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

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Applicant's conviction for not promptly deleting unlawful comments on Facebook did not breach his right to freedom of expression

In today's **Grand Chamber** judgment[1] in the case of Sanchez v. France (application no. 45581/15) the European Court of Human Rights held, by a majority, that there had been:

no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The application concerned 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 to delete comments posted by third parties on the "wall" of his Facebook account. The applicant alleged that his conviction had breached his right to freedom of expression under Article 10 of the Convention.

The criminal case had turned solely on the applicant's lack of vigilance and failure to react in respect of comments posted by others. It had thus raised the question of the shared liability of the various actors involved in social media. The French criminal courts, applying a "cascading liability" regime introduced by the Law of 29 July 1982, had convicted the authors for the unlawful messages together with the applicant as the Facebook account holder, being characterised as "producer".

First, the Court considered that the domestic legal framework, providing for a sharing of liability between all those involved, had been sufficiently precise, for the purposes of Article 10 of the Convention, to enable the applicant to regulate his conduct in the circumstances.

Secondly, the Court agreed with the domestic courts that the comments at issue, which had been posted in the specific context of a forthcoming election, could be classified as hate speech, when interpreted and analysed in terms of their immediate impact, and were therefore unlawful. Thirdly, it took the view that the interference with the applicant's freedom of expression pursued not only the legitimate aim of protecting the reputation or rights of others, but also that of preventing disorder or crime.

As the applicant had decided to make his Facebook "wall" publicly accessible and had "authorised his friends to post comments", in the Court's view he could not have been unaware, in view of the local tensions and ongoing election campaign around that time, that his choice was clearly not without certain potentially serious consequences.

The Court concluded, taking account of the State's margin of appreciation, that the decisions of the domestic courts had been based on relevant and sufficient grounds, with regard both to the applicant's liability, as a politician, for the unlawful comments posted by the third parties, who had themselves been identified and prosecuted as accomplices, and to the applicant's criminal conviction. The interference in question could thus be regarded as "necessary in a democratic society". There had therefore been no violation of Article 10 of the Convention.

A legal summary of this case will be available in the Court's database HUDOC (link).

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Principal facts

The applicant, Julien Sanchez, is a French national who was born in 1983 and lives in Beaucaire (France).

At the time of the events, Mr Sanchez – mayor of the town of Beaucaire and chair of the Rassemblement National (National Rally) group in the Occitanie Regional Council – was standing for election to Parliament for the Front National (FN) party in the Nîmes constituency. F.P., at that time a member of the European Parliament (MEP) and first deputy to the mayor of Nîmes, was one of his political opponents. On 24 October 2011 Mr Sanchez posted a message about F.P. on his publicly accessible Facebook "wall", which he ran personally: "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 ...".

Third parties, S.B. and L.R., added a number of comments under the applicant's post.

On 25 October 2011 Leila T., the partner of F.P., became aware of the comments. Feeling directly and personally insulted by what she viewed as "racist" remarks, she went straight away to the hairdressing salon managed by S.B., whom she knew personally. S.B., who had been unaware that the applicant's Facebook "wall" was public, deleted his comment immediately.

On 26 October 2011 Leila T. wrote to the Nîmes public prosecutor to lodge a criminal complaint against Mr Sanchez, S.B. and L.R. on account of the offending comments published on Mr Sanchez's Facebook "wall". On 27 October 2011 Mr Sanchez posted a message on his "wall" inviting users to "be careful with the content of [their] comments", but did not intervene in relation to the comments already posted.

Mr Sanchez, S.B. and L.R. were summoned to appear before the Nîmes Criminal Court in connection with the posting of the comments in question on the applicant's Facebook "wall", to answer charges of incitement to hatred or violence against a group or individual, in particular Leila T., on account of their origin or the fact of belonging or not belonging to a specific ethnic group, nation, race or religion.

On 28 February 2013 the Criminal Court found Mr Sanchez, S.B. and L.R. guilty as charged and ordered each of them to pay a fine of 4,000 euros (EUR). Mr Sanchez and S.B. were also ordered, jointly, to pay the sum of EUR 1,000 to Leila T., as civil party, in compensation for her non-pecuniary damage. The court concluded that, having set up a service for communication to the public by electronic means on his own initiative for the purpose of exchanging opinions, and having left the offending comments still visible as of 6 December 2011, Mr Sanchez had failed to act promptly to stop their dissemination and was therefore "guilty as principal offender". It found S.B. and L.R. guilty as accomplices.

Mr Sanchez lodged an appeal.

The Nîmes Court of Appeal upheld Mr Sanchez's conviction, reducing the fine to EUR 3,000. It also ordered him to pay Leila T. EUR 1,000 in costs. The Court of Appeal held that the Criminal Court had been correct in finding that the comments clearly defined the group concerned, namely persons of Muslim faith, and that associating 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. Moreover, it held that by knowingly making his Facebook "wall" public, Mr Sanchez had assumed responsibility for the content of the offending comments posted – which, according to the statements he had made to justify his position, he considered compatible with freedom of expression – and that his status as a politician required him to be all the more vigilant.

The applicant appealed on points of law to the Court of Cassation, which in a judgment of 17 March 2015 dismissed his appeal.

Complaints, procedure and composition of the Court

The applicant complained that his criminal conviction, on account of remarks posted by third parties on his Facebook "wall", had breached Article 10 of the Convention.

The application was lodged with the European Court of Human Rights on 15 September 2015.

In its judgment of 2 September 2021 a Chamber of the Court found, by six votes to one, that there had been no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

On 29 November 2021 the applicant requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 17 January 2022 the panel of the Grand Chamber accepted that request. A public hearing was held on 29 June 2022.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Marko **Bošnjak** (Slovenia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Krzysztof **Wojtyczek** (Poland),
Faris **Vehabović** (Bosnia and Herzegovina),
Egidijus **Kūris** (Lithuania),
Branko **Lubarda** (Serbia),
Armen **Harutyunyan** (Armenia),
Georgios A. **Serghides** (Cyprus),
Lətif **Hüseynov** (Azerbaijan),
María **Elósegui** (Spain),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Saadet **Yüksel** (Türkiye),
Ana Maria **Guerra Martins** (Portugal),
Mattias **Guyomar** (France),
Andreas **Zünd** (Switzerland),

and also Marialena **Tsirli**, *Registrar.*

Decision of the Court

Article 10

The Court began by noting that the applicant's criminal conviction had been handed down 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. As it had previously found, a criminal conviction under sections 23 and 24 of the Law of 29 July 1881 met the requirement of foreseeability of the law for the purposes of Article 10 of the Convention. In addition, the applicant had not substantiated his allegation that the domestic courts' interpretation had been arbitrary or manifestly unreasonable. Section 93-3 of Law no. 82-652 of 29 July 1982 was formulated with sufficient precision, for the purposes of Article 10 of the Convention, to enable the applicant to regulate his conduct in the circumstances of the present case.

The Court took the view that there was no doubt, having regard to the reasoning given by the domestic courts, that the interference pursued not only the legitimate aim of protecting the reputation or the rights of others but also that of preventing disorder and crime.

After a lengthy overview of its case-law concerning freedom of expression, political discourse, hate speech, the Internet and social media, the Court addressed the following points:

Context and nature of comments at issue

Noting that there was no universal definition of "hate speech", the Court found it necessary to examine the content of the comments at issue, which had been posted by two different authors, S.B. and L.R., particularly in the light of the grounds given by the domestic courts.

The Criminal Court had noted at the outset that the remarks had "perfectly" defined a specific group of persons, namely Muslims, and that the group was associated with objectively insulting and hurtful language, accentuating the intended assimilation between a group – taken as a whole on account of its religion – and criminality.

The Court acknowledged that L.R.'s comments had been made in a very specific context, in the run-up to an election and on the Facebook "wall" of a candidate whose ideas he supported and for whom he was actually working as campaign assistant. The author had sought to complain about the local situation in language from which the applicant did not distance himself. The Court accepted that the comments reflected a wish to complain of certain local difficulties, or even a degree of social distress that might call for a political response, besides the fact that they corresponded to the specific type of communication found on certain online portals. It reiterated nonetheless that, in an election context, the impact of racist and xenophobic discourse became greater and more harmful, particularly where the political and social climate was troubled and clear tensions existed within the population. When interpreted and assessed in their immediate context, the comments at issue genuinely amounted to hate speech. The Court thus found that the comments posted by S.B. and L.R. on the applicant's Facebook "wall" were clearly unlawful.

The political context and the applicant's specific liability in respect of comments posted by third parties

Referring to its Grand Chamber judgment in Delfi AS v. Estonia, the Court took the view that the applicant's Facebook "wall" was not comparable to a "large professionally managed Internet news portal run on a commercial basis". It thus approached the question in the light of the "duties and responsibilities", within the meaning of Article 10 § 2 of the Convention, to be assumed by politicians when they decided to use social media for political purposes, particularly to meet electoral goals, by opening publicly accessible fora on the Internet where the reactions and comments of users could be posted. The applicant was not merely a private individual and he himself had pointed out that he was using his Facebook account in his capacity as a local councillor, for political purposes and in the run-up to an election.

The Court emphasised that the applicant's initial post had not been at issue but the case had turned solely on his lack of vigilance and failure to react in respect of comments posted by S.B. and L.R. It noted that the attribution of liability for acts of third parties might vary depending on the moderation or vetting techniques applied by Internet users who were characterised by law as "producers" and who merely used social networks or accounts for non-commercial purposes. There was no consensus on this issue among the member States. The Court was of the view, however, that to engage a person's liability as "producer", within the meaning of section 93-3 of Law no. 82-652 of 29 July 1982, did not raise any difficulty as a matter of principle, provided that safeguards existed in the apportionment of such liability, which was to be applied in a context of shared liability between various actors, as was also the case for Internet hosts.

In the Court's opinion, while professional entities which created social networks and made them available to other users necessarily had certain obligations, there had to be a sharing of liability between all the actors involved, allowing if necessary for the degree of liability and the manner of its attribution to be graduated according to the objective situation of each one. In addition, the domestic courts in the present case had referred to the applicant's status as a politician and had

inferred from this that he had been bound by a special obligation. Owing to a politician's particular status and position in society, he or she was more likely to influence voters, or even to incite them, directly or indirectly, to adopt positions and conduct that might prove unlawful, thus explaining why he or she could be expected to be "all the more vigilant", to use the words of the Nîmes Court of Appeal. The Court emphasised that this finding was not to be understood as entailing an inversion of the principles established in its case-law hitherto and that the specific duties required of the applicant on account of his status as politician were indissociable from the principles relating to the rights which came with such status. The Nîmes Court of Appeal could usefully have referred to those principles in order to strengthen its reasoning.

In the circumstances of the present case, while referring to its earlier finding that the content of the comments published on the applicant's "wall" were clearly unlawful, the Court found that the Criminal Court and Nîmes Court of Appeal were best placed to assess the facts in the light of the difficult local context and their acknowledged political dimension. The Court therefore fully endorsed the Chamber's view that the language used in the comments at issue had clearly incited hatred and violence against a person on account of his or her religion and this could not be disguised or minimised by the election context or by a wish to discuss local difficulties.

Steps taken by the applicant

The Court, observing that a minimum degree of subsequent moderation or automatic filtering would be desirable in order to identify clearly unlawful comments, noted that the applicant had been free to decide whether or not to make access to the "wall" of his Facebook account public. The domestic courts had taken into account the fact that he had chosen to make it publicly accessible and had "therefore authorised his friends to post comments on it". The Court took the view that he could not be reproached for this decision in itself. Nevertheless, in view of the local and election-related tensions at the time, that option was clearly not without certain potentially serious consequences, as the applicant must have been aware in the circumstances.

The Court further pointed out that the use of Facebook was subject to the acceptance of certain terms and conditions laid down by the social network, in particular those in the "Statement of rights and responsibilities" accepted by each user. The applicant had nevertheless seen fit to draw the attention of his "friends" to the need for them to "be careful with the content of [their] comments", thus apparently showing that he had at least been aware of the issues raised by certain posts. He had not, however, deleted the comments at issue here, nor had he taken the trouble to check, or to have checked, the content of comments that were then publicly accessible. Turning more specifically to S.B.'s comment, which had been promptly withdrawn by its author less than 24 hours after being posted, the Grand Chamber accepted that the applicant could not have been required to have acted even more promptly, while noting that it had been only one of the elements to be taken into consideration in the case. Mr Sanchez had in fact been prosecuted, and ultimately convicted, not on account of the remarks made by S.B. or L.R., but for failing to proceed with the prompt deletion of all the unlawful comments posted by those authors on his Facebook "wall". Those comments had been responding to and complementing each other following the applicant's initial post, so for the Court they did not constitute a mere discussion thread but clearly a form of ongoing dialogue representing a coherent whole, and it was reasonable for the domestic authorities to apprehend the comments as such.

It could also be said that the deletion of S.B.'s message – the only one to mention Leila T. directly - had not released the applicant from liability in respect of her complaint. The Court emphasised that the applicant's liability, both criminal and civil, had not been engaged on account of any specific comment taken in isolation.

The Court further observed that the domestic courts had given reasoned decisions and had proceeded with a reasonable assessment of the facts, specifically examining the question whether the applicant had been aware of the unlawful comments posted on his Facebook "wall". The Court

found it appropriate to proceed with a proportionality analysis based on the degree of liability that might be attributed to the person concerned, whether a private individual, a local councillor and a candidate standing for election to local office, or a nationally prominent politician.

The possibility of holding the authors liable instead of the applicant

The Grand Chamber referred back to its findings on the lawfulness of the interference, from which it could clearly be seen that the acts of which the applicant stood accused were both distinct from those committed by the authors of the unlawful comments and governed by a different regime of liability. It endorsed the Chamber's finding that the applicant had not therefore been prosecuted instead of S.B. and L.R., who themselves had also been convicted.

Consequences of the domestic proceedings for the applicant

While a criminal conviction could have a chilling effect for users of social media or discussion forums, it was not to be ruled out in the case of hate speech or incitement to violence. In the present case the applicant, who could potentially have received a harsher sentence, was only sentenced to a fine of EUR 4,000 at first instance, an amount reduced to EUR 3,000 by the Court of Appeal, together with the payment of EUR 1,000 to Leila T. in respect of her costs. Moreover, there had been no other consequences for the applicant, who had not argued that he had subsequently been forced to change his conduct, or that his conviction had had a chilling effect on his freedom of expression or any negative repercussion on his subsequent political career.

Conclusion

On the basis of an assessment of the specific circumstances of the present case and having regard to the margin of appreciation afforded to the respondent State, the Court found that the decisions of the domestic courts had been based on relevant and sufficient reasons, both as to the liability attributed to the applicant, in his capacity as a politician, for the unlawful comments posted in the run-up to an election on his Facebook "wall" by third parties, who themselves had been identified and prosecuted as accomplices, and as to his criminal conviction. The interference in question could therefore be considered to have been "necessary in a democratic society". Accordingly, there had been no violation of Article 10 of the Convention.

Separate opinions

Judge Kūris expressed a concurring opinion. Judge Ravarani and Judge Bošnjak each expressed a dissenting opinion. Judges Wojtyczek and Zünd expressed a joint dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Denis Lambert (tel.: + 33 3 90 21 41 09)
Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)
Inci Ertekin (tel.: + 33 3 90 21 55 30)
Neil Connolly (tel.: + 33 3 90 21 48 05)

Jane Swift (tel.: + 33 3 88 41 29 04)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.