European Court of Human Rights (Grand Chamber) :
Sanchez v. France

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On 15 May 2023 the Grand Chamber of the European Court of Human Rights (ECtHR) has confirmed its earlier Chamber finding of 2 September 2021 in the case of *Sanchez v. France*. The ECtHR found that the criminal conviction of a politician for failing to promptly delete hate speech, that was 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 Grand Chamber of the ECtHR confirms that imposing criminal liability on internet intermediaries is capable of having chilling effects for the users of Facebook, other social networks or discussion fora. With reference to the Recommendation 1814 (2007) of the Parliamentary Assembly of the Council of Europe, the ECtHR also recognises that there is a movement in favour of decriminalising defamation. But it reiterates that this does not extend to hate speech or calls to violence: criminal prosecution, including the imposition of a prison sentence for an offence in the area of political speech may indeed be compatible with freedom of expression as guaranteed by Article 10 ECHR in exceptional circumstances, notably in the case of hate speech or incitement to violence.

The facts and essence of the domestic proceedings in this case are described in IRIS 2021-9/15 at the occasion of the reporting about the Chamber judgment, finding no violation of Article 10 ECHR. The case concerns the criminal conviction of Julien Sanchez, a politician of the radical right-wing Front National, standing for election to Parliament. Together with the two authors of offensive comments on his Facebook account, Mr Sanchez was prosecuted and finally 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 the French Law on Freedom of the Press of 28 July 1881 (article 23-24) and the Law of 29 July 1982 on audiovisual communication (article 93-3). The ECtHR noted in particular that the comments posted on Mr Sanchez's Facebook "wall", to which the public had access, were clearly unlawful, as they incited hatred or violence. The Chamber found, having regard to the margin of appreciation afforded to the respondent State, that the decision of the domestic courts to convict Mr Sanchez for not having promptly deleted the unlawful comments posted by third parties on his "wall", which he was using in support of his election campaign, had been based on relevant and sufficient grounds. Accordingly, it held that the

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interference could be considered “necessary in a democratic society” within the meaning of Article 10 § 2 ECHR.

This judgment however did not become final, as on 17 January 2022, on request of Mr Sanchez, the case was referred to the Grand Chamber of the European Court of Human Rights. In a judgment of 84 pages, including a concurring opinion and dissenting opinions expressed by four judges, the Grand Chamber, in essence, followed the reasoning and finding of the Chamber judgment, confirming Mr Sanchez’s liability in this case and his criminal conviction for not having promptly deleted the illegal incitement to hatred or violence.

The ECtHR emphasized that it attached the highest importance to freedom of expression in the context of political debate. It reiterated that there is little scope under Article 10 § 2 ECHR for restrictions on freedom of expression in the field of political speech, and that the promotion of free political debate is a very important feature of a democratic society. However, since tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society, it follows that, in principle, it may be considered necessary in certain 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. And while a degree of exaggeration, or even provocation, is permitted in political speech, remarks capable of arousing a feeling of rejection and hostility towards a community fall outside the protection guaranteed by Article 10 ECHR. Politicians and political parties can propose solutions to the problems linked to immigration, but in doing so they must avoid advocating racial discrimination and resorting to vexatious or humiliating remarks or attitudes, as such conduct might trigger reactions among the public that would be detrimental to a peaceful social climate and might undermine confidence in the democratic institutions.

The Grand Chamber judgment also refers to the ECtHR’s approach in *Delfi AS v. Estonia* (IRIS 2015-7/1) emphasizing, in particular, the necessity in a democratic society to combat online hate speech and the responsibility and duty-of-care as an internet intermediary regarding this matter. The ECtHR agreed with the French judicial authorities that the comments at issue were clearly unlawful and that Mr Sanchez was solely convicted for his lack of vigilance and failure to react in respect of these clearly unlawful comments posted by third parties. The Grand Chamber confirmed that the Internet has become one of the principal means by which individuals exercise their right to freedom of expression and that therefore interferences with the exercise of that right should be examined particularly carefully, since they are likely to have a chilling effect, which carries a risk of self-censorship. Nevertheless, the identification of such a risk must not obscure the

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existence of other dangers for the exercise and enjoyment of fundamental rights and freedoms, in particular those emanating from unlawful, defamatory, hateful or violence inciting remarks, which can be disseminated as never before. For this reason the possibility for individuals complaining of defamatory or other types of unlawful speech to bring an action to establish liability must, in principle, be maintained to constitute an effective remedy for the alleged violations. To exempt internet intermediaries or "producers" from all liability might facilitate or encourage abuse and misuse, including hate speech and calls to violence, but also manipulation, lies and misinformation. While professional entities, which create social networks and make them available to other users, necessarily have certain obligations, there should 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. When making a Facebook "wall" accessible to the general public, a politician experienced in communication to the public must be aware of the greater risk of excessive and immoderate remarks that might appear and necessarily become visible to a wider audience. The ECtHR found this "without doubt a major factual element", directly linked to the deliberate choice of Mr Sanchez, who was not only a politician campaigning in the run-up to an election but also a professional in matters of online communication strategy. Additionally, the ECtHR observes that the French courts gave reasoned decisions and proceeded with a reasonable assessment of the facts, specifically examining the question of whether Mr Sanchez had been aware of the unlawful comments posted on his Facebook "wall". Also, from a practical point of view, Mr Sanchez could have promptly deleted the clearly unlawful content. The question of the difficulties caused by the potentially excessive traffic on a politician's account and the resources required to ensure its effective monitoring, clearly did not arise in the present case. The ECtHR also accepted the possibility provided by the French law that next to the authors of hate speech, also the "producer", as an internet intermediary, could be held liable for the unlawful content posted by these authors. Finally the ECtHR found the sanction imposed on Mr Sanchez pertinent and proportionate. It noted in particular that his conviction to a fine and the payment of the cost to the civil party of all together 4.000 EUR had had no chilling effect on the exercise of Mr Sanchez's freedom of expression or any negative impact on his subsequent political career and his relations with voters.

In view of the foregoing, on the basis of an assessment in concreto of the specific circumstances of the present case and having regard to the margin of appreciation afforded to the respondent State, the ECtHR found that the decisions of the domestic courts were based on relevant and sufficient reasons, both as to the liability attributed to Mr Sanchez 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 were identified and prosecuted as accomplices, and as to his criminal conviction. The impugned interference was therefore considered to have been "necessary in a democratic society". Accordingly, the Grand

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Chamber, with thirteen votes to four, found that there has been no violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Grand Chamber, in the case of Sanchez v. France, Application no. 45581/15, 15 May 2023

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