

International Legal Research Group on Online Hate Speech

An introductory report on legal matters regarding online hate speech in Norway and Europe

National Coordinator: Olav Vogt Engeland

National Researchers: Ingeborg Collett Bjørgan, Pernille Edh Hasselgård, Pauline Sommerfelt Helle, Agnes Harriet Lindberg, Karoline Glückstad Torgersen

National Advisors: Inger Marie Sunde, Francis Augusto Medeiros

ELSA The European Law Students' Association



international
legal research group
on **online hate speech**

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The European Law Students' Association
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**NO HATE
SPEECH
MOVEMENT**



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The European Law Students' Association (ELSA) Norway

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i. What is ELSA?

ELSA is a non-political, non-governmental, non-profit making, independent organisation which is run by and for students. ELSA has 42 member countries with more than 300 Local Groups and 38,000 students. It was founded in 1981 by 5 law students from Poland, Austria, West Germany and Hungary. Since then ELSA has aimed to unite students from all around Europe, to provide a channel for the exchange of ideas and opportunities for law students and young lawyers to become internationally minded and professionally skilled. Our focus is to encourage individuals to act for the good of society in order to realize our vision; *“A just world in which there is respect for human dignity and cultural diversity”*.

Legal Research was one of the main aims of ELSA during our early years. In the 1980s, when ELSA was created as a platform for European cooperation between law students, the sharing of experiences and knowledge was the main purpose of our organisation. Later on in the 1990s, our predecessors made successful steps and built a strong association with a special focus on international exchange. In the 2000s, young students from west to east were facing impressive changes in their legal systems. Our members were part of such giant progresses as the EU expansion and the process of EU Law implementation. The outcome of the ELSA PINIL (Project on International Criminal Court National Implementation Legislation) has been the largest international criminal law research in Europe. The final country reports have been used as a basis for establishing new legislation in many European countries.

ii. What is the International Legal Research Group on Online Hate Speech?

The **Council of Europe (CoE)** is the human rights partner of ELSA. In 2012 the ‘No Hate Speech Movement’ was launched by the CoE and ELSA became an official partner of the campaign. *“The project stands for equality, dignity, human rights and diversity. It is a project against hate speech, racism and discrimination in their online expression”*¹. Young people play a central role in this by taking part in online and offline activities and by being its most important agents. The campaign is led by young people and addressed to everyone.

ELSA joined this initiative as a way to raise awareness among law students and young lawyers about the topic of the campaign and contributing to its high quality legal academic discussion. The projects that have been launched by ELSA during 2013 are an Essay Competition, an Online Survey and an International **Legal Research Group on Online Hate Speech (LRG on OHS)**. ELSA’s commitment to the Campaign will be concluded at the Final Conference on Online Hate Speech in Oslo, 3rd-8th of December 2013 (see onlinehatespeechconference.org). The results of

¹ www.nohatespeechmovement.org.



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the LRG will be presented at the conference where European students, academics and other stakeholder on this field will be present.

Moreover, a Legal Research Group is a group of law students and young lawyers carrying out research on a specified topic of law with the aim to make their conclusions publicly accessible. **25 European countries** have joined the LRG on OHS. These national groups investigate the same 11 questions provided by the ELSA International Coordination Team in cooperation with the CoE. The questions relate to legislation and case law on both national and European level. ELSA aims at presenting 20 pages per national report. Consequently, many of the answers can only serve as a starting point - a general overview. The 25 national reports will be compiled and made available to students and professionals in the field of free speech and discrimination. The final report seeks to serve as a comparative source that can reflect similarities and differences between the national legislations that are investigated. The final report will be published on ELSA's and the CoE's web pages in November 2013.

Finally, the **Norwegian LRG** was established in May 2013. The following report is a result of the cooperation between five national researchers, two academic advisors, three linguistic editors and one national coordinator. Some of the questions relate specifically to Norwegian law while others required research on international legislation and European Court of Human Rights case law. Requests relating to the Norwegian report can be directed to vpaa@elsa.no.²

² For more information about the LRG on OHS, see elsa.org/page/online-hate-speech-legal-research-group/.

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?)

1.1 General outline of section 135a of the Norwegian Penal Code

Hate speech is criminalized pursuant to section 135a of the Norwegian Penal Code³, which reads as follows:

“Any person who wilfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty.

A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her

- a) skin colour or national or ethnic origin,*
- b) religion or life stance, or*
- c) homosexuality, lifestyle or orientation*
- d) reduced functional ability”⁴*

The legal provision is neutral with regards to technology and this paper will mainly focus on its application to online expressions. Norway has ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of racist and xenophobic nature committed through computer systems (see chapter 9.2 and 11 of this paper).⁵

Section 135a is ordinary legislation and must be interpreted in light of the fundamental right to freedom of speech, which is introduced on a constitutional level, pursuant to Article 100 of the Norwegian Constitution⁶ and Article 10 of The European Convention on Human Rights (ECHR). ECHR is incorporated as part of Norwegian law.⁷

³ Act of 22 May 1902 no. 10, the General Civil Penal Code (The Penal Code). Section 135a of the Penal Code is from now on referred to as section 135a. It is important to note that The Penal Code currently in force is from 1902. A new penal code was however passed in 2005 by the Parliament, but has not yet entered into force due to technical challenges relating to the introduction of this comprehensive act into the Police's computer system. Consequently, The Penal Code of 2005 will be briefly mentioned later in the report, but it will not be explored into detail.

⁴ Ronald Walford and others, unofficial translation of the Norwegian Penal Code of 1902 (*The Norwegian Ministry of Justice*) <<http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>> accessed 8 July 2013.

At the time of writing, there is no official translation of this subsection and other amendments done this spring. I have therefore provided some corrections as to provide a version of section 135a that reflects the current legal situation in Norway.

⁵ Council of Europe, ‘Signatures and ratifications of the Additional Protocol to the Convention on Cybercrime’, <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=8&DF=&CL=ENG>> accessed 3 June 2013.

⁶ Article 100 of the Norwegian Constitution of 17 May 1814 reads:
“There shall be freedom of expression.

It is possible that an expression deemed at a first glance to contravene section 135a, is still protected by Article 100 of the Constitution. Moreover, if the level of protection differs between the latter and Article 10 of the ECHR, Article 100 will prevail. In practice, the court will try to avoid such conflicts by taking a flexible interpretation.

Section 135a is an offence "*against the general order and peace*"⁸. Its purpose is to protect vulnerable minority groups. This is deemed to be in the interest of the society as a whole, because striking down such expressions is meant to support important democratic values of tolerance and respect. For this reason, it is not necessary that the expression is aimed at a specific person (victim).⁹ Hateful expressions generally directed at one of the minority groups mentioned in section 135a are also prohibited. One consequence is that the police can initiate an investigation at its sole discretion, for instance when it has detected illegal expressions on the Internet. Procedurally, it is not necessary to await a formal report from an individual who belongs to the offended minority group.

1.2 The objective description of the offence

The wording of section 135a must be interpreted in light of other legal sources. The case law of the Supreme Court is of particular importance to its interpretation, along with preparatory works from the law-making process.¹⁰

1.2.1 "Expression": A criminal act

An expression can be a criminal act, cf. section 7 of the Penal Code.¹¹ In order for something to be considered an "expression" it must have an external manifestation. Thus, the law makes a distinction between an expression, which is considered a criminal act, and a thought, which is

No person may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law.

Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.

Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.

Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.

It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse."

Translation of the Norwegian Constitution (*The Norwegian Parliament*, last updated 7 October 2013)

<<http://www.stortinget.no/In-English/About-the-Storting/The-Constitution/The-Constitution/>> accessed 24 August 2013.

⁷ Act of 21 May 1999 no. 30 relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act).

⁸ The heading of chapter 13 of the Penal Code.

⁹ See chapter 1.2.3.

¹⁰ Preparatory works are considered a significant source of law in Norwegian jurisprudence.

¹¹ Section 7 paragraph 2 reads: "*if the act is constituted by an expression.*" (my translation).

contained in somebody's mind. "Expression" is understood widely as encompassing spoken words, written texts, videos, sounds, pictures, paintings, symbols, etc. Expressions on the Internet may take all these forms

1.2.2 The character of the expression: "discriminatory" or "hateful"

According to section 135a the expression must be "discriminatory" or "hateful". This is defined in the second paragraph as "*threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone*" (see chapter 10). Usually, this is the condition which is assessed by courts in 135a cases.

The main rule in Norwegian law regarding hate speech is that there is a large margin for distasteful expressions.¹² According to preparatory works only expressions that are of a "*qualified offensive character*" will be found discriminatory and hateful.¹³ The Supreme Court has defined this as expressions that encourage or give affiliation to violation of integrity or expressions that imply a gross devaluation of the human dignity of a group.¹⁴

In the *Sjolie* case¹⁵ (Rt.¹⁶ 2002 s. 1618), the Supreme Court weighted the concept of freedom of expression against the conducts described in section 135a. It placed such a decisive weight on freedom of expression that it only considered utterances that encouraged violence to be illegal. The Supreme Court judgment in this case resulted in an opinion from the UN Committee on the Elimination of Racial Discrimination (CERD), which stated that the judgment was a violation of Article 4 of ICERD¹⁷.¹⁸ The Supreme Court has now lowered the threshold for protection under freedom of expression,¹⁹ and has recently deemed illegal an expression which did not have any suggestion of incitement of violence, yet nonetheless disparaged a person's human dignity on the basis of his skin colour.²⁰

1.2.3 The protected groups

The protected minority groups are described in section 135a, second paragraph, letters a-d. The list is exhaustive hence other groups are not protected. The fact that section 135a is focused on minority groups might raise questions about hate speech concerning groups that are not minorities, e.g. women, senior citizens and politically active people. In such case one has to seek recourse in provisions concerning threats, defamation etc.

¹² Rt. 2012 p. 536, *Dørvakt*, paragraph 32 with reference to well established case law. See also chapter 2.1.

¹³ Ibid. paragraph 28.

¹⁴ E.g. Rt. 2012 p. 536, *Dørvakt*, paragraph 28. Rt. 2007 p. 1807 *Vigrid*, paragraph 33.

¹⁵ Anti-Semitic remarks were proclaimed in a public square during a demonstration.

¹⁶ Rt. = Norsk retts Tidende (In English: Norwegian Supreme Court Law Review).

¹⁷ United Nations International Convention on the Elimination of All Forms of Racial Discrimination (1965). accessed 10 July 2013.

¹⁸ The opinion, CERD/C/67/D/30/2003, is available on:

<http://www.regjeringen.no/upload/kilde/jd/prm/2005/0059/ddd/pdfv/255370-cerd_communication_30_2003.pdf>.

¹⁹ Ot.prp. no. 8 (2007-2008), p. 249 and Rt. 2012 p. 536 *Dørvakt*, paragraph 37.

²⁰ Rt. 2012 p. 536, *Dørvakt*.

The fact that the provision is directed against "anyone" brings about two elements: First it shall protect individuals who are identified with one of the minority groups. The rationale behind this is respect for the individual as a person.²¹ Secondly the expression can be directed at an entire group that is protected under the provision. It is therefore not a criterion that the actual expression reaches its target as long as it concerns a protected group. In the *Vigrid* case, the audience was the group of readers of an interview with neo-Nazis in a newspaper, and in the *Sjorlie* case other fellow neo-Nazis constituted the audience. Because the expressions concerned Jews as a group, they were covered by section 135a. There is no requirement that the protected group is limited or homogenous. In the *Kjuus* case²² (Rt. 1997 p. 1821), dark-skinned immigrants (a varied group of over 140 000 individuals) were seen as a protected group under the provision.

Norwegian scholars have discussed whether at all there can be personal victims under section 135a, which uses the word "anyone" to describe potential targets for hateful speech. Several cases only deal with hate speech against minority groups, e.g. immigrants and their descendants in the *Kjuus* case and Jews and immigrants in the *Sjorlie* case. The question seems to have been solved in the *Dorvakt* case where section 135a was applied when a doorkeeper had been severely insulted, based on his skin colour, by a visitor. The doorkeeper was referred to as "the victim". It shows that the provision can be used also for expressions aimed at individuals (due to the individual identification with one of the protected groups).

1.2.4 Public expression

According to section 7 paragraph 2, an expression is uttered publicly when it is "*suitable to reach a large number of persons*"²³. The preparatory works indicate that a number of 20 to 30 people is sufficient to be considered public.²⁴ Whether an expression is considered publicly uttered must be assessed with regards to the length of time that it is accessible. An audience of less than 20 people by the time the expression was uttered is not by itself an indication that it was not a public. If the said expression remains available to more than 20 people over time, the publicity criterion would be fulfilled.

In other words, expressions published online are considered public if the website is in principle open to access by the general public, regardless of the presence of access-control mechanisms or restrictions. This is the case regardless of how many people actually use it.²⁵ The ease of spreading an expression through the Internet can therefore be relevant in the assessment. An average Norwegian Facebook user has between 200 and 700 friends, so a post on someone's wall

²¹ Ibid.

²² On an extreme right wing party's program, statements about forced sterilization and abortion were directly linked at dark-skinned immigrants.

²³ The unofficial translation uses "likely" instead of "suitable", but "suitable" is better capturing the meaning.

²⁴ Prop. 53 L (2012-2013) cf. Ot.prp. nr. 90 (2003-2004).

²⁵ Prop. 53 L (2012-2013), p. 6.

would likely be seen as a public utterance.²⁶ On Twitter someone might have so few followers that one could wonder if his tweet would be regarded as "public" in the legal sense. However, the expression could easily be re-tweeted and spread to a considerable number of people (see chapter 2.2). The "suitable to reach" wording is the key to define the public character of the expression.

2 Contextual elements of Hate Speech

What are the key contextual elements to identify a "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

2.1. Key contextual elements to identify "hate speech"

This question must be answered in light of guidelines developed by the Norwegian Supreme Court and by the European Court of Human Rights (ECtHR) as Norway is bound not only by the wording of Article 10 of the ECHR, but also by its case law. Special care has to be taken in order to relate Article 10 case law to the application of section 135a, as hate speech is not a distinct and defined legal concept under the wording of the Convention. The ECtHR examines the contextual elements of unacceptable speech somewhat differently than the Norwegian Supreme Court. Overall, the latter has less systematic criteria, and prioritises freedom of expression slightly more than the ECtHR; however, there is general conformity with European standards on hate speech.

2.1.1 Norwegian case law on section 135a

In the *Sjolie* case (2002), the Supreme Court had a strictly textual interpretation of the expressions. This case is no longer seen as a source of interpretation, and it is now accepted that an expressions should be understood in its context.²⁷ This test establishes an objective standard. According to the *Kjuus* case (1997), an expression is to be understood in connection with the rest of the text of which it is part.²⁸ The greater context of the statements rendered them hateful expressions pursuant to section 135a. This judgement also demonstrated that the Supreme Court takes into account the medium of the expression, which, in this case, was a political program. The Supreme Court explicitly outlines that political expressions are given greater leeway than other types of expressions, but may also be struck down by section 135a.

The manner in which the expression is uttered can also be of importance.²⁹ Symbols can constitute standalone expressions under section 135a. When a text is supplemented by symbols,

²⁶ Inger Marie Sunde (eds), 'Forebygging av radikaliserings og voldelig ekstremisme på internett' (Oslo Police University College 2013) <http://brage.bibsys.no/politihs/bitstream/URN:NBN:no-bibsys_brage_43577/1/forebygging_av_radikaliserings.pdf> accessed 5 July 2013.

²⁷ Rt. 2012 p. 536 *Dørvaet*.

²⁸ Ot. Prp. No. 33 (2004-2005) p. 189.

²⁹ Ibid.

the textual implications can be radically altered resulting in a contravention of section 135a. Furthermore, an expression may draw on a wider set of associations, which may also be considered relevant to the context. In the *Vigrid* case (2007), the Supreme Court considered several comments seen together as hate speech despite the fact that the hateful content was only implicit.

The veracity of the statement is not treated as an independent criterion in the Supreme Court assessments, but can be one of many factors that are taken into account.³⁰ It means that an expression which is to some extent true could still be considered illegal.

In the *Sjolie* case, the expressions were found so absurd and illogical that they could not possibly be taken seriously or considered harmful. As per the subsequent change of practice (see chapter 1.2) also expressions with lack of meaning can be in contravention of section 135a.

2.1.2 ECtHR case law on Article 10

The ECtHR places particular scrutiny on the context of hate speech, as this element frames the other two assessed criteria, content and intention.³¹ As mentioned earlier, impermissible speech according to Article 10 is not conceptually identical to hate speech in section 135a. Still, the contextual criteria emphasized by the ECtHR may be relevant to the interpretation and application of section 135a.

In qualifying whether an expression is hate speech, the context nuances the gradation of “hate”, the probable impact of the comment and accordingly the margin of appreciation accorded to the sovereign state. Presently, the context of an expression is dissected by three categories: the status of the applicant in society (the alleged perpetrator), the status of person(s) targeted by comment (the victim), and the impact of the comment.³² For each category, the Norwegian counterpart (or lack thereof) will be discussed. As there have been virtually no cases pertaining to *online* hate speech either nationally or internationally, it is assumed that the conclusions lend themselves to online forums as well.

Within the ECtHR these three contextual elements cumulatively generate a combined force that can sway an expression from being “hate speech” to a comment vital to political discourse. Firstly, the **status of the alleged perpetrator** provides him with varying levels of leeway and responsibilities with regards to freedom of expression. As part of the Court’s fundamental belief in democracy, inflammatory comments by a politician in a political debate receive greater

³⁰ Rt 1981 p. 1305, *Løpeseddel*, p. 1315.

³¹ The weight of these three elements varies from case by case, as particularities of a case may lend itself more towards content over context and vice versa.

³² Anne Weber, ‘Manual on hate speech’ (Council of Europe Publishing 2009) <http://act4hre.coe.int/no_hate/No-hate-speech-movement/Studies-and-Research/Council-of-Europe>, accessed 25 July 2013.

flexibility than by representatives of the state.³³ Individuals, who are channels for social and public debate and the preservation of effective democracy, are shown more tolerance.³⁴ The Supreme Court is sensitive to the context of the expression, but has not yet outlined the status of the perpetrator as an independent criterion. In the *Kjuus* case, the court agreed that the political context of the program led to more leeway on its scrutiny, though this was related to the expression, not to the perpetrator.

Secondly, the **status of the victim(s)** affects the threshold for “acceptable” criticism they may be exposed to. On one hand of the spectrum is the state, whose role intrinsically places it under permanent scrutiny from all actors of society. On the other end are private individuals whom are safeguarded from visceral scrutiny and criticism. The case *Lingens v. Austria* judgment of 8 July 1986 adeptly illustrates this; a journalist had criticized a politician with regards to his affiliations with the Nazi era. The Court denotes that:

*“The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 [...] enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”*³⁵

The Norwegian Supreme Court, when assessing hate speech, does not have a general vulnerability evaluation as does the ECtHR in the cited judgement. The reason for this is that the purpose of section 135a is solely to protect particularly vulnerable groups (see chapter 1.2.3) whereas Article 10 is general and can in theory protect all groups of people (e.g. the above mentioned case which does not directly concern “hate speech”). When applying section 135a the question is whether the person belongs to a protected group (see the *Kjuus* case). Having for instance a public role is subordinate in this regard. However, *Lingens v. Austria* suggests that, in hate speech cases, a public spokesperson, for example, of a minority might have to endure more distasteful comments than others.

³³ Comparing *Incal v. Turkey* judgment of 9 June 1998 and *Seurot v. France* judgment of 18 May 2004, the Court enforces a milder standard on the former, where a politician had been accused of hate speech, than the latter, where the accused was a school teacher.

³⁴ Members of the press are differentiated into two “role” categories: authors and propagators. The press is a paramount actor in the maintenance of a democracy; accordingly the Court accords it both leniency and particular responsibilities. In *Jersild v. Denmark* judgment of 23 September 1994, a journalist had produced a documentary on a group of right extremists, the “Greenjackets”, which was aired on national television. “[T]aken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas, and was deemed apart of an important social debate.” The journalist was thus not outside his freedom of expression in the dissemination of these racist ideas, accordingly the state was given a smaller margin of appreciation in the matter.

³⁵ *Lingens v. Austria* judgment of 8 July 1986, para 42. My underlining.

Thirdly, the **“impact” of the comment** encapsulates the potential harm it may have inflicted (see chapter 2.2). The level of harm is difficult to ascertain not only for the domestic court but even more so for the ECtHR who is both temporally and culturally displaced from the incident. Nonetheless, this is at the heart of the “context” and is crucial in branding a comment as “hate speech”.

The impact of a comment is affected by several elements. It may vary according to the medium of dissemination. The written word, audio-visual media, and artistic works not only interact differently with the audience but also reach different quantities and demographics. As noted by the Court in the *Jersild v. Denmark* case³⁶, “*the potential impact of the medium is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media*”. The medium of the comment has a direct relationship with the amount of harm it can cause (see chapter 2.2). There is presently no explicit case law in Norway focusing on the medium of an expression.

Perhaps the most important factor in the impact of a comment is the circumstance of its dissemination. The ECtHR has repeatedly placed particular emphasis on the temporal, historical and cultural circumstances a comment has been introduced in. Historically, the ECtHR bases its evaluation in the state’s own assessment and provides it with great margin of appreciation in determining the harmful impact of a comment (see chapter 9.1). The *Soulas and Others v. France* judgment of 10 July 2008 illustrates this dynamic: in this case, two authors had published a book on the incompatibilities between European and Muslim civilizations with strong underlying incitement towards violence. The Court denoted that the subject matter of immigrant integration has been intensely debated in the media and was particularly problematic in France. In fact “*in their most serious expression [the tension], resulted in violent clashes between police and some radical elements of the [immigrant] population*”³⁷. Given the tense climate around this topic, the reception of such a book is far more inflammatory in current times than it would have been had it been published 100 years earlier.³⁸

Overall, for the ECtHR contextual elements of a case are paramount in ascertaining whether a remark constitutes hate speech. The Supreme Court appears to conform to the standard set by the ECtHR but does not apply the same criteria systematically. It does not evaluate each criterion separately but rather takes a general analysis. The lack of specificity in contextual criterion makes it less evident to systemize the threshold for hate speech in Norway.

³⁶*Jersild v Denmark* judgment of 23 September 1994, para. 31.

³⁷ *Soulas and Others v. France* judgment para 37. My translation.

³⁸ See also *Féret v. Belgium* judgment of July 16 July 2009. Here the Court considered the effect of the timing of the distribution of pamphlets in an election period. Besides, it should be noted that attacks targeting religious beliefs fall in a special category. The state is granted particularly wide margins of appreciation in such instances as there is no European consensus about what constitutes an offensive remark about other religious beliefs. As such there will be great variance in the evaluation of the context of the comment from state to state.

2.2 The multiplying and wider effect of online dissemination

The Internet allows a user to reach a phenomenally large audience. With a low barrier of entry, few or no “gate keepers”, generally easy access and multitudes of platforms, a user can spread words of hate with unprecedented effectiveness (see chapter 1.2.4). This multiplying and wider effect of information dissemination that the Internet provides – i.e. its reach - is not synonymous with equal ability to influence – i.e. its impact. The impact of online hate speech is by no means uniform. Much like traditional communication media, the impact of online hate speech is influenced by its form, perceived legitimacy, perceived goal and audience.

Online hate speech can be prolifically spread through different forms and channels. It can be in the form of written text, audio-visual aids or artistic works. As previously noted with regards to the *Jersild* case, audio-visual medium may have a more powerful impact and can “go viral”. The impact of the comment will thus not only vary by content but also by form. Additionally, the form of the comment can be communicated through a multitude of platforms: web sites, blogs and online forums, personal messages, social networking sites, video and music streaming services etc. In fact, each platform has advantages and limitations in respect of their potential impact. The “comment culture”³⁹ that has emerged exemplifies this; whilst anyone can make a hateful online comment which could be read by hundreds of thousands, it may also be completely overlooked or lost amongst other commentators. Moreover what such comments fundamentally lack, like most online hate speech comments, is credibility: such comments are largely discredited and disqualified, undermining its potential impact. This is particularly evident when comparing such forms to the printed press, as online hate speech generally lacks the authoritative stamp of more traditional modes of communication and thus has less of a meaningful impact.

Several extremist groups have effectively utilized online platforms which have both reach and impact. Stomfront, a white-supremacist web site, combines textual messages on its site, along with the publication of YouTube videos. They appeal to several demographics and have achieved, at least within their own members, a certain level of credibility. The Internet’s cross-linking of web sites and other sources also strengthens the sense of authority and weight of a claim. A particular phenomenon is the “counter knowledge” sites, which present themselves as “truth” tellers whose information the mainstream media censors. When such sites are linked to real life associations, like political parties, their comments carries much more weight as the association confers them “real life” authority and credibility.⁴⁰ In this context, online hate speech does enable individuals to have a much larger impact than they would be able to gain by using traditional media.

³⁹ Gavan Tiltley, ‘Hate speech online: considerations for the proposed campaign - Starting studies about online hate speech and way to address it’ (Council of Europe Publication 2012) <http://www.beznenavisti.sk/wp-content/themes/beznenavisti/podklady-a-materialy/uvahy_ku_kampani.pdf> accessed 16 August 2013, p. 29.

⁴⁰ The Front National in France has utilized this strategy to present the mainstream press as controlled by corrupt elites who misrepresent the realities of immigration or Islam.

Moreover, there is another harmful consequence of online hate speech: the use of the Internet to convey messages of hate can lead to confusion about what is considered actually acceptable discourse in society. Ideas that normally would have existed in subcultures may be wrongly considered as mainstream ones.⁴¹ This affects the entire society and is not limited to certain individuals, and therefore endangers the climate for public debate.⁴² It establishes new norms of discourse that go beyond what would otherwise be considered respectful and ethically acceptable. Besides, the Internet can also function as an "echo chamber": people believing in radical ideas may get the impression that their views are shared by many others and thereby feel justified.⁴³

The Internet as medium has also reduced the space between thought and action.⁴⁴ Through the Internet, a statement can trigger an action which can be arranged and carried out more easily. One can find bomb recipes, videos of how to use weapons and some Internet games even provide links to arm dealers websites.⁴⁵ The Norwegian terrorist Anders Behring Breivik is an example of how hatred can transform ideas into real physical threats with the help of the Internet.⁴⁶

Presently, there are no conclusive studies on the effect of online hate speech on different age groups. There are however, emerging trends suggesting that youth are the most susceptible, but even then that the *"impact that online hate speech can potentially have on youth is likely to vary on a case by case basis. Some youth are more susceptible than others and varying degrees of involvement will produce varying degrees of impact"*⁴⁷.

Overall, the multiplying and wider effect of the Internet enables users to get their comment "out there" but does not guarantee that these comments will have a larger impact. The impact of their messages will depend on for example the form and platform used, the authoritative weight of the author and the persuasiveness of the language and information. However, it is naïve not to acknowledge that the Internet has changed the way we communicate and can make it easier to cross borders that might otherwise be harder to cross in the offline world.

⁴¹ Øyvind Strømme, 'Eit vegkart til ekstremismen', (*Morgenbladet* Oslo 4 April 2013), <http://morgenbladet.no/samfunn/2013/eit_vegkart_til_ekstremismen#.Ud_FKvm-2So> accessed 12 July 2013

⁴² Sunde (2013), p. 32.

⁴³ Strømme

⁴⁴ Sunde (2013), p. 48.

⁴⁵ Ibid.

⁴⁶ Sunde (2013), p. 97.

⁴⁷ Peter Weinberg, 'A critical rhetorical analysis of selected white supremacist hate sites', (*Rhode Island College* 2011) <http://digitalcommons.ric.edu/cgi/viewcontent.cgi?article=1051&context=honors_projects> accessed 1 August 2013.

3 Alternative methods of tackling Hate Speech

Denial and the lessening of legal protection under article 10 of the European Convention on Human Rights are two ways of tackling hate speech; are there more methods – through national and/or European legislation, jurisprudence or otherwise, to tackle this issue?

3.1 Legislation

3.1.1 Substantive criminal law

One method of tackling hate speech is to establish prohibitions through legislation. This exists to a various extent, both on a national (see chapter 1 about section 135a) and European level (see Chapter 11). Apart from Article 10 (see chapter 2.1.2), the ECHR has Article 17, which can be used in order to prevent hate speech that violates fundamental values of the Convention (see chapter 7). This way of tackling hate speech creates a certain degree of predictability. However, every case is individually assessed making the result difficult to predict. Furthermore, section 431 of the Penal Code establishes a strict liability for editors. He may be objectively responsible for utterances that are published on his media platform.

“The editor of a newspaper or periodical shall be liable to fines or imprisonment for a term not exceeding three months if the newspaper or periodical publishes anything for which the editor would have incurred criminal liability pursuant to some other statutory provision if he had known the content. He shall not, however, be liable to a penalty if he establishes that he cannot be blamed as regards checking the content of the publication or supervision, guidance or instruction of his deputy, colleagues or subordinates.”⁴⁸

3.1.2 Procedural law

Another possibility is to implement measures for more efficient international cooperation in hate speech cases. It should be, de lege ferenda, possible for the investigating state in which the speech has occurred, to obtain identification data (traffic data about the source) from a networking site in another state, provided that the source is located in the investigating state. This implies a need for lessening the condition of double criminality as the legal protection of speech differs between states. The solution should only be applied to hate speech aimed at vulnerable minority groups of the investigating nation and not to hate speech in general, in order to avoid risk of suppression of political debate by the authorities through politically motivated prosecution.

⁴⁸ First paragraph of section 431 of the Penal Code.

3.2 Soft-law

Furthermore, online hate speech can also be discouraged through non-binding informal rules, known as soft-law. Although non-binding, soft-law still has a practical effect.⁴⁹ In Norway, an example of soft-law is the Ethical Code of Practice for the Press⁵⁰ which sets out moral requirements to the press and official publications both in traditional and online media.⁵¹

The Ethical Code imposes liability on editors for the content of their publications.⁵² One can however not be criminally sanctioned by such a soft-law declaration. For this one has to seek recourse in section 431 of the Penal Code (see chapter 3.1.1). Further, the Ethical Code requires a certain degree of objectivity and general consideration when publishing.⁵³ This contributes to the limitation of hate speech, especially online where the majority of publications are now posted. The regulations' main objective is to create a preventive effect with regards to hate speech through visible moral standards.⁵⁴ The Press Professional Ethics Committee⁵⁵ is responsible for examining complaints on violations of the regulations and has the power to make statements when they believe the media has violated their ethical obligations.

Also, it has been argued that policy requirements towards the hosts of Internet pages be introduced, which obliges him to set clear boundaries and erase postings or messages which disregard the code of conduct.⁵⁶ Freedom of speech is not a right to publicise on *others'* websites. Such requirements would involve a higher protection against hate speech than the Ethical Code as these regulations only target the traditional press.

On European level, presently no official common soft-law exists specifically for online hate speech. Initiatives have been taken in order to discuss and establish common non-binding informal rules for dealing with hate speech,⁵⁷ among others in the European Union where there has been discussed whether European "be cautious" principles should be established (see also chapter 8 and 9).⁵⁸

⁴⁹ Andrew Power and Oisin Tobin, 'Soft Law for the Internet, Lessons from International Law', <www2.law.ed.ac.uk/ahrc/script-ed/vol8-1/power.asp> accessed 10 August 2013.

⁵⁰ In Norwegian: "Vær varsom-plakaten".

⁵¹ The regulations can be found on the Norwegian Press Association's web site: <http://presse.no/Etisk-regelverk/Vaer-Varsom-plakaten>.

⁵² The Ethical Code of Practice for the Norwegian Press article 2.1.

⁵³ Ibid. article 4.1.

⁵⁴ NOU 2011: 12.

⁵⁵ In Norwegian: "Pressens faglige utvalg" (PFU).

⁵⁶ Sunde (2013) p. 37.

⁵⁷ Power and Tobin.

⁵⁸ Ringerikes Blad, 'Ønsker europeisk vær varsom-plakat' <<http://mobil.ringblad.no/Utenriks/article1948636.ece>> accessed 10 August 2013.

3.3 Preventive initiatives

The term “preventive initiatives” is understood as initiatives taken by the authorities or the Internet industry aimed at preventing hate speech from arising and spreading online. Both direct and indirect initiatives have been implemented in Norway.

3.3.1 Direct initiatives

Filtering involves blocking of Internet pages that have a particular content. Filtering based on the individuals' personal preferences is offered worldwide.⁵⁹ It has been discussed whether there should be a national enactment on filtering in regards to all illegal speech and information online.⁶⁰ The Ministry of Justice and Public Security did not support such enactment because it would be difficult to prevent the filter from also blocking legitimate information from spreading. However, the host of an Internet page can remove hate speech without impinging on freedom of speech.

3.3.2 Indirect initiatives

Indirect initiatives have been implemented through education. Academics can have an awareness-raising function and can contribute to the launch of new ideas that can be discussed in the public sphere. Publication of articles is, among others, an important channel for legal professionals to promote differing views and contribute to a constructive debate. Raising awareness leads to increased dissemination of information and contributes to more well-informed attitudes by the population.

Norway and the rest of Europe have over the last years experienced an increase in the number of articles and reports concerning hate speech. The search engine Google indicates a substantial increase in the number of publications related to this topic. In 2008, there were in total 31.8 million hits on articles related to hate speech, in comparison to 44.7 million hits in 2010. For the first eight months of 2013, there were 143 million hits on publications covering the topic.⁶¹ The sources of incorrectness in such a non-scientific research can be many, but the tendency seems to be visible.

4 Distinction between blasphemy and Hate Speech based on religion

How does national legislation (if at all) distinguish between blasphemy (defamation of religious beliefs) and hate speech based on religion?

⁵⁹ See, among others, Windows' filtration services < <http://windows.microsoft.com/nb-no/windows7/looking-for-web-filtering-and-activity-reports-in-windows-parental-controls> > accessed 2 September 2013.

⁶⁰ Ot.prp.no.22 (2008-2009) paragraph 2.18.1.

⁶¹ Research of 10 August 2013.

Blasphemy is criminalized, according to the Penal Code section 142:

“Any person who by word or deed publicly insults or in an offensive or injurious manner shows contempt for any creed whose practice is permitted in the realm or for the doctrines or worship of any religious community lawfully existing here, or who aids and abets thereto, shall be liable to fines or to detention or imprisonment for a term not exceeding six months.

A prosecution will only be instituted when it is required in the public interest.”

This section is seen as “sleeping” and the last person prosecuted was the famous poet Arnulf Øverland in 1933, who was acquitted.⁶² The purpose of the provision is to protect the individual’s religious beliefs, whereas section 135a protects against insults based on religion. Where the border between these two sections is to be drawn has not been clarified by case law.⁶³ The above-mentioned blasphemy section has not been included in the new Penal Code of 2005 which, as mentioned in footnote 3, has still not entered into force.

5 Networking sites and online anonymity

Should networking sites be legally forced to reveal identities of persons at the origin of such online hate speech and is this feasible? What is the current status in your country?

5.1 Revealing identities of persons at the origin of online hate speech

This question does not concern anonymity in general, but the disclosure of the identity of people posting expressions that might be found to be a violation of section 135a. It means that the issue is whether websites should be legally forced to reveal the identity of the author (source) of a possible offence to the police in the course of a criminal investigation.

Disclosing the identity of people posting online hate speech may be necessary for effective prosecution. Identifying the perpetrator can be difficult in cases where more than one person has access to the device used for posting online hate speech. This happens usually when there is no authentication control for accessing the network, such as in “guest networks” found in public libraries, Internet cafes and even on open Wi-Fi networks.⁶⁴ Such problems may result in “dead end” investigations. The problem may justify the imposition of an obligation to keep logs that show the identity of the users for such services, or even, authentication for logon to the network.

⁶² St.meld. nr 26 (2003-2004).

⁶³ Ibid.

⁶⁴ Inger Marie Sunde: Inger Marie Sunde: *Lov og rett i cyberspace. Internettkriminalitet og etterforskningsmetode* (Fagbokforlaget 2006), p. 268.

The extraterritorial character of the Internet also implies that the offending expression may be posted on a foreign website, out of immediate reach of local law enforcement. This problem can be countered by more effective cooperation procedures as mentioned in chapter 3.1.2.

The issue of freedom of speech versus crime prevention plays a role here: some people fear that revealing identities and having people prosecuted for their online expressions of hate, will result in less people taking part in the public debate, i.e. jeopardizing the right to freedom of speech. Given the destructive examples of hate speech we have seen in Norway recently⁶⁵ one might argue that restricting freedom of expression is necessary in order to facilitate a public debate where everyone feels encouraged to take part.⁶⁶

5.2 The feasibility of obtaining identification data

Online anonymity means that identification data is concealed. There are three types of anonymity online: technical, legal and actual.⁶⁷ In this question we will present the three different types and then discuss some practical issues that emerge in this context.

On a *technical* basis it is to some extent feasible to compel networking sites to reveal identities of persons responsible for online hate speech. The sites have IP-addresses and sometimes even personal information about their users; e.g. name, address, telephone number etc. However, there are a number of challenges related to this. Some countries have laws that oblige the Internet providers to register their users so they can be identified while some do not.⁶⁸ This makes technical anonymity possible in some countries.

Legal anonymity means that a networking site has access to the identification data, but this cannot be disclosed directly to the police due a legislative prohibition.

Actual anonymity is when the networking site can choose if it wants to record the identification data from its users,⁶⁹ and when the act involves a foreign networking site subject to foreign assessment of the legality of the disclosure of the identity. In these situations extradition of the identity of the user can be refused. The EU Data Retention Directive⁷⁰ has however reduced the level of technical and actual anonymity in Europe.

⁶⁵ A prominent example is the comparison of people of the Romani population with the slugs and encouraging them to commit suicide.

⁶⁶ See also chapter 1.1.

⁶⁷ Sunde (2006), p. 268

⁶⁸ In the Norwegian legislation it is a violation if the networking site fails to register the identification data, cf. The Regulations of 16. February 2004 on Electronic Communications Networks and Services (Ecom Regulations)

⁶⁹ This means any physical or juridical person who agrees to access to a electronic communication web or service for their own use or loan, cf. Act on Electronic Communication (The Ecom Act) section 1-5, n. 15.

⁷⁰ Directive 2006/24/EC of The European Parliament and the Council 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

On a practical level it can be difficult to reveal the identity because there are many different platforms for publishing opinions online. Facebook and Twitter have 1 billion⁷¹ and 500 million⁷² users respectively. On the largest online newspaper in Norway, Verdens Gang, there are posted over 800 000 comments per year.⁷³ On the same website, in a debate section, there are more than 4 million comments posted every year.⁷⁴ In total 120 000 different users left a comment on articles on VG the last year, which represents approximately 2.4 % of the total population in Norway.⁷⁵ The numbers indicate that monitoring online debate cannot be done manually by the police - there are not enough resources. In other words, the only way to prosecute hate speech is if someone reports it or if the police stumbles upon it by chance. A solution to this problem could be the establishment of a department committed only to fight hate crime, which is the approach in Sweden.⁷⁶

On the other hand, the E-Commerce Directive⁷⁷, aimed at increasing the economic potential of online activities, has exempt Internet service providers (ISPs) from an active monitoring duty. Such an active monitoring obligation could have a major impact on the business model that has been successful so far.

5.3 The current status in Norway

The Ecom Act⁷⁸ section 2-9 first paragraph states that ISPs have a duty of confidentiality towards their users. This does not apply when the police demands information about identification data, according to third and fourth paragraph of the provision. If the police requires identification data the networking sites are as a main rule obliged to provide it. The Criminal Procedure Act⁷⁹ section 210 first paragraph states: “*A court may order a possessor to surrender objects that are deemed to be significant as evidence if he is bound to testify in the case*”⁸⁰. It is well established since Rt. 1992 p. 904 that information stored online is regarded as an “object”.

⁷¹ Donna Tam, ‘Facebook by the numbers: 1.06 billion monthly active users’ (Cnet 30 January 2013) <http://news.cnet.com/8301-1023_3-57566550-93/facebook-by-the-numbers-1.06-billion-monthly-active-users/> accessed 03.10.2013.

⁷² Kari Rolfsjord, ‘Twitter passerer 500 millioner brukere’ (Dagens IT 28 February 2012) <<http://www.dagensit.no/article2341629.ece>> accessed 16 September 2013.

⁷³ Based on readers pr.day. -- ‘Daglig dekning for nettavisen’ (medienorge, 2013), <<http://medienorge.uib.no/?cat=statistikk&queryID=253>> accessed 29 July .2013.

⁷⁴ www.vgd.no.

⁷⁵ A. Kjensli Knudsen and K. Bendiksen, ‘Skal vi tolerere intoleranse?’ (NRK P2, 8 July 2013) viewed on 27 July 2013 <<http://radio.nrk.no/serie/radioselskapet/mktr11013513/08-07-2013>, 00:31:58-00:32:18>.

⁷⁶ Ingjerd Hansen, ‘Hatkriminalitet – En drøfting av temaet og gjennomgang av anmeldelser i Oslo 2012’ (Oslo Police District April 2013) <https://www.politi.no/vedlegg/lokale_vedlegg/oslo/Vedlegg_2144.pdf>, accessed 30 July 2013.

⁷⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [200] OJ L 178/1.

⁷⁸ Act of 4 July 2003 no. 83 relating to electronic communication.

⁷⁹ Act of 22 May 1981 no. 25 relating to legal procedure in criminal cases.

⁸⁰ Ronald Walford and others, unofficial translation of The Criminal Procedure Act (The Norwegian Ministry of Justice) <<http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf>> accessed 11 August 2013.

6 Tackling the notions of “violence”, “hatred” and “clear presence of danger”

Should the notions of “violence” and “hatred” be alternative or cumulative given the contextual approach to “hate speech” (to compare the terms of the additional Protocol and the relevant case-law of ECtHR)? What about the notion of “clear and present danger” -adopted by US Supreme Court and some European countries?

6.1 The notions of “violence” and “hatred”

The notions of “violence” and “hatred” are often used by the Norwegian Supreme Court when assessing if a certain expression is in contravention of section 135a. National legislation and case law, which are the main sources to our understanding of “hate speech” in a legal context, must be examined in order to decide whether the notions should be alternative or cumulative from a Norwegian perspective.

Section 135a applies the term “hateful”. This covers both threats of integrity violations (violence), and highly derogatory utterances on human dignity (hate) (see chapter 1.2.2). Threats of integrity violations will not necessarily involve highly derogatory utterances on human dignity, and vice versa. There is therefore a need for a ban against both violence and hatred.

In the *Sjolie* case (2002), the Supreme Court analysed whether a demonstration containing derogatory utterances incited or supported integrity violations. It is natural to understand threats to violate the integrity of a person as illegal. The Supreme Court distinguished between this sort of hate speech, and hate speech without a violent aspect. Further, the Supreme Court found that there must be a close relation between the speech and the violent action. The offensive speech targeting Jews and immigrants, was not sanctioned by the Supreme Court in pursuance of section 135a, as the speech did not incite violence.⁸¹ The notions were treated as cumulative. However, in *Vigrid* case (2007), the Court dissented from the *Sjolie* case.⁸² The Court claimed that hate speech not inciting or supporting violence could be seen as a violation of Norwegian law. The notions were in this case treated as alternative.

In the above mentioned *Dornvakt* case (2012), the Supreme Court stated that the speech act did not incite violence, but was still covered by section 135a. The person was convicted solely on the basis of expressing hatred. This judgement indicates a development in case law, where the notions are clearly treated as alternative.

Overall, the current legal status complies with the Additional Protocol of the Convention on Cybercrime, which expresses an alternative view on the notions by using the term “violence *or*

⁸¹ 6 of 17 members of the Supreme Court dissented.

⁸² See chapter 1.2.3.

hatred”. This also corresponds with case-law of ECtHR who in more recent practice consistently seems to treat the notions as alternative.⁸³

6.2 The notion of “clear and present danger”

The US Supreme Court and some European countries have applied a notion of “clear and present danger” to determine when a state could limit an individual’s right to free speech.⁸⁴ The notion refers to an evaluation of whether there exists a clear and present danger for the hate speech to trigger illegal actions. If this is the case, the speech could be limited. The notion is not specifically explored in Norwegian law, but such a danger could *contribute* to a speech being deemed as hate speech pursuant to section 135a. It will play a role when assessing the character of the expression (see chapter 1.2.2).

7 Justifying the distinction between articles 10 § 2 and 17 of the European Convention on Human Rights

What are the justifying elements for the difference between the two approaches (exclusion in conformity with art 17 of the Convention and restriction in conformity with art 10 § 2 of the Convention) made by the ECtHR on hate speech? Can these elements be objectively grounded? What about subsidiarity and margin of appreciation?

7.1 The justifying elements for the two different approaches of the ECtHR

The ECtHR has recourse to two provisions of the ECHR when presented with a hate speech case. Either Article 10(2) is used, which restricts freedom of expression, or Article 17, where the expression is deemed contrary to the aims of the Convention and thus without legal protection.

The ECtHR applies **Article 10(2)** in cases concerning comments that are generally hateful but not evidently discriminatory in content or purpose. The majority of cases are not clear-cut cases of hate speech, but fall in a grey area between freedom of speech and intolerance speech.

There are four elements within Article 10(2) that must be present for an expression to constitute hate speech. Firstly, there must be an interference with freedom of speech, secondly, the interference must be prescribed by the law, thirdly, the interference must pursue one or more of the legitimate aims within the article and finally, it must be necessary in a democratic society. While the first three elements are generally straight forward, the last element is more problematic.

⁸³ See, for example, the *Garaudy v. France* judgement of 23 June 2003.

⁸⁴ The test was first presented in the judgement *Schenck v. United States* in 1919, formulated by Justice Holmes.

The fourth element requires the state to have a “*relevant and sufficient*” reason for interfering with freedom of speech and the interference must address a “*pressing social need*”.⁸⁵ As will be addressed further in chapter 7.3, states are accorded a wide margin of appreciation in determining this urgency and the Court rarely disputes the state’s assessment.⁸⁶ When evaluating the purpose, content and context of the comment, the Court aims to ascertain whether the objective is to disseminate hate or contribute to a social debate (see chapter 2.1.2). In the case of *Jersild v. Denmark*, the Court found that the impugned documentary was part of the social debate around immigration and that the journalist was not himself advocating racist ideas. As such, the Court concluded that Denmark’s interference was not “*necessary in a democratic society*” and that there consequently had been a violation of Article 10. Conversely the case of *Soulas and Others v. France* the ECtHR determined there to have been a pressing social need to interfere and concluded that the book did not contribute to a debate but rather incited violence.

As a whole, the Court balances the right to freedom of expression in article 10 (1) against the interests in article 10 (2). That is, the Court considers whether an individual’s potential contribution to public debate outweighs the needs of a democratic state. The assessment of that “need” is the focal point in the treatment of hate speech under Article 10 (2).

Article 17 is a general provision which protects against abuse of the rights and freedoms of the ECHR. The article has been applied in hate speech cases where there is a clear discriminatory comment and clarity of proof. The purpose of Article 17 in such cases is to safeguard the convention against situations where “*freedom of expression is asserted as a cover for hate speech*”⁸⁷.

Comments that are clearly racist, support totalitarian regimes or are of negationist⁸⁸ nature fall typically within the ambit of Article 17. In the judgement of *Garaudy v. France*, an author had published a book ‘The Founding Myths of Modern Israel’ in which he disputed the existence of crimes against humanity and incited racial hatred. The Court categorically denied his book protection:

“The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. It proponent indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.”

⁸⁵ Anne Weber, *Manual on hate speech* (Council of Europe Publishing 2009). The interference must also be proportionate to the aim pursued.

⁸⁶ There are however variations; the Court is most strict in matters that are incitements to hatred and most lenient when regarding “*matters liable to offend intimate personal convictions relating to morals or religion*”, cf. Weber p.32

⁸⁷ Françoise Tulkens, ‘When to Say Is to Do: Freedom of Expression and Hate Speech in Case-law of European Court of Human Rights’ (European Court of Human Rights 9 October 2012) <http://www.ejtn.net/Documents/About%20EJTN/Independent%20Seminars/TULKENS_Francoise_Presentation_When_to_Say_is_To_Do_Freedom_of_Expression_and_Hate_Speech_in_the_Case_Law_of_the_ECtHR_October_2012.pdf> accessed 10 July 2012.

⁸⁸ Negationism refers to the denial of crimes against humanity, such as denying the holocaust.

In contrast to Article 10, “*there is no weighing up of interests at stake, no analysis of the importance of the rights being forfeited and the damage caused as a result*”⁸⁹. The focus is thus whether the content of the comment is in conflict with the Convention. Its fundamental aim is to function as a self-preservation article for democracy. “[W]here a government seeks to achieve the ultimate protection of the rule of law and the democratic system, the convention itself recognizes in Art. 17 the precedence such objectives take, even of the protection of the specific rights which the convention otherwise guarantees”⁹⁰.

Several scholars have however called for caution in the application of Article 17 as it carries a latent danger of “*serv[ing] as a pretext for the worst kinds of abuses*”⁹¹. Nonetheless, Article 17 performs an important role as a safeguard not only for the preservation of democracy but for the potential victims of hate speech. No speech that aims to destroy the aims of tolerance, justice, and peace of others will be be condoned or protected.

In sum, Article 10 is applied in instances where the comment is inflammatory but not in clear conflict with the aims of the Convention. If a comment does conflict, it is considered inadmissible for consideration under Article 10.

7.2 Objective or subjective interpretations of justifying elements

In applying Article 10 (2) and Article 17, the Court uses an objective standard. This approach is necessary, for if a subjective test were adopted, the protection of victims of hate speech and democracy more generally would be significantly weakened.

In the Case of *Norwood v. UK*⁹², Norwood had placed an image of the twin towers burning in his window with the caption “*Islam out of Britain – protect the British people*”. He submitted that “[c]riticism of a religion is not to be equated with an attack upon its followers. In any event, [he] lives in a rural area not greatly afflicted by racial or religious tension, and there was no evidence that a single Muslim had seen the poster”⁹³. Even if we assume that this was Norwood’s true intention, i.e. that he did not intend to attack the followers of Islam themselves, observer of the posters would not have been aware of this. That is, an observer cannot know the inner thoughts of the creator of such an image, thus the Court must adopt an objective and fair interpretation as a basis when evaluating the impact of an image. The Court, in applying an objective test, considered that:

“The words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole

⁸⁹Tulkens, p.5.

⁹⁰ *Glaserapp v. Germany* judgement of 11 May 1984, para.110.

⁹¹ Tulkens, p.5.

⁹² *Norwood v. United Kingdom* inadmissibility decision of 16 November 2004.

⁹³ *Ibid.* p.4.

with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.”⁹⁴

An objective test must be applied to determine whether a comment, such as in the aforementioned case, is blatantly racist or within the scope of freedom of expression. For example, in the judgement of *Klein v. Slovakia* of 31 October 2006, a journalist who criticized an archbishop was deemed by the Court to have been within his rights as he was not attacking all followers of the Catholic faith nor inciting violence. This finding demonstrates why a subjective approach to hate speech could result in unjust findings for both the victim and the accused. Without an objective interpretation, the Court’s ability to provide an effective remedy would be fundamentally diminished.

7.3 Subsidiarity and margin of appreciation in cases of hate speech

There may be a tension between Article 17 and considerations of state sovereignty. On one hand, the ECtHR must be able to intervene if a state misuses Article 17 to silence public debate. On the other hand, hate speech is so contextually sensitive that subsidiarity is often prioritized. In the case of hate speech, the Court tends to give the state a wide margin of appreciation because the state is often better positioned to evaluate the consequences and impact of a comment. The consequences of inflammatory anti-Muslim books years after publication, such as that of *Soulas and Others*, may not be evident to an external court. Or, as expressed by the Court: “*The magnitude of these problems and the most appropriate way to remedy them are at the discretion of national authorities who have a thorough knowledge of the realities of the country*”⁹⁵.

As mentioned both in chapter 2.1 and in 7.1, states are given varying margins of appreciation depending on the case at hand. In situations where there is no European consensus, such as remarks on religious beliefs, states are given wide margins. A comment may provoke riots in one country yet not cause any controversy in another. For example, the Danish cartoons published in 2005 gave rise to vastly different reactions from country to country. On issues pertaining to the incitement of violence and claims that conflict with the Convention, the Court affords states a smaller margin of appreciation. This is so in relation to both publications which are clearly racist as well as interventions of the state which suppress public debate; the fibre of democracy.⁹⁶ Those targeting the fundamental aims of the Conventions will not be “excused” by cultural differences.

⁹⁴ Ibid.

⁹⁵ Ibid. para. 31. Unofficial translation.

⁹⁶ As seen in *Jersild v. Denmark*, *Klein v. Slovakia* and *Vejdeland v. Sweden* judgment of 9 May 2012.

8 Harmonisation of national legislation

Taking into consideration the principle of proportionality, what measures can be taken to achieve the harmonisation of national legislations?

Harmonisation of national legislation concerning cybercrime is important because cybercrime in terms of online hate speech cannot be limited by geographical boundaries. Thus, if the intention of criminalising an act is the protection of a certain group of people, it may be futile to criminalise an act in one state, if the same act can be performed legally in a different state and still harm the same group of people.

Even though cybercrime legislation does exist to a certain degree on international level⁹⁷, one must bear in mind that these conventions do not necessarily deal with online hate speech directly.

The process through which harmonisation of national legislation can be achieved varies from state to state. Within the EU, harmonisation of national legislation can be achieved through the passing of regulations and directives that establish certain standards that are legally binding for the EU member states.⁹⁸ Cybercrime directives, though not specifically targeting hate speech, are already in the process of being released.⁹⁹

Harmonisation can only be achieved through an international effort of negotiation and mutual agreement which would lead to international conventions on online hate speech. One example of such an agreement is the Council of Europe Additional Protocol to the Convention on Cybercrime (see chapter 9 and 11). The implementation of this convention into the national legislations of a large number of European states has led to more harmonised cybercrime legislation on online hate speech throughout the region and in fact was signed also by two non-European countries¹⁰⁰. Thus, to achieve the greatest possible effect of harmonisation of cybercrime legislation, an attempt should be made to reach an even wider agreement (see chapter 3.1.2). International bodies like the UN can, and are being used as a forum for discussions and negotiations regarding a potential future global agreement on cybercrime legislation.¹⁰¹

With regard to harmonising national legislation on cybercrime, the principle of proportionality must be considered from several perspectives. On the one hand, international harmonisation of regulation may result in national laws that conflict with national legal systems. The laws within every state have developed over centuries and are greatly influenced by local culture and customs.

⁹⁷ E.g. the Council of Europe Convention on Cyber Crime (23 November 2001).

⁹⁸ For example the The EU Data Retention Directive which also binds Norway and the other European Economic Area (EEA) states due to the EEA-agreement.

⁹⁹ Martin Finch, 'EU Directive to Harmonise Legislation and Penalties for Cyber Crime' (*Commisum*, June 2013) <<http://www.commisum.com/en/news/eu-directive-harmonise-legislation-and-penalties-c/>> accessed 28 July 2013.

¹⁰⁰ Canada and South Africa.

¹⁰¹ Stein Schjølberg, 'The History of Global Harmonization on Cybercrime Legislation – The Road to Geneva' (*Cybercrime Law*, December 2008) p. 19.

Creating a global standard for cybercrime legislation might therefore undermine and jeopardise the justification of national legislation.

As pointed out by Schjølberg, being able to predict the legality of one's actions and to know the consequences (the principle of legality) is paramount in any state governed by rule of law.¹⁰² The possibility to do so is based on the clarity and specificity of the wording of any treaty that is implemented into national legislation. However, if a national legislation provides for significantly differing punishments for similar crimes, this legislation will appear imbalanced and difficult to predict. Thus international harmonisation will be achieved at the expense of harmony within each state's national legislation.

On the other hand, if the international agreement only states that certain acts shall be criminalised, without providing more specific measures to be implemented, international harmonisation may not be achieved. The legal consequences of the same act will differ from state to state. It can further be difficult to justify different severity of punishment for the same offence, when the primary source of the criminalisation of that act is the same international treaty. Thus an international agreement which lacks specificity will undermine the goal of international harmonisation of cybercrime legislation.

In summary, harmonisation of national legislation on cybercrime within certain regions is achievable (see however chapter 9.2). Global harmonisation of such legislation may however present challenges for the global community due to significant differences between the cultural values and legal systems of states.

9 Legal implications of "hate speech"

Is a legally binding definition of "hate speech" on the national level possible? Is this possible and necessary at international level; why?

9.1 A legally binding definition on national level

As seen in chapter 1, there is a legally binding definition of hate speech in Norwegian legislation, as per section 135a. When defining hate speech the states are given a wide margin of appreciation (see chapter 2.1.2 and 7.3) which might be seen as both positive and negative. On one hand it is positive because the state is in a better position of assessing its needs. For example, in the Norwegian definition also homosexuals are regarded as a minority group protected by section 135a. This is not the case in the international definition made in the Additional Protocol to the Convention on Cybercrime Article 2; hence demonstrating that the margin of appreciation has been crucial for the protection of this group and for the conservation of fundamental values in

¹⁰² Schjølberg, p. 1.

modern Norwegian society. On the other hand, the wide margin of appreciation can be negative because the state's individual definitions might hinder a subsequent common international definition, making a combined effort against hate speech difficult.

9.2 A legally binding definition on international level

A definition of hate speech is found in the Additional Protocol to the Convention on Cybercrime Article 2 (see chapter 8 and 11). Among the states that have signed and ratified the Protocol there are several countries that have made reservations. This shows that the view on what is possible and necessary varies even between European states which are culturally and politically similar in many respects. It is foreseeable that it will be even more difficult to find consensus on a definition among non-European states. In the United States for instance, the right to free speech has few restrictions, while China and Russia are examples of countries in which this right is much more limited.

Regarding the necessity of a common international definition, it must be considered that hate speech is a global issue. This speaks in favour of an international definition. An international definition would offer a minimum standard of protection in all states. This would demonstrate that hate speech will not be tolerated by the international community and therefore prompt every state to review its domestic approach to the issue. An increased international and national focus on hate speech may raise awareness among victims of their rights and lead to greater reporting of instances of such speech. In this way, the development of an international definition of hate speech may indirectly reduce online hate speech through a 'ripple effect'.

10 Legal implications and differentiation of related notions

What about the notions of "intimidation" and "provocation", comparing to the "incitement to hatred"? How are 'incitement to hatred', intimidation and 'provocation' described in your national legislation? How, if at all, do they differ?

Section 135a applies the term "*threatening*" as a synonym to "intimidation". "Provocation" refers to encouragement of illegal actions.¹⁰³ The notion of "incitement to hatred" covers encouragement of hateful speech or behaviour towards others (see chapter 1.2.2).¹⁰⁴ The notions are closely related, but still cover different areas of the concept "hate speech".

One of the main conditions in section 135a is the notion of **intimidation**. The provision prohibits promotion of discriminating or hateful speech in terms of threats towards others. The Penal Code does not provide any further guidance in regards to the content of the notion and

¹⁰³ The Penal Code section 228.

¹⁰⁴ Ibid. section 135a.

neither do the preparatory works of the code. The notion has however been interpreted by the Supreme Court as explained in chapter 2.1.1.

The Penal Code does not contain one general provision relating to **provocation**, but the concept is mentioned in some of its provisions. Section 228 third paragraph concerns the infliction of minor bodily harm in retort of provocation. Section 250 concerns defamation caused by provocation, and section 127 second paragraph considers provocation in regard to the work of a public servant. Provocation is relevant to the criminal act in the sense that the court can either exempt or reduce the penalty. The action will still in principle be criminal. Provocation as a reason for dropping prosecution is a continuation of the principle in section 56 no. 1 on penalty reduction as a result of justified resentment.

The main provision on **incitement to hatred** is found in section 135a. The second paragraph prohibits promotion of discriminating or hateful speech, which among others includes incitement to hatred. Besides, there are other provisions aiming at preventing incitement to hatred, among others sections 246 and 247 of the Penal Code. These provisions protect people from defamation and the exposure of hatred.

The conducts of “intimidation” and “incitement to hatred” are treated in Norwegian legislation as potentially subject to legal sanctions. “Provocation” is on the other hand treated as a cause to reduce the penalty. Speech of “intimidation” and “incitement to hatred” can result in legal sanctions, while the act of provocation is not individually punishable.

11 Comparative analysis

Comparative analysis: how has the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189) been transposed into the domestic law of Council of Europe member States?

At the time of ratification of the Additional Protocol in Norway, the new Penal Code of 2005 had already been adopted by the Norwegian Parliament. The ratification of the Protocol therefore necessitated changes to both to the Penal Code of 1902, currently in force, and the new Penal Code of 2005.

The ratification did not require any major amendments to Norwegian law. This demonstrates that cybercrime issues had been taken into account by the legislative body even before the ratification. In 2009, following the ratification of the Protocol in 2008, a new chapter of the 2005 Penal Code was adopted by the Norwegian parliament, namely chapter 21 regarding “*Protection of information*”

and exchange of information”¹⁰⁵. According to the preparatory works of the act, this chapter was added to bring Norwegian domestic law in line with the Protocol.¹⁰⁶

Norway has declared reservations in accordance with Article 3 paragraph 3, Article 5 paragraph 2b (except for hatred offences) and Article 6 paragraph 2b (except for hatred offences).¹⁰⁷ As we can see differences, it is interesting to compare the Norwegian reservation regarding article 6 with the adaptation of the same article by Germany and the Netherlands. This short comparative analysis is by far not comprehensive enough (nor does the limited space permit) to establish an adequate overview of how the Protocol has been transposed into the domestic law of Council of Europe member states. For this purpose, one should read this paper in the context of the other national reports of the ELSA International Legal Research Group on Online Hate Speech.

Comparing the implementation of the Additional Protocol in Norway and Germany, one can note that Germany did not make any reservation in relation to Article 6,¹⁰⁸ perhaps because the conducts described within the Article was already criminalised by German law. In relation to the Dutch ratification of the Protocol, it is interesting to note that their reservation in relation to Article 6 paragraph 1 means that the Netherlands must only implement this part of the Protocol in relation to material which by distribution incites “*hatred, discrimination or violence on the grounds of race or religion*”¹⁰⁹. In contrast, Norway has only accepted the first paragraph of Article 6 insofar as the distribution of material is a “*hatred offence*”¹¹⁰.

Protection of the freedom of speech serves as the best explanations for this. As mentioned in chapter 2.1, freedom of speech holds a strong position in Norwegian legislation. In conclusion, the transposition of Article 6 in various national legal systems is illustrative of the challenges regarding that arise in establishing and implementing effective international conventions (see chapter 8 and 9).

¹⁰⁵ My translation. This chapter does not however concern online hate speech.

¹⁰⁶ NOU 2007: 2 Chapter 7.

¹⁰⁷ The Council of Europe, ‘List of declarations made with respect to treaty No. 189’, <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=189&CM=8&DF=&CL=ENG&VL=1>> accessed 1 august 2013.

¹⁰⁸ Ibid.

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¹¹⁰ Ibid.

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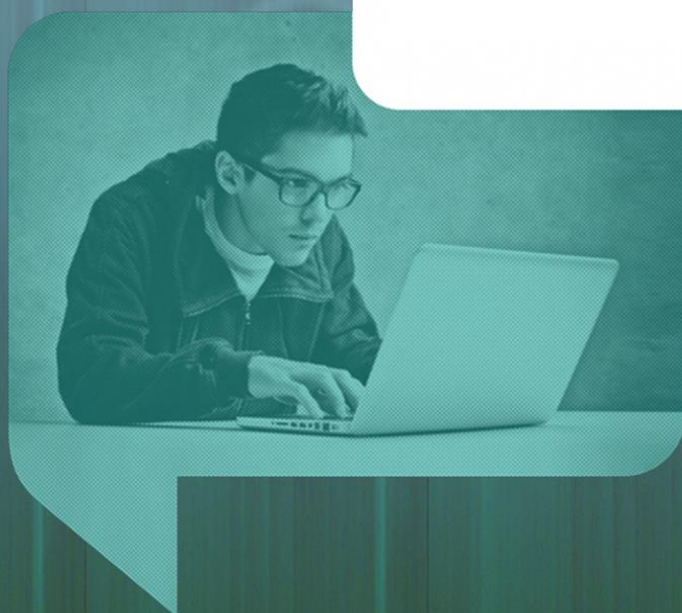
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