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A Court's Gotta Do, What a Court's Gotta Do.
An Analysis of the European Court of Human Rights
and the Liability of Internet Intermediaries through
Systems Theory

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Abstract

This paper explores recent developments in the liability of internet intermediaries for user-generated content at the European Court of Human Rights in the cases *Delfi v Estonia* (2015) and *MTE v Hungary* (2016). Regulatory approaches towards the liability of internet intermediaries raise the complex question of the kind of Internet that law should contribute to designing. For example, should law create a more regulated but less free environment? Moreover, should internet intermediaries decide on human rights standards, such as freedom of expression?

Drawing on the systems theory concept of autopoiesis, this paper demonstrates how the answer to these questions might be inherently connected to the performativity of law. In this analysis, particular attention is then paid to the question of anonymity and how it might challenge the role of law in granting remedies.

Keywords

Internet intermediaries; liability; legal arguments; autopoiesis, freedom of expression

I. Introduction*

In less than a year, the European Court of Human Rights (the Court, ECtHR) dealt twice with the complex issue of the liability of internet intermediaries for offensive comments posted by their users when ruling in two cases: *Delfi v Estonia* (2015)¹ and *MTE v Hungary* (2016).²

In the first case, *Delfi v Estonia* (2015), Delfi, an online news portal, alleged that the Estonian Court had violated its freedom of expression³ by holding it liable for anonymous and unlawful user comments. The ECtHR, in finding no violation of freedom of expression, stated that, in principle, internet intermediaries (in the form of content providers), when run on a commercial basis, are liable for third party content.⁴ This case has provoked strong criticism, as the ruling might encourage content providers to monitor user activities and act as “censors” to avoid liability problems.⁵ For this reason, both legal scholars and civil society have expressed concern over freedom of expression online.⁶

This criticism could be summarized at a practical level in the following points:

- Content intermediaries may seek to avoid liability by monitoring and filtering user content, which could result in unfair blanket censorship;⁷

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¹ *Delfi v Estonia* App No 64569/09 (ECtHR, 16 June 2015).

² *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* Eur app no 22947/13 (ECtHR, 2 February 2016) (hereinafter *MTE v Hungary* 2016).

³ Article 10 of the European Convention on Human Rights (ECHR).

⁴ Third party content or user generated content refers to “any digital content that is produced and shared by end users of an online service or website. This includes any content that is shared or produced by users that are members or subscribers of the service, but it is not produced by the website or service itself” (*Techopedia.com*, 2018) <<https://www.techopedia.com/definition/3138/user-generated-content-ugc>> accessed 11 January 2018.

⁵ See, for example, third party interveners (para 94, 96), or the joint dissenting opinion of Judges Sajo’ and Tsotoria (n 1) para 1.

⁶ See for example, *Article 19*, ‘European Court strikes serious blow to free speech online’ (*Article 19*, 14 October 2013) <<https://www.article19.org/resources.php/resource/37287/en/european-court-strikes-serious-blow-to-free-speech-online>> accessed 15 April 2017; Dirk Voorhoof, ‘Delfi AS v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers’ (*Strasbourg Observers*, 18 June 2015) <<https://strasbourgobservers.com/2015/06/18/delfi-as-v-estonia-grand-chamber-confirms-liability-of-online-news-portal-for-offensive-comments-posted-by-its-readers/>> accessed 11 January 2018; Lisl Brunner, ‘The Liability Of An Online Intermediary For Third Party Content’ (2016) *Human Rights Law Review* 16. Dirk Voorhoof offers more sources on the debate in ‘Qualification Of News Portal As Publisher Of Users Comment May Have Far-Reaching Consequences For Online Freedom Of Expression: Delfi AS V. Estonia’ (*Strasbourg Observers*, 25 October 2013) <<https://strasbourgobservers.com/2013/10/25/qualification-of-news-portal-as-publisher-of-users-comment-may-have-far-reaching-consequences-for-online-freedom-of-expression-delfi-as-v-estonia/>> accessed 11 January 2018. See also Martin Husovec, ‘General monitoring of third-party content: compatible with freedom of expression?’ (2016) *Journal of Intellectual Property Law & Practice*, Volume 11, Issue 1, pp. 17–20, <<https://doi.org/10.1093/jiplp/jpv200>> accessed 11 January 2018.

⁷ The dissenting opinion defined the ruling as “an invitation to self-censorship at its worst”. Delfi (n 1), at dissenting opinion, para 2; Brunner ‘The Liability of an Online Intermediary for Third Party Content’ (2016), *Human Rights Law Review* 16, pp. 163-174; p. 172.

- Intermediaries may stop providing services when they cannot afford quick and effective moderation;⁸
- Content may become authored, thereby eroding one of the key benefits of the Internet –the facilitation of extensive participation in online social interactions.

The second case, *MTE vs Hungary* (2016),⁹ which shares several similarities with the previous case, has generally received more positive comments. The similarities are 1) *the role of applicants* – as with Delfi, a key question was whether the applicants should have been considered media publishers or intermediaries, 2) *the context* – in both cases the applicants were sued for violating Article 8 (the right to respect for private and family life) for hosting offensive comments, and, finally, 3) the reasoning of the ECtHR, which confirmed the principle of the liability of content providers. However, in *MTE vs Hungary* (2016), the ECtHR took a softer stand and, regardless of the similarities, ruled that there had been a violation of freedom of expression. The main explanation for the different results lies in the details, from the nature of the comments themselves to the type of intermediary.

Existing commentary on the cases has focused on interpreting the rulings in light of freedom of expression¹⁰ or in terms of the approach that the Court of Justice of the European Union (CJEU) would have adopted in the case.¹¹ Instead, the present paper argues that the Court decided the case in order to create a space in which law itself can continue to operate. This is because the anonymity provided by internet intermediaries paired with multiple jurisdictions could prevent the legal system from operating in the online environment. This paper seeks to demonstrate how a specific rationale, namely the “maintenance”¹² of the legal system, influenced the outcome of the ruling. In other words, this paper attempts to illustrate the clash between the Internet (in the form of internet intermediaries) and legal system and how the legal system is simultaneously shaping and being shaped by the Internet.

In order to read the ruling in this way, it must be viewed at a more abstract level, rather than simply considering it a balancing exercise between freedom of expression and personality rights.¹³ Consequently, it is necessary to examine more closely how, by providing room for anonymity, internet communications technology challenges the legal system in multiple ways.¹⁴ To make the abstraction concrete, the paper then considers several legal devices, such as justificatory narratives, balancing and proportionality, thereby unfolding the complexity of the ECtHR’s reasoning.

The approach followed in this article is informed by autopoietic systems theory (discussed later in the section ‘A commentary through systems theory approach’), which claims that law is a self-organizational and self-referential unity (a sub-system of society) that produces and changes its own structures over time.¹⁵

⁸ Brunner, *ibid.*

⁹ Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (application no. 22947/13).

¹⁰ Neville Cox, ‘Delfi v. Estonia: Privacy Protection and Chilling Effect’, (*VerfBlog*, 19 June 2015) <www.verfassungsblog.de/delfi-v-estonia-privacy-protection-and-chilling-effect/>; Woods L, ‘Delfi v Estonia: Curtailing Online Freedom of Expression’ (*EU Law Analysis*, 18 June 2015) <www.eulawanalysis.blogspot.fr/2015/06/delfi-vestonia-curtailing-online.html>; Lisl Brunner ‘The Liability of an Online Intermediary for Third Party Content’, (2016) *Human Rights Law Review* 16 163-174.

¹¹ E.g. Oreste Pollicino and Marco Bassini ‘Free speech, defamation and the limits to freedom of expression in the EU: a comparative analysis’ in A. Savin, J. Trzaskowski (eds), *Research Handbook on EU Internet Law*, (2014); Mart Susi, ‘Delfi AS v. Estonia’ (2014) *American Journal of International Law*, 108(2), 295-302. doi:10.5305/amerjintlaw.108.2.0295.

¹² Richard Nobles and David Schiff. *Understanding Miscarriages of Justice: Law, the Media and the Inevitability of a Crisis*. (Oxford University Press 2000) p. 2.

¹³ This is not to minimise the relevance of balancing, but it is to say that the paper focuses on other issues.

¹⁴ See Susi (n 11).

¹⁵ Niklas Luhmann and others, *Law As A Social System* (Oxford University Press 2009).

Autopoietic systems theory is well suited to the scope of this paper for two reasons. First, it enables the exploration of law in its changing dimensions, as the paper compares two similar cases from the same court. Secondly, it is particularly apposite for a critical legal analysis where 'critical' refers to the deconstruction of what can be considered a reasonable or natural argument. Thus, in this context, critical should not be understood as the attempt to identify a lack of coherence in the reasoning of the Court.

The paper strives to reveal a new way of reading the two cases, where the practical outcome is simply an increase in knowledge of how law works (i.e. the extent to which an intermediary should be liable) and thus a better understanding of the regulatory approach adopted. By contrast, the aim is not to provide a 'solution' to the liability of intermediaries.

The structure of this paper is as follows. The first section provides the background by offering a brief explanation of the role of internet intermediaries in order to better contextualize the reasoning of the Court and the facts of the cases. It then offers an analysis of the judgments that reveals the way the Court constructed its arguments. Finally, it concludes by illustrating how autopoietic systems theory informed the paper and how it can shed new light on cases that have already been discussed in the literature.

II. Background

What is at stake with internet intermediaries?

Internet intermediaries retain a great amount of knowledge on the activities performed on and the information disseminated through their infrastructure because they operate as a link between users and the Internet. This position of power makes them very particular actors within the internet ecosystem. Intermediaries can not only enhance "private forms of governance",¹⁶ but are also particularly well-placed to make state policies and regulations more effective.¹⁷ In other words, they are of great importance to those interested in exercising forms of control over the Internet,¹⁸ as they can be easily used as a proxy to regulate online behaviour and control content.¹⁹ The choice of how to regulate them, including the imposition of liability for user activity, both affects the way people experience the Internet²⁰ and influences the development of the Internet itself.²¹ For instance, a model which demands strict liability for offensive behaviour by an intermediary's users (whether or not the intermediary has knowledge of them) results in an obligation to monitor user activity and could dissuade intermediaries from providing their services and developing new ones.²² In practice, given that the idea that an internet ecosystem with no regulatory interference has proven to be a fantasy,²³ many legal orders have opted for a middle-ground solution – a sort of lighter liability according to which, as long as intermediaries play a passive function and have no apparent knowledge of any wrongdoing, they are exempt from

¹⁶ Much attention has been paid to the privatization and delegation of governance, where private companies now perform traditional public functions. These companies become gatekeepers of freedom of expression, privacy and political debate, and one cannot help but wonder about the standards to which these tasks will apply; see Laura DeNardis, *The Global War For Internet Governance* (Yale University Press 2014). p. 154, and Emily B Laidlaw, *Regulating Speech In Cyberspace* (Cambridge University Press 2015).

¹⁷ Andrej Savin, *EU Internet Law* (Edward Elgar, 2013).

¹⁸ Ibid.

¹⁹ DeNardis (n 8).

²⁰ Laidlaw (n 8).

²¹ See Savin (n9), and Jacqueline Lipton, *Rethinking Cyberlaw* (Edward Elgar 2015).

²² The idea is that the burden of monitoring the activities of users could prevent new actors from coming into play, as they lack the competitive means for "supervising" their facilities. See Lipton (n 13).

²³ See the debates on Cyberpaternalism vs cyberliberalism in Chris Reed, *Making laws for cyberspace* (Oxford University Press 2013).

liability.²⁴ However, upon obtaining knowledge or awareness of content deemed to be illegal, they are required to remove it (see e.g. article 14, EU Commerce Directive). This is termed the notice and take down system.

This model takes inspiration from section 230 of the Communications Decency Act of 1996,²⁵ which states that internet intermediaries should not be treated as “the publisher or speaker of any information provided by another information content provider” and which envisaged immunity from liability for information provided by third-party users.

There were two regulatory rationales for limiting the liability of intermediaries. The first is rooted in the First Amendment argument²⁶, while the second aims to promote the development of the Internet and “preserve the vibrant and competitive free market that presently exists” online.²⁷

Delfi and *MTE* deal with particular types of intermediary, those that provide services and content and are often more exposed to liability because of their visibility.²⁸

Much attention in *Delfi* is devoted to the European regulatory framework, as the parties disagreed over the interpretation of the E-Commerce Directive (Directive 2000/31/EC) and its implementation in domestic legislation.²⁹ The applicant company considered itself an *intermediary* as regards third-party-generated comments, whereas the Estonian Domestic Court and the ECtHR deemed it a *publisher*,³⁰ although the ECtHR acknowledged the potential differences between a traditional publisher and an internet news portal.³¹ As will be seen below, the approach of these two Courts contributes to a different understanding of the liability of Internet service providers.

²⁴ E.g., Communications Decency Act of 1996, L No Pub L 114-38 para 230; Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) OJ L 178/1, Section 4.

²⁵ The difference between the EU approach and that of the US is that the latter contains a provision called the “good Samaritan”, which means that there is a safe harbour in case “ (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)”. See Valcke et al., ‘Did the Romans Get It Right? What Delfi, Google, eBay, and UPC TeleKabel Wien Have in Common’ *The responsibilities of online service providers* (Springer, Cham, 2017) pp. 101-116.

²⁶ In the US, the interpretation of the freedom of expression is based on the belief that there should be as little censorship as possible, because the “truth” will emerge through competition among ideas. Under paragraph 230 of the CDA, Internet is understood as a forum characterized by a number of features, such as educational and informational resources or the diversity of political discourse.

²⁷ CDA at para 230.

²⁸ Diane Rowland, et al. ‘Information technology law’ (Routledge 2012) p. 72.

²⁹ See, e.g., *Delfi* (n1) at para 26; it has been argued that the European Court of Justice seemed to be the right place to address the matter. The European Court of Justice (ECJ) interprets the law of the European Union (28 Countries), of which the European Charter of Fundamental (2001) rights is now part. The European Court of Human Rights, an international Court established in 1976 by the Council of Europe (47 Countries), interprets the European Convention of Human Rights, which is *not* part of EU law. However, all the European Member States are part of the Council of Europe (as a matter of fact, it is not possible for a country to be part of the European Union unless it is part of the Council of Europe), and the ECJ takes inspiration from the ECtHR. The meaning and scope of the European Charter of Fundamental Rights are the same as those of the European Convention of Human Rights, but the ECJ and the European Charter of Fundamental Rights can grant more extensive interpretation and protection.

³⁰ For a more detailed examination, see Neville Cox ‘*Delfi v. Estonia: Privacy Protection and Chilling Effect*’ (n 10) accessed 12 January 2018.

³¹ *Delfi* (n 1) para 113.

Different regulatory approaches

The following section of this paper provides an overview of the most common regulatory approaches, exemplified by the EU model, the Brazilian Internet Bill of Rights and human rights standards, to illustrate the manner in which the decision of the ECtHR differs from the liability of intermediaries as conventionally conceived. The regulation of intermediaries poses questions of both a very practical and also theoretical nature – questions which are intertwined with how the role of law itself is understood and whether a private model of regulation is acceptable for managing online content (i.e. the extent to which freedom of expression should be delegated to a private company).

First, it is important to outline the EU instrument regulating the intermediary regime, as it applies to all European Member States. The E-Commerce Directive³² establishes a limitation of liability on all forms of illegal activities by intermediary service providers. In Section 4 (art. 12-15), the E-Commerce directive states that intermediary service providers should not be liable for illegal third party content where they do not initiate or have actual knowledge of the illegal activity or information and are unaware of the facts or circumstances from which the illegal activity or information is apparent.³³ In addition, the E-Commerce Directive provides intermediaries with immunity from liability where “upon obtaining actual knowledge of illegal activities, they acted expeditiously to remove or disable access to information concern”.³⁴ Finally, the E-Commerce Directive states that Member States shall not impose a general obligation on providers to monitor information which they transmit or store.³⁵

The *Marco Civil da Internet*, the Brazilian Internet Bill of Rights,³⁶ offers a different perspective on the matter: an internet intermediary can be held liable *only if* it fails to remove content after a *court order*.³⁷ As Souza *et al.* explain, it was believed that allowing internet intermediaries to define what content was illicit would “diminish the judiciary power over the content posted on line”.³⁸ The authors highlight that at “the end of the day, a whole industry of extra-judicial notifications could lead to the removal of content that could be rendered licit if a judge were to analyse them”.³⁹ Thus, at the core of the Brazilian regulation is the idea of the non-privatization of judicial functions.

Likewise, international legal standards, such as those provided by the UN Special Rapporteur for freedom of expression, attribute importance to the legal protection of intermediaries⁴⁰ for third-party content because as private entities they are “not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences”.⁴¹ Moreover, the decisions taken by these intermediaries raise a democratic problem because of the lack of transparency in their decision making and because they might fail to identify the jurisprudential foundation for deciding in complex freedom of expression cases. This brief overview demonstrates how the liability of intermediaries depends on different regulatory mind-sets, and one might note that these considerations seem to have been neglected in the reasoning of the ECtHR.

³² Directive 2000/31/EC on electronic commerce (n 15).

³³ Ibid art 14.

³⁴ Ibid. The E-Commerce Directive states that Member States shall not impose a general obligation on providers to monitor information which they transmit or store.

³⁵ Ibid art 15.

³⁶ Lei n 12.965, de 23 de Abril DE 2014, Estabelece princípios, garantias, direitos e deveres para o uso da Internet no Brasil.

³⁷ Ibid in III Section.

³⁸ Carlos Affonso Souza, Fabro Steibel and Ronaldo Lemos, ‘Notes On The Creation And Impacts Of Brazil’s Internet Bill Of Rights’ (2017) 5 *The Theory and Practice of Legislation* 73.

³⁹ Ibid p. 10.

⁴⁰ The word ‘intermediary’ hints at some sort of non-responsibility and it is used to resist the burden of regulatory attempts. The word also takes a normative stand that intermediaries should be neutral.

⁴¹ Frank la Rue, UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of Freedom of opinion and expression’ (2011) A7HRC717/27.

III. Facts and Arguments of the Parties

Compared to other Courts in the US or the European Member States, the ECtHR has only recently begun to provide a deeper analysis of internet-related issues, and the number of cases remains limited.⁴² The two cases are very similar: the applicants in both *Delfi* and *MTE* alleged that their freedom of expression had been violated because they had been found responsible for comments written below some news items they had published. The ECtHR, in making its assessments, followed more or less the same matrix of criteria:⁴³

- a) the context and content of the impugned comments,
- b) the liability of the actual authors of the comments,
- c) the measures taken by the applicants and the conduct of the injured party,
- d) the consequences of the comments for the injured party,
- e) the consequences for the applicants.

The following section outlines the main facts and arguments of the cases.

Delfi v Estonia

In 2015, the Grand Chamber of the ECtHR heard the landmark case *Delfi v Estonia*. Cases heard in the Grand Chamber usually involve important issues, such as case law consistency, ‘high profile’ cases, and cases dealing with ‘new issues’. Furthermore, Grand Chamber Judgments are passed by those considered to be the most experienced judges and decided by the largest formation of the Court. Finally, they involve “a very selective jurisdiction”.⁴⁴ In addition to this, it should be noted that the ECtHR’s decisions influence understanding of the legal problem in question in the national courts of the contracting parties.⁴⁵

Delfi, the biggest news portal in Estonia, reported that the Saaremaa Shipping Company, a public ferry transporter, had destroyed the roads over the sea ice used in winter to connect Estonian islands with the mainland.⁴⁶ The article was then followed by the comments of *anonymous* and *unregistered* users. In particular, there were twenty comments (out of 185) deemed to be hate speech and to threaten the owner of the shipping company.⁴⁷ Some examples include:

⁴² This is compared to the US and European Member States.

⁴³ See Christina Angelopoulos, ‘MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression’, (Kluwer Copyright Blog, March 5 2016), <<http://MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression>> accessed 12 January 2018.

⁴⁴ Fiona de Londras and Kanstantsin Dzehtsiarou, ‘Managing Judicial Innovation in The European Court Of Human Rights’ (2015) 15 Human Rights Law Review 523.

⁴⁵ See, for example, the work of Janneke Gerards and Josph Fleuren, ‘the Implementation of the European Convention of Human rights and the Judgments of the ECtHR’ in *National case-law* (Intersentia 2014) p. 1; “the way the Court deals with the structure of fundamental rights strongly influences the interpretation and application of the Convention by national courts. Structural faults and deficits thus may be multiplied in national cases that never reach Strasbourg. In the end, this may hamper the effectiveness of the Convention system and limit the protection offered to individual citizens”, Janneke Gerards and Hanneke Senden ‘The structure of fundamental rights and the European Court of Human Rights’ (2009) *International Journal of Constitutional Law*, Volume 7, Issue 4, 1 October 2009, pp. 619–653, p. 621. It is worth mentioning that the Supreme Court of Cassation (Italy) recently ruled for the first time on the liability of hosting a webpage. The Court stated that the webpage hosting the comments can be *concurrently* found liable for defamatory comments posted, the unofficial document of the ruling Cassazione Penale Sez 5 Num 54946, Anno 2016 <<http://download.repubblica.it/pdf/2016/tecnologia/figc.pdf>> accessed 12 January 2018.

⁴⁶ *Delfi* (n 1) at para 16.

⁴⁷ *Ibid* at para 17.

2. [T]hey bathe in money anyway thanks to that monopoly and state subsidies, and now [they] start to fear that cars may drive to the islands for a couple of days without anything filling their purses. Burn in your own ship, sick Jew!
3. Good that [La.'s] initiative has not broken down the lines of the web flammers. Go ahead, guys, [L.] into the oven!
4. [little L.] Go and drown yourself⁴⁸

Delfi had implemented some safeguards, such as its *Rules of Comment*, in which the news portal claimed to be solely a technical medium which did not edit comments, thereby attributing liability to the authors themselves.⁴⁹ The domestic court nevertheless rejected the Delfi argument that it was a technical intermediary, since it invited users to post comments and thus could determine the rules for the comment space. Furthermore, it argued that Delfi should have been aware of the unlawful content of the comments and prevented their publication, whereas it had failed to remove them.

In response, Delfi argued that the decision of the Supreme Court of Estonia constituted a breach of its freedom of expression and claimed that instead of being deemed a *publisher*, it should be considered another type of disseminator, such as a postal service.⁵⁰

The ECtHR nonetheless agreed with the Supreme Court of Estonia, mostly focusing on the *duty and responsibilities* that intermediaries should bear. The Court considered particularly relevant the fact that Delfi was a professionally-managed, *commercially run* internet news portal which sought to attract a large number of comments on the news articles it published.⁵¹

One of the first arguments that the ECtHR took into account was the *nature of the comments*. The ECtHR ruled that the finding of the Estonian Supreme court that Delfi was liable had been a justified and proportionate restriction of the portal's freedom of expression, as users of the platform "engaged in clearly unlawful speech, which infringed the personality rights of others and amounted to hate speech and incitement to violence against them".⁵² As we will see, the Court also viewed as particularly problematic the impossibility of bringing a civil claim against the authors of the comments. Moreover, according to the Court, Delfi's decision to allow anonymous comments implied that it took responsibility for such comments.⁵³

As regards the measures adopted by the applicants in *Delfi*, in addition to the disclaimer stating that the writers, and not the applicant company, were responsible for the comments, the portal used an automatic deletion system, based on the presence of certain key words, for removing offensive remarks. Further, a notice-and-take-down system was also in place where, at the click of a button, any user could report inappropriate comments. Nevertheless, the comments in question were only removed by Delfi six weeks after they had been "uploaded to the website, upon notification by the injured person's lawyers to the applicant company".⁵⁴ The Court ruled that if accompanied by effective procedures allowing a rapid response, this system could indeed "function in many cases as an appropriate tool for balancing the rights and interests of all those involved".⁵⁵ However, in relation to *unlawful speech* the Court stated that

⁴⁸ Ibid at para 18.

⁴⁹ Ibid at para 32.

⁵⁰ *Delfi* (n 1), at para 20.

⁵¹ Ibid para at 144.

⁵² Registrar of the Court, press release ECtHR 205 (2015) 16.06.2015 p. 3.

⁵³ *Delfi* (n 1), para 65.

⁵⁴ Ibid at para 152.

⁵⁵ Ibid at para 159.

the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.⁵⁶

Lastly, the ECtHR emphasized that since Delfi had been required to pay a merely symbolic fee of 320 euros, there was no compulsion for it to change its business model as a result of the domestic proceedings.

The Narrative of the Court

The Court's reading begins with preliminary remarks and the scope of the assessment, and in the very first paragraph the Court sets the narrative for the rest of the judgment. Although, at one point, it explains the challenges that it faced in striking a balance between the beneficial aspects of online communications and their risks, the language deployed already indicates the choice made, the emphasis being on the dangers, rather than the benefits provided by the Internet.⁵⁷

The Court notes at the outset that user-generated expressive activity on the Internet *provides an unprecedented platform for the exercise of freedom of expression*. That is undisputed and has been recognised by the Court on previous occasions. . . . *However*, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, *can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online*.⁵⁸ (Italics is mine)

In this short passage, the Court anchors its reader to an undisputed truth: with benefits come dangers, and these dangers are vividly depicted in the text of the ruling.⁵⁹

This narrative pattern is often found in *Delfi* when the ECtHR highlights the dilemma between the Internet's role in enhancing public access to information and the higher risk of harm posed by internet content and communication in comparison to that posed by the press.⁶⁰ The Court repeatedly adopts the scheme of mentioning the *benefits* but focusing on the *risks*. Interestingly, by evoking risk, the court seems to emphasize the existence of an unregulated environment in which law fails to perform its ordinary functions, thereby reinforcing the need for law in the internet ecosystem. Nevertheless, well aware of the controversies that it might raise (e.g. relating to freedom of expression), in the following paragraph the Court stresses the contingency of its own decision and proffers a disclaimer, stating that as it was operating for the first time in an "evolving field of technological innovation",⁶¹ it was thus "necessary to delineate the scope of its inquiry in the light of the facts of the present case".⁶²

⁵⁶ Ibid.

⁵⁷ See Sajó's and Tsotsoria's remark "The Internet is described as an "unprecedented platform" and while there is reference to benefits, it is described as posing 'certain dangers', the advantages being scarcely mentioned. We disagree. The Internet is more than a uniquely dangerous novelty" *Delfi* (n 1) Joint Dissenting Opinion para 6; Oreste Pollicino and Graziella Romeo make a similar observation in 'Concluding Remarks: Internet Law, Protection of Fundamental Rights and the Role of Constitutional Adjudication' *The Internet and Constitutional law* (1 ed. 2016) p. 244.

⁵⁸ *Delfi* (n 1), at para 110.

⁵⁹ Moreover, to read the passage in this way, one should pay attention to the word "however". As an adverb, it performs the function of modifying the meaning of the premises (the beneficial aspects of the Internet). The word "however" is used to introduce a conclusion of the phrase and to create a hierarchy between the conclusion and the premises.

⁶⁰ Ibid at para 133.

⁶¹ Ibid at para 111.

⁶² Ibid at para 111.

While the *Delfi* case concerned hate/unlawful speech, this does not seem to be the Court's primary concern.⁶³ Instead, as will be argued below, a key element of its reasoning appears to be the issue of *granting remedies*. More precisely, in *Delfi* the ECtHR avoided exploring what constitutes unlawful speech, as its attention was directed entirely towards the 'duties and responsibilities' of the provider of the service. In fact, the ECtHR limited itself to agreeing with the Supreme Court of Estonia on the nature of the comments: "those comments are defamatory since they are of a vulgar nature, degrade human dignity and contain threats".⁶⁴ The ECtHR further noted that, as the evidence showed them to be unlawful, the comments "did not require any linguistic or legal analysis".⁶⁵

The reticence of the Court on the nature of the comments was criticized in the dissenting opinion, which claims that "it is unfortunate that the characterization of the comments remains murky."⁶⁶ Moreover, it has been noted that the approach of the Court neither seems correct in light of the manifestly racist comments that appeared on the intermediary's website, for which, according to the dissenting opinion, criminal action would have been appropriate, nor in relation to the case law of the ECtHR, which relies on the foreseeability of law as one of its pillars.⁶⁷ Furthermore, an investigation into the nature of the comments would have also provided an example of how to assess problematic content to decide which speech may be kept and which should be removed. Such an example is required because delineating the scope of freedom of expression demands a sophisticated level of examination, as not all content is protected by the right of freedom of expression, given that it is a limited right. The taken-for-grantedness of the ECtHR's comments is underscored, as noted in the dissenting opinion, by the fact that the ECtHR usually sets a high bar "as to what amounts to an impermissible call for violence".⁶⁸

In both *Delfi* and *MTE*, the Court touched upon what has been considered one of the revolutionary aspects of the Internet from the inception of Web 2.0: the lack of central editorial control – the idea that, as a matter of principle, anyone can participate in public debate. This is far from saying that all type of content should be available. As mentioned before, freedom of expression is not an absolute right and there are limitations.⁶⁹ The discourse of the Court thus concerns the significance of the Internet in changing the traditional media structure, as users are now "creators and primary subjects" and not only consumers.⁷⁰ Nonetheless, this was also *Delfi*'s argument in its submission to the Grand Chamber:

The applicant company argued that in today's world, Internet media content was increasingly created by the users themselves. User-generated content was of high importance – comments on news stories and articles often raised serious debates in society and even informed journalists of issues that were not publicly known, thereby contributing to the initiation of journalistic investigations. The opportunity of "everyone" to contribute to public debate advanced democracy and fulfilled the purposes of freedom of expression in the best possible way. *It was a great challenge in this setting to hold those who infringed the rights of others accountable while avoiding censorship.*⁷¹ (Italics mine)

This working paper does not attempt to neglect or downplay the harm caused by violent or indecent speech, bullying, and stalking, not to mention cases of revenge porn. Nor does it deny the tensions created by entities such as internet intermediaries, which today have increasingly become gatekeepers of information flow. Most importantly, this paper does not advocate the absence of regulations on

⁶³ The argument of the ECtHR in *MTE*, which will be illustrated below, is slightly different.

⁶⁴ Ibid at para 114.

⁶⁵ Ibid At para 117.

⁶⁶ Ibid dissenting opinion, at para 72.

⁶⁷ Ibid dissenting opinion, footnote 9.

⁶⁸ Ibid at dissenting opinion, footnote 10.

⁶⁹ Article 10 of the European Convention on Human Rights, at para 2.

⁷⁰ Yochai Benkler, *Wealth Of Networks* (Yale University Press 2008) p. 272 ; See also *Delfi* (n 1) at para 107.

⁷¹ Ibid at para 66.

individual protections. However, the remedy adopted by the Court seems somewhat at odds with the idea of the pluralistic freedom of expression emphasized by the Court itself in 1976, a freedom which is

applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”⁷²

Delfi as an intermediary?

The functioning of content intermediaries must be considered carefully – if, at their best, intermediaries are pivotal for pluralistic debate and for facilitating participations, at their worst, content providers publish sensational or provocative news (so-called clickbait), as their income is derived from advertisements: the more users click, the more revenue the provider receives.

Particularly in *Delfi*, the Court repeatedly remarked on the economic nature of the applicant. For instance, in handing down its judgment, the ECtHR stressed that Delfi was “a news portal run on commercial basis which sought to attract a large number of comments on news articles published by it”,⁷³ and as such it had “duties and responsibilities”. The ECtHR, perhaps mindful that it was on a slippery slope and its decision could have deep repercussions for a vast array of smaller actors, excluded the notion that social platforms or private and personal blogs faced the same liability risk.⁷⁴ Thus, one of the criteria adopted by the court concerned the size of the applicant involved. Although this criterion seems reasonable to some extent, on the other hand, it might be extremely difficult to design fixed legal categories for such a diversified environment.

As for user-generated content, Delfi submitted that it was sufficient to remove such content as soon as it became aware of its offensive nature. Thus, the Estonian news portal claimed that it should be treated as an intermediary in relation to the comments of its readers and that it was entitled to follow the law limiting the obligation to monitor third party content.⁷⁵

The Estonian Government disagreed with this argument, stressing that a) Delfi was the largest portal in the country; b) it also played an active role in inviting readers to comment; and c) the applicant was the only actor who could modify the comments.⁷⁶

Interestingly, Brunner notes that the ECtHR failed to seek a tailored solution for dealing with online news portals, instead treating it as traditional news media by relying on its own case law.⁷⁷ Brunner further emphasizes how European Court of Justice case law could have provided insights for assessing the case at hand and how in the *Google France* and *L’Oreal* cases commercial gain was considered irrelevant for interpreting the E-commerce Directive.⁷⁸ In particular, as Brunner claims,

If the *Delfi* case were examined in light of the E-commerce Directive and the case law of the CJEU, the enquiry would turn on whether Delfi should be regarded as an intermediary and, if so, the type of role that it played with respect to the comments at issue. Delfi could be deemed an intermediary

⁷² *Handyside v United Kingdom* App no. 5493/72 (ECtHR, 7 December 1976) para 49

⁷³ *Delfi* (n 1) at paras 115; 144.

⁷⁴ *Ibid* para 117 and, dissenting opinion at para 9.

⁷⁵ *Delfi* (n 1) at para 69.

⁷⁶ *Ibid* at para 81.

⁷⁷ Brunner, (n 7); for another comparison between the ECJ approach and ECtHRs see Peggy Valcke and Pieter-Jan Ombelet, ‘Did The Romans Get It Right? What Delfi, Google, Ebay, And UPC Telekabel Wien Have In Common’ in Luciano Floridi and Mariarosaria Taddeo (eds) *The Responsibilities of Online Service Providers*, (Springer 2016) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839213> accessed 11 January 2018.

⁷⁸ See Brunner (n 7).

for the purposes of user-generated content that it hosted, and the principles articulated in the *Google France* and *L'Oreal* cases would apply.⁷⁹

However, while one might easily agree with Brunner on the narrow approach adopted by the ECtHR, which treated *Delfi* as a *traditional medium*, the two Courts nevertheless work in different jurisdictions and operate with different semantics.

Law without remedies?

At this point, having faithfully dealt with a variety of legal and technical matters, the Court seemingly shifted to the thread which runs through its reasoning: the issue of *remedies*. The overarching questions of the case thus became what would happen if it were impossible to grant remedies, and what would occur if it were impossible to enforce those basic rights that law confers on individuals. Fundamental to the case is therefore the apparent threat of law losing terrain in the online environment. The narrative employed by the ECtHR portrays a scenario in which the function of law is undermined by the technicalities of the Internet, which restrict the capacity of law to perform its traditional tasks. Consequently, throughout a persuasive construction, the ECtHR emphasised the need to build an environment in which justice can be ensured and personal private life protected.

Moreover, in order to strengthen its argument – there are dangers and values ought to be protected – the ECtHR played down the ground-breaking nature of its approach. In order to do this, the ECtHR first relied on the significance of the *Google Spain and Google*⁸⁰ case brought before the Court of Justice of the European Union, in spite of the self-evident difference between the two cases. Thus, the ECtHR referred to the manner

in which that court, *albeit in a different context*, dealt with the problem of the availability on the Internet of information *seriously* interfering with a person's private life over an extended period of time and found that the individual's *fundamental rights*, as a rule, overrode the economic interests of the search engine operator and the interests of other Internet users⁸¹ (*Italics is mine*)

The ECtHR then went further by quoting the case of *K.U v Finland*,⁸² stressing that “legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others”⁸³ must be borne in mind, as in the case of sexual offences against minors. One could speculate that this quote has a threefold function. First, it appealed to *pathos*: who would allow an environment in which a sexual crime against a minor could remain unpunished, and – to read between the lines – who would allow an environment where law cannot function?

Second, citing the case of *K.U v Finland* also invokes the appropriateness and fairness of the ECtHR decisions, that is, its commitment to proportionality. Throughout *K.U v Finland*, the Court, demonstrated how it decided differently from *Delfi* on the opportunity of the victim to obtain damages from the service providers, as on that occasion it “held that there had to be a remedy enabling the actual offender to be identified and brought to justice”.⁸⁴ Moreover, here, one of the most evident contradictions in the Court's reasoning emerges: while the Court appeals to the solidity of its jurisprudential reasoning, it implicitly delegates to a content provider the complicated task of deciding which language, which register and consequently whose voice can be heard. However, the question that remains is whether, in such a scenario, intermediaries will act in a professional (deontological?) fashion when it comes to third-party-

⁷⁹ Ibid p.168

⁸⁰ Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317, para 14

⁸¹ *Delfi* at para 147.

⁸² *K.U. v Finland* App No 2872/02, (ECtHR, 2 December 2008).

⁸³ *Delfi* (n 1) at para 149.

⁸⁴ Ibid.

generated content or silence whatever speech is ‘sensitive’ or politically incorrect simply to avoid liability problems. Thus, the puzzling aspect of the Court ruling lies in its delegating to a private actor the role of defining the boundaries of freedom of expression, as intermediaries might not be best equipped for this task. Finally, quoting *K.U v Finland* helped the Court to underline one of the most problematic aspects of the internet ecosystem, the issue of anonymity:

Although the case of *K.U. v. Finland* concerned a breach classified as a criminal offence under the domestic law and involved a more sweeping intrusion into the victim’s private life than the present case, it is evident from the Court’s reasoning that anonymity on the Internet, although an important value, must be balanced against other rights and interests⁸⁵

Anonymity

The ECtHR considered also the issue of anonymity in its arguments and framed its question in terms of the need to maintain order:

Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does *not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media.*⁸⁶ (Italics is mine)

Anonymity is one of the Internet’s most challenging and interesting features. Anonymity is controversial, as while it allows a greater sense of safety when expressing opinions, and thus can be considered to promote freedom of expression⁸⁷, it can also be used for malign purposes.

However, in this specific case, anonymity, as provided by technology, appears as a disruptive force for the legal system. For instance, the Estonian Government emphasized the *impossibility* of identifying all the authors of the comments – primarily because Delfi “allowed comments by non-registered users”,⁸⁸ but also for several technical reasons, such as the existence of Wi-Fi hotspots, dynamic IP servers or servers in foreign countries. Delfi nonetheless disagreed with the Estonian Court’s argument, claiming that the case could have been brought against the authors of the comments.⁸⁹ In engaging with these issues, the Court observed that while anonymity cannot be absolute, different degrees of anonymity can be allowed. More precisely

an Internet user may be anonymous to the wider public while being identifiable by a service provider through an account or contact data that may be either unverified or subject to some kind of verification⁹⁰

The Court then continued its reasoning by providing an assurance that “the release of such information would usually require an injunction by the investigative or judicial authorities and would be subject to

⁸⁵ Ibid.

⁸⁶ *Delfi* (n 1) at para 147.

⁸⁷ The US Supreme Court has held in *Doe v. 2themart.com* that the right of internet users to speak anonymously should be safeguarded like other constitutional rights. Anonymity, ‘the absence of identity’, disinhibits people in expressing their thoughts, as they feel free to comment on sensitive or controversial political issues. *Doe v. United States*, 487 U.S. 201 (1988)

⁸⁸ *Delfi* (n 1) para 65.

⁸⁹ Ibid para 77.

⁹⁰ Ibid at para 148; the Court continues “A service provider may also allow a degree of anonymity for its users, in which case the users are not required to identify themselves at all and they may only be traceable – to a limited extent – through the information retained by Internet access providers”.

restrictive conditions”.⁹¹ Thus, the message sent by the Court is that authentication must be secured, when there is a need to “identify and prosecute perpetrators”,⁹² is also important for its reasoning.

In this paragraph one can detect the classical dichotomy between private and collective interest in that absolute anonymity cannot be permitted for the good of the collectivity.

Thus, the paragraph framed by the Court is again rich with meaning. The dangers that are associated with the use of anonymity (and the dangers that stem from the Internet) are presented as a threat to the security of the legal system. Here the idea of security could be divided in two aspects: the security offered by the legal system to the collectivity and the security of the legal system itself, which would not allow access to identity information unless *necessary*.⁹³

This latter feature plays a constitutive role in the Court’s reasoning, as it enables the ECtHR to rely on its own procedures and to make proportionality its hallmark.⁹⁴ The sharpness of this framing prevents counter arguments related to anonymity from emerging because, after all, the Court is implying that it is operating in a geographical space committed to democracy⁹⁵ and safeguarded by the Court itself.⁹⁶ As a regional Court, the ECtHR must justify itself as a credible institution, and thus cannot fail or override these democratic values.

Although one may agree that *Delfi* failed to follow best practices (for instance by allowing unregistered comments), the strict logic⁹⁷ advanced by the Court seems to leave no room for questioning whether other means existed for achieving the same regulatory aim, without weakening freedom of expression online. Thus, while the Internet was supposed to provide new opportunities, the Court simply returned to the status quo: the Internet is treated as a traditional medium and the legal system is “an organ of governance and regulation responsible for the establishment and current maintaining of a just order”.⁹⁸

Today, full anonymity on the Internet is more difficult to achieve because of technical identifiers, which enable traceable anonymity.⁹⁹ However, at the time of the cases, the Estonian Government justified its failure to attempt to collect pre-trial evidence by stating that “the State’s enacting of a regulation providing for mandatory identification of commentators on an Internet portal would constitute excessive interference”.¹⁰⁰ Moreover, the Estonian Government claimed that as civil proceedings were more appropriate in this specific case, it was not possible to rely on surveillance techniques.

⁹¹ Ibid para 148.

⁹² Ibid.

⁹³ For the concept of security see Massimo Fichera, ‘Security Issues as Existential Threat to the Community’ Massimo Fichera and Jens Kremer (eds) *Law and Security in Europe Reconsidering the Security Constitution* (Intersertia 2013).

⁹⁴ Proportionality is employed here as “evok(ing) an ideal of harmony, natural(quasi-geometric) order or coherence founded on reason”, Nicola Lacey, ‘The Metaphor of Proportionality’, (2016) 43 *Journal of Law and Society* 27-44 p. 31.

⁹⁵ As stated in the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols No 11 and No 14) 1950, CETS 5. “as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law”.

⁹⁶ Consequently, what the Court is saying is that full anonymity might not even be needed.

⁹⁷ It should be noted that approaching legal argumentations from Luhmann’s functionalism means to reject that they should work on best reason / or better arguments. As such, legal arguments should not be evaluated for their *reasonability*, which ultimately means autology (the ability to justify themselves), but for their persuasive power in the process of communication. Luhmann, (n 15) p. 309

⁹⁸ Jean Clam, ‘Contingency, Reciprocity, the Other, and the Other in the Other Luhmann–Lacan, an Encounter’ in Anders La Cour and Andreas Philippopoulos-Mihalopoulos (eds) *Luhmann Observed* (Palgrave Macmillan 2013) p. 20.

⁹⁹ DeNardis (n 8).

¹⁰⁰ *Delfi* (n 1) at para 64 .

Investigating each individual commentator in this case would have been too invasive and thus disproportionate and it would have drawn attention to Estonian institutions for using harsh measures. In this sense, the ECtHR, by agreeing with the Estonian Government in finding the content provider liable, might have achieved a twofold aim: to preserve the function of law by creating a more disciplined environment (e.g. by overcoming the problem of anonymity and dealing with different jurisdictions) and not to exceed with invasive measures (e.g. investigate the commentators) .

While this could, at face value, count as the court's *balancing exercise* between security and liberty, this appears to be done in a partial way and to be influenced by the need of the court to preserve the operations of law in the online ecosystem.

Magyar T.E. and Index.hu Zrt v Hungary

In February 2016, the ECtHR ruled on its second case, *MTE v Hungary*. Even though it confirmed the substantial reasoning of *Delfi*, it concluded that in this case a violation of freedom of expression had occurred. In its reasoning, the Court attempted to re-balance the previous approach, setting out a list of criteria to reduce the possibility of the imposition of liability and the restriction of content in the online environment.

Two companies were involved in the *MTE* case. The first was Magyar Tartalomszolgáltatók Egyesülete, a not-for-profit self-regulatory body of Hungarian internet service providers. The second applicant, Index.hu Zrt, was a major internet news portal. Both published an article on the unethical commercial conduct of two real-estate-management websites, owned by the same company, and this news item attracted rather unpleasant comments.¹⁰¹ In contrast to *Delfi*, in *MTE* the ECtHR ruled that the utterances in question, in spite of their vulgarity (e.g. "People like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead"),¹⁰² could not be categorized as hate speech or incitement to violence.

The ECtHR simply claimed that the statements *in this case* "did not constitute clearly unlawful speech and they certainly did not amount to hate speech or incitement to violence".¹⁰³ The ECtHR, in handing down its ruling, remarked that the domestic authorities had not investigated whether the impugned statements could be deemed unlawful. What is more, the Court declared that the domestic authorities had also failed to consider whether the actual authors could have been found liable. This lack of investigation contributed to the Hungarian court's poor proportionality analysis.

As in *Delfi*, both applicants in the *MTE* case had a notice-and-take-down system in place in which any user could flag unlawful comments to the service provider so that they could be removed. However, in this latter case, the ECtHR observed that "the injured company never requested the applicants to remove the comments but opted to seek justice directly in court".¹⁰⁴ The ECtHR considered that the Hungarian domestic Court had failed to take this latter element into consideration. The Court also remarked that the "notice-and-take-down system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved".¹⁰⁵ A relevant factor that led the Court to decide differently in *MTE* was that the conduct of the company had already been the subject of various complaints to the country's consumer protection organs.¹⁰⁶ For this reason, in assessing the proportionality of the domestic Hungarian authorities, the ECtHR emphasized that the comments in

¹⁰¹ *MTE* (n 6), para 19.

¹⁰² *Ibid* at para 14.

¹⁰³ *Ibid* at para 64.

¹⁰⁴ *Ibid* at para 83.

¹⁰⁵ *Ibid* at para 91.

¹⁰⁶ *Ibid* at para 72.

question would not have made “any additional and significant impact on the attitude of the consumers concerned”.¹⁰⁷

Moreover, while in *Delfi* the ECtHR stressed that the news portal had been sued for breaching the personality rights of the company owner, in *MTE* the real estate company had claimed that MTE and Index.hu Zrt had breached its right to a good reputation.¹⁰⁸ Here, the ECtHR paid particular attention to the fact that the right to a good reputation does not require the same level of protection as personality rights. Moreover, the ECtHR emphasized that companies cannot claim to be victims of personality rights violation.¹⁰⁹ Personality rights (such those involved in the *Delfi* case) are strictly intertwined with dignity and as such apply to natural persons, whereas commercial reputation is devoid of that moral dimension.¹¹⁰ Finally, whereas *Delfi* had been required to pay a symbolic fee, the *MTE* applicants had been obliged to pay the court fees, which the ECtHR acknowledged could have negative consequences, such as the closure of the comment space.¹¹¹ In addition the Court stated that:

[I]t cannot be excluded that the court decision finding against the applicants in the present case might produce a legal basis for a further legal action resulting in a damage award. In any event, the Court is of the view that the decisive question when assessing the consequence for the applicants is not the absence of damages payable, but the manner in which Internet portals such as theirs can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet. This effect could be particularly detrimental for a non-commercial website such the first applicant.¹¹²

The narrative of the Court

If the concern of the Court in the *Delfi* case was to safeguard the performativity of law, the *MTE* case can be viewed as a refined analysis of its approach, an attempt to remove the blind spots in its previous ruling. Since the *Delfi* Case was heard by the Grand Chamber, it represents a precedent. Therefore, since the *MTE* case was adopted by a Fourth Section Chamber, adopting new meanings presupposes a departure from the previous orientation of the Court. As already mentioned, the *MTE* case does not change the substantive approach to the liability of content providers,¹¹³ but it does restrict the reasons for such liability.

After recalling the *Delfi* framework, the Court concluded that the present case was different, as the “comments did not constitute clearly unlawful speech”.¹¹⁴ This time, the Court paid particular attention to the registers used in the new medium, the Internet. The Court not only remarked that vulgarity does not always qualify as an offense, but also that the style of the speech should be protected as part of the freedom of expression.¹¹⁵

This reflection can be seen as an attempt by the Court to remedy the problems deriving from the *Delfi* case, which appeared to lower the standards of freedom of expression that the ECtHR had built over time. Thus, the Court highlighted that

¹⁰⁷ Ibid at para 85.

¹⁰⁸ Ibid at para 15.

¹⁰⁹ Ibid at para 66.

¹¹⁰ Ibid at para 66.

¹¹¹ Ibid at para 86.

¹¹² Ibid at para 86.

¹¹³ *MTE* (n 6) at concurring opinion para 3.

¹¹⁴ Ibid at para 64.

¹¹⁵ Ibid at para 68.

[w]ithout losing sight of the effects of defamation on the Internet, especially given the ease, scope and speed of the dissemination of information,¹¹⁶ the Court also considers that regard must be had to the specificities of the *style of communication on certain Internet portals*. The expressions used in the comments, albeit belonging to a low register of style, *are common in communication on many Internet portals* – a consideration that reduces the impact that can be attributed to those expressions.¹¹⁷ (Italics are mine)

Further, the Court refuted the Hungarian understanding that, as the applicants had allowed unfiltered comments, they should have expected that some might be in breach of the law. This, the Court claimed, would have required “excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet”.¹¹⁸ Continuing this line of argument, the Court highlighted the domestic court’s failure to assess the effect of liability on freedom of expression on the Internet.¹¹⁹ To sum up, the Court found the *Hungarian notion of liability* problematic, as it precluded balancing between competing rights. This second ruling has drawn more positive reactions, but the scenario on the regulatory approach of internet intermediaries remains ill-defined.

IV. A commentary through systems theory

As indicated in the introduction, the focus of this working paper when assessing *Delfi* is to analyse the extent to which the ECtHR’s ruling was influenced by its desire to preserve the role of law in the online environment. By contrast, as can be deduced from the foregoing analysis, in MTE the main objective is to investigate how the law modulates and readapts meanings previously created in similar yet slightly different situations.¹²⁰

Previous commentaries have already stressed how the logic of the Court was driven by the concern to protect reputational rights. As Neville Cox contends,

there must be some defendant available from whom the injured party could seek redress, in order for the state’s positive obligation to support reputational and privacy rights to be fulfilled, and, the applicants were the only entity capable of providing realistic redress for the injured party, then liability should be imposed on them¹²¹

Cox further highlights a certain imbalance in the way the Court described the Internet. For example, he argues that the Court

significantly underplayed the realistic threat to freedom of expression that was at stake and also overplayed the realistic extent to which the applicants were exclusively responsible for any harm to L’s reputation which may have occurred.¹²²

Similarly, in their dissenting opinion, Sajó and Tsotsoria remark that

¹¹⁶ *Delfi* (n 1) para 147.

¹¹⁷ *Ibid* at para 77.

¹¹⁸ *Ibid* at para 82.

¹¹⁹ *Ibid* at para 88.

¹²⁰ See Alberto Febbrajo, ‘From Hierarchical to Circular Models in the Sociology of Law: Some Introductory Remarks’ (1988) *European Yearbook in the Sociology of law*, p. 16.

¹²¹ Neville Cox, ‘*Delfi AS v Estonia: The liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights*’ in the *Modern Law Review* (2014) 77 (4) *MLR* 619-640 p. 623

¹²² Cox (n 58) p 622.

[t]he Internet is described as an “unprecedented platform” and while there is reference to benefits, it is described as posing “certain dangers”, the advantages being scarcely mentioned. We disagree. The Internet is more than a uniquely dangerous novelty¹²³

One then might ponder why the ECtHR, a court that has historically been at the forefront of protecting freedom of expression, adopted such a controversial decision. Here, systems theory can assist in exploring the reasoning of the Court and thus help answer the question. Hence, the narrative constructed by the Court can be considered an “autopoietic move”, a move enabling the judiciary to preserve the possibility to perform in an environment that could potentially be (legally speaking) difficult to control. As shown above, anonymity coupled with internet technicalities and the possibilities of multiple jurisdictions prevented law from granting remedies. Of course, the ECtHR is not a court of direct remedies; rather, what is being referred to here are remedies as a structure of the legal system.

The next section illustrates the meaning of law within autopoietic systems theory and considers the remedies that exist for law in general and systems theory in particular. Only then it is possible to progress to an informed reading of the text of the cases.

Law as an autopoietic normative system

First, Luhmann’s autopoiesis means understanding law as an autonomous system that “reproduce[s] itself, its constitutive elements and its process of reproduction”.¹²⁴ To approach a ruling through the lens of autopoiesis firstly means *not* to expect from law what cannot be expected, which at its most basic level means not invalidating its operations.¹²⁵ Autopoiesis also involves considering the dynamism that self-reproduction entails, such as the temporality/contingency of decisions, the self-referentiality¹²⁶ of the legal system, and the legal system as a constant process of change.¹²⁷ This can be, for example, appreciated by assessing the differences between *Delfi* and the *MTE* case. In this latter case, the approach of the Court seems to limit the risks for the freedom of expression and address the concerns raised by the *Delfi* ruling.

Law, under systems theory, is a normative system which functions through and consists of communications. According to Luhmann’s systems theory, the legal system is a sub-system of society. Systems theory speaks of what the legal system *is* as opposed to its environment (everything that is outside the legal system). This is because systems theory is based on the idea of ‘functional differentiation’, according to which each system of society (economics, religion, politics etc.) performs different functions. The function of the legal system is to stabilize *normative expectations*. *Normative expectations* are time binding in the sense that they connect the present with the future by providing the predictability of certain guarantees. This function of maintaining normative expectations is the result of

¹²³ See Joint Dissenting Opinion para 6; Oreste Pollicino and Graziella Romeo make a similar observation in ‘Concluding Remarks: Internet Law, Protection of Fundamental Rights and the Role of Constitutional Adjudication’ *The Internet and Constitutional law* (1 ed. 2016) p 244.

¹²⁴ Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice And Society* (Routledge 2011) p. 50

¹²⁵ Perhaps I should clarify that autopoiesis does not depend on substantive law (which in this case is human rights and the regulation of internet service providers); rather, it concerns the legal system’s operations and structures. To draw such a distinction, however, appears difficult. If the concept of autopoiesis is employed here to demonstrate how the Court decided *Delfi* because anonymity and other technicalities were preventing the possibility of granting remedies, this is also extremely dependent on the model of regulation, which is substantive law. For a fuller debate on the topic, see Guilherme V Vilaca, ‘Interdisciplinary and tax law: The case of legal autopoiesis’ (2012) 23 *Critical Perspectives on Accounting* 483-492.

¹²⁶ To employ Philippopoulos-Mihalopoulos’ description, self-referentiality means that “the unity of the legal system is represented in the form of law reference to previous, already existing law. The legal system gets a sense of what it is expected of it. . . . Self-reference is not a quest for what kind of identity the system is supposed to have, nor a stabilization of a given identity; rather it is a quest for how not to lose the means of referring to something other than one’s identity: to what the system at any point is not” (n 52) p. 49.

¹²⁷ Philippopoulos-Mihalopoulos (n 52).

legal-system operations that “provide structures to stabilise the application of the code”.¹²⁸ Ultimately, the autopoiesis of law requires the processing of *normative expectations*,¹²⁹ as autopoiesis is performed through the production of operations.

While the legal system is distinct from its environment, the two are nonetheless related. Indeed, the environment indirectly impinges on the legal system. What is external to the legal system triggers the evolution of that system, as it filters outside influences and responds to them. In order to be interactive, a legal system must, together with its ‘operative closure’, be ‘cognitively open’. In other words, it must be able to learn from the environment. The legal system designs its borders, its identity, its limits and its unity through the application of the code legal/illegal. Through the code, the legal system autonomously reproduces its distinctiveness, ‘*what the law is not*’, and this process occurs continually over time.

The legal system’s internal operations (‘operative closure’) are based on the application of a binary code, which is legal/illegal. The application of the code requires programmes “which attribute the values legal/illegal”¹³⁰. Programmes equip the code with content,¹³¹ and mitigate the discrepancy that might emerge between law and society.¹³² The programme is contingent in nature, and *programmes* are the conditions established by the legal system to apply the code. Codes and programmes are then complementary,¹³³ the strict dichotomy of the code being supplemented by the programme which guides the application of the code. As explained by Nobles and Schiff, “law develops structures (conditional programmes) for the application of the code.”¹³⁴

Remedies

Having provided a brief overview of law under system theory, the following section explores the nature of remedies in the legal system. As suggested before, one of the problems in *Delfi* was the anonymity of the comments, which prevented the plaintiff from gaining direct redress from their authors.

West’s Legal Thesaurus/Dictionary defines remedies “as means by which a right is enforced; the steps by which the violation of a right is prevented, redressed, or compensated”.¹³⁵ Remedies also intersect the machinery through which law can operate.¹³⁶ As such, remedies are situated between substantive law and procedural law. Remedies are both a legal structure and the expectations that trigger the operations of the legal system. This is not to say that there is certainty of outcome or that there should be an outcome at all costs. Nonetheless, it would be self-defeating for the legal system to abandon the *possibility* of protecting those who expect protection. A lack of expectations of redress would create a crisis in the legal system, as there would be no application of the code in the first place.¹³⁷

¹²⁸ Richard Nobles and David Schiff, *A Sociology of Jurisprudence* p. 111.

¹²⁹ Luhmann Closure and openness: on reality in the world of law, EUI Working Paper No. 86/234.

¹³⁰ Nobles and Schiff in the introduction to Luhmann’s *Law as a Social System*

¹³¹ Micheal King and Chris Thornhill, *Niklas Luhmann’s theory of politics and Law* (Palgrave Macmillan, 2003) p. 59.

¹³² Niklas Luhmann, *Law as a social system* (n 15) p. 193

¹³³ Jean Clam quoted in Micheal King and Chris Thornhill, *Niklas Luhmann’s theory of politics and Law*

¹³⁴ Nobles and Schiff (n 129) p. 18

¹³⁵ Definition of ‘remedy’ in *West’s legal thesaurus/dictionary*, William P Statsky, (West Publishing Company, 1986) p. 647.

¹³⁶ *ibid*

¹³⁷ Luhmann’s *Law as a Social System* (n 15) p. 148; also Nobles and Schiff observe that without people seeking for legal operations these will decrease; thus, law must evolve along with its environment. This does not necessarily mean, however, that law can solve social problems, see Richard Nobles and David Schiff, ‘Legal Argumentation: A Sociological Account’ (2017) 8 *Jurisprudence* p. 62

It should be noted that autopoiesis does not depend on the content of law (which in this case is human rights and the regulation of internet service providers); rather, it concerns the operations and structures of the legal system. Nonetheless, there are difficulties in drawing such a distinction. In other words, the concept of autopoiesis is employed here to demonstrate that the Court's decision in *Delfi* reflected its concern that the technological design of internet intermediaries was preventing the legal system from performing its designated function. However, autopoiesis also depends on the model of regulation, which is substantive law. Therefore a circular relationship exists between the content of law and its operations. In short, when reading the cases, one should bear in mind that autopoiesis also depends on structural conditions which are both internal to the legal system and external to it: in this case the model of organization of the 'space for comments'.

To return to *Delfi*, the construction of the ruling includes an understated narrative on the Internet in which the Internet is viewed as a means for enhancing freedom of expression. Within its own operations, a legal system must choose between contrasting values, and creating homogeneity and compatibility between them is a difficult exercise.¹³⁸ It should be further mentioned that viewing the cases through systems theory means conferring upon legal arguments the function of communicative processes within the system. Legal arguments are self-justificatory narratives and a means for the law itself to evaluate the consequences of its own decisions. As Luhmann explains, legal arguments emerge where disagreements arise within the reasoning within the reasoning.¹³⁹

V. Conclusions

This paper provided an analysis of the ECtHR's approach to the liability of content providers for user generated comments. Two cases were considered: *Delfi v. Estonia* (2015) and *MTE v Hungary* (2016). More attention was paid to *Delfi*, as it represents the first ruling on the matter and has been generally criticized for potentially leading to a scenario where online providers, in order to avoid liability, might filter user content, thereby resulting in unfair censorship. The second case, *MTE v Hungary*, is also important as an effort to rebalance the stance taken in *Delfi*. The paper began what the Court neglected, i.e., the general concern that is associated with delegating traditional public functions to private actors, and with the consideration that the Internet creates benefits and not only the risks depicted by the Court in *Delfi*. In respect to the first point, if it is up to intermediaries to decide on the *content* of rights, these are reduced to a "technicality". This means that rights are evaluated based on standards which might not consider the tensions that different interests at stake might generate. Instead, exposing the tensions concerning the interpretation of rights contributes to developing rights' new meanings and dimensions. When intermediaries bear the responsibility of assessing the scope of application of rights they might silence these divergences thus affecting the configuration of the Internet as a pluralistic environment.

The analysis was conducted from a systems theory perspective, and for this purpose the working paper employed the concept of autopoiesis, which roughly means self-reproduction. The paper aimed to demonstrate that the concern of the Court exceeded the mere exercise of balancing between freedom of expression and unlawful speech. In addition, it relied upon a second narrative that underlines the challenges that internet technologies pose for the legal system. Thus, the paper emphasizes that Court's reasoning was intimately bound to the circumstances created by *Delfi*: anonymous and unregistered comments. Moreover, it further highlights how the Court attempted to regulate internet service providers in order to create a more disciplined environment in which law can function. Nonetheless, in sketching the main passages of the *Delfi* judgment, the working paper reveals the complexity of the arguments and the difficulties the Court faced in deciding the case.

¹³⁸ Alberto Febbrajo, 'From Hierarchical to Circular Models in the Sociology of Law: Some Introductory Remarks' (1988) *European Yearbook in the Sociology of law*, p. 16.

¹³⁹ Luhmann, *Law as a Social System* (n 15) p. 331; see also Niklas Luhmann, 'Legal Argumentation: An Analysis of Its Form' (1995) 58 *The Modern Law Review*.

The construction of reasoning is far from simple, since it is built on a complex blend of legal arguments that take external influences into account. These influences resonate within the legal arguments and enable exploration and reference to other arguments or possibilities (in this case, for example, the chilling effect on freedom of expression).

To put it more concretely, and to provide an example, in *Delfi* several third parties intervened in the case, thereby illustrating other normative problems associated with the Court's approach. The Court could not simply ignore their normative claims,¹⁴⁰ even in the event of disagreement, but instead was forced to refer to them. Third party arguments thus indirectly forced the Court to confront other possibilities of interpreting the case. Consequently, the "legal system learns and adapts to the environment"; however, "it does so according to its own operations and concepts".¹⁴¹

The second case, *MTE*, helps to understand law in its synchronic dimension and how the Court attempted to adjust to a supposedly new environment where the internet infrastructure itself had become a subject to be taken into account beyond users' rights. This case engages in a direct dialogue with the previous case, as shown in the well-known *necessary in a democratic society test*, where the Court, in handing down the ruling, compared the two decisions. In *MTE*, the Court answered the questions left open in *Delfi*, re-elaborating some meanings and clarifying others in order to restrict the possibility for cases of liability.

¹⁴⁰ *Delfi* (n 1), at paras 94-109; Luhmann, *Law as a social system* p. 332.

¹⁴¹ Vilaça, *Interdisciplinary and tax law* (n 123)

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