

XVII. HATE SPEECH AND CYBERBULLYING IN BELGIUM: CRITICAL UPDATE REQUIRED

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1. ‘Censorship can never be introduced’: Belgium’s constitutional background

In Belgium, as elsewhere, the issues raised by cyberbullying and hate speech are manifold. In legal terms, they bring into play two distinct, if not opposing, principles. On the one hand, the principle of freedom of opinion and expression, which lies at the heart of our modern democracies, and from which freedom of the press also derives. On the other hand, the preservation of public order and the need to repress prohibited behaviour.

On a technical level, the emergence of new technologies, and in particular social networks, raises the question of how to adapt existing law to new practices.

First adopted in 1831, the Belgian Constitution (hereinafter: Constitution) guarantees the principle of equality before the law, as well as equality between men and women.¹ The resulting principle of non-discrimination, which is also constitutionally recognised,² applies in particular to hate speech and cyberbullying, in that it provides the basis for criminalising speech that tends to stigmatise minorities. With regard to harassment, the Constitution provides that everyone has the right to respect for his or her private and family life, subject to the conditions laid down by law.³ Generally speaking, everyone has the right

¹ Belgian Constitution, art. 10 https://www.senate.be/doc/const_fr.html

² Belgian Constitution, art. 11.

³ Belgian Constitution, art. 22.

to lead a life in keeping with human dignity, which includes a non-exhaustive list of rights, including the right to cultural and social fulfilment.⁴

Freedom of expression is mentioned in the Constitution (along with freedom of worship), which guarantees the freedom to express one's opinions in all matters.⁵ However, the same article reserves the right to punish offences committed in the exercise of this freedom. Article 25 guarantees freedom of the press and expressly excludes the establishment of censorship. This provision is of particular importance with regard to legislation on online hate speech. In a 2012 ruling, the Court of Cassation ruled that digital broadcasting was one of the processes for reproducing a text containing the punishable expression of an opinion.⁶ As a result, the digital dissemination of texts containing the punishable expression of an opinion falls within the scope of the press offence (*délit de presse*).

As we shall see below, this has an impact on the applicability of the sanctions provided for against theoretically punishable online content. Article 150 of the Constitution requires a jury to be empanelled for press offences, making the procedure tedious and costly. However, the same article excludes from this measure press offences motivated by racism and xenophobia, which makes it easier to prosecute such offences. This exception was added in 1999 to allow better application of the anti-racism law adopted previously (we will return to this subject later). The parliamentary proceedings reveal that the constitutional revision was motivated by the *de facto* impunity of press offences inspired by racism or xenophobia.⁷

To fully grasp the implications of constitutional rules on the eventual prosecution of hate speech and online harassment, it is necessary to present the general rules applicable to said offenses.

2. Hate speech and the persistence of *de facto* impunity

In this section, we will take for the first place hate speech and its prosecution in its normative context, which happens to be rather extensive, although quite fragmented as well. We will then contrast this general set of rules with the

4 Belgian Constitution, art. 23.

5 Belgian Constitution, art. 19.

6 Cour de cassation, 6 March 2012, P.11.1374.N.

7 See the introductory statement by the authors of the proposal to revise the constitution <https://www.lachambre.be/FLWB/pdf/49/1936/49K1936002.pdf>.

special rules applicable to press offences, which contributes to a considerable imbalance in the legal structure designed to criminalise hate speech.

2.1. Hate speech's splintered legal background

In Belgium, hate speech is primarily dealt with under criminal law. As seen in the previous section, the freedom to express one's opinions is a constitutionally protected principle. Freedom of expression means that speech or actions that may be perceived as offensive or hurtful are not necessarily punishable by law. However, the Constitution also provides for the possibility of punishing offences committed in the exercise of freedom of expression.

In order to distinguish between what falls within the normal exercise of freedom of expression and what falls within the scope of punishable expressions of opinion, it is necessary to delimit the scope of repressive measures relating to hate speech. To this end, Belgian legislation identifies a number of characteristics that are protected against hate speech. These characteristics are referred to as protected criteria.

The law of 10 May 2007 to combat certain forms of discrimination⁸ (anti-discrimination law) lists a number of these protected criteria:

- (a) age, sexual orientation, marital status, birth, wealth;
- (b) religious or philosophical beliefs, political convictions or trade union membership;
- (c) the language;
- (d) state of health, disability, physical or genetic characteristic;
- (e) origin or social condition.

In addition, the law of 30 July 1981 to suppress certain acts inspired by racism or xenophobia⁹ (the antiracism law) lists the following criteria:

- (a) nationality;
- (b) a so-called race;
- (c) skin color;
- (d) descent or national or ethnic origin.

⁸ Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination, art. 4 (hereinafter: Loi anti-discrimination) <http://www.ejustice.just.fgov.be/eli/loi/2007/05/10/2007002099/justel>

⁹ Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie Art. 4 (hereinafter: Loi antiracisme) <https://www.ejustice.just.fgov.be/eli/loi/1981/07/30/1981001359/justel>

Finally, the law of 10 May 2007 to combat discrimination between women and men¹⁰ (gender law) defines several complementary criteria:

- (a) gender (real or perceived);
- (b) pregnancy, medically assisted reproduction, childbirth, breastfeeding, maternity, family responsibilities;
- (c) gender identity, gender expression, sexual characteristics and medical or social transition.

These protected criteria may be real or supposed, granted on their own or by association, taken alone or in combination with one or more other protected criteria contained in one or other of the aforementioned laws.

Discrimination and incitement to discrimination are intentional offences. For there to be discrimination, there must be an intention on the part of the perpetrator to treat the victim unfavourably on the basis of one of the protected criteria; the perpetrator must act knowingly and voluntarily.¹¹ Therefore, to be punishable, hate speech must target a person or group corresponding to one of the protected criteria, and the expression must also include an incitement component. In each of the three laws cited,¹² the following behaviours are punishable:

- a) incitement to hatred or violence against a person or group meeting at least one of the protected criteria;
- b) incitement to discriminate against a person or group, or incitement to segregate a group covered by a protected criterion.

The anti-racism law also introduced three specific offences designed to punish certain types of behaviour: Holocaust denial, racial supremacism and membership of a group advocating discrimination or segregation.

Holocaust denial is defined in the law¹³ as the act of denying, grossly minimising, seeking to justify or approving facts corresponding to a crime of genocide, a crime against humanity or a war crime, established as such by a final decision handed down by an international court. In so doing, the offender knew or ought to have known that such conduct would likely expose a person, a group, a community or their members to discrimination, hatred or violence on the

10 Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes, art. 4 (hereinafter: Loi genre) <https://www.ejustice.just.fgov.be/eli/loi/2007/05/10/2007002098/justel>

11 Mouffe, 2014, p. 153.

12 Loi anti-discrimination, art. 22; Loi antiracisme, art. 20; Loi genre, art. 27.

13 Loi antiracisme, art. 20, 5°.

basis of one of the protected grounds. Belgium refuses to see this offense as a political one¹⁴. This is far from insignificant, as political offences benefit from constitutional provisions similar to those for press offences, which would make it difficult to effectively condemn such actions.

As early as 1995, a law on Holocaust denial¹⁵ made it an offence to deny, grossly minimise, seek to justify or publicly approve of the genocide committed by the German National Socialist regime during the Second World War.

Conviction for Holocaust denial carries additional penalties. It should be noted that, in accordance with the provisions of the Criminal Code,¹⁶ the law provides that the convicted person may be deprived of certain rights:

- (a) holding public office, employment or office;
- (b) eligibility;
- (c) wearing a decoration or a title of nobility;
- (d) be a juror, expert, instrumental witness or certifier in acts;
- (e) give evidence in court other than to provide information;
- (f) manufacture, modify, repair, transfer, hold, carry, transport, import, export or transit a weapon or ammunition, or serve in the armed forces.

For the offence of Holocaust denial, this additional disqualifying penalty is imposed for a period of between 5 and 10 years.¹⁷ Indeed the court may order that the judgment be published, in full or in part, in one or more newspapers, and that it be posted, at the expense of the convicted person.

The dissemination of ideas based on racial superiority or hatred is also punishable.¹⁸ The broadcaster must have the actual intention of stirring up hatred against a specific group.

In addition, membership of or collaboration with a group or association that repeatedly advocates discrimination or segregation is punishable.¹⁹ The law therefore covers two types of situations: on the one hand, intentional membership of an association or group which, in public and on several occasions, advocates discrimination or segregation according to one of the protected

¹⁴ Lambert, 2020.

¹⁵ Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale <https://www.ejustice.just.fgov.be/eli/loi/1995/03/23/1995009273/justel>

¹⁶ Code pénal, art. 31.

¹⁷ Code pénal, art. 33.

¹⁸ Loi antiracisme, art. 21.

¹⁹ Loi antiracisme, art. 22.

criteria. On the other hand, intentional collaboration with such an association or group.

For each of these types of incitement, as well as for those provided for in the anti-racism law, the expression must be public. The legislation refers to the Belgian Criminal Code (hereinafter: Code pénal)²⁰ to establish the public nature of the act in question. The act must have been carried out in one of the following circumstances:

- (a) In meetings or public places;
- (b) In the presence of several individuals, in a place that is not public, but open to a certain number of people who have the right to assemble there or frequent it;
- (c) In any place, in the presence of the offended party and before witnesses;
- (d) By printed or unprinted matter, images or emblems displayed, distributed or sold, offered for sale or exposed to public view;
- (e) By writings not made public, but addressed or communicated to several people.

The penalties are identical for all the offences mentioned above, i.e. imprisonment for between one month and one year and a fine of between fifty and one thousand euros.

Other more general offences may occasionally apply in the specific case of hate speech. These include written insults and harassment. In these cases, the discriminatory motive may constitute an aggravating factor.²¹ In Belgium, it is a punishable offence to insult someone in public by means of actions, writings, images or emblems.²² Oral insults against ordinary citizens therefore do not come under this heading. The right to lodge a complaint is reserved solely for the person who has been personally insulted.

There is therefore no single norm that covers all cases of hate speech that are punishable. This normative fragmentation has been identified as a factor complicating anti-discrimination legislation.²³ Each of the offences mentioned above is likely to fall within the definition of press offences. These are cases where a punishable expression takes the form of writing and is published using a reproduction process. The Belgian Constitution prescribes the establishment

²⁰ Code pénal, art. 444. <https://www.ejustice.just.fgov.be/eli/loi/1867/06/08/1867060850/justel>

²¹ Code pénal, art. 78 https://www.ejustice.just.fgov.be/img_1/pdf/1867/06/08/1867060850_F.pdf

²² Code pénal, art. 448.

²³ Commission d'évaluation des lois fédérales tendant à lutter contre la discrimination, 2022.

of a jury and therefore the convening of an assize (Cour d'Assise) court for press offences.

2.2 Press offense and its impact on hate speech laws' enforceability

Press offences merit a closer look because it lies at the heart of the difficulties currently encountered in the effective enforcing of criminal law in relation to incitement to hatred and related offences. To understand what justifies such a protective regime, it is useful to recall the context in which the Belgian Constitution was adopted, in 1831. The Declaration of Belgian Independence, by which the country seceded from the United Kingdom of the Netherlands in 1830, followed the Belgian Revolution in the same year. Despite the imposed and unequal nature of the union with the Netherlands, there was a degree of press freedom; however, several liberal journalists were imprisoned and exiled in 1830 for their opinions (Potter, Tielemans, Bartels, etc.). As many of them took part in the revolution only a few months later, it is hardly surprising to find that the Constitution, less than a year after the event, gave particularly wide-ranging protection to press freedom. Most of the Constituents had been revolutionaries in 1830 and they wanted to prevent a return to the attacks on the press and partisan prosecutions that had marked the Dutch regime.²⁴ By entrusting the punishment of press offences to a jury, the Constituents intended to rely on popular opinion to judge this matter. The aim was to put an end to infringements of press freedom and prevent politically motivated prosecutions.

As the Constitution provides that the press is free and that censorship cannot be established,²⁵ it is guaranteed that no action can be taken preventively: only a posteriori repression of abuses committed in the exercise of freedom of the press is possible. Finally, the principle of cascading liability (*responsabilité en cascade*) applies, whereby the liability of the author is first sought, if he or she is known and domiciled in Belgium, before that of the publisher, printer or distributor.

Hence press offences, along with political offences, constitute a separate category of offence, outside the ordinary law.²⁶ Under Belgian law, freedom of the press is subject to two limitations. The civil aspect consists mainly of the 'right of reply' (*droit de réponse*) procedure, the aim of which is to repair the damage caused to the individual. The courts' practice of imposing penalties

²⁴ Van De Kerchove et al., 2014.

²⁵ Belgian Constitution, art. 25.

²⁶ Van De Kerchove et al., 2014.

of only a symbolic one euro limits the practical scope of the civil procedure.²⁷ The right of reply is open to any natural or legal person named or implicitly referred to in a periodical.²⁸ The criminal aspect is designed to punish offences committed in the exercise of this freedom. In this respect, the privilege of jurisdiction reserved for press offences constitutes what can best be described as a special regime: it is highly unusual and significant that the Belgian Code pénal contains no provision relating to press offences. The relevant articles of the Constitution are supplemented by two contemporary texts of a regulatory nature: the decree of 19 July 1831, which re-establishes the jury,²⁹ and the decree of 20 July 1831 on the press.³⁰ Article 8 of the first decree stipulated, for example, that preventive detention could never be used for simple press offences.

One can certainly welcome the laudable intention of the authors of the Belgian Constitution of 1831 to guarantee such a fundamental democratic principle as freedom of the press. However, when we look at the scope of application and the regime applicable to press offences, we see that the legal framework is ill-suited to contemporary issues.³¹ The Court of Cassation's interpretation is both restrictive and extensive. Restrictive, because the press offence regime applies only to written material, excluding in principle all audiovisual media. Extensive, because individual writings that undoubtedly fall into the category of insult or slander benefit from the protection in principle reserved for journalists.

We therefore find ourselves today in the paradoxical situation where press offences cover activities that are clearly not journalistic in nature, while activities that are eminently journalistic are not concerned. Admittedly, the task of disentangling where journalism ends and incitement to hatred begins is by no means easy, and it is understandable that a judge is not necessarily the best person to do this. The Court of Cassation's rigorous interpretation, which often runs counter to the more pragmatic decisions of courts of first or second instance, is often seen by legal scholars as an appeal to the legislator or even the constituent. The latter will be all the more encouraged to reform the law if it leads to solutions

²⁷ Ibid.

²⁸ Loi du 23 juin 1961 relative au droit de réponse, art. 1 <https://www.ejustice.just.fgov.be/eli/loi/1961/06/23/1961062307/justel>

²⁹ Décret du 19 juillet 1831 qui rétablit le jury.

³⁰ Décret du 20 juillet 1831 sur la presse.

³¹ Rosoux, 2005.

that are manifestly contrary to common sense.³² Worse still, for reasons of cost and the complexity of the procedure, in particular the convening of a *Cour d'Assises*, in practice press offences almost never result in an actual trial: there have only been three cases since the end of the Second World War. By the end of the 1990s, the problem had become so acute that the Constitution was amended to allow cases of press offences motivated by racism and xenophobia to be tried under ordinary procedure. Without this amendment, the 1981 anti-racism law would have remained, in part, a dead letter. Until the 1999 constitutional revision, only one case had resulted in a conviction for a press offence, concerning provocation to commit racist acts.³³ However, this partial solution in turn poses a problem of breach of equality, since the victims of incitement to hatred or discrimination on any other grounds are, in practice, deprived of any means of redress to have the abuse punished. Such a discrepancy between an applicant's prospects of winning his or her case owing to the motive of hatred can hardly be seen as anything other than a clear breach of the principle of equality.

In addition, and to address more directly the central issues of this work, it is essential to note that writings published on the Internet are also covered by the provisions relating to press offences. Initially, this view was based on a concern for consistency. It was unthinkable that a printed publication of a newspaper should be protected but that the same writings, published online, should not. In 2012, the Court of Cassation therefore accepted that digital distribution constituted a process similar to printing.³⁴ Since then, the *Cour de cassation* has defined a press offence as the infringement of the rights of either society or a citizen, through the expression of a criminal thought or opinion in printed or digital (emphasis added) material that has been distributed to the public.³⁵ However, and contrary to the interpretation of the Liège Court of Appeal,³⁶ the Court of Cassation does not make the jury's jurisdiction dependent on the relevance or social importance of the published thought or opinion, or on the more or less argued or developed nature of the offending writing, or on the notoriety

32 *Cour de cassation*, 7 October 2020, P.19.0644.F The defendant, the owner of a shopping centre, was prosecuted for having posted a message on the social network accusing his local councillor of corruption, along with personal insults, including about her appearance. Contrary to the Court of Appeal, the Court of Cassation concluded that mere insults could be considered as press offences.

33 A ruling by the *Cour d'Assises de Hainaut* on 23 June 1994 sentenced the defendants to the maximum penalties provided for by the law of 30 July 1981 designed to punish certain acts inspired by racism or xenophobia.

34 *Cour de cassation*, 6 March 2012, P.11.1374.N.

35 *Cour de cassation*, 7 October 2020, P.19.0644.F.

36 *Cour d'appel de Liège*, (18e ch.), 28 May 2019.

of its author. In other words, mere insults posted on social networks may not be excluded from the protection inherent to press offences.

The results of such an interpretation are predictable: in this age of ubiquitous social networking, a hate message published on an individual's profile page is treated with the same ceremonious respect as an editorial published in a daily newspaper. This has led to a proliferation of online hate speech.³⁷ Granted, in a case from 2021, a person was convicted by the Cour d'Assises de Liège of press offences and verbal threats committed in the course of his social networking activities.³⁸ The outcome of this case might lead us to believe that the current Belgian legal system is capable of responding to the phenomenon of online hate speech³⁹. But that would be forgetting that the prospect of convening a jury for every online hate publication is simply not feasible.

The institutional players involved in preventing discrimination regularly call for constitutional reform to ensure that anti-discrimination measures are consistent and that punishable acts are effectively prosecuted. For example, in 2015,⁴⁰ 2018,⁴¹ 2021⁴² and 2024,⁴³ Unia called for a revision of article 150 of the Constitution, which establishes the jury for press offences. In the last recommendation, in the form of an open letter co-signed by 39 other anti-discrimination organisations, it was noted that the current regulations were inadequate to deal with current issues, particularly with regard to social networks.

Two proposals saw the light of day in 2021, but were unable to be adopted due to the lack of the qualified two-thirds majority required for a constitutional revision. One was to extend the existing exception for press offences motivated by racist motives to any discriminatory motive.⁴⁴ The second set out in detail all the discriminatory grounds justifying an exception to the jury principle, but

37 Hugon, 2022, p. 71.

38 Cour d'assises de Liège, 13 October 2021.

39 Carneroli, 2021.

40 Freedom of the press and incitement to hatred: a parliamentary debate on Article 150 of the Constitution <https://www.unia.be/fr/legislation-et-recommandations/recommandations-dunia/liberte-de-presse-et-incitation-a-la-haine-pour-un-debat-parlementaire-sur-larticle-150-de-la-constitution>

41 <https://www.unia.be/fr/legislation-et-recommandations/recommandations-dunia/revision-des-articles-de-la-constitution>

42 "Prosecuting hate speech is simply logical" <https://www.unia.be/fr/articles/poursuivre-les-discours-de-haine-cest-tout-simplement-logique>

43 "Let's put an end to double discrimination in our Constitution" <https://www.unia.be/fr/articles/mettons-fin-double-discrimination-dans-constitution>

44 Milecan, 2021.

also proposed, by amending article 25 of the Constitution, to extend protection of the press to all written and audiovisual media.⁴⁵

In a revision of the Constitution the stakes are particularly high, not only for the victims of hate speech, but also for the journalistic profession, for whom the prospect represents both an opportunity and a risk. An opportunity, because the distinction between the written press and other media, not provided for in the Constitution but established by case law, could be eliminated. A risk, because a reduction in protection for the press in order to combat impunity for cyberbullying could have a knockback effect on the written press, which has until now benefited from this particularly broad protection. As for the prospect of making a distinction between professional journalists, who are subject to a code of ethics, and average Internet users, in order to better protect the former, this in turn raises a series of problems, particularly in terms of legal classification. In recent years, with the rise of so-called citizen media, the dividing line between professionals and ordinary citizens has become much blurred.⁴⁶

In the absence of a solution that would allow the exceptions relating to press offences to be extended, another option being considered is to change the way the justice system works. The idea would be to maintain the jury system but to make it more effective. The idea would not be to increase the number of exceptions to press offences, but rather to strengthen and modernise the jury system, since its intervention is a fundamental democratic guarantee that dates back to 1830 but is arguably still fully justified in the 21st century.⁴⁷ It should be noted, however, that this last solution, in itself, would resolve neither the incomprehensible gap in equality that currently exists between written and audiovisual content, nor the no less puzzling legal discrepancy between racist or xenophobic motives and other discriminatory motives.

This section shows that Belgium has a fairly well-developed legislative system for combating hate speech. However, the effectiveness of this legislation is seriously undermined by the combination of constitutional provisions that are ill-adapted to technological developments and a certain rigour in the interpretation of these provisions by the courts. In practice, written hate speech enjoys almost total impunity, except where it is motivated by racism or xenophobia. In the latter case, as well as in the case of hate speech conveyed in an audiovisual medium, the ordinary law procedure applies.

⁴⁵ Milecan, 2021.

⁴⁶ Milecan, 2021.

⁴⁷ Vrielink, 2022.

2.3. *Harassment, cyberbullying and related offenses*

The offence of harassment is defined in article 442bis of the Code pénal, introduced by a law of 30 October 1998.⁴⁸ The article states that anyone who harasses a person while knowing or ought to have known that this behaviour would seriously affect the peace and quiet of the person concerned will be punished by imprisonment of between fifteen days and two years and a fine of between fifty and three hundred euros, or by one of these penalties only.

The Criminal Code provides for a number of aggravating circumstances which justify doubling the minimum penalty:

- (a) Acts of harassment are committed to the detriment of a person whose situation of vulnerability due to age, pregnancy, illness, infirmity or physical or mental deficiency was apparent or known to the perpetrator.⁴⁹
- (b) One of the perpetrator's motives is hatred, contempt or hostility towards a person because of one of the protected criteria listed in section 2 on hate speech.⁵⁰
- (c) One of the perpetrator's motives is a link (real or supposed) between the victim and a person in respect of whom the perpetrator harbours hatred, contempt or hostility for one or more of the characteristics (real or supposed) listed above.⁵¹

This legal definition therefore criminalises harassment in the broad sense. There was some discussion for a time as to whether the absence of a more precise definition in the law of the concept of harassment infringed the principle of legality in criminal matters.⁵² These discussions were definitively settled following the pronouncement of several rulings by the Court of Arbitration, now the Constitutional Court, which settled the question by giving a negative answer.⁵³

Another more specific offence is provided for in article 145. § 3bis of the law of 13 June 2005 on electronic communications: it punishes by a fine of between fifty and three hundred euros and imprisonment for between fifteen days and two years any person who uses an electronic communications network or service or other means of electronic communications in order to annoy a correspondent

48 Code pénal, art. 442bis, para. 1.

49 Code pénal, art. 442bis, para. 2.

50 Code pénal, art. 442ter, para. 1.

51 Code pénal, art. 442ter, para. 2.

52 Thevissen et al., 2022.

53 Cour d'Arbitrage, 10 May 2006, n° 71/2006; Cour d'Arbitrage, 14 June 2006, n° 98/2006; Cour Constitutionnelle, 5 May 2009, n° 76/2009.

or cause damage.⁵⁴ The restrictive wording of this offence means that it does not necessarily cover all acts of cyberbullying. The text of the law does not include the term “harassment”, however the fact of using a means of telecommunication in order to annoy a correspondent or cause damage is a concept close enough to harassment. The law is specific in that it requires the perpetrator of harassment to use technological means as one of the material conditions for the offence to be defined. The definition of these technological means is contained in article 2 of the 2005 law.

The electronic communications network is defined as the transmission systems, whether or not based on a permanent infrastructure or centralised management capability and, where applicable, switching or routing equipment and other resources, including network elements that are not active, which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile networks, systems using the electricity grid.⁵⁵

An electronic communications service is the service normally provided for remuneration via electronic communications networks and includes the following types of service:

- (a) an Internet access service;
- (b) an interpersonal communications service (e.g. messaging service);
- (c) services consisting wholly or mainly of the transmission of signals, such as transmission services used for the provision of machine-to-machine services.

In practice, this provision is aimed primarily at ‘telephone harassment’, but its scope is not limited to this: other forms of harassment committed using electronic communications are also likely to be covered. Examples include the unsolicited sending of SMS messages or emails (spamming), or the deliberate sending of computer viruses with the aim of causing damage.⁵⁶

It follows from the above that cyberbullying, insofar as it refers to harassment committed on the Internet, is not as such criminalised by a specific offence in the Criminal Code. It can take a multitude of forms, such as the creation of false profiles, the sending of harassing messages, the posting and dissemination of insulting remarks, but also compromising photos or videos, which aim to harm a person or exclude him or her from a group.⁵⁷

⁵⁴ Loi du 13 juin 2005 relative aux communications électroniques, art. 145.

⁵⁵ Loi du 13 juin 2005 relative aux communications électroniques, art. 2, 3.

⁵⁶ Leroux, 2016.

⁵⁷ Colette-Basecqz, 2018.

When harassment is committed as part of a group, the offence of participation can be applied both to harassment under the provisions of the Criminal Code and to the offence contained in the 2005 law on electronic communications. Thus, co-perpetrators and accomplices to harassment may be prosecuted in the same way as the principal perpetrator.

Under the Criminal Code, the following are considered to be co-perpetrators of a felony or misdemeanour:

- (a) Those who carry out the order or cooperate directly in its execution;
- (b) Those who, by any act whatsoever, have given such assistance to the execution of the offence that, without their assistance, the crime or misdemeanour could not have been committed;
- (c) Those who, by means of gifts, promises, threats, abuse of authority or power, machinations or culpable artifices, have directly provoked this crime or offence;
- (d) Those who, either by speeches made at meetings or in public places, or by writings, printed matter, images or emblems of any kind whatsoever, which are displayed, distributed or sold, offered for sale or exposed to public view, directly incite others to commit a crime, without prejudice to the penalties laid down by law for those who incite others to commit crimes or offences, even if these incitements are not followed up.⁵⁸

The following shall be punished as accomplices to a felony or misdemeanour:

- (a) Those who have given instructions to commit it;
- (b) Anyone who procures weapons, instruments or any other means used in the commission of a crime or misdemeanour, knowing that they were intended for that purpose;
- (c) Those who knowingly aid or assist the perpetrator or perpetrators of the crime or misdemeanour in the acts which prepared or facilitated it, or in those which consummated it.⁵⁹

The difference between a co-perpetrator and an accomplice is that the assistance is indispensable (in the first case) and accessory (in the second) to the commission of the offence. An accomplice is punished less severely than a co-perpetrator.

According to Colette-Basiecz, the act of 'liking' a publication containing disparaging remarks might be considered as participation, within the meaning of

⁵⁸ Code pénal, art. 66.

⁵⁹ Code pénal, art. 67.

the Criminal Code, if the intention to promote or encourage harassment were established. The context surrounding the facts would undoubtedly be enlightening, particularly the content of the publication and the author of the 'like'. Intentionality is decisive, as serious carelessness is not enough to constitute guilty intent.⁶⁰

The question arose as to whether acts of cyber-harassment could be considered press offences, falling within the jurisdiction of the assize court. In a ruling dated 29 October 2013,⁶¹ the Court of Cassation accepted firstly, that the broadcasting of a video on the Internet could not constitute a press offence in the case of an audiovisual work, and secondly, that the mere fact of broadcasting a single video on the Internet could constitute the repetition inherent in the offence of harassment, given the permanent and repeated effects that such broadcasting may entail through successive consultations by the Internet users.

3. Preventing hate speech and (cyber)bullying: organisations and public policies

3.1. From prevention to reparation: the role of public organisations

In Belgium, three bodies are responsible for duties related to the three laws mentioned above, aimed at combating racism and discrimination and promoting equality between women and men. These are Unia, the Federal Institute for Human Rights (Institut fédéral des droits humains – IFDH) and the Institute for the Equality of Women and Men (Institut pour l'égalité des femmes et des hommes).

Unia is an independent public institution that fights discrimination and defends equality in Belgium. Founded in 1993 under the name "Centre for Equal Opportunities and Opposition to Racism",⁶² its objective is to defend the equal and inclusive participation of all in all sectors of society and to ensure respect for human rights in Belgium. Its mission is set out in the cooperation agreement

⁶⁰ Colette-Basecqz, 2018.

⁶¹ Cour de cassation, (2nd Ch.), 29 October 2013.

⁶² Loi adaptant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme en vue de le transformer en un Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains <https://www.unia.be/files/Documenten/Documenten/Wetgeving/20130817.pdf>

between the Federal State, the Regions and the Communities. It is also designated as the independent mechanism responsible for promoting, protecting and monitoring the application of the UN Convention on the Rights of Persons with Disabilities. Its task is to defend human rights in all its missions, but also to contribute to the evaluation of Belgium in terms of respect for human rights.

As a national human rights institute, Unia defends equality and fights discrimination on the basis of protected discrimination criteria, including skin colour, national or ethnic origin, philosophical or religious beliefs, disability, age and sexual orientation. Its territorial jurisdiction extends to the whole of Belgium: Unia is an inter-federal institution. This means that it operates at federal, regional and community level.

The organisation provides individual support and guidance to people who feel discriminated against, and listens to those who witness discrimination. This includes providing a reporting form and a telephone number that can be called free of charge. The idea is to give people easy, free access to personalised help, explaining their rights and seeking a solution through negotiation or, in some cases, legal action. Unia offers training for companies and institutions wishing to set up a diversity policy, and has also created an online training course on anti-discrimination legislation. Finally, it issues advice and recommendations to organisations and authorities. As a centre of knowledge and expertise, it produces publications and statistics to inform the authorities and various bodies about discrimination and diversity.⁶³

One of the most relevant aspects of Unia's work in the fight against hate speech is the search for alternatives to prosecution by offering mediation. In many situations, particularly where hate speech posted on social networks is concerned, a pedagogical approach may be better suited to helping both the perpetrator and the victim to repair the damage caused. The aim is to open a dialogue and encourage the perpetrator to understand what is at stake and to sincerely repent of his actions.⁶⁴ For example, in 2014, a student who made antisemitic statements on a social network agreed to take a training course designed to help him deal with the consequences suffered by victims of hate speech. He also agreed to visit a museum dealing with the Holocaust in Belgium and the timeless mechanisms of group pressure and collective violence, after which he spontaneously wrote a letter of apology showing how far he had come. In return for complying with the mediation agreement, the criminal

63 <https://www.unia.be/fr/a-propos-dunia>

64 <https://www.unia.be/fr/jurisprudence-alternatives/mesures-alternatives>

proceedings against him were dropped.⁶⁵ In 2020, mediation also took place in relation to a homophobic video posted on a video-sharing website.⁶⁶

We find this approach particularly interesting, as it allows a compromise solution to be found that is satisfactory to both parties: a middle ground of sorts, between impunity and the initiation of legal proceedings, especially when the perpetrators are motivated more by ignorance than by genuine malice. Rather than aiming to moralise social life by punishing individuals who have committed an offence against a criminal law, at the end of a judicial process entirely in the hands of the judge, penal mediation gives us a glimpse of the possibility of a consensual resolution of conflicts.⁶⁷

The Federal Institute for Human Rights (IFDH) was created by the law of 12 May 2019⁶⁸ in order to provide Belgium with a National Institute for Human Rights (INDH) responsible for ensuring that international human rights standards are respected and applied. The Institute's mandate extends to all issues relating to fundamental rights that fall within federal jurisdiction, except those dealt with by sectoral bodies for the promotion and protection of human rights. The Institute's mandate covers acts and omissions by public authorities, private bodies and individuals. However, its jurisdiction is solely federal, which means that it has no jurisdiction over matters decided by the communities and regions. Its scope of action is therefore still somewhat limited, as there are currently no plans to give it the power to deal with individual complaints. Its role is therefore limited mainly to issuing opinions and recommendations, and publishing reports.

The third institution that should bear mentioning is the Institute for the Equality of Women and Men. Created by the law of 16 December 2002,⁶⁹ the Institute for the Equality of Women and Men has the task of supporting gender equality policy at Belgian federal level. The law defines its objectives as follows:⁷⁰

(a) ensure that equality between men and women is respected;

65 <https://www.unia.be/fr/jurisprudence-alternatives/mesures-alternatives/des-commentaires-antisemites-sur-facebook-a-la-convention-de-mediation>

66 <https://www.unia.be/fr/jurisprudence-alternatives/mesures-alternatives/un-film-homophobe-sur-youtube-conduit-a-une-mediation>

67 Mincke, 2010.

68 Loi du 12 mai 2019 portant création d'un Institut fédéral pour la protection et la promotion des droits humains

69 Loi du 16 décembre 2002 portant création de l'Institut pour l'égalité des femmes et des hommes https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2002121635&table_name=loi

70 Loi du 16 décembre 2002, art. 3.

- (b) combat all forms of discrimination and inequality based on a criterion protected by the law of 10 May 2007 designed to combat discrimination between women and men
- (c) develop instruments and strategies based on a gender mainstreaming approach.

In carrying out its mission, the Institute engages in dialogue and collaborates with associations, institutions, bodies and services whose activities fall, exclusively or in part, within the same field or which are immediately associated with the accomplishment of the said mission.

The law empowers the Institute to carry out the following tasks:⁷¹

- (a) to carry out, develop, support and coordinate studies and research into gender issues and equality between women and men, and to assess the gender impact of the policies, programmes and measures implemented;
- (b) make recommendations to public authorities with a view to improving laws and regulations;
- (c) organising support for associations active in the field of gender equality or projects aimed at achieving gender equality;
- (d) to assist, within the limits of its purpose, any person seeking advice on the extent of his/her rights and obligations. This assistance enables the beneficiary to obtain information and advice on how to assert his/her rights;
- (e) to take legal action in disputes relating to the legal mission of the Institute. Where the victim is an identified natural or legal person, action on behalf of that victim shall only be admissible with the victim's consent. Action by the Institute in its own name does not require the consent of an identified victim.

3.2. Prevention in schools: the case of the French Community

In terms of positive law, the prevention measures relating to harassment and cyberbullying mainly concern the sphere of education and in the workplace. Since the latter falls outside the scope of this chapter, this section will focus on prevention measures in the school system. In Belgium's federal system, education falls within the remit of the various language communities. As a result, the rules governing harassment in schools are likely to differ depending on whether we look at the legislation specific to the Flemish, Walloon or German

⁷¹ Loi du 16 décembre 2002, art. 4.

communities, or at the particular case of the Brussels-Capital Region. Rather than detailing each system with its differences and points in common, this section will limit itself to a brief presentation of the existing system for the French Community, as an example of what is practised in Belgium. The reader is invited to bear in mind that differences may exist in other communities.

In a decree dated 15 September 2022,⁷² the government of the French Community defined the guidelines and priority themes for the continuing professional development of members of the educational team in schools and members of staff in psycho-medico-social centres.⁷³ One of the priorities is to develop a positive school climate.⁷⁴ Two of the priority themes included in this guideline relate to the issue of bullying: the prevention and management of conflicts between pupils, the problems of violence and bullying, and the prevention and management/intervention of bullying (including cyberbullying).

A French Community decree was issued on 27 April 2023⁷⁵ aimed at improving the school climate and preventing harassment and cyberbullying at school.

Article 1.7.10-4 of this decree stipulates that the headteacher and the educational team must establish a procedure for reporting and dealing with school harassment and cyberbullying within the school. The aim of this procedure is to detect situations of school harassment and cyberbullying, to refer the pupils concerned and to deal with the situations detected, depending on the skills available and/or the seriousness of the situation, either within the school or with external parties. This procedure must specify the following:

- (a) how the alert is registered,
- (b) the stages in the procedure, from reporting to processing;
- (c) maximum time limits for processing the alert;
- (d) identification of contact persons.

72 Arrêté du 15 septembre 2022 du Gouvernement de la Communauté française fixant les orientations et thèmes prioritaires de la formation professionnelle continue des membres de l'équipe éducative des écoles et des membres du personnel de l'équipe pluridisciplinaires des centres psycho-médico-sociaux pour la période entre les années scolaires 2023-2024 et 2029-2030

73 Psycho-medico-social centres are public services whose aim is to help students achieve their full potential at school and in their personal and social lives; they also look after the well-being and medical care of students. See relevant legislation: <http://www.enseignement.be/index.php?page=24659&navi=2018>

74 Arrêté du 15 septembre 2022, art. 1, 18.

75 Décret du 27 avril 2023 relatif à l'amélioration du climat scolaire et à la prévention du harcèlement et du cyberharcèlement scolaires https://www.gallilex.cfwb.be/document/pdf/51612_000.pdf

The procedure is approved by the organising authority⁷⁶ and is mentioned in the school's internal rules. It is explained to pupils by a member of the educational team at the beginning of each school year. The procedure is regularly communicated by the organising authority or its delegate to all parents, all members of staff at the school and members of the multidisciplinary team at the relevant PMS centre.

The decree of 27 April 2023 creates a framework programme aimed at improving the school climate by preventing and combating school harassment and cyberbullying. It is defined as a programme of actions and support to prevent and deal with bullying and cyberbullying in schools, specific to each participating school.

The schools selected receive a variety of support under the framework programme, such as access to forums for exchanging practices between school professionals, assistance in drawing up or revising the harassment procedure mentioned above, and a range of training courses to help them understand the issues surrounding harassment.

In order to allow a degree of flexibility, the framework programme is made up of three types of action: compulsory minimum actions to be implemented by the participating schools, complementary actions left to the free choice of the schools, and finally additional actions freely proposed by the schools themselves.⁷⁷ The actions in question may be individual, include a group or be collective in nature; they may be structural but can also be ad hoc depending on the needs and issues specific to a particular establishment. However, they must involve pupils as much as possible.

The minimum mandatory actions are as follows:

- (a) Providing training on harassment and cyberbullying;
- (b) Implement conflict management tools, including at least the creation of regulated discussion forums;
- (c) Set up information sessions specifically targeting the issue of cyberbullying, as part of a preventive approach, aimed at all members of staff at the school, as well as parents and pupils;
- (d) Informing parents and pupils about the school's involvement in the framework programme and its content.

⁷⁶ In Belgium, the 'organising authority' (*pouvoir organisateur*) is the authority responsible for organising educational activities in one or more schools. Depending on the type of school (public or private, denominational or non-denominational), it may be a legal entity under public law (local authority) or private law (non-profit association). See Bouttemont, 2004.

⁷⁷ Décret du 27 avril 2023, article 1.7.10-8.

The complementary actions are as follows:

- (a) Setting up an intervention unit made up of people who are trained and authorised to intervene effectively in cases of school harassment or cyberbullying;
- (b) Implementing measures to prevent harassment and cyberbullying in schools, in line with the elements that characterise the school climate.

Additional actions freely proposed by the school are actions contributing to the prevention and management of bullying and cyberbullying at school and to improving the school climate that do not fall within the scope of the minimum or complementary actions already mentioned.

3.3. Platform liability and the case of cascading liability (responsabilité en cascade)

Pending the effective implementation of the European DSA (Digital Services Act) regulation of 19 October 2022, the liability regime for online platforms in Belgium derives from Directive (EU) 2018/1808 of 14 November 2018.⁷⁸ As media regulation falls within the remit of the linguistic communities, each community has its own regulatory authority and its own legislative text. In the case of the French-speaking community, for example, Title IV of a 2021 decree⁷⁹ sets out the provisions applicable to hate speech.

Service publishers may not publish any programme or broadcast any commercial communication that undermines respect for equality between women and men or contains or incites discrimination, hatred or violence based on sex or related criteria such as pregnancy, maternity, gender reassignment, gender expression or gender identity, or contains incitement to violence against women or domestic violence. The same prohibition applies to content containing or promoting discrimination or inciting discrimination, hatred or violence, in particular on grounds of nationality, alleged race, skin colour, descent or national or ethnic origin, age, sexual orientation, religious or philosophical belief, disability, marital status, birth, property, political conviction, language, current or

⁷⁸ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:32018L1808>

⁷⁹ Décret du 4 février 2021 relatif aux services de médias audiovisuels et aux services de partage de vidéos <https://www.csa.be/wp-content/uploads/2021/03/Nouveau-decret-SMA-du-4-fevrier-2021-Publication-au-MB.pdf>

future state of health, physical or genetic characteristic, social origin or trade union membership.⁸⁰

Any video-sharing service provider must take appropriate measures to protect users from programmes and videos created by users in the situations mentioned above.⁸¹ The measures consist firstly of including the prohibitions in the general terms and conditions of use of the video-sharing service, and making available to the user a system for notifying the video-sharing service provider, according to a simple classification, of prohibited content and informing the user of the action taken by the provider in response to this notification. The service provider must make available to the user a procedure for handling and resolving complaints relating to the implementation of the reporting procedure. It must also take media education measures to make the user aware of these measures. The video sharing service provider shall ensure that these measures are transparent, user-friendly, easy to use and effective. Any video-sharing service provider must set up an internal mechanism for settling disputes with its users. This mechanism must enable disputes to be settled impartially and must not deprive the user of ordinary means of redress. Appropriate measures must take into account the nature of the content in question, the harm it could cause, the characteristics of the category of persons to be protected and the rights and legitimate interests at stake, including those of the providers of video-sharing services and those of the users who created the content or put it online, as well as the general public interest. In accordance with a principle of proportionality, the most harmful content is subject to the strictest access control measures.

The main originality of the Belgian system in terms of liability lies once again in the specific case of press offences. Under Article 25(2) of the Constitution, where the author is identified and domiciled in Belgium, the publisher, printer or distributor cannot be prosecuted.⁸² This means that the publisher, printer or distributor, successively, escape all liability for the writings they publish and distribute, if the author is known and domiciled in Belgium. The purpose of this provision is to protect the freedom of the press and prohibit censorship. It aims to prevent press auxiliaries from being tempted, for fear of a liability lawsuit, to put pressure on authors to modify their writings, or to refuse them assistance. This constitutional rule therefore encourages publishers and distributors not to interfere in the work of journalists, and if they do interfere, they assume their share of responsibility.⁸³ By giving publishers, printers and distributors the privilege of

⁸⁰ Décret du 4 février 2021, art. 2.4-1.

⁸¹ Décret du 4 février 2021, art. 2.4-2.

⁸² Belgian Constitution, art. 25, para. 2.

⁸³ Joachimowicz, 2023.

being able to avoid all liability, both civil and criminal, when the author is known and domiciled in Belgium, it restricts the application of article 1382 of the Civil Code. It therefore constitutes an exception to the ordinary law of civil liability. According to the Court of Cassation's constant jurisprudence,⁸⁴ liability cascading liability applies both on criminal as well as civil proceedings.⁸⁵

The rule of cascading liability does not apply to providers of intermediary online services, such as internet service providers, online platforms, search engines, social networks (Facebook, X (ex-Twitter), Instagram, etc.). Under certain conditions, and for some of their activities, they benefit from a separate liability exemption regime, which is based on section 4 of a European Directive from 2000⁸⁶ (eCommerce Directive), transposed into Belgian domestic law in Book XII of the Economic Law Code.⁸⁷ The eCommerce Directive was amended by Regulation (EU) 2022 on a single market for digital services.⁸⁸ Article XII. 19 of the Code of Economic Law and Article 6 of the DSA introduce a conditional exemption from liability. The host is not liable for information stored at the request of a recipient of the service provided that it does not have actual knowledge of the unlawful activity or information, or, in the case of a civil action for damages, of facts or circumstances from which the unlawful nature appears; or that it acts promptly, as soon as it has actual knowledge, to remove the information or block access to it and provided that it immediately informs the Public Prosecutor.

The host may itself become aware of the illegal nature of the content it is hosting, or may be informed of this by a third party asking it to remove the content or block access to it. It is therefore up to the host to assess whether or not the information is illegal. If he leaves the information and it is illegal, he is liable. If he deletes it and it is legal, he infringes the freedom of expression of the author of the information. He thus takes on the role of private censor of sorts. He can also contact the content provider and ask him to voluntarily remove the illegal information.

⁸⁴ Cour de cassation, 31 May 1996.

⁸⁵ Berbuto, Thevissen, 2021.

⁸⁶ 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.

⁸⁷ Code de droit économique, art. XII.1 to XII.23 https://www.ejustice.just.fgov.be/img_l/pdf/2013/02/28/2013A11134_F.pdf

⁸⁸ Regulation (EU) No 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services.

In practice, intermediaries set up procedures for reporting abuse and confine themselves to deleting illegal content in the event of flagrant infringement of intellectual property rights or personality rights.

The absence of a general obligation to monitor does not preclude intermediaries from being subject to specific injunctions from judicial authorities, which may impose a temporary monitoring obligation on them in a specific case, where this possibility is provided for by law.⁸⁹ Thus, for example, the CJEU considers that social networks may be subject to a judicial injunction to block access to certain stored information whose content has been deemed unlawful or to remove the unlawful content. Such an injunction is not considered to impose on the social network concerned a general obligation to monitor the data it stores or to actively seek out unlawful content.⁹⁰

Under Articles 9 DSA and XII.20, § 2, of the Code of Economic Law, as soon as an injunction to take action against specific illegal content is received from the competent national judicial or administrative authorities, the intermediary is required to inform them as soon as possible of any action taken.⁹¹

Intermediaries are obliged to inform the competent judicial or administrative authorities without delay of the alleged unlawful activities of the recipients of their services, or of the alleged unlawful information supplied by them. They must also communicate to the judicial or administrative authorities, at their request, all information relevant to the investigation and establishment of offences committed through their intermediary. Judicial injunctions must strike a fair balance between the rights and interests at stake: the protection of personal data, the protection of intellectual property rights, freedom of expression and communication, including the freedom to receive information and freedom of enterprise.⁹²

Summary

Belgium has a mixed legal landscape when it comes to regulating hate speech and cyberbullying. In terms of legislation, the country has, in principle, fairly comprehensive legislation to deal with contemporary issues. Three main laws

⁸⁹ Code de droit économique, art. XII.20, § 2.

⁹⁰ CJEU, 3 October 2019, Case C-18/18 *Glawischnig-Piesczek*.

⁹¹ Code de droit économique, art. XII.20, § 2.

⁹² CJEU, 29 January 2008, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*.

were passed successively from the early 1980s to the early 2000s, and have been regularly updated since then. They aim to combat racism and discrimination and to promote equality between men and women. These laws provide a fairly comprehensive legal framework (albeit a somewhat fragmented one) to protect victims and penalise the perpetrators of hate speech and harassment, in theory at least.

In practice, the constitutional provisions relating to press offences, which were originally intended to protect press freedom, result in *de facto* impunity for a large proportion of offences. Since a constitutional reform in 1999, crimes of opinion committed with racist or xenophobic motives have been excluded from the special regime for press offences. Moreover, the concept of press offence itself has been interpreted in what might be described as an originalist way by the Court of Cassation. As a result, the audiovisual media are excluded from the constitutional protection applied to the press. Anti-discrimination bodies have regularly protested against this breach of equality, but as they have not been able to muster the two-thirds majority required for a constitutional revision, no project has yet come to fruition.

Another limitation of the current system is to be found in the federal nature of the Belgian system and its administrative fragmentation, with legislation falling within the remit of the federated entities sometimes suffering from a lack of legibility. This is particularly the case in areas such as media regulation and the prevention of bullying in schools.

At the institutional level, the country has gradually built up institutions over the last few decades to support the fight against discrimination. These tasks include producing documentation to provide information to the public authorities and to victims of discriminatory acts. The bodies that provide this information also have the task of offering alternatives to legal proceedings, which seems particularly appropriate in the case of acts that are harmful but can potentially be remedied without involving the criminal justice system.

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