FREEDOM OF SPEECH AND THE PROHIBITION OF RACIAL DISCRIMINATION

BY

HENNING JAKHELLN

© Stockholm Institute for Scandianvian Law 1957-2009

In many countries, the freedom to express one's opinion on different subjects is a part of the written or unwritten constitution. This freedom is—not least during recent years—confronted with another basic human right: the right to be free from discrimination because of one's racial background.

International law is in a similar position. The principle of freedom to express opinions is clearly expressed in several basic conventions.[1] There are also conventions which stipulate a general prohibition against racial discrimination and against the promotion of racial hatred.[2] To a certain degree, these conventions indicate how the distinction should be drawn between the permitted freedom to express opinions and the prohibited racial discrimination. The guidance is, however, expressed in such general terms that it is of very limited use when the distinction is to be drawn in practice.[3]

In two recent decisions, which do not harmonize too well with each other, nor with the general tendency of court practice as far as other limitations on the freedom to express opinions are concerned, the Norwegian Supreme Court has evaluated the question of how the distinction should be drawn between these two principles. Both decisions are based on Norwegian regulations—of the Constitution[4] and the Penal Code[5]—but both decisions also refer to the

[1] Cf., e.g., the UN Universal Declaration of Human Rights (1948) art. 19; the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art. 10; the UN International Covenant on Civil and Political Rights (1966) art. 19.

[2] Cf. the UN International Convention on the Elimination of all Forms of Racial Discrimination (1965), the UN International Covenant on Civil and Political Rights (1966) art. 20 no. 2; cf. also the UN Universal Declaration of Human Rights (1948) art. 2; the European Convention for the Protection of Human Rights etc. (1950) art. 14, and, more specifically, the UNESCO Convention against Discrimination in Education (1960) and the ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation (1958).

[3] Cf., e.g., the UN Universal Declaration of Human Rights (1948) art. 29 no. 2; the European Convention for the Protection of Human Rights etc. (1950) art. 10 no. 2 (the freedom to express opinions "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 ..."), the UN International Convention on the Elimination of all Forms of Racial Discrimination (1965) art. 4 (where the parties shall have "due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention" in their efforts against racial discrimination. Art. 5(d) (viii) mentions particularly "the right to freedom of opinion and expression".)

[4] Sec. 100 of the Constitution Act reads in translation:

There shall be freedom to print. Nobody can be punished for any writing, whatever its contents may be, which he has caused to be printed or published, unless he wilfully and manifestly has either himself shown or incited others to breaches of the laws, contempt for religion or morality or

© Stockholm Institute for Scandianvian Law 1957-2009

UN Convention 1965 as the background of the Penal Code provision. Of interest is also a recent decision,[6] where the Supreme Court found the leader of the "Organization against harmful immigration to Norway" guilty of organized spreading of leaflets containing racial propaganda which constituted an offence under the Penal Code.

1. The freedom to express one's opinions is a fundamental human right and one that is necessary for our democratic system of government. Legally, the principle is deeply ingrained and has been an unamended part of the Norwegian Constitution since 1814 (sec. 100). Everyone is free to express frankly their opinions on the administration of the government and on any other subject whatsoever. But, like any other freedom, the freedom to express opinions has certain limits. Such limits are clearly presupposed by sec. 100 itself, which does not ban the enactment of statutory rules that make it an offence in certain connections to show or incite others to disobedience towards the laws, contempt for religion or morality or the constitutional authorities, or resistance to their orders, or to advance false and defamatory accusations against any other person.

2. On the other hand, the Constitution Act does not contain any explicit rule protecting ethnic minorities against encroachments—in spite of the fact that in Norway, at least throughout recorded history, there have existed small groups that differ from the bulk of the population. The Lapps in particular, but also the gypsies, differ from the majority of the population in that they appear somewhat "foreign" and partly also because of their special way of life and language. Discriminatory encroachments affecting these groups have taken place throughout history. Thus, the problems connected with race discrimination are ancient also in Norway.

It may be right to bring to mind that even the Constitution Act itself did originally contain a discriminating rule, as sec. 2 banned the Jews from access to the country.

This provision, like the ban against Jesuits and monastic orders, was probably based more on an intolerant religious attitude[7] than on a directly racially discrimi-

the constitutional authorities, or resistance to their orders, or has advanced false and defamatory accusations against any other person. Everyone is free to express frankly their opinions on the administration of the state and on any other subject whatsoever.

[5] Sec. 135(a) of the Penal Code reads in translation:

Anyone who makes a public statement or announcement or otherwise disseminates a statement among the public, whereby a person, or a group of persons, is threatened, insulted or subjected to hatred, persecution or contempt because of his religious belief, race, colour or national or ethnic origin, shall be punished by fines or imprisonment up to two years.

The same punishment shall apply to anyone who incites or otherwise participates in any act mentioned in the subsection above.

[6] 1981 NRt 1305.

[7] Cf. Falsen, ref. *St. Eft.* 1836–54, II (1893), p. 111, Steenbuch, *Bemerkninger over Norges Grundlov*, 1815, pp. 13–15. See also Castberg, *Norges Statsforfatning*, 1964, II, p. 143.

© Stockholm Institute for Scandianvian Law 1957-2009

natory one. But it can hardly be doubted that racial conditions were here interwoven with the religious attitude, thus giving the provision a racial background as well.[8]

The provision denying Jews access to the country was abolished in 1851, after a long and not very flattering political struggle. A proposal to this effect was originally presented by the poet Henrik Wergeland in 1839, cf. *St. forh.* 1839 IV, pp. 715–41. The proposal was discussed, but rejected in 1842, and again in 1845 and 1848. The Storting requested the opinion of the Supreme Court as to whether a possible abolition would be contrary to the spirit and principles of the Constitution, cf. the Constitution Act, sec. 112. This was done because banning Jews from the country was laid down as the eighth of the preliminary basic principles for the Constitution adopted by the National Assembly at Eidsvold in 1814. In 1842, the Supreme Court concluded (with two judges dissenting) that an abolition would not be in conflict with sec. 112.

The Supreme Court also assumed that the ban of sec. 2 would comprise all Jews, even those who had had access to the country according to a previous act of January 23, 1750, as well as those who could be granted special permission according to sec. 3-22-1 of the Norwegian Code of 1687. Previously, it had been the opinion of the administration that it was entitled to grant special exemptions, cf. in this connection *St. Eft.* 1836–54, II (1893), pp. 108ff., which also contains information on previous administrative practice. — Against the abolition was, *inter alia*, advanced "a fear that poor Jews would invade the country and become a burden to us [and] that the rich ones would grasp and take over all the trades to the detriment of the nation's native inhabitants" (*loc. cit.*, p. 112). Typical of the general attitude at that time is the case of the Polish Jew—Jonas—(briefly reported *loc. cit.*, pp. 110f.). He arrived in Bergen on a ship, which on December 30, 1817, had been shipwrecked on its way from Königsberg (Germany) to London. Six days later he was sent to Oslo, accompanied by a police officer, and from there sent on to Gothenburg.[9]

As a pure curiosity may be mentioned that the "Ministerpresident" Quisling on February 12, 1941, decided—without even the shadow of legal authority—that "the prohibition abolished by constitutional amendment of July 21, 1851" against giving Jews access to the country, should be reinstated in sec. 2 of the Constitution.

In our days we are perhaps more aware of the problems in connection with racial discrimination than was the case previously. The demand for dignity as human beings, as a fundamental standard of value for all people, is now possibly more pronounced. But, the general increase in welfare has had the effect that we have now come to expect that this standard of value should be

[8] Cf., e.g., Falsen, *Norges Grundlov, gennemgaaet i Spörgsmaal og Svar*, 1816, pp. 8f.: Besides, fraud and underhand means in commerce, among the majority of those professing to the Jewish religion, are so common qualities that probably it cannot be said to be an unnecessary caution to keep them away from a commercial country such as Norway.

[9] By a decision of the Supreme Court, the Chief of Police in Bergen was ordered to pay the costs of the transport. I have not been able to find out whether this refund claim was based on the view that it would have been cheaper for the state to have Jonas sent out of the country by ship from Bergen, or whether the claim was made because an illegal act had taken place. However, the former is the more likely.

© Stockholm Institute for Scandianvian Law 1957-2009

given practical implementation. One result of this is a fairly general and increasingly marked tendency in the legal and cultural development of our system of society to limit the traditional freedom through rules protecting the weaker members of the society. It would be strange if this general tendency did not lead to certain consequences also for the freedoms to express opinions. As far as expressions made in mass media are concerned, the need to protect the weaker members of society is accentuated. Such expressions reach out to large and undefined groups of people. The detrimental effects may therefore be much larger than when similar expressions are made in smaller gatherings or between individuals. At the same time, considerable commercial interests are involved in the freedom to express opinions. Expressions of opinion received from the general public are "hot stuff", and often "sell" better than more objective and informative articles.

3. Before 1961, Norwegian legislation did not contain special rules to protect people of other races. Members of minority groups did, naturally, enjoy the same protection as anyone else. Faced with the wave of anti-semitic actions and demonstrations which at the beginning of 1960 spread over great parts of Europe, sec. 135 of the Penal Code was amended by an Act of June 9, 1961, giving this a new subsection directed against all encouragement of racial hatred. It was held, *inter alia*, that this penal provision might especially become important if organized anti-semitism should gain a foothold in Norway, and that a penal provision against racism was justified as a matter of principle. The intention was that only grossly improper actions should be covered by the provision.[10]

On August 6, 1970, Norway ratified the UN Convention dated December 21, 1965, on the abolition of all kinds of racial discrimination.[11] The rules of the Convention went further than sec. 135(2) of the Penal Code did at that time, and prior to the ratification it was, therefore, necessary to amend the Code in order to satisfy the provisions of the Convention.[12] As regards the limits of the freedom to express opinions, the Convention itself does not clarify

[10] *Ot.prp.* no. 45 1960–61, pp. 1 f.

[11] In this connection it may be mentioned that Norway has also ratified other conventions containing provisions against racial discrimination. Special note should be taken of the European Convention for the Protection of Human Rights etc., art. 14, which secures the right of the Convention irrespective of race, etc., the UNESCO Convention, December 14, 1960, against discrimination in education, the ILO Convention no. 111, June 25, 1958, against discrimination due to race, etc., in working life, and the UN International Convention of December 16, 1966, on political and civil rights, art. 20 no. 2, against any encouragement of race hatred, etc. At the ratification of the mentioned Convention, the Minister of Justice emphasized that, as far as race hatred was concerned, art. 20 no. 2 did not go further than the UN Convention of 1965, and referred on that point to what had been stated by the European Council, the expert committee on human rights (CM 69) 59, pp. 53–54, cf. *Ot.prp.* no. 10 1970–71, p. 19.

[12] *Ot.prp.* no. 48 1969–70, p. 4.

© Stockholm Institute for Scandianvian Law 1957-2009

the question very much. Art. 4 contains the reservation that measures against racial discrimination shall take place with due regard to the rights expressly stated in Art. 5, which in subsection c(viii) mentions the freedom to express opinions.

The matter is touched upon in *St. prp.* no. 107 1969–70, p. 3.

The greatest difficulty involved when Art. 4 was to be formulated was to distinguish between, on the one hand, the expressions of opinions on racial questions which must be permitted in a society where freedom to express opinions is the rule, and, on the other, expressions and actions which cannot be tolerated. Considering the very far-reaching measures against racial discrimination which the parties of the Convention are obliged to implement, the Nordic countries emphasized strongly that the text should contain a general reservation that the measures should not take place at the cost of other basic human rights as, e.g., the freedom to express opinions. The Nordic countries put forth in this connection a proposal that the last part of the Article should be formulated with "due regard to the rights expressly mentioned in Article 5". This formulation, as well as a French proposal to refer also to the UN Declaration on Human Rights, was passed.

The obligations which Art. 4 imposes on the parties of the Convention are thus modified by reservations already expressed in the same Article.

By an amendment dated June 5, 1970, the second subsection of sec. 135 of the Penal Code was abolished, and at the same time sec. 135(a) was added. The new sec. 135(a) reaches further than the previous sec. 135(2). The previous rule covered utterances against an ethnic group,[13] while the present rule applies also to utterances against a person or group of persons.[14] And the rule is no longer limited to the relatively serious expressions which insult or incite hatred or contempt. Now it is sufficient that the expressions expose the person in question to hatred, persecution or contempt, or are threatening or insulting. Finally, the present rule makes it clear that it will apply not only to statements expressed in public, but also to statements which in any other way are spread among the general public.[15]

Sec. 135(a) is not limited to racially discriminatory expressions, but also comprises statements which discriminate because of religious or national circumstances. The following discussion will mainly deal with racial discrimination, but because of the

[13] In *Ot.prp.* no. 45 1960–61, p. 2, it is presumed that it is not a condition that the ethnic group concerned must be a part of the Norwegian population or specifically connected with Norway. This opinion must apparently also apply to the new sec. 135(a), as the same considerations still take place in this field.

[14] While it was the opinion of the Ministry of Justice (*Ot.prp.* no. 48 1969–70) that the provision should apply only towards statements made against a group of persons, the Parliamentary Committee of Justice declared that the acts which the penal provision were directed against were of the same character, whether they are carried out against individuals or groups, and changed the proposed bill accordingly, cf. *Innst. O.* no. 42 1969–70, p. 72.

[15] Cf. *Ot.prp.* no. 48 1969–70, p. 18: It is not at all necessary that the statement is immediately directed towards a larger group of persons. It may also be spread among the general public through repeated private conversations. The Parliamentary Committee of Justice adhered to this view, cf. *Innst. O.* no 42 1969–70, p. 72.

© Stockholm Institute for Scandianvian Law 1957-2009

formulation of sec. 135(a), I see no reason to define the term racial in this connection, as the other alternatives of sec. 135(a) will normally apply in borderline cases.

4. Today, discrimination against members of other races is more likely to take place when these also have a low status in society. This is usually linked with, *inter alia,* a poor standard of housing and a low status of work—quite often also with a foreign religion. Much of what today is classified as racial discrimination probably has its roots in other reasons—e.g. historical and present social status, different religion or ethical beliefs. In many cases the language proficiency of foreign workers and their families is low, which increases their difficulties and makes the group more exposed. And their position is often further weakened because of the insecurity linked to the provisions stipulated for working permits and residence permits for persons with non-Scandinavian citizenships.

One should, however, be very careful to avoid thinking that the problems connected with racial discrimination concern only the lower social groups of society. Thus, the Jews have generally belonged to the more wealthy groups, which—as will be known—has not prevented the Jews from being subject to a certain degree of racial persecution also in Norway. Other, relatively wealthy groups may also be exposed to racial discrimination, e.g. families with children adopted from other countries.

5. Immigration questions, policies in relation to foreign workers, and racial questions in general affect important interests of society, basic standards of value and ethical principles. Obviously, it is vital to secure the free exchange of opinions on these questions also. In the view of the present author it is clear that increased tolerance and humanism, and the suppression of racial prejudice and the underlying attitudes, can only be achieved by way of information and persuasion. However, it must be equally clear that those who adhere to different views must have ample opportunity to present them. Anything else would be synonymous with the monopolizing of opinions and indoctrination. Another consequence would be that the reasons why such persons hold such opinions would not come into the open, and it would not therefore be possible to discuss and refute them.

Since the freedom to express opinions must be strongly protected, any limitation must be well founded. In this connection, it is important to keep in mind that the influence on public opinion exerted by the mass media may indirectly result in gross infringements. Therefore, it is important that the limits of the freedom to express opinions are drawn in such a way that the danger of encroachment is not increased. A too lenient attitude towards public

© Stockholm Institute for Scandianvian Law 1957-2009

utterances about, e.g., foreign workers, may contribute to creating and strengthening the impression that different standards of behaviour apply in relation to them. This may have most serious consequences for an individual belonging to another ethnic group. The fact that such attitudes may be built up, with disastrous results for entire minority groups of a population, is clearly and sadly proved in history. There is little reason to protect the unscrupulous, insulting exercise of the freedom to express opinions that may endanger the life, health or welfare of such people. Here, other interests must be considered paramount.

The fact that also in Norway encroachments based on racial attitudes take place towards foreign workers should be made clear. Therefore, we cannot, unfortunately, maintain the attitude that racial encroachments are phenomena which belong to the time of the Nazi occupation and to history. On the contrary, these issues must be treated very seriously today.

6. As mentioned above, it follows directly from the Constitution Act, sec. 100, that the freedom to express opinions is not unlimited. The limitations that are of special interest in our connection—"breaches of the laws" and defamatory accusations—must be held to have their basis in a uniting general principle of impropriety. Other rules of the Constitution Act have also been conceived in this way—*inter alia* sec. 97[16]—and it is exactly this formulation which the Supreme Court has used as basis when laying down the limitations of the freedom to express opinions—as far as racial questions are concerned, and also in other relations.[17] Thus, the Supreme Court adhered to the judge's summing up of the law to the jury (1977 NRt 115, at p. 120), where the judge held, *inter alia,* that with regard to improper expressions of opinion, the protection of the freedom to express opinions is not unlimited (p. 116). It follows from the principal points of view above that there is every reason to investigate what the standard of impropriety may lead to as far as racially discriminatory statements are concerned.

To this clarification of the standard of impropriety it might today be natural to apply the criterion of objectivity. The *travaux préparatoires* of the rules of the Penal Code against racial discrimination express such a view: It is not the intention of the provision to prevent an objective debate on problems connected with minority groups in society, cf. *Ot. prp.* no. 45 1960–61, p. 2. Similarly, it is held in the *travaux préparatoires* of the amendment of 1970 that the impartial and objective criticism of a certain group of the population, etc., should not be

[16] Knoph, *Rettslige standarder*, 1939, pp. 83 ff.

[17] Cf. 1958 NRt 479: Art. 100 of the Constitution Act guarantees every citizen the right to express their opinion on any matter whatsoever, but it does not prevent provisions being enacted that stipulate punishment of those who express their opinions in an improper manner (p. 482).

© Stockholm Institute for Scandianvian Law 1957-2009

affected, cf. *Ot. prp.* no. 48 1969–70, p. 16. The Supreme Court too has presented a statement along these lines: Nor would an objective impartial criticism of the behaviour of members of these groups in our country be in conflict with the penal provision, cf. 1978 NRt 1072, at p. 1075.

Personally, however, I do not believe that the criterion of objectivity is the central point. In many relations it is clearly unfair to take into consideration the racial background of the person(s) in question, e.g. as regards public decision-making, termination of employment or tenancy agreements, membership of trade unions, boycotting of commercial relations, etc. I also have difficulty in understanding how a criticism based on racial grounds can be a proper criticism at all, unless the word "proper" in this connection is given a meaning different from other connections—something which hardly can be recommended. On the other hand, the criterion of decency seems to give a certain guidance although it is not very much more specific than the standard of impropriety. The reference to social standards outside the rule of law, in order to fix the limits to what can be accepted, is the central point of both. But the criterion of decency may also relate to the form of the statement, whereas the criterion of impropriety mainly refers to its contents. In any case, an expressed opinion may very well be unfair without being indecent, so that this formulation gives room also for expressed opinions that are unfair.

In legal writings, Professor Castberg[18] and Professor Andenæs[19] both support the criterion of decency. And, in fact, the *travaux préparatoires* of the Penal Code are probably also relevant to this, in that they refer to fair and objective criticism. However, the freedom to express opinions protects also lopsided utterances. Utterances need not be objective, in the sense of being balanced, and expressing considerations pro and contra. Such a rule would remove most of the right to express opinions frankly.

7. The contents of the term decent depends on the general opinion of society, and may, of course, change as time passes. But the general opinion of society cannot be applied uncritically and without any further discussion.[20] Further, it is extremely difficult to ascertain that opinion. By statutory rules, certain standards may be laid down as to what should be considered decent—in the same way as has been done, e.g., as far as defamation is concerned. Such statutory rules are also an expression of the principal attitude of society—an attitude which the courts must loyally support. However, if these rules are interpreted restrictively, their influence on the generally prevailing attitude will be reduced accordingly.

[18] Castberg, *op.cit.*, p. 290.
[19] Andenæs, *Statsforfatningen i Norge*, 1976, p. 337.
[20] Cf., e.g., Augdahl, *Rettskilder*, 1949, pp. 192 ff., especially p. 200.

© Stockholm Institute for Scandianvian Law 1957-2009

It should also be noted that the influence on the generally prevailing attitude is pointed out, in principle, in the *travaux préparatoires* of the rules of the Penal Code. As previously mentioned it is stated (*Ot. prp.* no. 45 1960–61, p. 2) that a penal provision against racial persecution must be justified, as a matter of principle. Such a provision underlines the condemnation of society of the base actions towards which it is directed.[21] And in the same way it was later stated (*Ot. prp.* no. 48 1969–70, p. 16) that although new statutory rules were introduced into this field, the most important protection against racial discrimination, etc., would, also in the future, consist of public opinion. General information and educational activities in schools, press, radio and television, etc., play an important role. Here, the new statutory rules may, however, be considered as an expression of the principal opinion of society as far as matters of discrimination are concerned.[22]

Further, it is equally clear that the courts must disregard any statutory rule which encroaches upon the freedom to express opinions laid down in the Constitution Act, sec. 100. Any statutory rule must be interpreted on the basis of this constitutional principle. At the same time, however, those grounds which have been the basis of the limitations of the freedom to express opinions must be taken into consideration—the limits of the freedom to express opinions must be found by balancing these conflicting considerations. This is clearly expressed by the Supreme Court, also as far as the penal provisions against racial discrimination are concerned. Thus, in principle there is—so far—every reason to adhere to the attitude of the Supreme Court.

> *1977 NRt 114.* The Constitution Act, sec. 100, protects a human right. The UN Convention, from which sec. 135(a) derives ... has also the purpose of protecting a human right ... Where those interests which one of the provisions shall protect seem to be in conflict with the interests that shall be protected by the other, a balancing must take place in deciding which interest should be given priority in the specific situation. Sec. 135(a) of the Penal Code should then be interpreted and applied with sec. 100 of the Constitution Act as background and guidance (p. 119).[23]

The basic standpoint for the interpretation which takes place in individual cases must, however, be that the constitutional freedom to express opinions is *not* unlimited. The conflicts between the various considerations are therefore substantially mitigated compared with those results that would have been

[21] This statement was agreed upon by the Parliamentary Committee of Justice, cf. *Innst. O.* no. 42 1969–70, p. 72.

[22] Cf. also the debate in Parliament, *Ot.forh.* 1969–70, p. 371: The acts which under this bill are subjected to punishment deserve nothing but condemnation.

[23] Cf. also 1978 NRt 1072, where the majority of the Supreme Court (p. 1076) held that sec. 135(a) must be interpreted with sec. 100 of the Constitution Act as background and guidance, and where the minority (p. 1078) agreed that sec. 135(a), against the background of sec. 100 of the Constitution Act ... must be restrictively interpreted. Similarly 1981 NRt 1305 at p. 1312 and p. 1318 (majority as well as minority opinion).

© Stockholm Institute for Scandianvian Law 1957-2009

derived from an absolute and over-simplified principle of complete freedom to express opinions.

8. Sec. 135(a) of the Penal Code is in many respects similar to sec. 247 of the Penal Code, which stipulates punishment for defamatory statements. The freedom to express opinions as regards defamatory statements is, however, also limited by sec. 100 of the Constitution Act. There is, however, every reason briefly to bring to mind how practice and theory have balanced the considerations in this field.

> In translation, sec. 247 of the Penal Code reads: Anyone who, in word or deed, behaves in a manner likely to harm the good name or reputation of another person, or who exposes him to hatred, contempt or loss of the confidence required in his position or trade, or is an accessary thereto, shall be punished with fines or imprisonment up to 1 year.

Sec. 100 of the Constitution Act is not formulated too successfully as far as defamation is concerned, but legislation as well as court practice and legal writing have adopted a relatively liberal attitude towards the wording of the provision. *Inter alia*, there is general agreement that defamatory statements may be punished, even if they should not contain any accusations.[24] Further, the requisite of intent is in practice almost completely abandoned.[25] Nor has the term honour been subject to any narrow interpretation. Linguistically, the term honour comprises reputation as well as self-respect,[26] and to be exposed to contempt is a part of this. To be exposed to hatred where the statement is not defamatory goes beyond the meaning of the term honour in usual language.[27] But neither in this respect has the Constitution Act, sec. 100, been considered an obstacle.[28] For a long time, sec. 247 of the Penal Code has had such an extended definition, and it now seems natural to consider this extended understanding of the term defamatory as accepted.[29]

Further, it must be assumed that the expression of such opinions towards less clearly defined groups of people is not constitutionally protected. Although the provision of the Penal Code regarding defamation does not comprise statements, etc., expressed towards a group of people, the interpretation of the Penal Code, especially sec. 251(2),[30] is not decisive as far as the Constitution Act, sec. 100, is concerned. The term defamatory accusations against someone

[24] Castberg, *op. cit.*, p. 290.
[25] Andenæs, *op. cit.*, p. 340.
[26] Skeie, *Den norske Strafferett,* 1946, II, p. 155.
[27] Skeie, *op. cit.*, p. 156.
[28] Castberg, *op. cit.*, pp. 289 f.
[29] The term honour in sec. 247 of the Penal Code is somewhat wider than the usual meaning of the term, also because it extends to loss of the confidence required in position or trade, cf. Skeie, *op. cit.*, pp. 156 f., but this fact has, again, not been considered as contrary to the constitutional freedom to express opinions.
[30] Cf. Andenæs, *Spesiell Strafferett,* 1971, p. 121, cf. also Skeie, *op. cit.*, pp. 159 f.

© Stockholm Institute for Scandianvian Law 1957-2009

must also comprise defamatory accusations against larger groups of persons. Sanctions against such expressed opinions may therefore be further regulated by statutory rules.[31]

Consequently, it must be assumed that when the exposure of others to hatred or contempt is not protected by the constitutional freedom to express opinions as far as sec. 247 of the Penal Code is concerned, the same view should be applied also as far as sec. 135(a) is concerned. Further, it must be right to assume that the term "insults" in the latter provision may be considered as a defamation in regard to the Constitution Act, sec. 100, because insults may undoubtedly be an infringement not only of a person's self-respect but also of his reputation. And, obviously, the liability to persecution must be included in the limitations imposed on the constitutional right to express opinions. Persecution will, in this connection, usually be a consequence of and an effect of being exposed to hatred. In addition, persecution may represent serious crimes, with the consequence that the provision of sec. 100 of the Constitution Act on breaches of the law may also apply.[32]

Utterances having a racial basis and also constituting threats may also be made punishable, in which case sec. 100 of the Constitution Act does not apply. Such utterances will usually also involve a violation of other alternative provisions of sec. 135(a) of the Penal Code. But the alternative may be of independent importance, e.g. by threats on the use of boycotting, which does not at the same time expose the person boycotted to contempt. Such threats may severely impair the position of those affected—not only in the economic field—while at the same time the possibility to make such threats can hardly be said to represent an interest worth very much protection.[33]

[31] All insults are, however, not subject to punishment by the present Penal Code. This is, for instance, the case as far as insults made to an indefinite group of persons are concerned. And, if a person from Pakistan is called "Pakkis", or a Lapp "Finnish devil", this may probably be a punishable insult under sec. 246 of the Penal Code (i.e. where the statement has been made to the person in question), but not under sec. 247 (i.e. where the statement has been made to other persons about the person in question), cf. Andenæs, *op. cit.*, p. 117, cf. also Skeie, *op. cit.*, p. 162.

In translation, sec. 246 reads: Anyone who unlawfully violates another's feeling of personal honour in word or deed, or is accessory thereto, shall be punished with fines or imprisonment up to six months.

[32] Similar rules seem to apply to incitement to hatred, etc., cf. the previous sec. 135(2) of the Penal Code. In this connection court practice regarding incitement to aversion against military service should also be observed, cf. sec. 134(3) of the Penal Code, which reads: Anyone who publicly incites a member of the armed forces to disaffection against the service, or to hatred of military officers or superiors, shall be punished according to the provisions of the second subsection. The Supreme Court considered it clear in 1950 NRt 1043 that this provision did not conflict with art. 100 or the Constitution Act, and referred to a previous Supreme Court decision, 1913 NRt 722. There the Court simply stated: It is not considered dubious that legislation may lay down provisions for punishment in cases of this kind, without thus conflicting with the Constitution Act, sec. 100.

[33] Sec. 349(a) of the Penal Code stipulates punishment not only for a boycott imposed in commercial connections, etc., but also for incitement to such a boycott. The fact that such a boycott is a violation of sec. 349(a) does not have the effect that sec. 135(a) may not be applied. Cf. also Vatne, "'Yngre nordmann får arbeid'—straffelovens § 349 a?", *Lov og Rett* 1977, pp. 186 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

Against this background it seems right to conclude that the provision in sec. 135(a) of the Penal Code does not represent any limitation of the freedom to express opinions over and above those limitations previously known in other connections and accepted in court practice.

> *1977 NRt 115.* Sec. 100 of the Constitution Act protects the right frankly to express opinions. It is clear, however, that one may interfere against misuse of the freedom to express opinions by enacting penal provisions ... The provision of the Penal Code, sec. 135(a), is not *per se* contrary to sec. 100 of the Constitution Act.[34] (p. 119)

9. Sec. 135(a) of the Penal Code comprises only those utterances on racial conditions, etc., which represent a threat, insult or exposure to hatred, persecution or contempt. Statements which do not have this character are not affected. The limit for the permitted utterances must be drawn by an interpretation of sec. 135(a) of the Penal Code, against the background of sec. 100 of the Constitution Act, the effect on the general attitude which sec. 135(a) of the Penal Code is supposed to have, and the standard of decency.[35] Where the exposure of someone to contempt in particular is concerned it may be difficult to define the limit. This alternative is the most far-reaching—the other alternatives are all more limited. Therefore, one is justified in concentrating the following discussion especially on the alternative of contempt.

Freedom of expression must be seen in relation to a number of external factors. When defining the limits of the freedom to express opinions, taking into consideration also the question of whether the group exposed to criticism is small or large, weak or strong, etc., must be justified. Towards a large and strong group, which easily may react and defend itself, somewhat more may be

[34] In the case referred in 1978 NRt 1072 it was not even held that sec. 135(a) of the Penal Code was contrary to sec. 100 of the Constitution Act.

[35] The standard of decency may also entail limitations of the possibilities of imposing other than criminal sanctions on outspoken utterances. These limitations will however differ in individual cases depending on various factors, e.g. the demands made on a public servant are higher than on an ordinary citizen. But utterances made by a public servant outside service may conflict with the express or implicit demands raised by the status and integrity of public service, so that disciplinary sanctions—even dismissal—may be justified. Cf. the Labour Court decision of September 30, 1981, where a high school teacher had been summarily dismissed because of racially discriminatory statements made in class as well as publicly. Apart from the demands raised by the requisite of presentation, the Labour Court notes that there must be a minimum standard as to the validity of the views maintained by the teacher outside school.

In the view of the present author one should distinguish between what is presented as fact and what is presented as a value-judgment, e.g. as to what course of action should be taken, etc. In the presentation of facts one may demand that at least certain contradictory facts are mentioned so that the presentation meets a minimum standard of objectivity. The statement will acquire a certain amount of authority in the eyes of the public because of the position of the public servant. Apart from that, a certain degree of objectivity is a precondition for the trust of the public in the public servant. On the other hand, there should be greater leeway for value-judgments as it is useful for the public debate that even extreme views are allowed to be presented, in particular where one point of view cannot be regarded as more "correct" than another and where there is a danger of "steering of opinion" or one-sidedness.

© Stockholm Institute for Scandianvian Law 1957-2009

accepted than may be accepted towards a smaller and weaker group.[36] As regards sec. 135(a) this point may be expressed so that it will take more before such a strong group has been exposed to contempt, etc., than the smaller and weaker group.[37]

Since the question concerns statements uttered publicly, or in other ways spread among the public, what must be decisive is the meaning the general public will give the statement, the whole statement seen in its context. The fact that the statement, if thoroughly analyzed after profound study, may have another content is thus not decisive.[38]

General statements, not directed against any special group, will under normal conditions basically not be punishable—irrespective, of course, of whether one disagrees strongly with the statement. It is true that a statement such as "Norway for Norwegians" implies a certain disparagement—a certain contempt—of persons belonging to another race, nationality, etc., and a corresponding glorification of native Norwegians. But, in such cases the contempt is expressed too loosely and insipidly. Ordinarily, such statements reflect a certain opinion of the general policy that ought to be adopted, and are thus precisely among those frankly expressed opinions on the administration of the state, or on any other subject whatsoever, that are protected by sec. 100 of the Constitution Act.[39]

However, when such general statements are directed against a more defined and limited group—such as the Jews, Pakistanis, etc.—the statement involves immediately a larger degree of contempt. This specification exposes the group more to contempt and the consequences of contempt than in the previous example. Yet, such statements should not be considered as covered by the penal provision of sec. 135(a) of the Penal Code. As long as a general opinion is expressed—e.g. that the specified group should leave the country, etc.—the

[36] In these connections, too, it is certainly true that the less the independence is, the greater will be the force of other people's judgment, cf. Skeie, *op. cit.*, p. 158.

[37] In addition, the relativity of the words must be taken into consideration. It is a well-known fact that the meaning of the words varies very much according to the situation in which they are used. Normally, it will be flattering to be talked about as a gentleman, but it may be a defamation if it follows from the context that this term has been used in the meaning of "strike-breaker". Cf. 1910 NRt 273. Similarly, general and normally harmless statements, like "Norway for Norwegians" and "Yankee Go Home", may in contexts of special situations—e.g. in an agitated atmosphere—represent an encouragement to commit violent acts against, e.g., Jews, Pakistanis, Americans, etc.

[38] Cf. 1978 NRt 1072, the dissenting judge, and 1981 NRt 1305, the minority opinion. Cf. also the Labour Court decision of September 30, 1981 (mentioned above, note 35).

[39] In the newspaper *Nordlandsposten* September 18, 1976, the following advertisement appeared, signed The Norwegian Union of 1976: BOYCOTT—at the parliamentary elections of 1977, all political parties of this country will be subjected to boycotting, unless they include in their programs the proposal that the coloured people who have come into this country, and who never have had any right to be domiciled here, shall be sent back to those regions of the earth from which they have come—in a manner, however, worthy of a nation with culture (quoted from Thomassen, *Tale eller tie?*, 1978, p. 55). An advertisement like this will certainly not be contrary to sec. 135(a) of the Penal Code.

© Stockholm Institute for Scandianvian Law 1957-2009

statement has primarily the character of a general political opinion. Here, the contempt is expressed secondarily, as a consequence of the general view. If such statements are to be affected by the penal provision, something further must apply. Therefore, if the statement is emphasized by other statements where the contempt is the primary element, the limit of what is not punishable will easily be exceeded.[40]

The practice of the Supreme Court is, however, not quite satisfactory:

> The decision in 1977 NRt 114 seems on this point at least to go a little too far. The decision is based on the fact that the accused had stated in newspaper interviews, *inter alia* that Norwegian Jews should leave the country. What the accused meant must have been that this group is not wanted here and should be deported. If they are not willing to move, they should, according to the accused, be isolated in a separate Jewish local community, because they take up space required for Norwegians. The Supreme Court made the comment (p. 118) that these statements fall within the described acts of the penal provision. By his statements the accused has thus insulted the Jews or exposed them to contempt ... his statements imply an encouragement to—or at least an acceptance of—extreme violations of the integrity of the Jews.

In the opinion of the present author it can hardly be justified to regard these statements, as they are referred in the decision, as exceeding the limit for punishable expressions. The statements are directed against the Jews, and they are negative. But they are couched in a very general form, where primarily a certain opinion of what should be general policy towards the Jews has been expressed. These statements hardly contain any encouragements to extreme violations of the integrity of the Jews. It is true that compulsive isolation is expressed as a political goal, if the Jews should not want to move voluntarily. But beyond this the statement does not contain any encouragement to commit illegal acts against the Jews or, in the wording of the Act, expose them to hatred, persecution or contempt, And even if an expressed acceptance of an illegal act in the specific case may very well represent exposure of someone to contempt, etc., it seems in this case to have been a question of a general future attitude, even in a rather hypothetical form. When account is also taken of the

[40] Cf. also 1981 NRt 1305, where the majority and the minority of the Supreme Court agreed that statements about Islam as religion and about Norwegian immigration policies were not an offence against sec. 135(a), although the harsh and aggressive form of the statements would be felt as an offence by the Islamic immigrants and could have harmful effects for them in Norway. Both fractions held, however, that *in casu* the leaflets also contained statements more directly levelled against the Islamic immigrants in this country, their qualities and behaviour, beyond the limits of sec. 135(a). The minority also held that the question whether the characterization of a religion was correct or not was, in principle, not decisive. However, the tenability might be taken into consideration when evaluating whether the provision of the Penal Code had been offended (p. 1315). — An utterance may, however, in principle be a violation of sec. 135(a) even if it is directed against groups of people living outside Norway, cf. *Ot.prp.* no. 48 1969–70, p. 18, and *Ot.prp.* no. 45 1960–61, p. 2. And, in the case of a religion with a small following, a statement will more easily be seen as directed against a specified group than will be the case of the greater religious movements of an area.

© Stockholm Institute for Scandianvian Law 1957-2009

fact that the position of the Jews in the Norwegian society of today is a secure one, it seems that the Supreme Court in this case did go too far.

On the other hand, the decision in 1978 NRt 1072 seems too liberal:

> In a long letter from a reader of the newspaper *Morgenavisen*, quoted in full in NRt, the accused criticized the immigration policy of the government in regard to refugees, foreign workers and extremists. This letter was characterized by the Supreme Court as a rather incoherent mixture of exaggerated, partly meaningless statements and accusations (p. 1075). The City Court of Bergen convicted the accused. But the Supreme Court (by a majority of 4–1) reversed the decision.

All the members of the Supreme Court agreed that the general meaning of the reader's letter was that the Pakistani, Turkish and Arab foreign workers should be returned to their home countries, and that such an opinion was not *per se* any violation of the Penal Code, sec. 135(a). However, in the concrete evaluation of the reader's letter, the majority based its findings on a principal view as regards the meaning of the term contempt which deviated from the result of the previous case, 1977 NRt 114. The rude contents of the reader's letter seem also to have been minimized.

> The majority in 1978 NRt 1072 based its opinion on the view that contempt is a strong expression, which cannot be extended to cover every disparagement, although the reader's letter probably was apt to produce or strengthen prejudice or negative attitudes held by some readers of the newspaper especially against the Pakistani foreign workers. The majority held that these effects could not be assumed to be of such a strength or be aroused in so many people as to have led to the limit of what is punishable being exceeded. This was the majority view, even though they did agree that the overall impression of the reader's letter through its allegations, exaggerations and unreasonable generalizations could have an emotional appeal, especially to readers who might already adopt similar attitudes, and that the reader's letter might have influenced in a negative direction the views of certain readers vis-à-vis those groups of foreign workers here dealt with.

In principle it does not seem reasonable to take into consideration the question whether a statement actually will result in contempt or if it has had such a result.[41] The assumptions of the majority in 1978 NRt 1072 that the effects of the reader's letter would not be likely to have led to the limit of what is punishable being exceeded, seem speculative. What seems at least problematic—apart from the fact that the majority do not give any indication as to where the limit for punishable statements should be drawn—is how evidence on this point should be produced.

The criterion should rather be whether the statement is *apt* to expose the

[41] In the event of defamatory expressions the same question arises of whether one may be exempted from punishment because of the fact that the statement was so unreasonable that no one would believe in it. Here, the traditional opinion is that if the statement is defamatory according to its contents, it will not serve as an excuse for the accused that nobody believed in it, cf. Andenæs, *op. cit.*, p. 123.

© Stockholm Institute for Scandianvian Law 1957-2009

persons in question to contempt.[42] It is this *possibility* against which the Penal Code reacts.[43] Otherwise, sec. 135(a) of the Penal Code would in reality be a useless provision.[44] One single statement will rarely be sufficient to obtain the effect of contempt, which was evidently desired by the author of the reader's letter. Such an effect will normally depend on a number of statements. The precondition of propaganda is the repetition. Obviously, the evaluation from a penal law point of view is not necessarily the same as regards continued or organized acts, as it is where specific, isolated acts are concerned.[45] But to restrict the applicability of sec. 135(a) to the first-mentioned situation only would merely complicate the situation as regards both the legal aspects and the evidence: What is the actual connection in the case, and how strong must this connection be?[46]

It should further be noted that the previous sec. 135(2) contained as a specific alternative the spreading of false accusations against a group of people. By the amendment of 1970, this alternative was considered to be covered by the term contempt without any expressed condition that the spreading of the accusations should have had any effects.[47]

[42] In a statement from the Law Department, the Ministry of Justice, dated July 4, 1975 (referred to by the City Court of Bergen, 1978 NRt 1080) it is held, *inter alia*: Especially where an expressed opinion is indecent in its form, or is intended to provoke reactions against the ethnic minority, it may be affected by sec. 135(a). — In my opinion, it is somewhat unfortunate that the Ministry here makes use of the phrase "intends to provoke reactions", because this may leave the impression that the accused must have acted with intent. It is, however, quite clear that it is sufficient that the expression was used on purpose, cf. 1977 NRt 114, at p. 119: The presiding judge held that the fact that the accused had not made his statement in order to insult the Jews or expose them to contempt did not exempt him from punishment. This concept of the law was, in the opinion of the Supreme Court, correct.

[43] This view has been considered decisive in comparatively similar situations, cf. the wording of sec. 247 of the Penal Code, cf. also 1950 NRt 1043 regarding sec. 134(3) of the Penal Code, where a witness had stated that a poster had not had any effect as an incitement to disaffection against military service. The Supreme Court stated: The fact that the poster should have had the *effect* of inciting disaffection is no condition for punishment. — In 1981 NRt 1305 the district court took a position in accordance with the opinion expressed above: "The accusations are beyond doubt ... *liable* to spread and strengthen already existing prejudices against this group of foreign workers, and may thereby provide a basis for hatred and contempt." Both majority and minority fractions of the Supreme Court found that the leaflets had exposed for foreign workers to contempt, and did—thus—not comment on this question.

[44] Cf. the statement of the City Court of Bergen, 1978 NRt 1072, at p. 1081: But if those verbal expressions and words referred in the prosecution should not be covered by sec. 135(a) of the Penal Code, it seems difficult to understand that this penal provision will have any independent importance at all.

[45] Cf. 1981 NRt 1305, the district court (p. 1322): "In this case ... we do not deal with a solitary statement or a spontaneous outburst of opinion, but an organized campaign in the form of a number of leaflets containing repeated and rude accusations ... against a particular group of people, a compaign that must be characterized as inflammatory ... the protection of the freedom to express opinions must be given a reduced importance when the liability to prosecution of such a campaign is to be considered."

[46] *Ex tuto* it may be noted that both incitement and participation are punishable according to sec. 135(a) (2) and may, e.g., be said to apply to an organized campaign of readers' letters, a signature campaign, etc.

[47] Cf. *Ot.prp.* no. 48 1969–70, p. 18.

© Stockholm Institute for Scandianvian Law 1957-2009

This view is adopted by the minority in the decision in 1978 NRt 1072:

> It is not satisfactory to apply the law in such a way that it prevents an expression of opinion being given in a form natural to the person concerned. This must be so, even if it means accepting exaggerations, unfair generalizations or unnecessarily sharp formulations. On the other hand, due regard must be had for a limited minority group—who, because of their foreign appearance and foreign habits, stand out rather clearly from the other population, and who therefore easily become the victims of criticism and alienation. And when the description of the Pakistanis is so grotesque, unbalanced and misleading, and the appeal to human prejudice against foreigners so strong, the minority must be entitled to protection by the law.[48]

In this way it becomes possible to evaluate specifically the statement in question. The limits of the freedom to express opinions may be drawn somewhat differently according to the more or less exposed situation of the group concerned. At the same time there will be no advantage for those who are capable of expressing their opinions in an irreproachable form.[49] Moreover, it will still be possible to utter sharp formulations, generalizations and—within certain limits—those exaggerations which are inevitable in any public debate, even in these matters. Consequently, a certain misleading description may be unavoidable, though there must also be certain limits—the exaggerations must not go too far—they must not become indecent, rude, improper etc.[50] In these matters the appeal to those human prejudices and the base motives which these are rooted in is especially dangerous, and the limit must therefore be drawn more narrowly.

Statements that arouse base motives and prejudices and so appeal to a latent discontent and channel this in a certain direction, are almost impossible to combat and difficult to refute: The counter argument will hardly attract as much attention as the original appeal to prejudice. Further, the opinions which such statements are based on may easily have quite a different effect by being

[48] Cf. also 1981 NRt 1305, the minority at p. 1316.

[49] Cf. also 1981 NRt 1305: "A good margin must be given for invidious and tasteless utterances. Anything else would be an unreasonable preference of the well educated and reflecting, who know how to express themselves" (p. 1318). But it must be noted that in 1981 as well as in 1978, the Supreme Court found the meaning of the respective utterances partly incoherent and meaningless, partly unclear and absurd. Further, an unclear but suggestive utterance gives a possibility to influence the subconscious and imagination of the readers—by leaving it to them, consciously or unconsciously, to draw an intended but not directly expressed conclusion. Unclear utterances may therefore be just as suitable to create contempt as an utterance with clearly expressed opinions. Against this background, it must be appreciated that the Supreme Court in 1981 did not consider the unclearness of the utterances a relevant excuse for punishment.

[50] Cf. in this direction, as far as insults are concerned, 1979 NRt 1607. A housing cooperative and its employees were accused of corruption by the editor of an economic magazine. The Supreme Court held, *inter alia*: "He has on the basis of thin and mainly uncontrolled information taken the initiative to a violent and unspecified attack. Although it is an important task for the press to disclose corruption, considerable regard must be taken in favour of those who were insulted. I cannot see that it would result in any unreasonable limitations on the freedom of the press, if he had given his attack *a more sober and nuanced form*" (p. 1614, my italics).

© Stockholm Institute for Scandianvian Law 1957-2009

presented through the mass media than by being expressed in smaller circles, where counter arguments may be advanced immediately. In such smaller circles the situation is probably rather that the discriminatory opinion expressed is usually likely to fade away quietly, and not that it will continue to grow in silence. To some extent, therefore, evaluating the content of the expressed opinion by reference to the size of the audience to which the statement is directed must be justifiable. Where a small audience is involved, the limit for what is punishable may be drawn a little less narrowly than is the case where opinions are presented through the mass media.[51]

It should also be observed that sec. 135(a) of the Penal Code is not only directed against statements made publicly, but comprises also statements which are spread among the public in any other way. The *travaux préparatoires* indicate clearly that the statement does not have to be expressed directly to the public. It is not at all necessary that the statement is immediately directed towards a larger group of people. It may also be spread among the public through repeated private conversations. A condition for punishment, however, is that it is the intention of the perpetrator not to confine the spreading of the expression to a limited number of people.[52] See also the opinion of the Court, 1977 NRt 114 (p. 119): The accused has made statements in interviews with reporters from the newspapers *Verdens Gang* and *Dagbladet*. It must be assumed that the accused was aware of the fact that his expressed opinions were to be printed in these newspapers. He cannot be said to have made his statements publicly, but he has by his conduct spread them among the public. See also 1978 NRt 1072 (the minority who adhered to the majority): The decisive factor must be the content of the opinions spread by the letter through the newspaper to the readers.

Finally, it must be emphasized that sec. 135(a) of the Penal Code is a provision especially designed for the protection of certain minority groups with certain indicated criteria. The fact that other exposed groups of the society might also need such protection—but have not yet obtained any—can be no argument for a restrictive interpretation of sec. 135(a). However, in this connection too the statement of the majority in 1978 NRt 1072 may be criticized:

The majority further held (p. 1077) that in the public debate allegations will continuously be set forth that certain groups of the society are given advantages at the expense of other groups, that too heavy demands are being made, that social insurances and benefit schemes are being misused, partly by legal, partly by illegal means, etc. Given the existence of freedom to express opinions all groups must accept such allegations, even if those are set forth without any good reason and by means of misleading information. Even those groups mentioned in sec. 135(a) must to a considerable extent be prepared to tolerate allegations of this kind.

[51] Cf. 1981 NRt 1305 where the majority (p. 1318) as well as the minority (p. 1315–16) emphasized "that here it is not a question of single statements or spontaneously expressed opinions, but of an organized campaign where the utterances are hammered in through leaflets distributed on a large scale".
[52] Cf. *Ot.prp.* no. 48 1969–70, p. 18, and *Innst. O.* no. 42 1969–70, p. 72.

© Stockholm Institute for Scandianvian Law 1957-2009