basis that the defendants had reacted sufficiently rapidly to information on unlawful comments and that the arrangement of monitoring was appropriate. The Supreme Court did not grant leave to the appeal, and therefore the decision of the High Court was final. [187]

5.4 Summarizing remarks

The absence of clear legislation on the area of freedom of expression is unfortunate as this could lead to a chilling effect on the exercise of the right. Uncertainty about the consequences of an expression is a threat to its full realization. Moreover, this unclarity will diminish the deterrent factor as for the preventive effect of criminal law. In this way, foreseeability and accessibility of legal rules, as important basic principles for a state based on rules of law, could be argued to be even more important in relation to free speech than in many other legal fields.[188] In short, the legal expressions that are close to the area of illegality will not be heard, whereas the persons expressing illegal utterances will not have a clear incentive to refrain from presenting these utterances.

Responsibility for user-generated content on Internet portals is a novel area, and there are still uncertainties as to the regulation that applies and how it is to be understood. Even so, it seems like the Internet intermediaries could be held liable for not removing clearly illegal user-generated content without undue delay, upon obtaining knowledge.

[185] NIM (2018) p.4.

[186] Equality and Anti-Discrimination Ombud (2018) pp. 20–21.

[187] Høiness v. Norway, in paras. 26 and 31.

[188] Kierulf (2009) p. 55.

6 Reflections

6.1 Hate speech as a concept in public debate

In the public debate, the term hate speech is used to cover a broader range of expressions than what is penalized under law. Hence, it is used including everything from bullying in social media and aggressive and intolerant views in the social debate, to racism and threats towards individuals.[189]

If one looks at the ethic norms, a lot more than what constitute illegal expressions could be expressions that are unwanted in the public debate. Most communities will strive for a debate climate characterized by respect and tolerance and therefore, politically it makes sense to talk about hate speech even though these utterances are not restricted under the freedom of expression.[190]

Research shows that it is the extension and continuing flow of hate speech, and not a single hateful expression alone, that is damaging for the society and the participation in the public debate. Therefore, even less grave expressions contribute to a limitation of freedom of expression.[191]

6.2 Studies of hate speech in the public debate

The Equality and Anti-Discrimination Ombud in Norway conducted a study in 2017 on the basis of comments from the Facebook page of the two news portals, NRK Nyheter and TV2 Nyhetene. The comments were gathered twelve hours after their publication, hence there is reason to believe that most of the comments remaining were legal.[192]

The definition of hate speech used in the study included expressions creating or promoting negative feelings or attitudes based on characteristics such as ethnicity, religion, gender, reduced functional capacity, sexual orientation, age, political views and social status. The Equality and Anti-Discrimination Ombud found that seven percent of comments in the edited debate were to be considered hateful. If other categories than included in the definition, such as appearance, were considered, the amount of hateful comments reached nine percent.

[189] Nadim (2016) p. 18.

[190] Sunde (2013) p. 42.

[191] Equality and Anti-Discrimination Ombud (2018) p. 40.

[192] Ibid. pp. 5, 28 and 40.

Moreover, the study suggests that hate generates hate, as the existence of one hateful comment seems to elevate the risk of more hateful comments being published in the same debate.[193]

The hateful comments often referred to categories that are not included in the § 185 of the Penal Code, namely political conviction (28%), appearance (15%) and gender (12%). Twenty-eight per cent reported having experienced hate speech on the basis of nationality or ethnicity.[194] In relation to this, a study from 2016 showed that minorities do not receive hateful comments more often than the majority population, but they do experience more illegal hate speech as the comments are of a different character and more often fall under the scope of §185. Furthermore, one in four answered that hate speech had made them more cautious with expressing their opinion publicly, and it did not matter whether the hateful comments were directed against any of the categories protected under the Penal Code or not. This shows that independently of the characterization of the comments, and if they could be penalized, expressions that are perceived as harassment have an adverse effect on the public debate and on democracy.[195]

When the public debate is moved from traditional media to social media, the tone in the debate changes and there are many examples of it creating an unnuanced and polarized debate. Persons in positions of power in the society, as for example politicians, should be particular careful with using polarizing rhetoric. [196]

6.3 Concluding remarks

The balancing of protection against hate speech and the right to freedom of expression is fundamental for a functioning democracy, and the presence of hate speech in the public debate is an important factor as for whether people participate and to what extent all voices are heard.

The public debate online seems to become increasingly polarized and excluding, and hate speech has extensive damaging effects independently of if one uses a narrow (legal) definition or a broader definition. [197] It contributes to social exclusion, augmented polarization, the

[193] Equality and Anti-Discrimination Ombud (2018) pp. 11, 37 and 46 (my translation).
[194] Ibid. p. 67.
[195] Nadim (2016) pp. 103, 106–107 and 114–116.
[196] Equality and Anti-Discrimination Ombud, CERD 2018, p. 15 (my translation).
[197] Ibid. p. 14.

abstention from public debate, maintaining of prejudices and creation of anxiety and worry in the affected groups. Furthermore, hate speech deprives the people affected from dignity through signalizing that they are not equal citizens of the society.[198]

Prohibitions on hate speech constitutes restrictions on freedom of expression, while at the same time permitting the free flow of hateful comments threaten the exercise of free speech. Thus, it could be argued that it is necessary to limit freedom of expression to secure the fulfilment of its purpose and the most extensive enjoyment of the right itself. There are provisions that protect against hate speech both in international and national law. Still, there is a remaining problem as not all expressions perceived as hate speech in the public debate are included under these provisions.

Regulation of responsibility for third-party content on the Internet is a novel area and the legal regulations do not develop at the same rate as technology. The absence of a clear legal framework is unfortunate, as the uncertainty regarding liability could lead to a too extensive censoring of content. This is closely interrelated with the reason to implement responsibility for hate speech on the Internet, namely the big potential the Internet carries for dissemination together with the danger that dissemination of hate speech constitutes for the society. At the same time, unclear regulation will not have the desired preventive effect as for being an incentive for persons to abstain from uttering hate speech. As a result, persons that add hate speech to the public debate will not have sufficient incentives to change their behavior, whereas the legal, yet controversial, voices will not be heard.

In conclusion, it is of utter importance to democracy that the Internet is regulated as to avoid the dissemination of and incitement to hatred, and at the same that there is a public debate open to everyone where polarized views can be discussed and refuted.

[198] Equality and Anti-Discrimination Ombud (2018) p. 11.

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