



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SANCHEZ v. FRANCE

(Application no. 45581/15)

JUDGMENT

Art 10 • Freedom of expression • Local councillor convicted for not promptly deleting illegal comments by third parties on public Facebook page used in election campaign • Incitement to hatred or violence against Muslims • Applicant's separate liability as Facebook account holder, message authors also being convicted • Relevant and sufficient grounds • Proportionate sanction

STRASBOURG

2 September 2021

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
15/05/2023**

This judgment may be subject to editorial revision.

In the case of Sanchez v. France,

The European Court of Human Rights (fifth section), sitting as a Chamber composed of:

Síofra O’Leary, *President*,
Mārtiņš Mits,
Ganna Yudkivska,
Stéphanie Mourou-Vikström,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar, *judges*

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 45581/15) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr Julien Sanchez (“the applicant”), on 15 September 2015;

the decision to give notice to the French Government (“the Government”) of the complaint concerning Article 10 and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 6 July 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns, in the light of Article 10 of the Convention, the criminal conviction of the applicant, at the time a local councillor who was standing for election to Parliament, for the offence of incitement to hatred or violence against a group or an individual on grounds of religion, following his failure to take prompt action in deleting comments posted by third parties on the “wall” of his Facebook account.

THE FACTS

2. The applicant was born in 1983 and lives in Beaucaire (France). He is represented by Mr D. Dassa Le Deist, a lawyer.

3. The Government were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of Europe and Foreign Affairs.

4. The applicant has been the mayor of the town of Beaucaire since 2014 and president of the Rassemblement national (known as Front national (FN) until 2018) group in the Regional Council of Occitanie. At the relevant time he was the Front national candidate for the Nîmes constituency in the French parliamentary elections. F.P., then a member of the European Parliament (MEP), first deputy to the mayor of Nîmes, was one of his political opponents.

5. On 24 October 2011 the applicant published a post about F.P. on the publicly accessible “wall” of his Facebook account, which was managed by him personally, reading as follows (translation):

“While the FN has launched its new national website on schedule, spare a thought for the Nîmes UMP [Union for a Popular Movement] MEP [F.P.], whose site, which was supposed to be launched today, is displaying an ominous triple zero on its home page ...”

6. A third party, S.B., reacted on the same day to that post, adding the following comment to the wall of the applicant’s Facebook account (translation):

“This bigwig has turned Nîmes into Algiers, there’s not a street without a kebab shop and mosque; drug dealers and prostitutes reign supreme, no surprise he’s chosen Brussels, capital of the new world order of sharia... Cheers UMPS [amalgam of UMP and PS, Socialist Party], at least we don’t have to pay for the flights and hotel... I love this free version of Club Med... Thanks [F.] and kisses to Leila ([L.])... Finally, a blog that changes our life ...”

7. Another reader, L.R., wrote the following three comments (translation):

“Shisha bars all over the town centre and veiled women ... Look what’s become of Nîmes, the so-called Roman city ... The UMP and the PS are allies of the muslims.”

“Drug trafficking run by the muslims rue des lombards, it’s been going on for years ... even with CCTV in the street ... more drug dealing in plain sight on avenue general leclerc where riff-raff sell drugs all day long but police never come and in front of schools too, stones get thrown all the time at cars belonging to ‘white people’ route d’arles at the lights ... Nîmes is the insecurity capital of Languedoc Roussillon.”

“[P.], councillor for economic development lol hallal economic development boulevard gambetta and (islamic) republic street.”

8. In the morning of 25 October 2011, L.T., the partner of F.P., became aware of the comments. Feeling directly and personally insulted by comments that she described as “racist”, associating her forename, which “sounded North African”, with the policy of F.P., she immediately went to the hairdressing salon run by S.B., whom she knew personally. S.B., who was unaware of the public nature of the applicant’s Facebook account, deleted his comment just after L.T. left, as he subsequently confirmed when he was interviewed by the gendarmes.

9. On 26 October 2011 L.T. wrote to the Nîmes public prosecutor to lodge a criminal complaint against the applicant, S.B. and L.R. on account of the offending comments posted on the applicant’s Facebook page. With her letter she attached screen shots as evidence of the offending comments.

10. On 27 October 2011 the applicant posted a message on the “wall” of his Facebook account asking users to “be careful with the content of [their] comments”, but did not do anything about the comments already posted.

11. L.T. was interviewed by the gendarmes on 6 December 2011. She stated that she had discovered the comments on 25 October 2011 when she was in the office of her partner, an MEP and first deputy to the Mayor of

Nîmes. She explained that their relationship was public knowledge and that the racist comments on the applicant's publicly accessible Facebook page included one associating her North African-sounding forename with that of her partner and his policies. She stated that after she had discovered the posts she had immediately gone to the hairdressing salon run by S.B. to express her indignation. According to her, S.B. had been very surprised and had clearly not been aware of the public nature of this Facebook page, but he had confirmed he was talking about her when he said "Thanks [F.] and kisses to [L.]". She added that she had then been accompanied to the town hall by the Prefect's wife, who was just passing by and who had seen how annoyed she was. On the way there she had logged onto Facebook again to find that S.B.'s comment had already been removed. The investigation into the applicant's Facebook account revealed, on the same day, that the comments by L.R. were still there, while those posted by S.B. had indeed disappeared.

12. For his part, L.R. was identified as being an employee of Nîmes town council. When interviewed by the gendarmes on 23 January 2011 he explained that he worked as an assistant in the applicant's election campaign and denied that his comments had been racist or an incitement to racial hatred. Explaining that he had never intended to direct his comments against L.T., he explained that in the meantime he had deleted the comments in which F.P. could have recognised himself or have been recognised by others.

13. During his interview of 25 January 2012 S.B. told the gendarmes that he had been unaware that the applicant's Facebook page was publicly accessible and had deleted his comments immediately after L.T. had come to see him at his hairdressing salon. He added that he had informed the applicant later that day of his altercation with L.T.

14. On 28 January 2012 the applicant was also interviewed by the investigators. Recalling that he had been a candidate in Nîmes standing against F.P., L.T.'s partner, he explained that he had been unable to monitor the large number of comments posted each week on the "wall" of his Facebook account. He indicated in particular that he had not written the impugned comments himself; he had not had the time to delete the comment by S.B., who had already done so; he had only become aware of L.R.'s comments when he was summoned to the gendarmerie, and he was prepared to delete them if the courts so requested; he consulted his Facebook "wall" every day, but did not often read the comments, which were too numerous given that he had more than 1,800 "friends" who could post comments 24 hours a day, and that he preferred to post content to inform his readers; L.T., whom he knew only by her partner's surname, had not been mentioned by name and he had not been aware of her forename until she filed a complaint; L.T. had once personally taken him to task at a polling station; she should have telephoned him to ask him to delete these comments, which would have obviated the need for a criminal complaint, but her aim had clearly been to destabilise his candidature, as he was standing against her

partner; instead, L.T. had gone to the hairdressing salon of S.B., whom she knew, to insult and threaten him in front of witnesses; lastly, he knew L.R. and S.B., activists in his party who did not hold any office in it. Referring to his foreign origins, he added that he had never displayed any racism or discrimination against anyone, and that he did not perceive any call to murder or violence in the disputed remarks, which he considered to be within the limits of any citizen's freedom of expression. He emphasised that he had removed public access to his Facebook "wall" a few days before this interview, in order to limit access only to those who chose to be his friends and to avoid any further incidents that were not of his making. After the interview, the investigators were able to confirm that the applicant's Facebook page was indeed no longer accessible to the public.

15. The applicant, together with S.B. and L.R., were summoned to appear before Nîmes Criminal Court in connection with the publication of the comments in question on the "wall" of his Facebook account, to answer charges of incitement to hatred or violence against a group, and in particular L.T., on account of their origin or the fact of belonging or not belonging to a specific ethnicity, nation, race or religion. The summons referred to section 23, first paragraph, section 24, eighth paragraph, and section 65-3 of the Law of 29 July 1881, and section 93-3 of Law no. 82-652 of 29 July 1982.

16. In a judgment of 28 February 2013 the Nîmes Criminal Court found the applicant, S.B. and L.R. guilty as charged and ordered each of them to pay a fine of 4,000 euros (EUR). The applicant was convicted under section 23, first paragraph, and section 24, eighth paragraph, of the Law of 29 July 1881, and section 93-3 of Law no. 82-652 of 29 July 1982. S.B. and the applicant were also ordered jointly to pay EUR 1,000 to L.T., as civil party, in compensation for non-pecuniary damage. However, the court did not see fit to order the sanction of electoral disqualification that had been called for by the public prosecutor.

17. In its judgment the court began by finding that the various offending comments had specifically defined the group concerned, namely "Muslims". To equate that group with "drug dealers and prostitutes" who "reign supreme", "riff raff who sell drugs all day long" or those responsible for "throwing stones at cars belonging to white people", was clearly likely, on account of both the meaning and scope of the comments, to arouse a strong feeling of rejection or hostility towards people who belonged, or were assumed to belong, to the Muslim community. It further took the view that L.T. could be regarded as having been provoked by the impugned comments, in view of the references to her partner and the wording "Thanks [F.] and kisses to [L.]" which had had the effect of portraying them both as being responsible for the alleged transformation of "Nîmes into Algiers" and to arouse hatred or violence against them.

18. As regards the applicant, the court observed that it could be inferred from section 93-3 of the Law of 29 July 1982, as interpreted by the

Constitutional Council in its decision of 16 September 2011, that the criminal liability of the producer of a website intended for communication to the general public, including access to messages posted by its users, would only be engaged in respect of such messages if it could be established that the producer had been aware of their content before they were posted or, if not, if he or she failed to act promptly to delete the messages at issue upon becoming aware of them. It dismissed the applicant's arguments according to which he had not had time to read the comments and that he had not been aware of the comments by S.B. and L.R., on the grounds that: first, comments could only be posted on his wall after he had given access to his "friends" of which there were 1,829 at 25 October 2011, and that he was responsible for checking the content of the posts; second, he must have been aware that his page was likely to attract comments with a political, and thus essential polemical, content, and that he should have been all the more careful to monitor them. The court concluded that, having set up an electronic public communication service on his own initiative for the purpose of exchanging opinions, and having left the offending comments, which had remained visible as of 6 December 2011 according to the investigators, the applicant had failed to act promptly to put an end to their dissemination and was therefore guilty in his capacity as principal.

19. The applicant and S.B. appealed. S.B. subsequently withdrew his appeal.

20. In a judgment of 18 October 2013 the Nîmes Court of Appeal upheld the applicant's conviction, reducing the fine to EUR 3,000. It further ordered him to pay L.T. EUR 1,000 in costs for the appeal proceedings.

21. In its reasoning the Court of Appeal held that the Criminal Court had been correct in finding that the comments clearly defined the group of people concerned, namely Muslims, and that to associate the Muslim community with crime and insecurity in the city of Nîmes was likely to arouse a strong feeling of rejection or hostility towards that group. Noting that the legislation cited in the proceedings concerned discrimination against a person or group of persons, it found as follows:

"... the expression 'kisses to Leila', referring to [L.T.], and her connection with [F.P.], deputy mayor of Nîmes, who is described in the posts as having contributed to the abandonment of the town of Nîmes to the Muslims and thus to insecurity, is such as to associate her with the transformation of the town and thus to arouse hatred or violence against her; on the basis of these elements, the two posts in question constitute incitement to hatred or violence against a person, namely [F.P.]'s partner, [L.T.], on account of a presumption, because of her forename, that she belonged to a Muslim community ..."

22. Referring further to the provisions of section 93-3 of the Law of 29 July 1982 and to the facts of the case, the Court of Appeal noted that there was no evidence that the applicant had been informed of the content of the comments before they were posted, but that in his capacity as an elected

member of the Front National and a public figure, he had “knowingly made his Facebook wall public and [had] therefore authorised his friends to post comments on it”. The court continued its reasoning as follows:

“... by thus acting voluntarily he became responsible for the content of the comments posted; his status as a political figure required him to be all the more vigilant; he cannot claim not to have been aware of the comments posted on his website on 24 October, especially as he stated during the investigation that he consulted it every day; he did not, however, remove the comments, which were subsequently deleted by [S. B.] himself; alerted by the latter to the reaction of the civil party, he did not delete [L.R.’s] comment either, and the latter was still present on his website when consulted by the investigators on 6 December 2011; he cannot be regarded, as the court below rightly found, as having promptly put an end to the dissemination of the offending comments; he legitimised his position by explaining that such comments appeared to him to be compatible with freedom of expression; the fact they were left on his ‘wall’ was thus deliberate on his part; in the light of these elements, the court below was right to find the defendant guilty as charged and the judgment is upheld in respect of his conviction ...”

23. The applicant appealed to the Court of Cassation, relying in particular on Article 10 of the Convention. In a single ground of appeal, he argued that, for the offence to be made out, the comments had to contain encouragement or incitement to discrimination, hatred or violence, and not merely give rise to a strong feeling of rejection or hostility towards a group or person; that the mere fear of a risk of racism could not deprive citizens of the freedom to express their views on the consequences of immigration in certain towns or neighbourhoods, the comments having specifically deplored the transformation of the town of Nîmes by immigrants of North African origin and of the Muslim faith; that the summons to appear before the court had been unlawful; and, lastly, that the impugned remarks had in no way been directed at L.T. personally and had been distorted by the Court of Appeal.

24. In a judgment of 17 March 2015 the Court of Cassation dismissed his appeal, in particular with regard to Article 10 of the Convention, stating as follows:

“... first, the offence of incitement ... is established where, as in the present case, the court finds that, by both their meaning and their scope, the impugned texts may arouse a feeling of rejection or hostility, hatred or violence, towards a group or an individual on account of a particular religion; ... second, since the above-mentioned text falls within the restrictions provided for in paragraph 2 of Article 10 of the European Convention on Human Rights, the principle of freedom of expression enshrined in paragraph 1 of that Article cannot be relied upon; ...”

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

A. Law of 29 July 1881

25. The relevant provisions in force at the material time read as follows:

Section 23

“Anyone who, by uttering speeches, cries or threats in a public place or assembly, or by means of a written or printed text, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or assembly, or by means of a placard or notice exhibited in a place where it can be seen by the public, or by any electronic means of communication to the public, has directly incited the perpetrator or perpetrators to commit a serious crime or major offence (*crime* or *délit*), and if the incitement has been acted upon, shall be punished as an accomplice in the said offence.

This provision shall also be applicable where the incitement has been followed only by an attempt to commit a serious crime (*crime*) under Article 2 of the Criminal Code.”

Section 24 (paragraphs 8 and 10-12)

“Anyone who, by one of the means referred to in section 23, has incited discrimination, hatred or violence against a person or group on account of their origin or because they belong, or do not belong, to a given ethnicity, nation, race or religion, shall be liable to a one-year prison term and a fine of 45,000 euros, or only one of those two sanctions.

...

Where a conviction is secured for one of the offences provided for in the two preceding paragraphs, the court may further order:

1° The deprivation of the rights listed in paragraphs 2° and 3° of Article 131-26 of the Criminal Code for a maximum of five years, save where the offender’s liability is engaged under section 42 and the first paragraph of section 43 hereof, or under the first three paragraphs of section 93-3 of Law no. 82-652 of 29 July 1982 on audiovisual communication.

2° The display or dissemination of the decision pursuant to Article 131-35 of the Criminal Code.

...”

Section 65-3

“For the offences (*délits*) provided for in the sixth and eighth paragraphs of section 24, section 24 bis, the second paragraph of section 32 and the third paragraph of section 33, the limitation period prescribed by section 65 shall be one year.”

B. Section 93-3 of Law no. 82-652 of 29 July 1982 on audiovisual communication

26. The relevant provisions as in force at the material time read as follows:

“Where one of the offences provided for in chapter IV of the Freedom of the Press Act of 29 July 1881 is committed by an electronic means of public communication, the publication director or, in the situation provided for in the second paragraph of section 93-2 hereof, the codirector, shall be prosecuted as the principal, when the content of the impugned message has been fixed prior to its communication to the public.

In the absence thereof, the author, and failing which the producer, shall be prosecuted as principal.

Where charges are brought against the publication director or codirector, the author shall be prosecuted as an accomplice.

Any person to whom Article 121-7 of the Criminal Code is applicable may also be prosecuted as an accomplice.

Where the offence stems from the content of a message addressed by an Internet user to an electronic public communication service and made available by that service to the public in a forum of personal contributions identified as such, the publication director or codirector may not be held criminally liable as principal if it is established that he or she had no effective knowledge of the message before it was posted on line or if, upon becoming aware thereof, he or she acted promptly to ensure the deletion of the said message.”

27. In a decision of 16 September 2011 (no. 2011-164 QPC), the Constitutional Council declared section 93-3 of Law no. 82-652 of 29 July 1982 on audiovisual communication to be compliant with the Constitution, subject to the following consideration:

“7. Consequently, taking into account, on the one hand, the specific liability applicable to the publication director under the first and last paragraphs of section 93-3 and, on the other, the characteristics of the Internet which, as the relevant rules and techniques now stand, allow the author of a message disseminated on the Internet to preserve his or her anonymity, the provisions under review could not, without establishing an irrebuttable presumption of criminal liability in breach of the aforementioned constitutional requirements, be interpreted as allowing the creator or administrator of an online public communication site, enabling messages from Internet users to be accessed by the public, to be held criminally liable as a producer solely on account of the content of a message of which he or she was unaware before it was posted online. Subject to that reservation, the provisions under review are not contrary to Article 9 of the Declaration of 1789.”

28. Subsequently, in a judgment of 30 October 2012 (Appeal no. 10-88825), the Criminal Division of the Court of Cassation ruled as follows:

“It can be inferred [from section 93-3 of the Law of 29 July 1982] that the criminal liability of the producer of an online public communication site, enabling messages from Internet users to be accessed by the public, will only be engaged, on account of the content of such messages, where it is established that he or she had been aware thereof before they were posted online or that, if that were not the case, he or she refrained from acting promptly to remove them upon becoming aware thereof.

...

However, in so deciding, without ascertaining whether, in his capacity as producer, Mr X ... had been aware of the content of the offending message before it was posted online or whether, if that were not the case, he had refrained from acting promptly to withdraw it as soon as he became aware thereof, the Court of Appeal did not correctly apply section 93-3 of the amended Law of 29 July 1982 on audiovisual communication in the light of the above-mentioned reservation of the Constitutional Council. ...”

29. The Court of Cassation had also developed case-law on the concept of “producer”, adopting this characterisation for a person who had taken the initiative of creating an electronic communication service for the exchange of opinions on pre-defined topics (Court of Cassation, Criminal Division, 8 December 1998, *Bull. crim.*, no. 335; Court of Cassation, Criminal Division, 16 February 2010, *Bull. crim.*, no. 30 – concerning the liability, as producer, of the managing director of a company operating a website, on account of the dissemination of a number of texts on a discussion forum; and Court of Cassation, Criminal Division, 16 February 2010, *Bull. crim.*, no. 31 – concerning the liability, as producer, of the chair of an association for the dissemination of contentious statements on the latter’s blog). This definition of “producer” was accepted by the Constitutional Council, which, in its decision of 16 September 2011 (see paragraph 27 above), observed:

“It follows from these provisions, as interpreted by the Court of Cassation in its judgments of 16 February 2010 ..., that a person who has taken the initiative of creating an online communication service for the exchange of opinions on pre-defined topics may be prosecuted in his or her capacity as producer.”

30. Furthermore, the Court of Cassation has ruled that the use of the Internet is covered by the phrase “any electronic means of public communication” (Court of Cassation, Criminal Division, 6 May 2003, *Bull. crim.*, no. 94; and Court of Cassation, Criminal Division, 10 May 2005, *Bull. crim.*, no. 144), while developing case-law on the concept of “publicity”, which is established when the addressees are not linked to each other by a community of interest and the offending remarks are disseminated via a website accessible to the public (Court of Cassation, Criminal Division, 26 February 2008, Appeal no. 07-87.846, and 26 March 2008, Appeal no. 07-83.672). The Court of Cassation has thus held that insults posted on the “wall” of a defendant’s Facebook account, which were accessible only to individuals approved by the defendant, constituted private and not public insults (Court of Cassation, Criminal Division, 10 April 2013, Appeal no. 11-19.530).

31. As regards the offence (*délit*) of incitement to hatred or violence, the Court of Cassation has consistently held that the comments in question must be such as to arouse immediate reactions from the reader, against the persons targeted, of rejection or even hatred and violence (Court of Cassation, Criminal Division, 21 May 1996, *Bull. crim.*, no. 210), or that the judges must find that both by its meaning and its scope, the text at issue may either arouse a feeling of hostility or rejection, or incite the public to hatred or violence

against a specific person or group (Court of Cassation, Criminal Division, 16 July 1992, *Bull. crim.* no. 273; Court of Cassation, Criminal Division, 14 May 2002, Appeal no. 01-85.482; Court of Cassation, Criminal Division, 30 May 2007, Appeal no. 06-84.328; Court of Cassation, Criminal Division, 29 January 2008, Appeal no. 07-83.695, and Court of Cassation, Criminal Division, 3 February 2009, Appeal nos. 06-83.063 and 08-82.402). Comments may also give rise to sanctions if their meaning is implicit (Court of Cassation, Criminal Division, 16 July 1992, *Bull. crim.*, no. 273).

32. Furthermore, Law no. 2020-766 of 24 June 2020, on the combat against hateful content on the Internet (and which was the subject of Constitutional Council decision no. 2020-801 DC of 18 June 2020, declaring numerous provisions to be unconstitutional) created an online hate “Observatory”. Its mission is to monitor and analyse developments in this area, by involving operators (in particular of social networks such as Facebook), associations, authorities and researchers concerned with the combat against and prevention of such acts. Working groups have been tasked with reflecting on the concept of hateful content, improving knowledge of this phenomenon, analysing the mechanisms of dissemination and the means of combating it and, lastly, ensuring prevention, education and support for Internet users.

33. The said Law also led to the creation of a national unit for combating online hate, within the Paris *tribunal judiciaire*, which started operating in January 2021. It exercises jurisdiction based on the complexity of the procedure or the extent of the breach of public order, which may stem in particular from the high media profile or particular sensitivity of a given case (Circular of 24 November 2020 on the combat against online hate – CRIM 2020 23 E1 24.11.2020).

II. INTERNATIONAL INSTRUMENTS

A. Internet communication

34. The relevant texts adopted by the Council of Europe’s Committee of Ministers and the United Nations can be found in paragraphs 44 to 49 of the judgment in *Delfi AS v. Estonia* ([GC], no. 64569/09, ECHR 2015).

B. Hate speech

1. United Nations

(a) Human Rights Council

35. In his report submitted in accordance with Human Rights Council resolution 16/4 (A/67/357, 7 September 2012), the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr Frank La Rue, made the following observations:

“46. While some of the above concepts may overlap, the Special Rapporteur considers the following elements to be essential when determining whether an expression constitutes incitement to hatred: real and imminent danger of violence resulting from the expression; intent of the speaker to incite discrimination, hostility or violence; and careful consideration by the judiciary of the context in which hatred was expressed, given that international law prohibits some forms of speech for their consequences, and not for their content as such, because what is deeply offensive in one community may not be so in another. Accordingly, any contextual assessment must include consideration of various factors, including the existence of patterns of tension between religious or racial communities, discrimination against the targeted group, the tone and content of the speech, the person inciting hatred and the means of disseminating the expression of hate. For example, a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website. Similarly, artistic expression should be considered with reference to its artistic value and context, given that art may be used to provoke strong feelings without the intention of inciting violence, discrimination or hostility.

47. Moreover, while States are required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20 (2) of the Covenant, there is no requirement to criminalize such expression. The Special Rapporteur underscores that only serious and extreme instances of incitement to hatred, which would cross the seven-part threshold, should be criminalized.

48. In other cases, the Special Rapporteur is of the view that States should adopt civil laws, with the application of diverse remedies, including procedural remedies (for example, access to justice and ensuring effectiveness of domestic institutions) and substantive remedies (for example, reparations that are adequate, prompt and proportionate to the gravity of the expression, which may include restoring reputation, preventing recurrence and providing financial compensation).

49. In addition, while some types of expression may raise concerns in terms of tolerance, civility and respect for others, there are instances in which neither criminal nor civil sanctions are justified. The Special Rapporteur wishes to reiterate that the right to freedom of expression includes forms of expression that are offensive, disturbing and shocking. Indeed, since not all types of inflammatory, hateful or offensive speech amount to incitement, the two should not be conflated.”

(b) Committee on the Elimination of Racial Discrimination

36. General Recommendation no. 35 of 26 September 2013, on combating racist hate speech, provides guidelines on the requirements of the International Convention on the Elimination of All Forms of Racial Discrimination, the aim being to help the States parties to fulfil their obligations. It is indicated in particular as follows:

“6. Racist hate speech addressed in Committee practice has included all the specific speech forms referred to in article 4 directed against groups recognized in article 1 of the Convention – which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin – such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups. In the light of the principle of intersectionality, and bearing in mind that ‘criticism of religious leaders or commentary on religious doctrine or tenets of

faith' should not be prohibited or punished, the Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism. Stereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee.

7. Racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives. In line with their obligations under the Convention, States parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them. The principles articulated in the present recommendation apply to racist hate speech, whether emanating from individuals or groups, in whatever forms it manifests itself, orally or in print, or disseminated through electronic media, including the Internet and social networking sites, as well as non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings, including sporting events.

...

15. ... On the qualification of dissemination and incitement as offences punishable by law, the Committee considers that the following contextual factors should be taken into account:

The content and form of speech: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered.

The economic, social and political climate prevalent at the time the speech was made and disseminated, including the existence of patterns of discrimination against ethnic and other groups, including indigenous peoples. Discourses which in one context are innocuous or neutral may take on a dangerous significance in another: in its indicators on genocide the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech.

The position or status of the speaker in society and the audience to which the speech is directed. The Committee consistently draws attention to the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention, and has encouraged such persons and bodies to adopt positive approaches directed to the promotion of intercultural understanding and harmony. The Committee is aware of the special importance of freedom of speech in political matters and also that its exercise carries with it special duties and responsibilities.

The reach of the speech, including the nature of the audience and the means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups.

The objectives of the speech: speech protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions.

...

39. Informed, ethical and objective media, including social media and the Internet, have an essential role in promoting responsibility in the dissemination of ideas and opinions. In addition to putting in place appropriate legislation for the media in line with international standards, States parties should encourage the public and private media to adopt codes of professional ethics and press codes that incorporate respect for the principles of the Convention and other fundamental human rights standards.”

2. The Council of Europe

(a) The Committee of Ministers

37. The Annex to Recommendation no. R (97) 20 of the Council of Europe’s Committee of Ministers on “hate speech”, adopted on 30 October 1997, provides in particular as follows:

“Scope

The principles set out hereafter apply to hate speech, in particular hate speech disseminated through the media.

For the purposes of the application of these principles, the term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

...

Principle 1

The governments of the member states, public authorities and public institutions at the national, regional and local levels, as well as officials, have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur.

...

Principle 4

National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.

Principle 5

National law and practice should allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech. In this regard, these authorities should, in particular, give careful consideration to the suspect’s right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts

should, when imposing criminal sanctions on persons convicted of hate speech offences, ensure strict respect for the principle of proportionality.

Principle 6

National law and practice in the area of hate speech should take due account of the role of the media in communicating information and ideas which expose, analyse and explain specific instances of hate speech and the underlying phenomenon in general as well as the right of the public to receive such information and ideas.

To this end, national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand.”

(b) European Commission against Racism and Intolerance (ECRI)

38. The relevant passages of ECRI’s General Policy Recommendation n° 15 on combating hate speech, adopted on 8 December 2015 reads as follows:

“ The European Commission against Racism and Intolerance (ECRI):

...

Taking note of the differing ways in which hate speech has been defined and is understood at the national and international level as well as of the different forms that it can take;

Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of ‘race’, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;

...

Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions;

Recognising that the use of hate speech can reflect or promote the unjustified assumption that the user is in some way superior to a person or a group of persons that is or are targeted by it;

Recognising that the use of hate speech may be intended to incite, or reasonably expected to have the effect of inciting others to commit, acts of violence, intimidation, hostility or discrimination against those who are targeted by it and that this is an especially serious form of such speech;

...

Recognising that the use of hate speech appears to be increasing, especially through electronic forms of communication which magnify its impact, but that its exact extent

remains unclear because of the lack of systematic reporting and collection of data on its occurrence and that this needs to be remedied, particularly through the provision of appropriate support for those targeted or affected by it;

Aware that ignorance and insufficient media literacy, as well as alienation, discrimination, indoctrination and marginalisation, can be exploited to encourage the use of hate speech without the real character and consequences of such speech being fully appreciated;

Stressing the importance of education in undermining the misconceptions and misinformation that form the basis of hate speech and of the need for such education to be directed in particular to the young;

Recognising that an important means of tackling hate speech is through confronting and condemning it directly by counter-speech that clearly shows its destructive and unacceptable character;

Recognising that politicians, religious and community leaders and others in public life have a particularly important responsibility in this regard because of their capacity to exercise influence over a wide audience;

Conscious of the particular contribution that all forms of media, whether online or offline, can play both in disseminating and combating hate speech;

Recommends that the governments of member States:

10. take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly:

a. ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied;

b. ensure that the scope of these offences is defined in a manner that permits their application to keep pace with technological developments;

c. ensure that prosecutions for these offences are brought on a nondiscriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs;

d. ensure the effective participation of those targeted by hate speech in the relevant proceedings;

e. provide penalties for these offences that take account both of the serious consequences of hate speech and the need for a proportionate response;

f. monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these;

...”

39. In its “Explanatory Memorandum” ECRI provides the following clarifications:

“...

14. The Recommendation further recognises that, in some instances, a particular feature of the use of hate speech is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence,

intimidation, hostility or discrimination against those targeted by it. As the definition above makes clear, the element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.

15. Intent to incite might be established where there is an unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker. However, the existence of intent may not always be easy to demonstrate, particularly where remarks are ostensibly concerned with supposed facts or coded language is being used.

...”

III. EUROPEAN UNION LAW AND CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

40. Framework Decision 2008/913/JHA of 28 November 2008 of the Council of the European Union on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, pp. 55-58) is presented in paragraphs 82 et seq. of the judgment in *Perinçek v. Switzerland* ([GC], no. 27510/08, ECHR 2015 (extracts)).

41. In addition, in May 2016 the European Commission launched a code of conduct involving four major IT companies (Facebook, Microsoft, Twitter and YouTube) to address the proliferation of racist and xenophobic hate speech online. The aim of the code is to ensure that requests to remove content are dealt with quickly. To date the Commission has conducted five evaluations of the code of conduct and presented its results in December 2016 and June 2017, and in January 2018, 2019 and 2020. On 1 March 2018 the Commission published Recommendation (EU) 2018/334 on measures to combat illegal content online effectively (OJ L 63, 6 March 2018). Lastly, on 15 December 2020, the Commission published, *inter alia*, the draft “Digital Services Act” Regulation, with the aim of having it adopted in 2022, to enable the implementation of a new regulatory framework, introducing across the European Union a series of new harmonised obligations for digital services (COM/2020/825 final).

42. As to the case-law of the CJEU, it held in its judgment *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH* of 5 June 2018 (C-210/16, EU:C:2018: 388), that the administrator of a fan page hosted on Facebook must be characterised as being responsible for the processing of the data of individuals visiting the page and therefore shares joint liability with the operator of the social network, within the meaning of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23 November 1995, pp. 31-50).

43. In its judgment in *Fashion ID* of 29 July 2019 (C-40/17, EU:C:2019:629), it held that the manager of a website, who inserts a “like” module from the social network Facebook, may be regarded as responsible, within the meaning of Directive 95/46, for the collection and communication of the personal data of visitors to his or her website.

44. In *Glawischnig-Piesczek v. Facebook Ireland* of 3 October 2019 (C- 18/18, EU:C:2019:821), the CJEU held that Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178 of 17 July 2000, pp. 1-16), in particular Article 15(1) thereof, must be interpreted as not precluding a court of a Member State from: ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information; ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content; and ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law.

IV. TERMS OF USE OF SOCIAL NETWORK FACEBOOK

45. At the relevant time a “Statement of rights and responsibilities” governed Facebook’s relations with its users, who were deemed to agree to it upon accessing the network. It provided in particular as follows: “when you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information and to associate it with you (i.e. your name and profile picture)” (point 2.4). The statement also contained a provision on “hateful” content (replaced by “hate speech”, then “hateful speech” on subsequent amendment – cf. Part III, point 12 “Hate Speech”, in the latest version of “Community Standards”).

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

46. The applicant argued that his criminal conviction, on account of comments posted by third parties on the “wall” of his Facebook account, had breached Article 10 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Admissibility

47. Noting that this complaint is not manifestly ill-founded and is not inadmissible on any other grounds within the meaning of Article 35 of the Convention, the Court declares it admissible.

B. Merits

1. The parties’ submissions

(a) The applicant

48. The applicant submitted, by way of preliminary argument, that the domestic courts had extrapolated from the expression “kisses to [L.]” that it was directed against the partner of the deputy mayor of Nîmes and they had relied upon it in convicting him for incitement to racial hatred and discrimination, whereas L.T. had not been the subject of, or identifiable in, S.B.’s comment. He also stressed that he had not been aware, at the time of their publication, of the comments that had been posted on the “wall” of his Facebook account. He pointed out that S.B. had deleted his comments after his discussion with L.T., on the same day, and argued that he could not therefore be criticised for failing to react promptly to a publication that had materially existed for less than twenty-four hours and in respect of which L.T. had not sent him any notice to delete, even though his contact details, in his capacity as a local councillor, were in the public domain. The applicant stated that he was not a close friend of the couple, the deputy mayor of Nîmes and his partner, that he knew neither the surname nor the forename of the partner

and that she was not a public figure. Lastly, he noted that, after the comments containing the expression “kisses to [L.]” had immediately been removed by their author, S.B., only the comments posted by L.R. remained, and the latter had made no reference to L.T. The applicant concluded that his conviction had been decided in breach of the requirement of foreseeability of the law, since he had not been able to anticipate its application to the circumstances of the case.

49. The applicant further submitted that the Court’s case-law attached the utmost importance to the protection of freedom of expression in the context of political controversy, especially during an election period. L.R. had therefore been legitimately entitled to post his unseemly comments about the deterioration of the town of Nîmes during the term of office of the outgoing mayor. He also submitted that in their case-law prior to the events, the domestic courts had required much harsher language, which had to “contain an incitement or an encouragement to commit an act”. The applicant also saw in this a failure to ensure foreseeability and legal certainty.

50. By analogy with the case-law concerning the lack of liability of journalists who merely “disseminated” statements made by third parties (referring to *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, 2 February 2016), the applicant submitted that his conviction, in his capacity merely as publisher or producer, did not appear to be a necessary and proportionate restriction of his freedom to impart information, given that the authors of the impugned statements had been identified and punished. He also criticised the courts for not taking into account the fact that at no time had the person who considered herself the target of the comments asked him to delete them. In his view this would entail a strict liability potentially requiring him to close the commenting space altogether and thus entailing a chilling effect on freedom of expression.

51. Lastly, the applicant contended that by requiring him to ensure particular vigilance on account of the fact that his Facebook profile was likely to attract comments of a political nature that were in essence polemical, the courts had placed a special burden of liability upon him.

(b) The Government

52. The Government began by stating that the criminal offences provided for in the Freedom of the Press Act of 29 July 1881, where they were committed not by the written press but by an audiovisual or online means of communication, were subject, in view of the specific nature of such media, to a special system of criminal liability governed by sections 93-2 and 93-3 of Law no. 82-652 of 29 July 1982.

53. They added that Facebook pages fell within the category of online communication to the public, which was itself included in the broader category of electronic means of public communication. They emphasised that, according to the Court of Cassation and the Constitutional Council, the

“producer” was “the person who took the initiative of creating an online public communication service for the exchange of opinions on pre-defined themes”.

54. The Government acknowledged that there had been no other case-law concerning the criminal liability of an individual who owned a Facebook “wall” on account of comments posted there by third parties. They noted, however, that the Court of Cassation had previously held that the use of the Internet was covered by the phrase “any electronic means of communication to the public”, while developing case-law on the concept of “publicity”, which was established when the addressees were not linked to each other by a community of interest and the offending remarks were disseminated via a website accessible to the public (see paragraph 29 above). They further referred to two cases in which the Court of Cassation had handed down judgments relating to the criminal liability of private individuals, producers of an online public communication site enabling messages from Internet users to be accessed by the public, under section 93-3 of Law no. 82-652 of 29 July 1982 on audiovisual communication: one concerned the agent of a chain of shops (creator of a “discussion forum” on the Internet aimed at allowing non-salaried managers of the chain’s shops to express their views), who had been sued for defamation on account of comments posted on the forum (Court of Cassation, Criminal Division, 31 January 2012, Appeal no. 11-80.010); the second concerned the chair of an association for the defence of local residents of a municipality, on account of comments posted by Internet users on the personal contribution page of the association’s website (Court of Cassation, Criminal Division, 30 October 2012, Appeal no. 10-88.825).

55. The Government did not deny that the applicant’s conviction constituted an interference with the exercise of his right to freedom of expression and in particular with his right to impart information. However, they took the view that this interference was “prescribed by law”, pursued a legitimate aim and was “necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention.

56. They first pointed out that the Court had previously held that a conviction under section 24 of the Act of 29 July 1881 was “prescribed by law” within the meaning of Article 10 § 2 of the Convention (*Soulas and Others v. France*, no. 15948/03, 10 July 2008). As to whether the offence could be imputed to the applicant, they noted that the concept of producer of an online communication site, the definition of which had not changed since the Court of Cassation’s judgment of 8 December 1998, had been perfectly foreseeable and accessible to the applicant, a fact which the latter had not disputed. They took the view that the applicant was merely challenging the domestic courts’ *in concreto* assessment of the constituent elements of the offence.

57. The Government added that the applicant’s analysis of the grounds for his conviction was incorrect. In actual fact, the domestic courts had noted his

status as a politician in order to characterise him as a producer, establishing that he had deliberately chosen to set up an online communication site, and they had convicted him on the ground that he had not promptly deleted the hateful comments. His status as a politician had been noted among other evidence and facts, including his own statements about his daily consultation of the site, the fact that he could not have been unaware of the comments or the fact that he had been informed of the civil party's anger.

58. As to the legitimate aim, the Government stressed that section 24 of the Act of 29 July 1881 punished conduct which induced a feeling of hostility, rejection or hatred towards members of a community. The interference had sought to ensure the "protection of the reputation or rights of others", this being one of the legitimate aims enumerated in the second paragraph of Article 10.

59. As to the necessity of the interference, the Government noted that the issue was a novel one, while acknowledging that similar subjects had been analysed in the Court's case-law.

60. They submitted that, in view of the context of the case and the nature of the remarks made, the State had enjoyed a wide margin of appreciation. While this margin was narrower in the case of remarks made by a politician in a political or general-interest debate, this was not the case where they actually constituted hate speech.

61. They noted that the applicant had not been convicted for posting, on his Facebook "wall", comments expressing a mere political opinion on changes in the town of Nîmes, but comments that had incited hatred towards the Muslim community in general and L.T. in particular. In their view, the aim and effect of the impugned remarks had been to arouse a strong feeling of rejection and hatred towards those targets, whilst the applicant had maintained that they "remained within the limits of freedom of expression" since they contained "no call to murder or violence". In the Government's submission, the test for hate speech was not whether or not it called for murder, but whether it aroused significant feelings of rejection and hatred. The impugned statements therefore fell within the scope of hate speech, in respect of which States had a broader margin of appreciation in view of the serious consequences that such speech could have.

62. The Government further argued that, as a politician, the applicant had special "duties and responsibilities" in relation to hate speech, thus affecting the margin of appreciation to be afforded to the State.

63. As to the existence of sufficient and relevant grounds, the Government first noted the electoral context and, consequently, the fact that the Facebook "wall" was likely to receive numerous hits. L.R.'s comment had been left there even though the applicant had issued a statement urging commentators to be careful, thus showing that he had read the posts on the "wall" of his Facebook account. Therefore, the retention of L.R.'s comment, together with the warning given, could have led the reader to believe that the applicant had

not regarded it as problematic and that he was associating himself with it. His conviction had therefore been in keeping with the need to combat hate speech effectively during election campaigns.

64. With regard to the status of the person targeted by the impugned comments, they pointed out that L.T. was well known but without being a public figure. She could therefore legitimately expect not to be associated, like the Muslim community, with the alleged insecurity in the town of Nîmes.

65. The Government further submitted that the national courts, in well-reasoned decisions, had found that the remarks in question amounted to incitement to hatred. They had convicted the applicant because he had deliberately left a hateful comment on the “wall” of his Facebook account, despite being aware of its existence. The applicant had chosen to allow comments to be posted on his “wall” and to make it publicly accessible.

66. The Government pointed out that, contrary to the applicant’s submission, the case-law prior to the relevant events had not required much harsher language “containing an incitement or encouragement to commit an act”. On the contrary, according to the Court of Cassation, trial courts had to find that the impugned remarks “may incite the public to discrimination, hatred or violence against a specific person or group”, incitement already being defined as any remarks capable of inciting the public to discrimination, hatred or violence against a specific person or group.

67. The Government submitted, lastly, that the severity of the penalty was proportionate to the offence committed.

2. *The Court’s assessment*

68. The Court notes that it is not in dispute between the parties that the applicant’s criminal conviction constituted an interference with the exercise of his right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. Such interference will infringe Article 10 unless it was “prescribed by law”, pursued one or more of the legitimate aims referred to in paragraph 2 and was “necessary” in a democratic society in order to achieve the aim or aims in question.

(a) “Prescribed by law”

69. The applicant began by complaining about the lack of foreseeability of his criminal conviction, alleging a breach of the principle of legal certainty. The Court, however, agrees with the Government’s observation that the applicant merely called into question the *in concreto* assessment by the domestic courts of the elements of the offence (see paragraph 56 above). It thus notes that the applicant, who did not raise any arguments to dispute the point that the interference was “prescribed by law” within the meaning of Article 10 of the Convention in the context of his appeal on points of law (see paragraph 23 above), was in fact complaining about the assessment by the

domestic courts in the circumstances of the case (see paragraphs 48 et seq. above), this being relevant to an examination of the “necessity” of the interference and not to whether the interference was “prescribed by law”.

70. Moreover, the Court notes that the applicant’s criminal conviction was handed down mainly on the basis of section 23 first paragraph, section 24, eighth paragraph, of the Law of 29 July 1881 and section 93-3 of Law no. 82-652 of 29 July 1982 (see paragraphs 16 and 25-26 above).

71. It observes that it has previously found that a criminal conviction under sections 23 and 24 of the Law of 29 July 1881 meets the requirement of foreseeability of the law within the meaning of Article 10 of the Convention (see, among other authorities, *Garaudy v. France* (dec.), no. 65831/01, 24 June 2003; *Soulas and Others v. France*, no. 15948/03, § 29, 10 July 2008; and *Le Pen v. France* (dec.), no. 18788/09, 20 April 2010). It does not see any reason to depart from that finding in the present case.

72. The Court also notes that the applicant was prosecuted as principal, in his capacity as producer within the meaning of section 93-3 of Law no. 82-652 of 29 July 1982, in line both with the Constitutional Council’s decision of 16 September 2011 and the Court of Cassation’s case-law prior to the applicant’s conviction concerning the concept of “producer” (see paragraphs 27-29 above). Admittedly, it finds that the responsibility of a Facebook account holder on account of remarks posted on the “wall” had not previously given rise to any specific case-law. The Court would point out, however, that the novel character, particularly in the light of case-law, of the legal question thus raised does not constitute in itself a breach of the requirements of accessibility and foreseeability of the law, in so far as the solution adopted was one of the possible and reasonably foreseeable interpretations (see, *mutatis mutandis*, *Soros v. France*, no. 50425/06, § 58, 6 October 2011; *Huhtamäki v. Finland*, no. 54468/09, § 51, 6 March 2012; and *X and Y v. France*, no. 48158/11, § 61, 1 September 2016). In addition, and above all, the applicant has not called into question this legal basis in terms of the requirements of Article 10, not having raised such an objection in the context of his appeal on points of law either (see paragraph 23 above). The Court does not therefore find it necessary to address this aspect of the foreseeability of the law.

73. In those circumstances, the Court does not see any reason to find that the interference was not “prescribed by law” within the meaning of the second paragraph of Article 10 of the Convention.

(b) Legitimate aim

74. The Court finds that the measure pursued the legitimate aim of protecting the reputation or rights of others (see *Soulas*, cited above, § 30; *Le Pen*, cited above; and *Delfi AS v. Estonia* [GC], no. 64569/09, § 130, ECHR 2015).

(c) Whether the interference was “necessary in a democratic society”

(i) General principles

75. The Court would refer to the general principles for assessing the necessity of an interference with the exercise of freedom of expression, those principles having been frequently reaffirmed by the Court since the *Handyside v. the United Kingdom* judgment (7 December 1976, Series A no. 24), and restated more recently in *Morice v. France* ([GC], no. 29369/10, § 124, ECHR 2015), *Delfi AS* (cited above, §§ 131-139), and *Perinçek v. Switzerland* ([GC], no. 27510/08, §§ 196-97, ECHR 2015 (extracts), with the case-law references therein).

76. The Court thus reiterates that freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to Article 10 § 2, it applies 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.

77. The adjective “necessary” in Article 10 § 2 implies the existence of a pressing social need. In general, the “need” for an interference with the exercise of the freedom of expression must be convincingly established. Admittedly, it is primarily for the national authorities to assess whether there is such a need capable of justifying that interference and, to that end, they enjoy a certain margin of appreciation. However, the margin of appreciation goes hand in hand with European supervision, embracing both the law and the decisions that apply it.

78. In exercising its supervisory jurisdiction, the Court must examine the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it were “relevant and sufficient”. In doing so, the Court has to satisfy itself that these authorities applied standards which were in conformity with the principles embodied in Article 10 and that, moreover, they relied on an acceptable assessment of the relevant facts.

(ii) Application to the present case

79. The Court observes that the domestic courts found the applicant guilty of the offence of inciting hatred or violence against a group in general, and the individual L.T. in particular, on account of their origin or the fact of belonging, or not belonging, to a given ethnicity, nation, race or religion. The Nîmes Criminal Court, relying on the provisions of section 93-3 of the Law of 29 July 1982, as interpreted by the Constitutional Council in its decision

of 16 September 2011, found that the applicant, by taking the initiative of creating an electronic public communication service for the exchange of opinions, and by allowing L.R.’s comments to remain visible almost six weeks after they had been posted, the applicant had not promptly put an end to this dissemination and was therefore guilty in his capacity as principal (see paragraph 18 above). Subsequently, the Nîmes Court of Appeal, while upholding the first-instance judgment, noted for its part that there was no evidence that the applicant had been informed of the content of the comments before they were posted, but that in his capacity as an elected representative and public figure, which required him to be particularly vigilant, he had knowingly made the “wall” of his Facebook account public and had thus authorised his friends to post comments on it, thereby becoming liable for the content of any such posts. It also found that the applicant had not promptly stopped the dissemination of the impugned comments, while noting that he had further justified his position by claiming that such comments were compatible with freedom of expression and that he had deliberately left them on his Facebook “wall” (see paragraph 22 above).

80. In the light of the reasoning of the domestic courts, the Court must, in accordance with its settled case-law, examine whether their finding of liability on the part of the applicant was based on relevant and sufficient grounds in the particular circumstances of the case (see, in relation to a major Internet news portal, *Delfi AS*, cited above, § 142). In doing so, and in assessing the proportionality of the impugned penalty, it will consider the context of the comments, the steps taken by the applicant to remove the comments once posted, the possibility of holding the authors liable instead of the applicant and, lastly, the consequences of the domestic proceedings for the applicant (see, *inter alia*, *Delfi AS*, cited above, §§ 142-43, and *Jezior v. Poland* [Committee], no. 31955/11, § 53, 4 June 2020).

(α) Context of impugned comments

– *Nature of impugned comments*

81. The Court notes at the outset that the comments posted on the “wall” of the applicant’s Facebook account were clearly unlawful in nature (see, *mutatis mutandis*, *Delfi AS*, cited above, § 140). Both the Criminal Court, in its judgment of 28 February 2013 (see paragraph 17 above), and the Nîmes Court of Appeal, in its judgment of 18 October 2013 (see paragraph 21 above), established in reasoned decisions that: first, the impugned remarks clearly defined the group concerned, namely Muslims, and that to equate the Muslim community with delinquency and insecurity in the city of Nîmes, by associating this group with “drug dealers and prostitutes” who “reign supreme”, “riff-raff [who] sell drugs all day long” or those who throw stones “at cars belonging to ‘white people’”, sought, in meaning and scope, to arouse a strong feeling of rejection and hostility towards the group of people who

were known or presumed to be Muslims; on the other hand, the expression “Kisses to [L.]” referring to L.T., who was associated with F.P., a deputy mayor of the town of Nîmes portrayed in the comments as having contributed to the abandonment of the town to Muslims and thus to insecurity, was such as to associate her – because she was presumed, on account of her forename, to belong the Muslim community – with the alleged transformation of the town and thus to arouse hatred and violence against her personally.

82. The applicant indeed claimed that L.T. had not been the subject of S.B.’s comment and had not been identifiable (see paragraph 48 above) and that L.R.’s remarks, made in an electoral context, had not exceeded the limits of the right to freedom of expression (see paragraphs 14 and 49 above).

83. On this point, the Court reiterates that its role is limited to ascertaining whether the interference at issue in the present case can be regarded as “necessary in a democratic society” and that Contracting States enjoy, under Article 10, a certain margin of appreciation in assessing the need for and extent of an interference in the freedom of expression protected by that Article (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 59, ECHR 2012 (extracts)). This margin is defined by the type of expression in question; in this connection, there is little scope under Article 10 § 2 of the Convention for restrictions on political expression or on debate on questions of public interest (see *Perinçek*, cited above, § 197).

84. As regards the electoral context relied upon by the applicant, the Court would emphasise that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001 VIII, and *Féret v. Belgium*, no. 15615/07, § 63, 16 July 2009). However, the freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain “restrictions” or “penalties”, but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in Article 10 (see *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236, and *Féret*, cited above).

85. The Court thus reiterates that tolerance and respect for the equal dignity of all human beings are the cornerstones of a democratic and pluralistic society. It follows that, in principle, it may be considered necessary in democratic societies to penalise or even prevent all forms of expression that propagate, encourage, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued (see *Féret*, cited above, § 64).

86. The Court also attaches particular importance to the medium used and the context in which the offending remarks were disseminated, and therefore to their potential impact on public order and social cohesion (*ibid.*, § 76). The present case concerned the “wall” of a Facebook account which was freely accessible to the public and used in the context of an election campaign, representing a form of expression which was aimed at the electorate in the broad sense, and thus the entire population. As the Court has previously held, in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet, which includes blogs and social media (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, 8 November 2016), plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general (see *Delfi AS*, cited above, § 133). However, while user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression, 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 (*ibid.*, § 110; *Savva Terentyev v. Russia*, no. 10692/09, § 79, 28 August 2018; and *Savcı Çengel v. Turkey* (dec.), no. 30697/19, § 35, 18 May 2021).

87. In an electoral context, while political parties should enjoy broad freedom of expression in order to try to convince their electorate, in the case of racist or xenophobic discourse such a context may contribute to stirring up hatred and intolerance, as the positions of election candidates tend to become more rigid and slogans or catchphrases are given more prominence than reasonable arguments. The impact of racist and xenophobic discourse is then likely to become greater and more harmful (see *Féret*, cited above, § 76). The Court reiterates that the particular responsibility of politicians in combating hate speech has also been emphasised by the Committee on the Elimination of Racial Discrimination in its General Recommendation no. 35 of 26 September 2013 (see paragraph 36 above) and by ECRI in its General Policy Recommendation no. 15 (see paragraph 38 above).

88. The Court has examined the offending remarks posted by S.B. and L.R., who were not themselves politicians or active members of a political party speaking on its behalf. It considers that the domestic courts’ findings regarding these posts were fully justified. The language used clearly incited hatred and violence against a person on account of his or her religious association and this fact cannot be disguised or minimised by the electoral context (see, *mutatis mutandis*, *Féret*, cited above, § 76) or the intended reference to local problems. The Court reiterates, as a matter of principle, that inciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering certain parts of the population or specific groups thereof, or to incite hatred and violence against a person on account of his or her religious association, as was the case in the present instance, will

be sufficient for the authorities to seek to combat such xenophobic or otherwise discriminatory speech in response to freedom of expression which has been exercised in an irresponsible manner and is harmful to the dignity, or even the safety, of those parties or groups (ibid., § 73, and *Atamanchuk v. Russia*, no. 4493/11, § 52, 11 February 2020). The Court would also refer to the Explanatory Memorandum in respect of ECRI's General Policy Recommendation No. 15 of 8 December 2015 (see paragraph 39 above), according to which, in some instances, a particular feature of the use of "hate speech" is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. The element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular "hate speech" used. Intent to incite might be established where there is an unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker. However, the existence of intent may not always be easy to demonstrate, particularly where remarks are ostensibly concerned with supposed facts or coded language is being used (see also *Kilin v. Russia*, no. 10271/12, § 73, 11 May 2021).

– *The applicant's liability in respect of comments by third parties*

89. The Court would point out that the comments in question were expressed in the context of the local political debate, more specifically an election campaign for the forthcoming parliamentary elections, and that they were posted on the "wall" of the Facebook account of the applicant, an elected politician and candidate in those elections. While the Court attaches the utmost importance to freedom of expression in the context of political debate and considers that political discourse cannot be restricted without compelling reasons (see paragraph 84 above), and it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely (see *Orlovskaya Iskra v. Russia*, no. 42911/08, § 110, 21 February 2017, and *Magyar Kétfarkú Kutya Párt*, cited above, § 56), it would nevertheless refer back to its finding as to the clearly unlawful nature of the impugned comments (see paragraphs 81-88 above). Therefore, in addition to the fact that comments made in the context of political debate must not exceed certain limits, particularly as regards respect for the reputation and rights of others (see *Le Pen v. France* (dec.), no. 45416/16, § 34, 28 February 2017), in view of "the vital importance of combating racial discrimination in all its forms and manifestations" (see *Jersild v. Denmark*, 23 September 1994, §§ 30-31, Series A no. 298), the applicant's status as an elected official cannot be regarded as a circumstance mitigating his liability (see *Féret*, cited above,

§ 75). In this connection, the Court reiterates that it is crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance (see *Erbakan v. Turkey*, no. 59405/00, 6 July 2006, § 64) and, since they too are subject to duties and responsibilities under Article 10 § 2 of the Convention, they should also be particularly careful to defend democracy and its principles, especially in an electoral context characterised, as in the present case, by local tensions, their ultimate aim being to govern (see *Féret*, cited above, § 75).

90. The Court notes, moreover, that the applicant was not reproached for using his right to freedom of expression, particularly in the political debate, but for his lack of vigilance and reaction to certain comments posted on the “wall” of his Facebook account.

91. The Court observes in this connection that F.P. was precisely one of the applicant’s political opponents (see paragraphs 4-5 above) and that the events took place in a particular local political context, with clear tensions within the population, which were evident in particular from the comments at issue, but also between the protagonists.

92. The Court has previously emphasised that national authorities are better placed than the Court to understand and appreciate the specific societal problems faced in particular communities and contexts (see *Maguire v. the United Kingdom* (dec.), no. 58060/13, § 54, 3 March 2015). From this perspective, the Court considers that the Nîmes Court of Appeal’s close knowledge of the local context of the events at issue enabled it to have a better grasp of the context of the impugned comments.

93. The Court concludes from the foregoing that both the Criminal Court and the Court of Appeal based their reasoning as to the applicant’s liability on relevant and sufficient grounds under Article 10 of the Convention.

(β) Steps taken by the applicant

94. The Court notes that the Nîmes Court of Appeal held that there was no evidence that the applicant had been informed of the content of the comments before they were posted. Like the first-instance court, it thus examined the applicant’s conduct only in relation to the period after those comments appeared.

95. The domestic courts relied on a number of factors in finding the applicant liable. Both the Criminal Court and the Nîmes Court of Appeal noted first of all that the applicant had knowingly made the “wall” of his Facebook account public and had thus authorised his friends, namely 1,829 individuals as at 25 October 2011 according to the first-instance court, to post comments on it. They concluded that the applicant was therefore under an obligation to monitor the content of the comments posted. Moreover, the Criminal Court emphasised that the applicant could not have been unaware of the fact that his account was likely to attract comments with an inherently polemical political content and that he had a heightened duty to monitor them

specifically (see paragraph 18 above). The Court of Appeal considered, in the same vein, that his status as a political figure required him to be all the more vigilant (see paragraph 22 above). The Criminal Court accordingly rejected the applicant's arguments that he had not had time to read the comments and was not aware of what S.B. and L.R. had posted, while the Court of Appeal pointed out that he had told the investigators that he consulted the "wall" of his Facebook account every day.

96. The Court further notes that it is not in dispute that S.B. himself deleted the comment of which he was the author within minutes after L.T.'s arrival at his workplace, the morning after it was posted. L.T. formally acknowledged this to the investigators, stating that she had been able to see that the comment had disappeared shortly after her discussion with S.B. (see paragraph 11 above). The impugned comment, which was in fact the only one directed at L.T. and was widely relied upon by the domestic courts in their reasoning, was thus promptly withdrawn by its author, less than twenty-four hours after being posted. Accordingly, assuming that the applicant had indeed had the time and opportunity to see this comment before its deletion, the Court considers that to require him to have acted even more promptly, bearing in mind that the domestic authorities were unable to show the existence of such an obligation in the light of the particular circumstances of the case, would amount to requiring excessive and impracticable responsiveness (see, *mutatis mutandis*, *Jezior*, cited above, § 58).

97. However, the Criminal Court expressly found that L.R.'s comments, for their part, were still visible on 6 December 2011 (see paragraph 18 above), that is to say, almost six weeks after they were posted (compare *Delfi AS*, cited above, and *Pihl v. Sweden* (dec.), no. 74742/14, 7 February 2017, cases where the unlawful content remained online for six weeks and nine days, respectively; contrast *Jezior*, cited above, § 57). The Court observes that, although the applicant informed the investigators that public access to the "wall" of his Facebook account had been removed, the deletion did not take place until a few days before his interview, that is to say, approximately three months after the events (see paragraph 14 above), even though S.B. had told the gendarmes that he had informed the applicant of his altercation with L.T. on the very same day, 25 October 2011 (see paragraph 13 above). Admittedly, on 27 October 2011 the applicant also posted a message on his "wall" inviting contributors to "be careful of the content of [their] comments", but without deleting the impugned comment (see paragraph 10 above) and, in view of his statement that he had been unaware of L.R.'s remarks before being summoned by the gendarmes, without having taken the trouble to check, or have checked, the comments that were then publicly accessible.

98. In addition, in the Court's view there is, without any doubt, a shared liability between the holder of a social media account and the operator of the network (see, in the same vein, albeit concerning a fan page and not an individual account on Facebook, the CJEU judgment in *Unabhängiges*

Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH, paragraph 42 above). Moreover, Facebook's terms of use already included the prohibition of hate speech, indicating that consent to this rule was given by all users upon accessing the network (see paragraph 45 above).

99. In these circumstances, the Court is of the view that the grounds given by the Criminal Court and the Court of Appeal were, one again, in respect of the steps taken by the applicant, relevant and sufficient within the meaning of Article 10 of the Convention. It considers, moreover, that this finding is strengthened by the applicant's claims, as taken into account by the Nîmes Court of Appeal, that such comments remained within the limits of freedom of expression (see paragraphs 14 and 22 above).

(γ) Possibility of authors of comments being held liable instead

100. The Court notes that the authors of the impugned remarks were identified, whether directly by L.T., who immediately recognised S.B. (see paragraph 8 above), or by the investigators in the case of L.R. (see paragraph 12 above). It points out that the applicant was nevertheless held liable, on the basis of section 93-3 of the Law of 29 July 1982, in his capacity as the producer of an online public communications site, allowing Internet users to post publicly accessible messages and incurring liability, in particular, by failing to remove unlawful messages as soon as he became aware of them. It thus notes that, although the applicant was considered by law to be the "perpetrator" of the offence and was sentenced accordingly by the domestic courts, he had in fact been accused of conduct which was separate from that of those who actually posted the comments on the "wall" of his Facebook account. In other words, the domestic courts established the facts for which the applicant was liable and he was not prosecuted instead of S.B. and L.R., who were dealt with separately, but on account of a particular form of conduct directly linked to his status as holder of the "wall" of his Facebook account. In the Court's view, it is legitimate for such status to entail specific obligations, in particular where, like the applicant, the holder of a Facebook "wall" decides not to avail himself of the possibility of restricting access to it, choosing instead to make it accessible to the general public. Like the domestic courts, the Court considers that this is particularly true in a context which is conducive to the expression of clearly unlawful comments, as in the present case.

101. Admittedly, as advocated in the Annex to Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe on "hate speech" (see paragraph 37 above), domestic law and practice should draw a clear distinction between, on the one hand, the liability of the author of expressions of hate speech and, on the other, the potential liability of the media and media professionals who contribute to its dissemination as part of their task of imparting information and ideas on matters of public interest. In

the present case, however, the comments were clearly unlawful (see paragraphs 81-88 above) and, moreover, contrary to Facebook's terms of use (see paragraph 45 above).

102. The domestic courts therefore relied on relevant and sufficient grounds in this connection.

(δ) Consequences of domestic proceedings for applicant

103. The Court observes that the applicant was ordered to pay a fine, the amount of which was reduced by the Nîmes Court of Appeal to an amount of 3,000 euros. It reiterates that the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference (see, among many other authorities, *Leroy v. France*, no. 36109/03, § 47, 2 October 2008, and *Féret*, cited above, § 79). It takes the view that, having regard to the sentence and the fact that there were no other established consequences for the applicant, the interference with his right to freedom of expression was not disproportionate on this basis.

(ε) Conclusion

104. In conclusion, having regard to the specific circumstances of the present case, the Court finds that the decision of the domestic courts to convict the applicant, for not having promptly deleted the unlawful comments posted by third parties on the "wall" of his Facebook account, used in the context of his election campaign, was based on relevant and sufficient reasons, having regard to the margin of appreciation afforded to the respondent State. The interference may thus be regarded as "necessary in a democratic society".

105. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been no violation of Article 10 of the Convention.

Done in French, and notified in writing on 2 September 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

SANCHEZ v. FRANCE JUDGMENT

Victor Soloveytchik
Registrar

Síofra O’Leary
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Mourou-Vikström is annexed to this judgment.

S.O.L.
V.S.

DISSENTING OPINION OF JUDGE MOUROU-VIKSTRÖM

I am unable to agree with the majority in finding that there has been no violation of Article 10 of the Convention.

This case has presented us with a novel question: the criminal liability of the holder of a Facebook account in respect of messages posted by third parties on his or her “wall”. Could the applicant, as a mere holder of a Facebook account, be found criminally liable on account of comments written by third parties? To what extent was it possible to convict and sentence him for comments of which he was not the author but which were indeed recognised by the courts as being criminal in nature? The question is all the more sensitive as the person concerned is a politician and the events took place during an election campaign.

On 24 October 2011, the applicant, while mayor of Beaucaire, chair of the Front national group in the Occitanie Regional Council, and candidate in the parliamentary elections, wrote on his Facebook account a message concerning a political opponent, F.P., who was an MEP and deputy to the mayor of Nîmes.

The message, which unquestionably had a critical and ironical connotation, read as follows: “While the FN has launched its new national website on schedule, spare a thought for the Nîmes UMP MEP [F.P.], whose site, which was supposed to be launched today, is displaying an ominous triple zero on its home page ...”. The jibe about the supposed incompetence of F.P. can unambiguously be seen in this text, but it does not as such fall foul of the criminal law.

It is not in dispute that the Facebook account was not administered by anyone except its holder, namely the applicant, or that the account was accessible to the general public and was not reserved merely for the holder’s 1,829 “friends”. Thus the public nature of the account and its open access is established, even though it appears that only the “accepted friends” were able to write comments.

On the same day, 24 October 2011, two messages were posted on the applicant’s Facebook page by S.B. and L.R.

L.T., who was F.P.’s partner, filed a criminal complaint against S.B., L.R. and the applicant, taking the view that the messages were “racist” and (with specific regard to the message posted by S.B.) associated her forename, as it sounded North African, with her partner and with his municipal policy which, according to her, was presented in such a way as to arouse a feeling of rejection *vis-à-vis* Muslims.

The authors of these messages, together with the applicant in his capacity as holder of the Facebook account, were convicted with final effect by the domestic criminal courts, following a public prosecution, and fined (the applicant was ordered to pay EUR 4,000, reduced to EUR 3,000 on appeal).

In addition L.T., as civil party in the criminal case, was awarded the sum of EUR 1,000 euros, to be paid by the applicant and S.B.

The legal texts on the basis of which the applicant was convicted are section 23 first paragraph, section 24 eighth paragraph and section 65-3 of the Law of 29 July 1881, together with section 93-3 of Law no. 82-652 of 29 July 1982, providing for the offence of incitement to hatred or violence against a person or group on account of their origin or the fact of belonging or not belonging to a specific ethnicity, nation, race or religion.

The Nîmes Criminal Court and the Nîmes Court of Appeal both took the view, with reference to section 93-3 of the Law of 29 July 1982, that the applicant, even though he was not the actual author of the offending messages, had to be found liable since he had chosen to make his “wall” public and had thereby made it available for his friends to post messages that were visible to all.

Following a confrontation with L.T., S.B. deleted the impugned message on 25 October 2011, the day after its publication on the applicant’s “wall”.

The message by L.R. was, for its part, still visible on 6 December 2011, about six weeks after its publication. However, the applicant claimed, without there being any proof or even any allegations to the contrary, that he had not become aware of the impugned message by L.R. until a few days before he was summoned by the investigators, who interviewed him on 28 January 2012. Public access was removed three days before he was due to attend the police interview, which would seem to corroborate the idea that his knowledge of the impugned remarks did indeed coincide with the police summons. His reaction in removing public access was thus prompt at that point.

In this opinion I will not be analysing the merits of the conviction of the two main authors of the messages, S.B. and L.R., but will argue that the conviction of the Facebook account holder, who was found to incur specific liability, is incompatible with the requirements of Article 10 of the Convention.

In my view it is important to dissociate the facts of the present case from the position of principle as to the applicant’s liability. For even though a case is to be adjudicated *in concreto*, its scope is not limited to a case-specific solution as it has much broader significance.

The application of this “projected” or “derived” liability of the Facebook account holder is, to my mind, capable of breaching the right to free expression of commentators and account holders, especially in the case of public figures or politicians who have a large number of “friends”.

It should be noted that in the case of *Delfi AS v. Estonia* ([GC], no. 64569/09, ECHR 2015) the Court did make a clear distinction between:

- the “Delfi” website, which it defined as “a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them”, and
- other types of online fora where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum’s administrator; or a social media platform where the platform provider does not offer content and where the content provider may be a private person running the website or blog as a hobby (*ibid.*, §§ 115-16).

With reference therefore to the *Delfi* case-law, it is clear that the present applicant’s Facebook account would fall within the second category. At the very least, the reasons why the Chamber judgment departs from the framework set out in *Delfi* should have been explained by the majority here. The same liability cannot be attributed to the holder of a Facebook account as to a news portal, which invites its readers to make comments that are accessible to the general public and incidentally have commercial repercussions for the website. *Delfi* was an active host whose polemical vocation was well known; thus its awareness of the messages posted on its site were to be “presumed”. Such a set-up cannot reasonably be transposed to the user of a Facebook account, otherwise, as the dissenting judges in *Delfi* emphasised, it would be an “invitation to self-censorship at its worst”.

Moreover, the decisions of the domestic courts, supported by the finding of no violation reached by the majority in the present judgment, are not in line with the statutory prescriptions, as interpreted by the Constitutional Council, setting an important and clear reservation as to the criminal liability of the holder of a website that is open for comment.

It should be pointed out that the liability of the producer of an electronic public communication service may only be established if he or she was aware of the messages before they were posted or otherwise if he or she has failed to act promptly to remove them upon becoming aware of them.

In the present case only the comment by L.R. should raise an issue, since that of S.B. was spontaneously deleted by him within twenty-four hours. Can the holder of a Facebook account be expected to react within a few hours after the posting of a message by a third party? The applicant could not reasonably have been required to have deleted S.B.’s message within a twenty-four hour period, otherwise the obligation to react would be excessive and impracticable.

Moreover, as to the message posted by L.R., is it possible to prove that the applicant was aware of it? To establish criminal liability, any knowledge he may have had of L.R.’s message cannot be a matter of speculation or even

presumption: it requires evidence. The domestic courts, however, failed to demonstrate the existence of such knowledge, preferring to base their reasoning on a general obligation to monitor comments, particularly relying on the applicant's status as a politician.

While it is true that on 27 October, two days after L.R.'s comment, the applicant invited his "friends", in a message on his Facebook "wall", to be careful with the content of their "comments", there is nothing to suggest that he was aware of the impugned comment by L.R. He might well have been referring implicitly, when making this appeal for vigilance, to the other message that S.B. had posted and promptly deleted.

Bearing in mind that knowledge is one of the basic elements for the purpose of establishing the criminal liability of the account holder, it must be demonstrated in compliance with the rules of criminal law which – it goes without saying – have to be interpreted strictly.

Therefore, only an unequivocal message by an individual feeling offended by the comments – or simply condemning them for falling within the scope of the law on incitement to hatred – would have been such as to prove that the applicant had been aware of the impugned comments.

But no such message exists. It is not in dispute that L.T. did not seek to warn the applicant about the content of L.R.'s message, or even that of S.B.'s message.

The domestic courts based their decisions to convict the applicant on the following findings:

- The fact that the applicant, as a politician, could not have been unaware that his account would generate and encourage messages that would be in essence political and therefore polemical. (In this connection it is noteworthy that the message that the applicant himself had initially published was admittedly critical of and mocked his political opponent, but it had not been directed against any part of the population, and still less incited hatred against anyone.)
- The liability of the applicant, who had taken the initiative of setting up an electronic public communication platform and had failed to delete with sufficient rapidity the comments posted by certain "friends" that he had accepted on Facebook.

It should be noted straight away that the fact that S.B. informed the applicant of his discussion with L.T. and of the subsequent withdrawal of his message is not such as to place on the applicant a duty of heightened vigilance, extending to a presumption that he was aware of the other comments posted on his "wall".

It is important to dissociate this case from the context and even the content of the impugned remarks, in order to focus solely on the criminal liability of the Facebook account holder where he or she is, like the applicant, a public figure. The finding of no violation of Article 10 of the Convention places a very heavy burden on the account holder in terms of monitoring posts, since

he or she would otherwise face criminal prosecution. There is a risk that such a fear will cause the account holder to systematically vet and even to censor certain comments posted on his or her “wall”. In case of doubt as to the legal consequence of a comment posted by someone else, the account holder will of course be more inclined to delete or report a message by way of precaution. The chilling effect is self-evident, thus entailing a serious threat to freedom of expression.