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Iris Nguyễn Duy

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# The Limits to Free Speech on Social Media: On Two Recent Decisions of the Supreme Court of Norway

Iris Nguyễn Duy

Department of Law, University of Agder, Kristiansand, Norway

## ABSTRACT

In January 2020, two persons in Norway were condemned by a unanimous Supreme Court of Norway for comments posted on ‘closed’ Facebook groups. With the two decisions, the Supreme Court confirmed for the first time the boundaries of hateful, racist, and discriminatory speech in the context of online utterances in social media. It also established a new sanctioning standard for hate speech.

## KEYWORDS

Hate speech; freedom of speech; social media

Any prohibition of hate speech is an infringement on free speech. Although enshrined in section 100 of the Norwegian Constitution (NC), free speech is not absolute in Norway.<sup>1</sup> Section 185 of the Penal Code (PC), the so-called ‘racism clause’, covers discriminatory or hateful expressions (hate speech) made in public or in the presence of others, in a grossly negligent or deliberate way. Such expressions, which can also take the form of pictures and symbols, may involve threatening or insulting someone or inciting hatred, persecution, or contempt of someone because of their skin colour or national or ethnic origin, religion or life stance, sexual orientation, gender identity or gender expression, or reduced functional capacity.<sup>2</sup> The penalty may consist in a fine and/or imprisonment. Legal sanctions<sup>3</sup> only apply for the most serious violations.<sup>3</sup>

**CONTACT** Iris Nguyễn Duy  [iris.nguyen-duy@uia.no](mailto:iris.nguyen-duy@uia.no)  Department of Law, University of Agder, Universitetsveien 19, Kristiansand 4630, Norway

<sup>1</sup>See an overview of the regulatory framework and the main case law on the topic in Jon Wessel-Aas, Audun Fladmoe, and Marjan Nadim, *Hate Speech Report 3. The Boundary between Freedom of Speech and Criminal Law Protection against Hate Speech*, Norwegian Institute for Social Research, Report 2016:22.

<sup>2</sup>Norway is bound by the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter ICERD) of 21 December 1965. Articles 4 and 6 ICERD require the states to protect and provide remedies against racist statements; they have *inter alia* a duty to criminalise statements that express ideas of racial hatred and incitement to violence. The ICERD was implemented in Norwegian law by the Equality and Anti-Discrimination Act (2018). Section 185PC also reflects Norway’s fulfilment of its international commitments in the fight against discrimination and hate speech:

‘A penalty of a fine or imprisonment for a term not exceeding three years shall be applied to any person who with intent or gross negligence publicly makes a discriminatory or hateful statement. “Statement” includes the use of symbols. Any person who in the presence of others, with intent or gross negligence, makes such a statement to a person affected by it, see the second paragraph, is liable to a penalty of a fine or imprisonment for a term not exceeding one year.

“Discriminatory or hateful statement” means threatening or insulting a person or promoting hate of, persecution of or contempt for another person based on his or her

- (a) skin colour or national or ethnic origin,
- (b) religion or life stance,

In November 2020, a 50-year-old woman was sentenced to 36 days' imprisonment, of which 12 were suspended, by a unanimous Supreme Court of Norway for hate speech.<sup>4</sup> While queuing outside a snack bar, completely unprovoked, she had said the following to a young boy of African origin: 'Go back to Africa where you come from, bloody foreigner.'<sup>5</sup> This was the third time that year that the Norwegian Supreme Court had taken a stand on the boundaries of hate speech. The decision corroborated the position adopted by the Supreme Court in two decisions, dated 29 January 2020, that confirmed for the first time the legal boundaries for hateful, racist, and discriminatory speech in the context of online speech.<sup>6</sup> More importantly, those earlier decisions also established a new sanctioning standard, applied in the November decision.<sup>7</sup> This case note focuses on the January decisions.

In the first January case, a woman was convicted for making hateful comments about Sumaya Jirde Ali, a Norwegian woman of Somalian descent taking an active role in public debate. The woman had published, under a post on a Facebook group called 'We who support Sylvi Listhaug', the following comment: 'Bloody black offspring go back to Somalia and stay there you corrupt cockroach.'<sup>8</sup> The Supreme Court found that the comment was covered by section 185 PC.

In the second case, a man had been convicted for several comments, posted on a Facebook group called 'Fatherland First', regarding Muslims and dark-skinned people. Focusing on two of these comments – 'it would be better if we removed these disgusting rats from the face of the earth ourselves!!' and 'yes they will only disappear the day these steppe baboons go back to where they belong!' – the Supreme Court found that these were also covered by the same legislative provision.

In both cases, the appellants had posted their comments in closed Facebook groups. Both argued that these utterances were constitutionally protected by section 100 NC on freedom of expression.<sup>9</sup>

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- (c) sexual orientation,
  - (d) gender identity or gender expression, or
  - (e) reduced functional capacity'

text based on the following unofficial translation <[https://lovdata.no/dokument/NLE/lov/2005-05-20-28/\\*#\\*](https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*#*)> accessed 17 February 2021. PC, s 185 is a continuation of a similar provision in the previous Penal Code (1902) § 135a (hereafter PC 1902).

<sup>3</sup>See Rt 1997 p 1821 (*Hvit Valgallianse*), Rt 2002 p 1618 (*Boot Boys*), Rt 2007 p 1807 (*Vigrid*), Rt 2012 p 536 (*bouncer*) and HR-2018-674 (*the quarrel judgment*).

<sup>4</sup>HR-2020-2133-A. The penalty also included violence against the police. The woman had been sentenced to 30 days' imprisonment by Sør-Østerdal District Court, but the Court of Appeal reduced the sentence to 24 days of prison in June, partly because the term 'bloody foreigner' had no direct reference to skin colour or national or ethnic origin. The verdict had been appealed again by both the prosecution and the accused.

<sup>5</sup>In the individual assessment, the Court had found that the statement was highly degrading and insulting, and entailed aggravated degradation of the boy's worth, with reference to his skin colour and ethnic origin; they were thus covered by PC, s 185.

<sup>6</sup>HR-2020-184-A and HR-2020-185-A. For a comment of these cases in Norwegian, see Vidar Strømme, *Eksperterkommentar til HR-2020-184-A og HR-2020-185-A om hatytringer på Facebook*, *Juridika*, 15 June 2020.

<sup>7</sup>See HR-2020-2133-A, § 58.

<sup>8</sup>The Facebook group supported the then Minister of Immigration and Integration, Sylvi Listhaug, a controversial politician of the right-wing populist *Progress Party*.

<sup>9</sup>In the first case, the appellant was convicted of violation of Section 185PC, Subsection 1, cf Subsection 2 (a) and sentenced to 14 days' imprisonment by the Court of Appeal of Gulating. In the second case, the appellant was convicted of violation of Section 185PC, Subsection 1, cf Subsection 2, and sentenced to pay a fine of NOK 12,000 or serve 18 days in prison by the Court of Appeal of Agder.

The Supreme Court had to interpret and apply section 185 PC in a manner compatible with freedom of speech as protected in both section 100 NC and the international conventions Norway is bound by, implemented into Norwegian law through the Human Rights Act, including Article 10 of the European Convention on Human Rights (ECHR).<sup>10</sup> In both decisions, a unanimous Supreme Court dismissed the appeal.

Although these were the first Supreme Court decisions to deal with online (social media) hate speech, they confirmed a trend set by a long line of case law on the topic (as seen in section 1 below).

However, the fact that leave to appeal to the Supreme Court was granted shows the Supreme Court's determination to raise awareness on the legal limits to digital hate speech among a larger public ('a larger audience', 'more people').<sup>11</sup> To do so, it established a new sanctioning standard in such cases. This represents the real novelty in the first decision, and was confirmed in the second (section 2).<sup>12</sup>

## 1. Clarifying the Boundaries between Free Speech and Digital Hate Speech

Both Supreme Court rulings of January 2020 mainly focused on two of the requirements for criminal liability in section 185 PC: the public character of the utterances (section 1.1) and the legal interpretation of their content, that is, whether they were discriminatory or hateful (section 1.2).

The fulfilment of the third condition required for guilt, whose assessment is linked to the act itself – whether the utterance was done 'with intent or gross negligence', defined in sections 22 and 23, paragraph two, of the PC – was neither contested nor commented upon in the decisions.

### 1.1. What is 'public speech' in social media?

A discriminatory or hateful statement falls under section 185 PC if it has been made either 'publicly' or 'in the presence of others'.<sup>13</sup> It was not disputed that the statements in both cases had been made in public.<sup>14</sup>

It is the number of persons who could have knowledge of the content of an utterance that is relevant here, rather than where it was posted. According to section 10 subsection 2 PC: 'If the act consists of making a statement, it is also public if the statement is made in a way that makes it likely to reach a sizable number of persons.'<sup>15</sup> Referring to this section

<sup>10</sup>In theory, it should also have carefully balanced free speech with the general equality and non-discrimination principle contained in Section 98NC and Norway's other international obligations to fight and, in part, to criminalise, certain forms of hate speech. However, while it made a reference to Article 4 ICERD, and to Article 20 (2) of the UN Covenant on Civil and Political Rights in the first case, there is no mention of section 98NC in the decisions.

<sup>11</sup>HR-2020-184-A, § 42.

<sup>12</sup>See HR-2020-184-A, (46) and HR-2020-185-A, (44). It was also confirmed and applied in HR-2020-2133-A, (58)-(59).

<sup>13</sup>This opens up the possibility of punishing hateful statements made in semi-public or private settings.

<sup>14</sup>It did not matter that the statement had been made on Facebook, since PC, s 185 applies regardless of the medium used.

<sup>15</sup>Section 10PC subsection 2:

'An act is public when it is committed in the presence of a sizable number of persons or when it could easily have been observed and has been observed from a public place. If the act consists of making a statement, it is also public if the statement is made in a way that makes it likely to reach a sizable number of persons.'

of the Penal Code, the Supreme Court confirmed that the utterances had been made publicly because of the number of Facebook group members with access to their content.

The fact that the Facebook groups where the comments had been posted were ‘closed’, meaning that the comments could only be read by members added by an administrator, was not deemed relevant, as such, in determining the public character of the utterances.<sup>16</sup>

In Supreme Court decision HR-2018-871-A, referred to by the Court in the second case, the convicted person had posted an image of himself wearing a police hat on an ‘open’ profile on Facebook and was deemed to have done this publicly. According to the preparatory works for the PC, when an utterance is published on the internet, it has been made ‘publicly’ if more than 20–30 people have had access to it.<sup>17</sup> In the first case, the Facebook group had approximately 20,000 members; in the second, 15,000 members. What is central is not how (through what medium) the message was conveyed, but whether it was done in a way suitable to reach more than 20–30 persons. A website may thus be deemed open to the public, even if access has been restricted, for example by the requirement of a login or password, and even if they are so-called closed Facebook groups, as was the case in both decisions.<sup>18</sup> After all, a closed group’s existence is visible to all Facebook users. Besides, the fact that the public character of the comments was not contested in either case reinforces the line of interpretation followed by the Supreme Court.

Although the public nature of the comments was not an issue per se, the fact that the ‘closed’ character of the Facebook groups did not seem relevant for the court in the decisions suggests that a group’s status may be disregarded when considering whether a statement was made publicly.<sup>19</sup>

## ***1.2. Identifying an utterance as harassment or hate speech: The boundaries between free speech and hate speech confirmed***

In HR-2020-184-A, the appellant said that her statement (‘Bloody black offspring go back to Somalia and stay there you corrupt cockroach’) was political and thus constitutionally protected, because section 100 NC broadly embraces utterances on general societal issues, including politics and religion.

In HR-2020-185-A, the appellant had posted several comments regarding dark-skinned people, Muslims, and Islam in the comments field of a closed Facebook

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<sup>16</sup>The main differences with public groups are the following: (1) new members must ask to join or be invited by a member, rather than just adding themselves; (2) only current members can see the content of group posts; and (3) only current members can see the group in their newsfeed: see Gennie Gebhart, ‘Understanding Public, Closed, and Secret Facebook Groups’ (EFF, 13 June 2017) <[www.eff.org/deeplinks/2017/06/understanding-public-closed-and-secret-facebook-groups](http://www.eff.org/deeplinks/2017/06/understanding-public-closed-and-secret-facebook-groups)> accessed 17 February 2021.

<sup>17</sup>See Ot.prp nr 90 (2003–2004), section 12.2.2 and Prop53 L (2012–2013), point 3.6. In Rt 2006 p 799, the Supreme Court held that a group of 11 to 14 persons was ‘a sizable number of persons’ in the meaning of Section 135a PC 1902. It also took into account the context in which the utterances were made.

<sup>18</sup>Prop53 L (2012–2013), point 3.6, p 6.

<sup>19</sup>In August 2019, Facebook changed the options for the creation of groups, with a new privacy model, reducing them from three (public, closed, or secret) to two categories (public or private). Public groups allow anyone to see who is in the group and everything that is shared there. With private groups, only members can see who else is in the group and what they have posted. ‘By default, a group that was formerly ‘secret’ will now be ‘private’ and ‘hidden’. A group that was formerly ‘closed’ will now be ‘private’ and ‘visible’. Groups that are ‘public’ will remain ‘public’ and ‘visible’: Jordan Davis, ‘Making Groups Privacy Settings Easier to Understand’ (Facebook, 14 August 2019) <<https://about.fb.com/news/2019/08/groups-privacy-settings/>> accessed 17 February 2021.

group, in connection with various articles posted in that group. He contended that the first comment, ‘it would be better if we removed these disgusting rats from the face of the earth ourselves!!’, was a lawful criticism of religion ‘building on a true factual foundation’, while the second comment, ‘yes they will only disappear the day these steppe baboons go back to where they belong!’ amounted to legal defamation.

The main issue was whether these statements were protected by free speech. The court had to decide where to draw the line between constitutionally protected free speech and ‘non tolerable’, meaning legally sanctionable, hate speech.

Referring to the distinction it had already made in Rt 1981 p 1305 (*flyer*), p 1314, the Supreme Court first examined the object of the statement to see whether it was a statement on a political, cultural, or religious *subject matter*. Even when offensive, erroneous, biased, or tasteless, critical claims about subject matter generally benefit from a high level of protection. In contrast, statements directed at one *person* (or group of persons) and taking the form of a personal attack or harassment only enjoy a ‘modest constitutional protection’ and may fall under section 185 PC, because they ‘... do not have anything in common with the essence of what the freedom of expression is meant to protect, namely an open debate’.<sup>20</sup> It is not always easy to distinguish between statements on immigration and on immigrants, and statements on Islam and on Muslims, but that problem was actually not raised by the Supreme Court. In any case, as a rule, the threshold for ‘tasteless utterances’ not protected by section 100 NC remains rather high in order to protect free speech.<sup>21</sup>

Only discriminatory or hateful statements fall under section 185 PC.<sup>22</sup> But what constitutes ‘hateful or discriminatory speech’ is rather broadly defined in this provision.<sup>23</sup> The difficulty in defining such subjective concepts as ‘hate’, ‘persecution’, and ‘contempt’ is yet another issue. However, the Supreme Court found some guidance in the preparatory works for the former section 135a PC 1902 and in its previous case law on the same provision: they are meant to cover what ICERD Article 4 (a) expresses with the words ‘all dissemination of ideas based on racial superiority or hatred’, and only statements of a ‘qualifiedly insulting nature’ are covered, including those that ‘call for or support violations of integrity’ and those entailing a ‘serious degradation of a group’s dignity’.<sup>24</sup> The insult also needs to be based on the person’s or group’s ‘skin colour or national or ethnic origin’ (or any of the alternatives listed in section 185 PC); only certain groups of persons, regarded as minorities or needing protection for some other reason, are protected by section 185 PC.

Regarding the interpretation of the content of the statement, the Supreme Court’s method, relying on the average reader’s or listener’s ‘... natural perception of the statement made from the context’, is in accordance with the ECtHR’s interpretation

<sup>20</sup>See HR-2020-184-A, § 24 referring to the Supreme Court judgment HR-2018-674-A (the *quarrel* judgment), § 15, and HR-2020-185-A, § 19.

<sup>21</sup>HR-2018-674-A, § 17.

<sup>22</sup>This legal provision is popularly known as the ‘racism clause’ although the word ‘race’ is not included as a prohibited ground of discrimination. The legislator referred to a person’s skin colour or his/her national or ethnic origin instead.

<sup>23</sup>That is one of the reasons why this legislative provision has been criticised. A petition for the abolition of PC, s 185 was signed by 18 public debaters in June 2019: see 18 samfunnsdebattanter, ‘Opprop: Rasismeparagrafen hører ikke hjemme i et liberalt demokrati’ (*Aftenposten*, 21 June 2019) <[www.aftenposten.no/meninger/debatt/i/BRzx17/opprop-rasismeparagrafen-hoerer-ikke-hjemme-i-et-liberalt-demokrati](http://www.aftenposten.no/meninger/debatt/i/BRzx17/opprop-rasismeparagrafen-hoerer-ikke-hjemme-i-et-liberalt-demokrati)> accessed 17 February 2021.

<sup>24</sup>See HR-2020-184-A, § 27, referring to a line of jurisprudence developed since the end of the 1990s (see footnote 3).

method,<sup>25</sup> but the Supreme Court did not refer to this in the decisions. It referred instead to its own case law, namely the *Bouncer* judgment and precedents such as Rt 1997 s 1821 (*Hvit valgallianse*) and *Boot Boys*, thus highlighting that this method was part of the Norwegian approach to the interpretation of allegedly criminal speech even before the adoption of the Human Rights Act of 1999 incorporated the ECHR into Norwegian law.<sup>26</sup>

The average reader's understanding of the statement is central.<sup>27</sup> Utterances that the average reader would perceive as a serious insult, as a gross denigration of the human value of a person or group, and/or as incitement to violence or violation of integrity may fall under section 185 PC.

At the same time, the Supreme Court applied the so-called 'caution rule': a person can only be held liable for what they have actually stated, and '... no one should risk criminal liability due to a statement being assigned a meaning that is not explicitly expressed, if this cannot be derived from the context with a reasonably high level of certainty'.<sup>28</sup> In both cases, the appellants had expressed themselves in a thread of comments on Facebook and endorsed what others had said in the comment field. The Supreme Court refused to punish the appellant for other people's comments, but it did remark in HR-2020-184-A § 35 that '... these other comments are suited to strengthen the interpretation of A's statement that can be derived from the words she herself chose'.

The context in which a discriminatory statement was made can indeed influence how it is interpreted. It can be of significance, for example, that a statement was made during a debate or used as a slogan during a demonstration.<sup>29</sup> Even when a statement qualifies as insulting, it is not punishable if it can be regarded as expressing a political statement or religious criticism, and as such taking part in the public debate.<sup>30</sup> The Supreme Court had already pointed out in a previous decision that freedom of expression '... not only includes the right to make statements that are positively received or considered harmless, or possibly insignificant, but also statements that appear offensive, shocking or disturbing'.<sup>31</sup> However, in the first case, the court did not find the statement to be about a political issue, since it was exclusively directed at the aggrieved party as a person, and consequently fell under section 185 PC. In the second case, the first statement ('rats') was an insulting and hateful statement towards people as a religious group, not an enlightened criticism of religion (it did not contain any '... objective opinions related to religious faith or dogmas in Islam'), and it even encouraged violence. It was thus covered by section 185 PC. The second statement ('steppe baboons') was deemed qualifiedly insulting, as it entailed serious degradation of dark-skinned people's human dignity. Since it did not contribute to the public debate either but promoted hate and contempt towards a group of people based on their skin colour, it was also covered by section 185 PC.

<sup>25</sup>See e.g. *M'Bala M'Bala v France*, no 25239/13, ECHR 2015, § 37.

<sup>26</sup>See Rt 2012 p 536 (*bouncer*) § 18, referring to Rt 1997 p 1821, p 1826, and Rt 2002 p 1618, p 1626.

<sup>27</sup>In the *flyer* judgment, p 1314, the court refers to the 'meaning the individual statements immediately convey to the not specially thoughtful reader', i.e. the immediate, not significantly processed, understanding of an utterance.

<sup>28</sup>*Bouncer* judgment, § 24.

<sup>29</sup>Ot.prp nr 33 (2004-2005), p 189, mentioned in Rt 2012 p 536 (*bouncer*) § 20 and §24.

<sup>30</sup>Blasphemy is no longer punishable in Norway.

<sup>31</sup>See Rt 1997 p 1821, p 1829.

## 2. A New Standard for Sentencing in Online Hate Speech Cases

Section 185 PC establishes two alternative sentencing frameworks, where the severity of the sentence depends on whether the utterance was public or not (i.e. ‘in the presence of others’): it consists of ‘[a] penalty of a fine or imprisonment for a term not exceeding three years’ when a person, with intent or gross negligence, has publicly made a discriminatory or hateful statement.<sup>32</sup> The penalty is lower where the utterance has not been made in public (a fine or a maximum of one year imprisonment instead of three), because it ‘... is potentially less harmful than similar statements that are spread in the public sphere’.<sup>33</sup> When a discriminatory or hateful statement has been made in public, as was the case in HR-2020-184-A and HR-2020-185-A, ‘[a] penalty of a fine or imprisonment for a term not exceeding three years’ applies.

In HR-2020-184-A, the Supreme Court set a new sentencing standard, which would have been followed in HR-2020-185-A had the sentence been appealed.<sup>34</sup> It was applied in HR-2020-2133-A as well (§ 58 ff), although that case was not related to social media.

### 2.1. The Supreme Court’s grounds for the sentencing standard

The Supreme Court has, *inter alia*, ‘... a responsibility for the evolution of the law – within the framework of existing legislation – as and when required by new societal developments’.<sup>35</sup> Quite remarkably, the court justified setting a standard for punishments for comments made on social media by pointing out the need to raise awareness among a larger public. It stated that, due to increased use of social media, and thus the increased possibility of spreading ideas to a wider audience, ‘... more people need to be made aware of the limits that the Penal Code set for criminal speech’.<sup>36</sup>

Regarding sentencing in hate speech cases, the traditional legal sources were of little help in tackling the challenge posed by the development of the internet and social media in terms of allowing individual statements to reach larger audiences (see HR-2020-184-A, §§ 39–41).

Little or no guidance was to be found either in the Supreme Court’s case law under section 185 PC or in its case law dealing with section 135a PC 1902.<sup>37</sup> In the *flyer* judgement, a woman was sentenced to 60 days’ suspended (conditional) imprisonment for statements made in three leaflets she had authored and allowed to be distributed as the main active leader in ‘The Organisation Against Harmful Immigration in Norway’. In Rt 1977 p 114 (*school teacher*), a lecturer was sentenced to 120 days’ suspended imprisonment for making anti-Semitic statements in newspaper interviews. In this last case, the Supreme Court observed that there was no disproportionality between the offence and the sentence imposed, indicating that it had performed a proportionality test.

<sup>32</sup>The sentencing framework was increased from two to three years’ imprisonment in 2005.

<sup>33</sup>See Ot.prp nr 22 (2008–2009) ch 16.1, p 399.

<sup>34</sup>HR-2020-185-A, § 44.

<sup>35</sup>Supreme Court of Norway, ‘The Highest Court’ <[www.domstol.no/en/Enkelt-domstol/supremecourt/the-supreme-court-of-norway-/the-highest-court/](http://www.domstol.no/en/Enkelt-domstol/supremecourt/the-supreme-court-of-norway-/the-highest-court/)> accessed 17 February 2021.

<sup>36</sup>HR-2020-184-A, § 42.

<sup>37</sup>As PC, s 185 replaces PC 1902, s 135a without any changes of relevance for the two affairs, it was interpreted by the courts in the light of previous case law.



Because of inconsistency in sentencing, the Supreme Court could not rely on the lower courts' case law either. In several cases, the sanctions comprised both suspended imprisonment and a fine, or solely a fine, but in some the sentence was immediate (unconditional) imprisonment, as in the court of appeal's judgment in the first case.

The Supreme Court also referred to preparatory works for the legislative provision, emphasising the legislator's will to punish such criminal offences more severely and, as a result, to sharpen the penalties.<sup>38</sup> Indeed, with the reform of the Penal Code in 2005, the maximum sentence had been increased from two to three years' imprisonment. The court also remarked that an offence concerning someone's 'skin colour' or 'national or ethnic origin' is an 'aggravating circumstance' according to section 77 (i) PC, while deploring the fact that the preparatory works did not specify a level from which the sentences were meant to increase.

In HR-2020-184-A, the court also chose to balance the appellant's freedom of speech with the need to protect the aggrieved party's own freedom of expression. In the Supreme Court's case law, the judgements sometimes referred to the way in which the utterances had been experienced by the aggrieved party, although this did not add weight in enforceable judgments. But in the determination of the sentence, rather than in the interpretation of the comments, in HR-2020-184-A § 42, the Supreme Court underlined how such utterances may actually have a chilling effect on the aggrieved party, limiting their freedom of expression and thus hindering their participation in general debate.

The Supreme Court had then to decide on an adequate punishment for hate speech on social media. The communication medium used seems to have been irrelevant here, meaning that a person has potentially the same responsibility for utterances they make in a newspaper, on social media, or on television – or for that matter in person, such as at a lecture or in a speech, before a large group of people.

## 2.2. The standard

Both decisions contribute to establishing a standard (or penalty level) for determining the penal sanction for hate speech on social media.

In the first case, the District Court had sentenced the convicted to conditional imprisonment for 24 days and a fine of 10,000 NOK (approximately €950). The appellant had then been sentenced to unconditional imprisonment for 14 days by the Court of Appeal, with no fine. For the Supreme Court, the criminal sanction chosen by the Court of Appeal was too severe: The appropriate reaction was actually suspended imprisonment in combination with a 'noticeable' fine, see section 54 PC, corresponding to approximately one month's gross salary, or an alternative of 15 days' imprisonment, see HR-2020-184-A § 44.

In contrast, the Supreme Court criticised the leniency of the District Court and the Court of Appeal in the second decision (they had imposed a fine of 12.000 NOK/€1150) and stated that, based on the penalty level established in HR-2020-184-A, the sentence would clearly have been stricter if it had been subject to review, see HR-2020-185-A § 44.

Rather than a hard-line stance, the Supreme Court chose to adopt a moderate approach in line with ECtHR's case law (*ES v Austria*),<sup>39</sup> in which the European Court

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<sup>38</sup>See Ot.prp nr 33 (2004–2005) p 188; and Ot.prp nr 8 (2007–2008) p 343.

<sup>39</sup>*ES v Austria*, no 38450/12, § 56, ECHR 2018. In this decision, a person had been convicted for having called the Prophet Muhammad a paedophile.

balances the need to react relatively severely to deter hate speech and hate crimes on the one hand, with the need to take into account several other factors that may either have an extenuating or aggravating effect. Indeed, while Norway's Supreme Court reaffirmed the need to deter such offences by giving the penalty a 'disciplinary effect', it stated, interestingly, that considerations of general deterrence should not be given too much emphasis, and that misuse of freedom of expression should not be met with an exaggerated reaction (see HR-2020-184-A § 43). It also checked whether the offence had been repeated (meaning that several comments had been made over a certain length of time), whether the person had previously been convicted for similar offences, and whether the statements incited violation of personal integrity or even to the total annihilation of a person or a group of persons – the lack of which weighed in favour of the appellant in determining the sentence.<sup>40</sup>

While the penalty needs to be 'moderate, but noticeable' (see HR-2020-184-A, § 43) in order to ensure a disciplinary effect over time, its nature (i.e. immediate or suspended imprisonment, and fine) depends on the gravity of the offence. The abovementioned criteria, read in combination with the second case's *obiter dictum* at § 44, gives a clear sense of how the Supreme Court determines the penalty and appropriate level of sentencing.

The length of a prison sentence depends on the clarity of the violation of section 185 PC; a 24-day suspended imprisonment sentence was given for a clear violation. Yet this remains at the lower end of the statutory scale of punishment of up to three years' jail time, which reflected a need to respond strictly when such statements are made as part of a racist or otherwise discriminatory activity that is organised.<sup>41</sup> Multiple and/or repeat offences, especially those inciting violence, would however likely raise the level of the sentence, with unconditional imprisonment and longer prison time, as implied by the Supreme Court in HR-2020-185-A, § 44.

### 3. Concluding Remarks

With the development of digital communication and social media, many have gained access to new arenas where they can express themselves on almost any topic. They can spread ideas worldwide and potentially reach everyone.

By convicting two Norwegians for publishing comments on Facebook that it deemed to fall under section 185 PC on hate speech, the Supreme Court of Norway clearly stated that social media platforms like Facebook are not a place for unbound free speech and confirmed that hate speech would not remain unpunished when directed at a person or group of persons and does not contribute to the public debate.

The mission undertaken by the Supreme Court to edify the public on the matter also took the form of a new sentencing standard for hate speech, now confirmed in the November ruling HR-2020-2133-A, § 58 ff.

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<sup>40</sup>For the lower courts, it seems that the fact that it was a one-time violation of PC, s 185, that the person acted alone and may only be convicted for his/her own utterances (even though he/she has given her support to other comments in the Facebook thread), that the person had apologised, and the excessive length of the criminal proceedings could additionally be considered as extenuating circumstances. For an example of aggravating circumstances in the context of hate speech (violence against the police) that weighed on the penalty, see HR-2020-2133-A.

<sup>41</sup>See Ot.prp nr 33 (2004–2005), pp 188–9.