European Court of Human Rights: *Sanchez v. France*

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The European Court of Human Rights (ECtHR) has delivered a controversial judgment with regard to the criminal liability for posts on Facebook. It found that the criminal conviction of a politician for failing to promptly delete hate speech, posted by others, from his public Facebook account, did not violate the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

The case concerned the criminal conviction of Julien Sanchez, a politician of the radical right-wing *Rassemblement National* (National Rally— RN), who was standing for election to Parliament. Together with the two authors of the offensive comments posted on his Facebook account, Mr Sanchez was prosecuted and convicted by the French courts for incitement to hatred or violence against a group of people or an individual on the grounds of their membership of a specific religion in application of *la loi du 29 juillet 1881* (Law of 28 July 1881 on Freedom of the Press (article 23-24)) and *la loi du 29 juillet 1982 sur la communication audiovisuelle* (Law of 29 July 1982 on audiovisual communication (article 93-3)).

He was ordered to pay a fine of EUR 3000 as well as the sum of EUR 1 000 to the civil-party claimant, in compensation for non-pecuniary damage. Mr Sanchez's conviction was based on his failure to take prompt action in deleting comments containing unlawful hate speech posted by others on the wall of his Facebook account. He was found guilty as the "producer" of an online public communication site, and hence as the principal offender. The *cour d'appel de Nîmes* (Nîmes Court of Appeal) found that the offensive comments had clearly defined the group of people concerned, namely those 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 comments posted and that his status as a political figure required even greater vigilance on his part. After the *Cour de cassation* (Court of Cassation) dismissed his appeal, Mr Sanchez lodged an application with the ECtHR, submitting that his conviction had been in breach of Article 10 ECHR.

The ECtHR emphasised that it attached the highest importance to freedom of expression in the context of political debate. It considered that very strong

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reasons were required to justify restrictions on political speech and that in the run-up to an election, opinions and information of all kinds should be permitted to circulate freely. In the specific circumstances of the case, however, it found that the French courts' decision to convict Mr Sanchez had been based on relevant and sufficient reasons linked to his lack of vigilance and responsiveness. The judgment refers to the ECtHR's approach in *Delfi AS v. Estonia* (IRIS 2015-7/1) emphasising, in particular, the necessity in a democratic society to combat hate speech, and the responsibility and duty-of-care as an Internet intermediary, regarding this matter. The ECtHR stated that personal attacks by means of insults, ridicule or defamation directed at certain sectors of the population, or incitement to hatred and violence against a person on account of membership of a particular religion, are sufficient for the authorities to make it a priority to combat such behavior when faced with irresponsible use of freedom of expression that undermines the dignity, or even the safety, of the population groups or sectors in question. The ECtHR agreed with the French judicial authorities that the comments at issue were unlawful and in breach of the Facebook terms of use. The ECtHR observed that Mr Sanchez had not been criticised for making use of his right to freedom of expression, particularly in the context of political debate, but had been accused of, and convicted for, a lack of vigilance and responsiveness in relation to the comments posted on the wall of his Facebook account. Mr Sanchez had knowingly made the wall of his Facebook account public, thereby allowing his friends to post comments there. He had thus been under a duty to monitor the content of the statements published and he could not have been unaware that his account was likely to attract comments of a political nature, which by definition were polemical and should therefore have been monitored even more carefully by him. Mr Sanchez' status as a political figure required even greater vigilance on his part. As the conviction to pay a fine of EUR 3 000 was not a disproportionate sanction, the interference in question could thus be seen as 'necessary in a democratic society'. The ECtHR reached the conclusion, by six votes to one, that there had been no violation of Article 10 ECHR.

Judge Mourou-Vikström dissented. She criticised the majority's approach for not being sufficiently consistent with the ECtHR's earlier case-law on the subject of liability of Internet intermediaries, and for imposing a too high a level of liability for users' comments on a Facebook account. Most importantly, in her view, the judgment neglects the disclaimer in *Delfi AS v. Estonia*. The approach in *Delfi AS v. Estonia* only concerned the liability of a professionally managed Internet news portal, run on a commercial basis, and not "other fora on the Internet where third-party comments can be disseminated (..)'" According to the dissenting opinion, the approach and outcome in Sanchez v. France imposing strict liability on the holder of a Facebook account could lead to overbroad censoring of users' comments on Facebook and could have a chilling effect on freedom of expression on the Internet.

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This judgment is not final: at its meeting on 17 January 2022 the Grand Chamber panel of five judges decided to refer the case Sanchez v. France (application n° 45581/15) to the Grand Chamber of the European Court of Human Rights.

Arrêt de la Cour européenne des droits de l'homme, cinquième section, rendu le 2 septembre 2021 dans l'affaire Sanchez c. France, requête n° 45581/15

Judgment by the European Court of Human Rights, Fifth Section, in the case of Sanchez v. France, Application no. 45581/15, 2 September 2021

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