*Rodoljub ETINSKI**

Liability for Third Party Unlawful Speech in Light of Article 10 of the European Convention on Human Rights

1. Introduction

The liability of a person, natural or legal, governing the media, for unlawful speech by a third party, transmitted through the media, is determined by national law. The term "media" is used here in the broadest sense to encompass all forms of media, including print media, television and radio broadcasting and Internet websites. The European Court of Human Rights (the Court) considers the establishment of such liability as an interference with the right to freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights. (the Convention) The Court examines whether this interference is in accordance with the second paragraph of the Article. It focuses on whether the interference is "necessary in a democratic society," whether there is a "pressing social need" for such interference, and whether a fair balance had been struck between the right to freedom of expression and the right to the protection of private life.[1]

As in other matters, national legal qualification of an act does not oblige the Court. Speech that runs counter to the values underlying the Convention is not protected by Article 10, as stipulated in Article 17 of the Convention, and it will be deemed unlawful by the Court. Unlawful speech can take various forms, including racial propaganda, incitement to violence or crime, and defamatory statements among others. Consequently, a range of subjects may be harmed, including an indefinite number of members of a group, a limited number of easily identifiable group members, specific individuals, or legal entities. Therefore, the purposes of interference may vary and may encompass the protection of national security, public safety, prevention of disorder or crime and protection of the reputation or rights of others. The Court typically considers the protection of human

* *Professor, the University of Novi Sad, the University of Donja Gorica.*
Emai: etinskirodoljub@yahoo.com
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1 Article 10 reads as follow: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

rights of others as a legitime aim of such interference. In some cases, the focus has been on striking a fair balance between the right to freedom of expression and the right to protection of private life. In concluding remarks, this article will argue that the time has come for the Court to, in some cases, shift its focus towards striking a fair balance between the interest of an individual, protected by Article 10 of the Convention and the interest of community, grounded in the general values underpinning the Convention.

The article will focus on the evolution of principles related to liability for third party speech in light of Article 10 of the Convention that happened from the landmark *Jersild* case in 1994 to the recent *Sanchez* case in 2023. In the *Jersild* case,[2] the Court found that criminal prosecution and conviction of television journalist Mr. Jersild for broadcasting overtly racist statements, made by some young men in his television rapportage were in violation of Article 10. Three decades later, in the *Sanchez* case[3], the Court found that the prosecution and conviction of local politician Mr. Sanchez for hosting critical comments with racist undertones on his Facebook page, posted by two of his political supporters, were in accordance with Article 10. The shifts in these principles were not solely driven by the emergence of new Internet media platforms, but were significantly influenced by broader social and legal development. These developments together led to a change of the Court's reasoning and approach to such cases over time.

2. Two Chains of Cases

The development of principles regarding the liability of individuals or entities responsible for media content in cases of unlawful speech by third parties transmitted through the media can be categorized into two distinct chains of cases. The initial phase of building these principles began with the *Jersild* case[4] and continued in later cases, including *Thoma*[5], *Verlagsgruppe News*[6] and *Print Zeitungsverlag*[7].

The evolution of these principles continued in *Delfi*[8] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*[9], *Pihl*[10] and *Sanchez*,[11] which constitute the "second chain of cases". Notably, the second chain of cases pertains to Internet media, whereas the first

2 "The Jersild Case," *Drepturile Omului / Human Rights*, vol. 1995, no. 3, 1995, pp. 53-54. Lene Johannessen, "Judgment of the European Court of Human Rights, 23 September 1994 - Jersild v. Denmark," *South African Journal on Human Rights*, vol. 11, no. 1, 1995, pp. 123-132.

3 Neville Cox, "Delfi AS v Estonia: The Liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights." *Modern Law Review*, vol. 77, no. 4, 2014, pp. 619-629. Mart Susi, "Delfi AS v. Estonia," *American Journal of International Law,* vol. 108, no. 2, 2014, pp. 295-302.

4 *Jersild v. Denmark* (App. no. 15890/89), Judgment 23 September 1994.

5 *Thoma v. Luxembourg*, (App. no. 38432/97), Judgment of 14 December 2006.

6 *Verlagsgruppe News GmbH v. Austria*, (App. no. 76918/01), Judgment of 14 December 2006.

7 *Print Zeitungsverlag GmbH v. Austria*, (App. no. 26547/07), Judgment of 10 October 2013.

8 *Delfi AS v. Estonia* (App. no. 64569/09), Judgment of 16 June 2015.

9 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary,* (app. no. 22947/13), Judgment of 2 February 2016.

10 *Pihl v. Sweden* (App. no. 74742/14), Decision of 7 February 2017.

11 *Sanchez v. France* (App. no. 45581/15), Judgment of 15 May 2023.

chain primarily related to television, radio broadcasting and printed media. The second chain of cases introduced specific changes in the principles partly due to the unique characteristics of Internet media and more due to social and legal development.

2.1. The first chain of cases

In *Jersild*, the Court ruled that the criminal punishment of a television journalist for broadcasting racial statements, made by a few members of a group of youths constituted a breach of the right to freedom of expression, as guaranteed by Article 10 of the Convention. The following passage in the judgment reflects essence of the Court's approach and might be qualified as a principle, having in view its repetition in later cases:

> The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.[12]

The central idea behind the majority's reasoning in the Grand Chamber of the Court was that the television journalist's intent was not to promote racism, but conversely, to contribute to the public discussion on racism as a relevant issue in Danish society. Building upon the principle established in *Jersild*, the Court's decision in the *Thoma* case held that imposing civil liability on a journalist working for a national radio station for quoting an article critical of individuals responsible for reforestation in Luxembourg, published in a newspaper, was contrary to Article 10. The Court reiterated the key sentences from *Jersild* and extended the principle to civil liability. Citing the *Thoma* case, the Court applied the same principle in *Verlagsgruppe News*, which concerned the liability of a company for publishing an article containing excerpts from a letter by an artist criticizing some Austrian politicians. In these cases, a common feature was that the interest to discussing matters of public interest outweighed other concerns, and that third persons whose speech was contested, were known.

Print Zeitungsverlag was different by the fact that identity of a third person was not known. Establishing civil liability of a company for publishing an article, which transmitted content of an anonymous defamatory letter targeting two brothers, lawyers, one of whom was a leading figure in local touristic organization in the time of election for this post, was not, according to the Court, contrary to the freedom of expression. The Court referred to *Jersild*, *Thoma* and *Verlagsgruppe News* and observed that its approach in the case was not at variance with its case law. This observation might be unexpected, since the outcome of the case was contrary to the outcomes in the mentioned cases.[13] First time, protection of reputation of individuals outweighed "the contribution of the press to discussion of matters of public interest" in the context of liability for third party speech. The Court found ground for its different approach in some considerations in the *Jersild* judgment

12 *Jersild*, para. 35.

13 *Print Zeitungsverlag GmbH*., para. 39.

on circumstances in which the television rapportage was broadcasted and emphasized the context in which offensive quotations were made to justify its different approach.[14] The invoked passages from *Jersild* enabled the Court to turn its focus of investigation on criteria relevant for balancing the right to the freedom of expression against the right to respect of private life, as they were determined in its case law. The criteria are as follows:

> (a) contribution to a debate of general interest (b) how well known is the person concerned and what is the subject of the report? (c) prior conduct of the person concerned (d) method of obtaining the information and its veracity (e) content, form and consequences of the publication (f) severity of the sanction imposed.[15]

Concerning veracity of allegations against the two persons, the Court found that there was no factual basis for value judgments in the anonymous letter," which were thus no more than a gratuitous attack on their reputation."[16] The Court concluded, thus, that the article transgressed the limits of permissible reporting.[17] Accordingly, the establishment of civil liability of the company was not contrary to Article 10. There is a difference between *Jersild* and *Print Zeitungsverlag*. It the first case, racist statements were offending indefinite number of members of three groups-a group of colored men and two ethnic groups. The issue of relationship between Article 10 and Article 8 was not raised. In *Print Zeitungsverlag*, the anonymous letter targeted two persons and the relationship between the two Articles became a central issue. In *Thoma*, a limited number of individuals have been targeted, some of whom initiated civil proceedings against the company, but the issue of protection of the right to private life was not considered. The same situation was in *Verlagsgruppe News*. Thus, *Print Zeitungsverlag* might be seen as a remarkable modification in the first chain of cases which brought a contradiction in the chain: it seems that Article 10 protects freedom of expression more in a case of racial statements offending whole groups than in a case when unlawful speech attacking professional reputation of two persons.

2.2. The Second Chain of Cases

On the same date, 10 October 2013, when *Print Zeitungsverlag* was decided, the same Chamber rendered judgment in the *Delfi* case. This case was significant because it delved into the liability of the owner of Internet portal for comments made by third parties on the portal for the first time. In *Delfi*, the Court ruled that the establishment of civil liability for a company due to comments posted by third parties on its Internet new portal, which incited violence and racial hatred against the owner of another company, was not in violation of Article 10. The Court reiterated the principle established in *Jersild* and referred to *Thoma*, *Verlagsgruppe News* and *Print Zeitungsverlag*.[18] However, the primary focus of the Court's analysis was whether Estonia had struck a fair balance between

14 *Ibid*.
15 *Ibid*., para 33.
16 *Ibid*., para. 40.
17 *Ibid*.
18 *Delfi AS*, para. 135.

the right to freedom of expression and the right to protection of private life, thereby determining whether the interference with freedom of expression was proportional. This was essentially the same approach as in *Print Zeitungsverlag*, but in the new context of Internet communication.

To answer this question, the Chamber in *Delfi* identified four relevant aspects of the case, and these aspects were subsequently accepted as relevant by the Grand Chamber. The four aspects are following:

> the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the applicant company.[19]

The Chamber made, thus, difference in exploration of liability a company for printing unlawful speech of third party and liability of a company for unlawful comments posted on its Internet news portal by third parties. It may be said that the first aspect-context of the comments-was taken from *Jersild* and that it could be found in all cases of the first line. It relates to circumstances in which unlawful speech was transmitted. The second aspect was imposed by different nature of media. Thus, investigation of "the measures applied by the applicant company in order to prevent or remove defamatory comments" was required by the fact that posting defamatory comments on the Internet news portal was not an intentional act of the company. Contrary to that, broadcasting of racist statements in *Jersild*, or broadcasting the article in *Thoma* etc. were intentional acts of the journalist or the companies. Due to nature of media, the issue whether a person responsible for media might have prevented or removed unlawful speech was not relevant in the first chain of cases. Obviously, kind of liability cannot be same in the two chains of cases. In the first chain, a person responsible for media, such as television or radio or printed media may be liable for his or her action, for assisting spreading of unlawful speech. In the second chain of cases, a person responsible for Internet media may be liable for her or his inaction, for missing to prevent appearance of unlawful speech on an Internet site or for missing to remove it. Probably, due to that difference, the Chamber allowed that liability of an Internet website holder might be replaced by liability of actual authors of comments. That issue was not raised in *Jersild* and other cases of the first chain. The last aspect-consequences of the domestic proceedings for intermediary-was taken from criteria controlling striking a fair balance between the right to freedom of expression and the right to protection of private life. These four aspects, called later four criteria, were applied in the second chain of cases- *Magyar Tartalomszolgáltatók Egyesülete and Index. hu Zrt*, *Pihl* and *Sanchez*.

Concerning the context of the comments in *Delfi*, the Grand Chamber considered as important two mutually interrelated factors: nature of the Delfi news portal and control of the applicant company over the comments. The Grand Chamber stressed that Delfi was a professionally managed Internet news portal, which was run on a commercial basis and which sought to get many comments on news articles published by the applicant

19 *Ibid*., para. 142.

company on the portal.[20] It agreed with the Supreme Court of Estonia that the applicant company had an economic interest in the posting many comments.[21] Since the applicant company only had technical means to remove comments, the Court remarked that the applicant company had "a substantial degree of control" over the comments.[22] Thus, the Court found "that it was sufficiently established by the Supreme Court that the applicant company's involvement in making public the comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider".[23] Essential result of exploring the context in this case was finding of the Court that, having in view the nature of the Delfi AS company, it had capacity to control comments posted on its Internet news portal and was expected to do that.

Regarding the context of the comments in *Sanchez*, the Court explored nature of impugned comments, the political context and the applicant's specific liability. Concerning the nature of the comments the Court examined the content of the comments observing that they were "insulting and hurtful" intending. The comments aimed to impute criminality to Muslim religious group.[24] The Court provided specific examples from the comments, such as references to:

> …transformation of 'Nimes into Algiers', to 'kebab shops', to the 'mosque', or to 'dealers and prostitutes [who] reign supreme', and it can be seen from other passages, namely 'more drug dealing', 'riffraff sell drugs all day long', 'stones get thrown at cars belonging to 'white people'" (…). In the Court's view, the association is even more obvious where mention is made of 'drug trafficking run by the Muslims'.[25]

The Court acknowledged the right of commentators to discuss the actual political situation and all problems in the city, but emphasized that this right does nor extend to making comments in a racist tone. It noted that the applicant did not distant from the tone of the comments.[26] That might imply that the Court took in view certain level of acceptance of the comments by the applicant. The Court observed, also, that the comments did not remain in circle of political supporters of the applicant, but has gone beyond that circle and affected a particular person.[27] and that "in an election context, the impact of racist and xenophobic discourse becomes greater and more harmful".[28] The Court considered, thus, real and potential impact of the comments to an individual and local community. The Court noted that in *Delfi*, it made a difference between "large professionally managed Internet news portal run on a commercial basis" and "other fora on the Internet where third-party comments can be disseminated," in particular "a social media platform where the platform provider does not offer any content and where the content provider may be

20 *Ibid*., para. 144.
21 *Ibid*.
22 *Ibid*., para. 145.
23 *Ibid*., para. 146.
24 *Sanchez*, para. 173.
25 *Ibid*.
26 *Ibid*., para. 175.
27 *Ibid*., para. 176.
28 *Ibid*.

a private person running the website or blog as a hobby".[29] Contrary to the Government's argument, the Court did not agree that the applicant's Facebook "wall" was comparable with a "large professionally managed Internet news portal run on a commercial basis" and found that it was rather "other fora on the Internet where third-party comments can be disseminated," characterized, however, by specific features consisting of political engagement of the owner of the Facebook account.[30] The Court noted that the applicant was not a private person, but that he himself stated that he was using his Facebook "wall" in his capacity of local councillor for political purposes in the context of an election.[31] It was noted, also, that the applicant was not only a professional politician, but that he had some expertise in the field of the Internet.[32] The Court found that the applicant was aware that unlawful comments were posted on its Facebook "wall". It seems that the Court thought that when a person, and especially a politician experienced in communication to the public, choose to make his/her Facebook wall accessible to the general public, he/she must be aware of greater risk that unlawful comments may be visible to a broader public and that that requires certain vigilance of the person.[33] Thus, beside a capacity and duty of an Internet portal holder to control comments posted on the portal, the Court examined here also nature of disputed comments.

In the case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*, the Court took a different approach from the Hungarian courts in assessing the disputed comments made on the website. While the comments were described as offensive and vulgar, the Court did not agree with Hungarian Courts that they constituted unlawful speech.[34] Instead, the Court found that the comments had a factual basis and did not amount to hate speech or incitement to violence.[35] It seems that the Court saw these facts as making the case essentially different in comparison with *Delfi*.[36] The Court found another partial difference: "while the second applicant is the owner of a large media outlet which must be regarded as having economic interests, the first applicant is a non-profit self-regulatory association of Internet service providers, with no known such interests."[37] However, the Court did not decide that establishment of liability of the second applicant was in accordance with Article 10. Thus, decisive factor of departure from *Delfi* might be that, according to assessment of the Court, disputed comments did not meet criteria of unlawfulness and did not have the same level of negative social impact as the comments in *Delfi*, which incited violence and racial hatred.

29 *Ibid*., para. 179.
30 *Ibid*., para. 180.
31 *Ibid*., para 180, 189.
32 *Ibid*., para 180, 193.
33 *Ibid*., para 193.
34 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*, paras. 64, 75, 76. See Jurate Sidlauskiene, Vaidas Jurkevicius. "Website Operators' Liability for Offensive Comments: A Comparative Analysis of Delfi AS v. Estonia and MTE & Index v. Hungary," *Baltic Journal of Law and Politics*, vol. 10, no. 2, 2017, pp. 46-75.
35 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*., para. 64.
36 *Ibid*.
37 *Ibid*.

3. Development of Law Regarding Liability for Third Party Unlawful Speech on Internet portals

The development of law regarding liability for third party unlawful speech on Internet portals has been a complex and evolving process encompassing an interaction between case law and international documents. Here is an overview of how the Court explored this development in *Delfi* and *Sanchez*. In *Delfi*, the Court consulted certain documents of the Council of Europe, UN documents, directives of the EU and case law of the Court of the EU regarding liability of an Internet service provider for illegal information of a third party, which it transmitted or storage. One important reference was a Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted on 21 December 2005. This declaration emphasized that individuals should not be liable for content on the Internet of which they are not the author unless they have adopted that content as their own or refused to obey a court order to remove it.[38] In his report of 16 May 2011 (A/HRC/17/27) to the Human Rights Council, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression made a difference between the Internet and traditional media. The difference was based on characteristics of the Internet. Being a means of alive communication, the Internet offers possibilities that traditional media do not offer. The Special Rapporteur stated: "in cases of defamation of individuals' reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate."[39] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services and a Declaration on freedom of communication on the Internet, adopted by the Committee of Ministers of the Council of Europe on 28 May 2003 are consonant regarding liability of the Internet service providers. According to the two documents, the Internet service providers, which store information emanating from third party may be considered liable if they do not act expeditiously to remove or disable access to information as soon as they become aware of illegality of information.[40] The Court of the EU found in the case C-291/13, *Sotiris Papasavvas* found that a newspaper publishing company, which posted online version of a newspaper on its website, may be liable for commercial advertisement posted on the website, since the company had knowledge of the information and had control over that information. Beside, the company received income from commercial advertising.[41]

Having in view a subject-matter of the *Sanchez* case, it might have been expected that the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems was the main international source which has informed paragraph 2 of Article 10 of the

38 *Delfi AS*, para. 49.
39 *Ibid*. para. 48.
40 *Ibid*. paras. 44, 50.
41 *Ibid*. para. 57.

Convention. Really, the Court began the section on international materials in its judgment by presentation of the Protocol. Protocol has entered into force in 2006 and France was a State Party.[42] Article 3 of the Protocol obliges the State Parties to establish as a criminal offence "distributing, or otherwise making available, racist and xenophobic material to the public through a computer system". Second paragraph of the Articles enables that a State Party "may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of this article, where the material … advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available." Article 2 of the Protocol defines "racist and xenophobic material" as "any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors." The Exploratory Report, cited by the European Court, informs that the act of distributing or making available is only criminal if the intent is also directed to the racist and xenophobic character of the material.

4. The Relationship between Jersild and Sanchez

The Court repeated many times that:

> While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.[43]

However, the Court reiterated, also, in many cases that:

> While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.[44]

What is the relationship of the two cases-*Jersild* and *Sanchez*-in the light of the two quotations? Whether *Sanchez* departed from *Jersild* and if it departed why that happened? The two cases are identical by the fact that criminal liability of intermediaries was established and they are different by employed media-television broadcasting and Internet news portal. It seems that *Sanchez* departed from *Jersild*. The Grand Chamber, which adjudged *Sanchez* in 2023, would probably adjudged *Jersild* differently than the Grand Chamber in 1994. The main reason of the change is not a difference between Internet news portal and television rapportage. The main reason was the change of relevant law, in particular adoption of above-mentioned Additional Protocol to the Convention on

42 https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=189.

43 *Chapman v. the United Kingdom* (App. no. *27238/95*), Judgment of 18 January 2002, para. 70; *Christine Goodwin v. The United Kingdom*, (App. no. 28957/95), Judgment of 11 July 2002, para. 74. Similarly in *Mamatkulov and Askarov v. Turkey* (App. nos 46827/99 and 46951/99) Judgment of 4 February 2005, para. 121.

44 *Mamatkulov and Askarov*, para. 121.

Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems and, possibly, warring development in some European countries regarding inter-racial relations.

In *Jersild*, television journalist transmitted blatant racial statements, such as "niggers" and "foreign workers" were "animals" in his television rapportage. Above in the text are quoted disputed comments which were posted on Mr. Sanchez's Facebook page. They were racist statements, but not of such degree of brutality. The context was similar. The presentation of statements in *Jersild* was intended to contribute to public discussion on racism in Danish society. Mr. Sanchez created his Facebook page to serve for public political discussion. Majority of twelve judges in *Jersild* found thus that conviction and sentence of the applicant was not necessary in democratic society. Minority of seven judges dissented. They observed that it was the first case before the Court on dissemination of racist remarks which denied to a large group of persons the quality of human beings and that the applicant did not clearly make their statements unacceptable, but made some "cryptical remarks."[45] The minority did not deny the right of Danish journalist to report on problem of racism in Danish society, but did not accept the way by which he did that. Similarly, the majority of the Grand Chamber in *Sanchez* did not negate the right of political supporters of Mr. Sanchez to criticize criminality, prostitution, or riots in their city, but denied the right to do that in racist way. Four judges dissented in *Sanchez*. All of them did not agree with majority that French law satisfied the test of foreseeability. Two judges thought that conviction of the applicant for comment of one of commentators, which was deleted by the author of the comment a day after it was posted, was not proportional.[46] Two other judges were reserved concerning the regime of individual criminal liability for failure promptly to delete remarks of third parties.[47]

5. Concluding Remarks

Development of principles regarding liability for third party unlawful speech has begun in *Jersild* and continued in two chains of cases: one related to not-Internet media and other related to the Internet media. Most probably, the principles, as stated in *Delfi* have not been finalized, and their development will continue. It may be expected that potential impact of unlawful speech to society will be given more consideration. The consideration of nature of unlawful speech in *Sanchez* suggests such development. Thus, posting of racial statement on a private individual's website, as an isolated act in a society not burdened with racial issues, would not constitute a "pressing social need" for interference with the freedom of expression by the criminal liability of the owner of the website. On the contrary, frequent posting of racial statements on private individual's website in a society facing racial problems might constitute "pressing social need" for

45 *Jersild, op. cit*., Joint Dissenting Opinion of Judge Ryssdal, Bernhard, Spielann and Loizou, paras 1,3..

46 *Sanchez, op. cit*., Dissenting Opinion of Judge Ravarini, para. 217. Dissenting opinion of Judge Bošnjak, para. 221.

47 *Ibid*., Joint Dissenting Opinion of Judge Wojtychek and Judge Zünd, para. 240.

interference with the freedom of expression through the criminal liability of the owner of the website. In such circumstances, whether the website owner is a company professionally managing the website with economic interest, as in *Defli*, or a politician with experience in website management, as in *Sanchez*, or a private person without experience in website management who maintains website as a hobby, would be of little importance. Otherwise, the Internet may be misused to undermine the fundamental values of a society.

In mixed situations where unlawful speech is a combination of racial statements and defamatory statements against a particular individual, as was the case in *Delfi* and *Sanchez*, the potential impact of unlawful speech on a society may be taken into account in assessment of existence of "pressing social need". In such cases it will be appropriate for the Court to examine the fair balance between the interest of an intermediary, based on the freedom of expression, and the interest of the community, based on fundamental values underlying the Convention. The Court weighs conflicting legitimate interests of individual and community in some other areas covered by the Convention and might be difficult to see obstacles for doing that here. In other cases, the focus will, probably, remain on exploration the balance of the right to freedom of expression and the right to protection of private life or other specific rights.