

XVIII. LIBERTÉ, ÉGALITÉ... ET FRATERNITÉ? COMBATING HATE SPEECH AND CYBERBULLYING IN FRANCE, HOME OF THE ENLIGHTENMENT

PÉTER SZÓKE

Combating cyberbullying is an uphill battle which must be fought even against all odds. The evolution of the relevant French laws has so far produced an intricate web of formally *sui generis* norms which revise and update one another and the end of the road is not in sight. This reflects a reactive approach: a rapidly changing technological and social environment gives rise to a rapidly changing, increasingly complicated and detailed legal environment. In the view of this writer, French lawmakers could as well have chosen a different path: a solid, elaborate dogmatic framework provided for by the Press Act and the Penal Code with only rare amendments in case of compelling necessity so as to leave the rest to judicial practice.

1. Striking a delicate balance: hate speech in physical and virtual space

1.1. Introductory remarks: to punish or not to punish

Hate speech as such is a new category and a new offence. Different legal systems deal with it differently. Some seem hardly to bother at all. The US Supreme Court, e.g. has deduced from the First Amendment an obligation of neutrality

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between points of view, which should preclude the prosecution of hateful expressions. But the absence of penal repression does not mean passivity. Public authorities can denounce and criticize hate speech and start a counter-discourse or allow and even encourage other players to do it. And it is not penal law only that can be deployed in the fight. Administrative and civil law can furnish the state and the public with important tools. Disciplinary measures can be taken against subjects, such as professors or journalists, who abuse their position to spread hatred and contempt against segments of society. TV channels violating anti-discriminatory laws or the terms of their license can be taken off the air.¹

Interestingly, the approach of the European Court of Human Rights (ECHR) is not very dissimilar from that of the Supreme Court. The repression, even penal, of any abuse of freedom of expression should, by definition, not be problematic. However, the ECHR usually takes a different line. It sees the incrimination of an expression more often as a limitation on freedom of expression and questions its justifiability. And justification seems to be more difficult to establish when the disputed measure is of penal nature. For the ECHR, a criminal conviction is “one of the most serious forms of interference with the right to freedom of expression”.² In fact, the Strasbourg case law has shown its preference for non-penal measures, if available, against hate speech like offences.³

The ECHR is, needless to say, even more reluctant to go along with prison sentences for speech related offences. Prison sentences should in principle be excluded in matters of freedom of expression. A prison sentence for a press offence is compatible with the freedom of journalistic expression guaranteed by Article 10 of the European Convention on Human Rights only in exceptional circumstances⁴, where the impugned remarks incite the use of violence against an individual, a representative of the State or a section of the population. Today, French courts are rather cautious when it comes to condemning such speech, let alone imposing prison sentences. A conservative jurisprudence tends to require that the disputed expression be sufficiently explicit, or that it apply to all members of the group,⁵ as demonstrated by the acquittal of Éric Zemmour by the Paris Court of Appeal, to which I shall return in due course.

1 Hochmann, 2024, pp. 2–3.

2 ECHR, *Perinçek v. Switzerland*, 15 October 2015, § 273. For more recent see ECHR, *Halet v. Luxembourg*, 14 February 2023, § 150., cit. by Hochmann, 2024, p. 3.

3 Hochmann, 2024, p. 4.

4 ECHR, *Cumpăna et Mazăre v. Romania*, § 115. 17 December 2004.

5 Hochmann, 2022, p. 4.

1.2. *From Voltaire to anti-racist legislation*⁶

Many have said and written that, of the threefold constitutional motto of liberty, equality and fraternity, it is to the last to which France issuing has been able to live up the least. The country has seen not one but several bloody revolutions. But France has always been a laboratory of new ideas, a political culture in constant turmoil, a political culture honed between sharp intellectual contrasts, a world of republican patriots versus nationalist collaborators with the Third Reich, of revolutionaries versus uncompromising conservatives, a world divided between a high European culture and immigrant subcultures with varying degrees of social integration. The understanding of French legislation may also be of particular interest, as France is a cradle of the constitutional and legal guarantee of modern freedom of expression. In a 1984 decision, the Constitutional Council (Conseil constitutionnel) affirmed that freedom of expression is fundamental, precious not only in its own right, but also as the guarantee of other human and civil rights, and even of national sovereignty.⁷ Thinkers of the French Enlightenment played a pioneering role in the development of the concept and in the recognition of freedom of expression and opinion as a fundamental right, the universality of which would be difficult to contest. The passionate attitude of the French towards the right to freedom of expression is well illustrated by the bon mot attributed to Voltaire, although perhaps apocryphal: 'I disapprove of what you say, but I will defend to the death your right to say it'.

The French constitutional basis for action against hate speech is still founded on the balance already struck in the Declaration of the Rights of Man and of the Citizen, which forms part of the current Constitution.⁸ Nowhere is, for that matter, a definition of hatred in French law to be found. So the legislator targets hatred without ever defining it. The specificity of this legislation is that the important substantive provisions relating to criminal liability are not exclusively, or even primarily, contained in the Penal Code (Code pénal),⁹ but in the 1881 Act on the Freedom of the Press¹⁰ ('Press Act') and subsequent legisla-

6 For a brief historical overview of French legislation on freedom of expression, see Vilard, 2001, pp. 137–148.

7 Cons. const., Oct. 10–11, 1984, no. 84–181 DC.

8 Constitution du 4 octobre 1958.

9 Penal code. In French law, the major codes have no number. Some codes are not codifications but compilations, i.e. a constantly evolving collection of the main rules in force in a given field of law. The drafting of this chapter encountered a particular difficulty: we had to decide in each case whether to give as the legal reference the relevant provision of the basic law, such as the Penal Code, or the law which amended it, or both.

10 Loi du 29 juillet 1881 sur la liberté de la presse.

tion, which has become necessary due to the emergence of new media and the changes in the social fabric of the nation.

Chapter IV of the Press Act is entitled ‘Crimes and offences committed through the press or any other means of information’.¹¹ Article 29 defines two basic offences: defamation (diffamation) and insult (injure). Defamation is ‘any allegation or imputation of a fact that is prejudicial to the honour or reputation of the person or body to which the fact is imputed..... The direct publication or reproduction of this allegation or imputation is punishable, even if it is made in ambiguous (dubitative) form or if it refers to a person or body not expressly named, but whose identification is made possible by the terms of the incriminated speeches, cries, threats, writings or printed matter, placards or posters’. Insult is ‘any offensive (outrageante) expression, term of contempt or invective that does not imply the imputation of any fact’. The distinction is, therefore, possible by the presence or the absence of a statement of or reference to a fact. This implies the *exceptio veritatis* principle developed by French case law. If the accused can prove that he acted in good faith, reasonably believing that the contested statement was true, then he may see the charges against him dropped. Needless to say that the case law struggles to set standards by which the exception of truth can be established.¹² Both insult and defamation have to be committed in public to trigger criminal prosecution. If they are committed in private, they may constitute a mere contravention subject to an administrative sanction, possibly a fine. In 2013, e.g. the French Supreme Court (Cour de Cassation) ruled that an employee’s remarks posted on Facebook against his superior, however offensive they might be, did not constitute a public insult if the viewership of the post is restricted to the ‘Facebook friends’ of the offender.¹³

The amendments to the Press Act reflect the changes that have taken place in the norms governing criminal responsibility for opinions over the last one hundred and forty years. It is worth recalling a rare episode from the legal history of interwar Europe. While some other European countries were passing anti-Jewish laws, the Daladier government attempted to combat racist propaganda with a decree-law promulgated on April 21, 1939. This was the ‘Marchandeau Decree’, which amended the Press Act, punishing with imprisonment anyone seeking to discredit (defamation) a person or group of people on the grounds of their race or religion, in order to excite hatred against them among

11 On some occasions, the Penal Code itself refers to it, e.g. in Article 132-76.

12 The fact has to be precise for the court to establish responsibility for defamation. Letteron, 2023, pp. 525-532 cites extensive case law on insult and defamation based on article 29 of the Press Act.

13 Civ. 1ère 10 avril 2013 cit. in Letteron, 2023, p. 525.

citizens or the general public.¹⁴ The term ‘race’ appeared for the first time in French law; however, unlike elsewhere in Europe, the French legislator’s intention was not to persecute but to protect an embattled minority then. It was in the same spirit that Article 1 para 1 of the 1958 French Constitution mentions again ‘race’: in fact, it guarantees the ‘equality without distinction on the basis of origin, race or religion before the law’. After the Second World War, France adopted its first ‘anti-racist’ legislation as early as 1972, way ahead of other European countries. It is commonly known as the ‘Pleven Law’.¹⁵

The French lawmakers have chosen to reaffirm and apply the traditional freedom of expression to cyberspace by way of a *sui generis* new legislation, instead of adapting the Press Act and the Law on Audio-visual Communication¹⁶ to the new realities. In 1986, Article 1 of the Léotard Law declared that ‘communication to the public by electronic means is free’; the same article makes it clear that the purpose of the law is to apply the freedom of expression to cinema, radio and television.¹⁷ Soon, the legislator found it necessary to extend the scope further still, i.e. to the Internet. Once again, he did this not by way of amendments but of new legislation, namely by Act 2004-575 on confidence in the digital economy (LCEN).¹⁸ Its Article 1 repeated the principle of the freedom of expression in online communications. However, both laws, in their respective first articles, drew limits: ‘The exercise of this freedom may be limited [...] by respect for human dignity, the freedom and property of others and the pluralist nature of the expression of schools of thought and opinion and, on the other hand, by the protection of public order, national defence requirements, public service requirements, the technical constraints inherent in the means of communication and the need for audio-visual services to develop audio-visual production.’¹⁹

14 ‘...exciter à la haine entre les citoyens ou les habitants’. The original text of the legislation is not available on Légifrance, the official data base of French legislation but only on Gallica, which archives official journals: <https://gallica.bnf.fr/ark:/12148/bpt6k6550948q/f3.item#>.

15 Loi n° 72-546 du 1 juillet 1972 relative à la lutte contre le racisme. Pleven was the Minister of Justice who proposed the draft. In France, laws are often and informally named after the person who proposed the draft.

16 Loi n° 82-652 du 29 juillet 1982 sur la communication audiovisuelle.

17 Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard).

18 Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique.

19 This is in line with the Declaration of the Rights of Man and of the Citizen: freedom is enshrined and guaranteed, but within the limits set by the law. The latter is the origin of Liberty, its source and its limit that form, all rolled up into one, the French concept of *légicentrisme*. It means that the law is central and perfect as the expression of the general will. At least, it was regarded as such until 1958, the creation of the Constitutional Council, which alone has the power of check and sanction laws against the Constitution.

1.3. New minorities: extending protection in post-colonial France

However, the Marchandeu decree, which was repealed in 2011, had proved inadequate to deal with the new tensions. For one thing, it was difficult to enforce in the courts. It was never easy to prove that incitement to hatred was the purpose of committing an act, so the courts seemed ready to tolerate a ‘moderate racism’ of sorts. Thus, e.g., in 1952, a few years after the Holocaust, a Paris court acquitted a man who had called for ‘just laws against the exploitative activities of the Jews against our people’ and for ‘moderate and reasonable anti-Semitism’.²⁰ After the Algerian civil war and the liberation of the French colonies, the proportion of people of North African and sub-Saharan origin in the French population increased, and with it the atrocities, discrimination and even crimes against them. Among the perpetrators were far-right groups opposed to Algerian independence, paramilitary groups, but also ordinary citizens: concierges, landlords, cab drivers, gendarmes, etc. On the other hand, civil rights campaigners would demand decisive action from the state to protect minorities, claiming that racially-motivated or xenophobic crimes often went unpunished; in other words, there was a suspicion that racism had contaminated the justice system and had become endemic.²¹ Prior to the adoption of the Pleven Law, there was an extensive public debate on the appropriateness of a distinction between specific categories of victims and on the necessity of adopting a *lex specialis*. Sceptics asked whether it would not violate the principle of equality if the legislator were to tell the judge how to interpret a crime committed against members of a particular ethnic or religious group, while for other groups the general rules of criminal law would continue to apply. The turning point came after France ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted by the UN General Assembly in 1965, and the ensuing legislative obligation. The Pleven Law of 1972²² added an anti-racist clause to Article 24 of the Press Act, prohibiting discrimination and incitement to hatred or violence on ethnic, national, racial or religious grounds. It punishes with up to one year in prison and/or a fine anyone who ‘incites discrimination, hatred or violence against a person or group because of their origin or because they belong or do not belong to a particular ethnic group, nation, race or religion’. In this case, the behaviour itself is criminal, even if not ‘effective’, i.e. the incitement is not followed by action.²³ Of course, the incitement can be effective and

20 Hochmann, 2022, p. 2.

21 Brahim, 2020, pp. 237–270.

22 Loi n° 72-546 du 1er juillet 1972 relative à la lutte contre le racisme.

23 Pleven Law Art. 1.

successfully provoke someone to commit a racially motivated crime or offence. In this case, the wrongdoer will be punished as accomplice to the action classified as crime or offence under the Penal Code and the severity of the punishment will vary accordingly. The provocation must happen 'either by speeches, shouts or threats uttered in public places or gatherings, or by writings, printed matter, drawings, engravings, paintings, emblems, images or any other means of any other written, spoken or pictorial material sold or distributed, offered for sale or exhibited in public places or by placards or posters exposed to public view'; it is also necessary that the employment of the aforementioned means will have 'directly provoked the perpetrator or perpetrators to commit the said action', if the action was actually carried out.²⁴ It is clear that the establishment of direct causality is required, i.e. the incitement must inevitably lead to the action. The Pleven Law added the definitions of 'racially motivated insult' and 'defamation', making these two specific offences subject to public prosecution, contrary to the general statutory provisions on insult and defamation, classified as private offences.²⁵

One of the key achievements of the Pleven Law was to allow certain NGOs accredited and registered to combat racism and discrimination to exercise the rights of a private party in ongoing criminal proceedings, with the consent of the victim.²⁶

Yet, not even the Pleven Law did fully meet the expectations. The application of the law was uncertain. Social pressure did not abate, and street demonstrations followed one another: e.g., an association of mothers of the victims of racist crimes organized a mass rally in the spring of 1984 to demand that anti-racist legislation be maintained and, in general, that both lawmakers and law enforcement agencies take tougher action. In the end, they obtained but minor concessions. Law 85-10 of 1985 on certain social provisions went only as far as to widen the scope of NGOs eligible as private parties in criminal proceedings for racist offences.²⁷

The 1980s were marked by an increase in atrocities committed against mainly Arab and African immigrants, but also by a rise in anti-Semitic demonstrations towards the end of the decade. Lawmakers were first confronted with the phenomenon of Holocaust denial after far-right politician Jean-Marie Le Pen

²⁴ Pleven Law Art. 2; Penal Code Art. 121-7.

²⁵ Pleven Law art. 3,4, art. 5. Para I. The more stringent punishment in case of racial motives is also backed by art. R625-8 of the Penal Code.

²⁶ Ibid. art. 5 para II.

²⁷ Loi n° 85-10 du 3 janvier 1985 portant diverses dispositions d'ordre social; Brahim, 2020, p. 6.

referred to the gas chambers as a ‘detail’ of the Second World War.²⁸ The fight against Holocaust revisionism led to the adoption of the Gayssot Law,²⁹ the purpose of which was to suppress racist, anti-Semitic and xenophobic expressions. This law further amended the Press Act and the Penal Code. It introduced the criminal offence of Holocaust denial — a move that remains controversial to this day. Its critics argue that codifying a particular reading of history violates freedom of expression and, by distinguishing the Shoah from other genocides, may compromise the principle of equality. But in 2015 the Constitutional Council rejected both of these criticisms. On the one hand, it found that denying or minimizing the atrocities committed during the Second World War and crimes against humanity condemned as such by international criminal tribunals and French courts constituted racist and anti-Semitic incitement in itself, and on the other, that the text of the norm as intended by the legislator would in no way restrict historical debate. Holocaust denial is an abuse of freedom of expression, and the legislative instrument chosen to prevent it constitutes an appropriate and proportionate restriction on that freedom. The special provisions on Holocaust denial are justified not only by its seriousness but also by its special place in previous national and international legislation and case law: perpetrators of the Holocaust had been tried and the nature and character of their crimes clarified by international and French courts.³⁰ It is interesting to note, however, that the United Nations Human Rights Committee (UNHRC) had already gone further sixteen years earlier in *Faurisson v. France*. It concluded that a challenge to the infallibility of the International Tribunal of Nuremberg would not in itself have created a sufficient basis for restricting freedom of expression; the decisive argument to convince the UNHRC was that Faurisson, who had been convicted in France under the Gayssot Law, had expressed his revisionist views not as a researcher, in an academic debate, but through hate speech.³¹

The ensuing debate focused on the appropriateness of introducing racist, anti-Semitic and xenophobic motives as a general aggravating circumstance in penal law. Legislators hesitated for a long time, but at the turn of the millennium the situation became so serious that they felt compelled to act. Once again, some external causes were to blame for the rise in racial and ethnic antagonism: the escalation of tensions in the Middle East, the terrorist attacks on 9/11 and

28 Available: <https://www.dailymotion.com/video/x2m2xr4>

29 Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe.

30 Decision no. 2015-512 QPC du 8 2016.

31 Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996). Available at: <http://hrlibrary.umn.edu/undocs/html/VWS55058.htm>; Kondorosi, 2015, p. 83.

the wars launched by the United States and its allies in response, radicalized certain sectors of the French Muslim minority, but also the anti-immigration political movements. Two deputies from the Gaullist ruling party in the National Assembly declared that the frequency and nature of anti-Semitic and Islamophobic incidents were already reminiscent of the atmosphere of the interwar period.³² It was also during these years that the European Union took an interest and adopted legislation to combat racism, xenophobia and anti-Semitism. Law no. 2003-88³³ finally introduced ethnic, national, racial or religious hatred as a general aggravating circumstance in the Penal Code. The existence of an aggravating circumstance may be established by the court if the wrongdoing is preceded, accompanied or followed by a verbal, visual, material or other manifestation that offends the honour or consideration of the victim because of his or her belonging or not belonging to a particular ethnic group, nation, race or religion. The relevant provision of the law establishes categories according to the punishments threatening the general offences and defines the measure of the aggravation of the punishment in each category if the offence is accompanied by an expression of racial hatred. Thus, e.g., 30 years' imprisonment is changed to life, 20 years to 30 years in prison, etc.³⁴ In January 2017, in a separate article sex, sexual orientation or gender identity were added to the catalogue. The tendency is clear: the lawmaker wants to take an increasing number of minorities under his protective umbrella.³⁵

1.4. New fronts open up: the battle continues in cyberspace

As we have seen, the Press Act has been continually updated over the decades. As a result, it is increasingly pointless to distinguish between offline and online means of combating hate speech. The current wording of the Press Act already extends the scope of the law to journalists publishing on the Internet³⁶. In general, it is safe to say that there is no such thing as *sui generis* cybercrime, but only crimes and offences committed via the Internet. Most of these were known before the advent of the Internet, but there are types of crimes that are easier to commit in cyberspace. Thus, the Internet is just the 'medium', nothing more and nothing less.³⁷

³² Brahim, 2020, p. 10.

³³ Loi n° 2003-88 du 3 février 2003 visant à aggraver les peines punissant les infractions à caractère raciste, antisémite ou xénophobe.

³⁴ Penal Code art. 132-76.

³⁵ Penal Code art. 132-77.

³⁶ Press Act art. 2.

³⁷ Letteron, 2023, p. 532.

An important legislation in the fight against hate content in cyberspace is the LCEN. It contains basic provisions on the possibilities for co-operation and action against hateful content, and the liability of content providers and online platform operators. The most important rules are set out in Article 6 of the LCEN and its supplements. The legislator has regulated material on three levels. Firstly, he has defined the civil and criminal liability shared between the Internet service provider (ISP, *hébergeur*) and the content publisher (*éditeur*). Secondly, he has defined and sanctioned situations and behaviours in which hateful content constitutes a threat to public order. In such cases, the norm imposes a duty of vigilance on the ISP. The third layer or level targets particularly serious offences such as child pornography or terrorism.

The lawmakers now considered this legislation outdated — there were no smartphones or social media at the time of its adoption — and moved to strengthen liability by passing the Avia Law in 2020.³⁸ The Avia Law would have imposed stricter responsibilities and obligations on operators of online platforms and search engines to remove hate content almost immediately after an alert. This rule never entered into force as the Constitutional Council declared all but one provisions of the Avia Law unconstitutional. Eventually, a new legislation to address constitutional concerns was passed in August 2021. This was the Law Reaffirming Respect for the Principles of the Republic,³⁹ which sought to draw the consequences from the fiasco of the Avia Law. The original aim of this law was to combat separatism, which is why it is referred to in the literature as ‘Separatism Act’.⁴⁰ Title I aims to guarantee coherence with the principles of the Republic and the minimum requirements of social life. Its provisions include rules on hate speech and harmful content on the Internet. The provisions of Chapter IV are so comprehensive that they are often regarded as ‘a law within a law’.⁴¹ It amends the Penal Code, the Code of Criminal Procedure, the Press Act, the Léotard Law, the LCEN and the Code of Education.⁴²

The lawmakers wanted to react to terrorist and hate crimes that were threatening the constitutional order, such as the attack on the editorial office of *Charlie Hebdo*, or the murder of high school teacher Samuel Paty in broad daylight in the fall of 2020. Mr. Paty had been targeted by Muslim extremists on social media, who virtually condemned him to death after he taught his students how to defend freedom of expression even in the face of the outrage provoked by the

38 Loi n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet.

39 Loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République.

40 Bigot, 2021, p. 8.

41 Bigot, 2021, p. 1.

42 Code de l'éducation.

Mohammed cartoons of Charlie Hebdo. After his assassination, he was widely considered the victim of ‘doxing’, the practice of seeking out and disclosing private or identifiable information about a person on the Internet with the intention of harming him. Lawmakers now decided to combat doxing by introducing a new provision in the Penal Code that criminalizes the disclosure, dissemination or transmission of personal data or information, whether off- or online, with the aim of identifying the victim or members of his or her family and thereby exposing them to imminent risk of assassination. The penalty is three years’ imprisonment and a fine of 45,000 euros. The offence entails a harsher punishment if committed against a public official, a journalist, a minor or a person with one of the vulnerabilities listed in the provision. If a printed, audio-visual or online publication has been used to commit the offence, criminal liability must also be established in accordance with the rules governing the publisher’s or operator’s liability.⁴³ This provision was also challenged before the Constitutional Council on the grounds that this penal provision could hinder the establishment of facts by journalists against public figures or law enforcement agencies abusing authority. However, in August 2021, the Council upheld the provision, arguing, i.a., that the disclosure of personal data only constitutes a criminal offence if it is intended to deliberately and directly endanger the victim;⁴⁴ journalistic activities will therefore not be subject to this penal provision.

The offender is punishable if found guilty of these four elements:

- a) Information or data is revealed, diffused or transmitted, whether off- or online. In this way, the legislator wanted to keep up with the times and go beyond the paradigm offered by the Press Act.
- b) The information concerns the victim’s either private or professional life. Here too, the legislator wanted to avoid the often contentious debate on the limits of privacy;
- c) The information enables the offender to identify and locate the victim: this is the most important requisite which helps us understand why the first two concepts are defined so broadly.
- d) Motive: a *sine qua non* for establishing criminal responsibility. This offence cannot be committed through negligence. It must be proved in court that the purpose of the act was to expose the victim, his family or his property to a ‘direct risk of harm’.
- e) It must be a danger that the author could not have been unaware of.⁴⁵

⁴³ Art. 223-1-1 of the Criminal Code.

⁴⁴ Cons. const., 13 août 2021, n° 2021-823 DC.

⁴⁵ Bigot, 2021, p. 12.

The only provision of the Avia Law untouched by the Constitutional Council provided for the establishment of an Observatory of online hate speech (*Observatoire de la haine en ligne*)⁴⁶. The Observatory, today functioning as part of the Audio-visual and Digital Communications Regulatory Authority (ARCOM)⁴⁷ monitors and analyses hate content on the Internet, particularly on social media to whose role and powers.

1.5. The rules in force

Before turning to jurisprudence on hate speech and then to the issue of cyberbullying, let's review and set out the key elements of existing hate speech legislation and related offences in light of what has been said so far.

Article 23 of the Press Act contains a general penal clause limiting the freedom of the press, to prevent it from being abused to facilitate the commission of crimes. Any person is liable as an accomplice who directly provokes the commission of a crime by

- a) comments or threats made in public or in a public place;
- b) in written, printed or illustrated form, if they are sold or displayed in a public place, e.g. on a poster, or
- c) electronically.

It is important to note that any incitement must be followed by effect for the act to be punishable. By contrast, Article 24 of the Press Act criminalizes all acts which, by abusing the means of free public expression, incite the commission of specific violent crimes against human life and dignity and crimes against the interests of the nation (treason), even if the incitement is not followed by effect. This is the link between the different 'generations' of amendments to the Press Act and the Penal Code: if the incitement is effective, i.e. if it actually triggers one of the offences mentioned, the act is already covered by the general part of the Penal Code⁴⁸. More relevant to our subject is the above-mentioned article 24 of the Press Act, which imposes the same penalty on anyone who justifies (*fait l'apologie*) of

- a) war crimes or crimes against humanity, or
- b) slavery
- c) cooperation with the enemy,

46 <https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Observatoire-de-la-haine-en-ligne-analyser-pour-mieux-lutter>

47 Autorité de régulation de la communication audiovisuelle et numérique.

48 Penal Code art. 121-7.

even if the perpetrators of the acts justified or condoned have never been convicted for the simple reason that their acts were not considered criminal under the laws of the time but would be subject to prosecution and moral indignation now. These latter provisions may be understood in light of France's colonial past or by some events of the Second World War. In fact, some segments of the public cherish nostalgia for colonial gloire and their relationship with the Vichy regime also remains ambiguous.

If we look for the current definition of hate speech, then Article 24 might be a candidate. It states that anyone who incites discrimination, hatred or violence against a person or group on the grounds of their origin or belonging or not belonging to a particular ethnic group, nation, race or religion is liable to a prison sentence of up to one year and/or a fine. In the same way and in another paragraph of the same article, the law threatens to punish anyone who commits the above-mentioned offences against a person or group because of the victim's gender, sexual orientation, identity or disability. The punishment is harsher if the perpetrator is a person exercising public authority or a public function, and commits the offence in that capacity. It is important to note that there is no criterion of effectiveness, i.e. the incitement does not have necessarily to result in action in order to be punishable. It should be remembered that Article 24, as it stands, is the product of a long evolution in which the legislature has sought to extend protection to more and more categories. A case in point is gender and sexual orientation for which one can become the victim of hate crimes. However, the attentive reader will have noticed that the definition is not that of hate speech. There is no general prohibition of hate speech in French law as the legal system cannot impose the obligation on anybody to love or not to hate somebody. One can rather speak about 'hate speeches' in plural rather than 'hate speech' in singular. What they all have in common is that they target a person or a group not for what they do but for what they are.⁴⁹

Articles 32 and 33 of the Press Act govern the offence of defamation. Defamation may be directed against an individual or group on the grounds of their belonging or not belonging to a particular ethnic group, nation, race or religion. The offence is punishable by a fine and/or imprisonment. In the same article, the legislator also provides for the punishment of insult based on gender or identity, sexual orientation or disability.⁵⁰ The court may order the offender, if found guilty, to exhibit or publish the sentence in whole or in part or to publish

⁴⁹ Laslier, 2024, pp. 1–2.

⁵⁰ Here too, the scope of protected persons has been extended by the law on separatism.

it, even in the *Journal officiel de la République française*⁵¹. With regard to discrimination, the article refers to the definition in the Penal Code⁵².

Under Title III of Book I of the Penal Code, among the aggravating circumstances, it is provided that if the offence is preceded or accompanied by hate speech, the penalty is increased according to a scale. The aim of the Penal Code is to avoid the need to prove causality in court. The aggravating circumstance can therefore take on two forms. The offender has uttered insults (visual, verbal, etc.) against the victim on the grounds of race, nationality, ethnicity, religion, gender or sexual orientation, which

- a) were directed against his or her honour or reputation, or
- b) it is proven that the victim's affiliation or orientation was the motive, as described above.

However, to complicate matters further, the Criminal Code, in its special part, in the case of the crime of aggression (violence), also separately mentions, among its various elements, qualified cases in which the violence is committed because of the victim's identity or because he or she belongs or does not belong to one of the above-mentioned categories.⁵³

1.6. Hate speech between penal law and press law⁵⁴

The relationship between the Press Act and the Penal Code is complex and not easy to understand. In olden days, defamation and insult would typically target some individual citizen or public figure. Today's expressions of contempt are meant to injure entire categories or communities of persons thus threatening the fabric of democratic society and peaceful convivence with disruption. Successive legislators have strengthened the penal sanctions attached to this type of speech. These developments have given rise to a system of laws designed to suppress hate speech. It includes a gradual extension of the statute of limitations for hate speech offences and an increase in penalties. As to the former, the original statute of limitations under Article 65 for press offences was only three months based on the idea of the 'right to forget' (*loi d'oubli*): the rapid circulation of expressions should effectively chase away the memory of the offence. But this was about to change. A new Article 65-3 of the Press Act created by the

⁵¹ Penal Code articles 131–35.

⁵² Penal Code, articles 225-2 and 432–7.

⁵³ Penal Code, article 223–13.

⁵⁴ This paragraph owes much to Laslier, 2024.

Law of March 9, 2004 adapting the justice system to developments in criminality⁵⁵ extended to one year the statute of limitations for offences of incitement to discrimination, hatred or violence on the grounds of the victim's belonging or not belonging to a particular ethnic group, nation, race or religion, to the denial of crimes against humanity and to racially motivated defamation and insults. Then, by more recent amendments, the one year time limit was applied to further offences: provocation, defamation and insult committed on the grounds of gender, sexual orientation or identity, or disability⁵⁶ and, in 2017⁵⁷, to these same offences when they were committed because of the victim's gender identity.

Legislators for some time favoured a method of increasing the quantum of punishment in the presence of behaviour constituting hate speech. To illustrate this point, we can refer to the general aggravating circumstances set out in articles 132-76 and 132-77 of the Penal Code. The purpose of these circumstances is to increase the custodial sentence incurred for an offence committed for reasons relating to the victim's actual or assumed belonging or not belonging to a particular race, ethnic group, nation or religion, or to his or her actual or assumed sex, sexual orientation or gender identity. Created in 2003,⁵⁸ these aggravating circumstances were subsequently generalized in 2017.⁵⁹ This generalization means that repression is systematically aggravated in the presence of discriminatory behaviour or expression. The legislator did not, however, include the disabled in the conditions that may provoke discriminatory motivation from the offender. This wasn't necessarily an omission: disability was probably not yet considered a cause for hatred.

1.7. Hate speech in a volatile jurisprudence

The judicial application of hate speech laws continues to fluctuate to this day. Two main trends coexist.⁶⁰ The first tends to condemn even expressions intended to provoke feelings of rejection, hostility and even hatred capable of violence,

55 Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.

56 Loi n° 2014-56 du 27 janvier 2014 visant à harmoniser les délais de prescription des infractions prévues par la loi sur la liberté de la presse du 29 juillet 1881, commises en raison du sexe, de l'orientation ou de l'identité sexuelle ou du handicap.

57 Loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté.

58 Loi n° 2003-88 du 3 février 2003 visant à aggraver les peines punissant les infractions à caractère raciste, antisémite ou xenophobe.

59 Loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté.

60 Hochmann, 2022, p. 4. The Supreme Court decisions cited here are also quoted by Hochmann in this article.

as stated in a 1976 Supreme Court ruling.⁶¹ In this sense, in 2017 the Supreme Court upheld the conviction of the mayor of a small town who had called the Roma a ‘nightmare’ and regretted that the ambulance had been called in time when a Gypsy caravan was set on fire.⁶² According to another interpretation, sanctions can only be imposed if the perpetrator has incited or encouraged hatred, violence or discrimination. If such incitement, even implicit, cannot be established, criminal liability is not established. In the classic example, the statement ‘Brutus is a traitor!’ is not punishable, but if we add: ‘He must therefore be killed’, then it is. This is what emerges from another relatively recent ruling by the Supreme Court. In the original case, the defendant was accused of inciting discrimination, hatred or violence through his tweets, the subject of which was mainly the changing ‘racial’ composition of the French national soccer team. However, the courts of first instance and of appeal found only one of the messages punishable, in which the author suggested that those who were ‘not French but on paper’ should be removed from the French national team. Finally, the Supreme Court ruled that this was a call for discrimination.⁶³ In a similar case, a group of friends, some of them off-duty police officers, while drinking, chanted Hitler and white supremacy and invoked death to the Jews. Convicted, they appealed to the Supreme Court, arguing that the appeal court had misinterpreted the Pleven Law, which requires incitement or provocation to hatred to be directed against a precisely identifiable person or group, and that they had merely expressed their political opinions, admittedly in a public place, but without addressing the public. However, the Supreme Court considered that Hitlerism, the ideology of white power, the call to reopen the gas chambers – all these elements delineated with sufficient precision the group of people whom the authors felt should be discriminated against, hated and subjected to violence.⁶⁴ At the same time, the same jury upheld the acquittal of the author who, in an article on the Rwandan genocide, had described the Tutsis as ‘the most mendacious race under heaven’.⁶⁵ Éric Zemmour, journalist turned presidential hopeful in the 2022 elections, regularly attacks immigrants, Muslims in

61 ‘...tending to arouse in the minds of readers feelings of hatred towards immigrant workers and as constituting calls for racial discrimination and even violence’. Cour de Cassation, Criminal Division, April 12, 1976, 74-92.515.

62 Cour de Cassation, February 1, 2017, 15-84.511.

63 Cour de Cassation, November 13, 2019, 18-85.371.

64 Cour de Cassation, March 28, 2017, 15-80.875. Hochmann cites this ruling with what we think is an erroneous conclusion, when he mentions it among the cases in which the courts, through their too narrow interpretation, reject the charge of incitement to hatred.

65 Cour de Cassation, November 8, 2011, 09-88.007.

particular. He has been tried several times for incitement to hatred under the Pleven Law, but never convicted. In an interview, Zemmour boasted that he was careful not to talk about religion or ethnic groups as a whole, so that his remarks could not be described as racist.⁶⁶ In 2021, Zemmour was acquitted by the Paris Court of Appeal of charges of hate speech. According to the prosecution, Zemmour wanted to incite hatred for speaking publicly about the invasion and colonization of France by Muslim immigrants. The court justified the acquittal on the grounds that Zemmour had not spoken of all immigrants or of all Muslims in general, but only of a group of them, a common set of ‘Muslim immigrants’.⁶⁷ The question arises as to why the cartoons of Mohammed in *Charlie Hebdo*⁶⁸ and other sometimes crude mockery of different religions, notably Islam and Christianity, do not fall under the norms prohibiting incitement to hatred. According to Hochmann, the answer to this question lies in the fact that the *Charlie Hebdo* cartoonists do not target a particular religion or its followers in general, but specific behaviours such as sectarianism, fundamentalism, etc.⁶⁹ In like manner, the Supreme Court more recently found that a verbal attack against a person as ‘Islamist’ is not discriminatory and cannot be qualified as hate speech because it does not denigrate a religion or a religious population but merely a specific political orientation.⁷⁰ In addition, the offence of blasphemy does not exist in French law. Moreover, the whole question may fall within the scope of what is sometimes referred to as the ‘right to humour’.

A recent decision of the Supreme Court is worth citing to illustrate the sometimes heated public debate. A controversial and militant antiracist activist, Taha Bouhafs was found guilty by a Paris Court of public insult on the grounds of origin, ethnicity, nation, race or religion under Articles 23, 29 and 33 of the Press Act after he called Linda Kebbab, a police officer and trade union delegate an ‘Arabe de service’, a ‘token Arab’. Bouhafs appealed to the Supreme Court on the grounds that both he and the opposite party share the same ethnic origin, a fact which in his view excludes any possible racist motive. Yet the Supreme Court upheld the verdict, reasoning that ‘the expression ‘token Arab’ presents [Ms. Kebbab] as a servile and complacent person, serving as an alibi and pretext, on

66 ‘J’avais dit le mot magique’ comment Eric Zemmour évite habilement les condamnations, Gala, 17 November 2021. https://www.gala.fr/l_actu/news_de_stars/il-sait-ou-se-situe-la-ligne-comment-eric-zemmour-evite-habilement-les-condamnations_479674

67 Cour d’appel de Paris, September 8, 2021, no. 20/05847.

68 In January 2015, a jihadist terrorist squad attacked the editorial office of French satirical magazine *Charlie Hebdo* in revenge for the publication of cartoons mocking the Prophet Mohammed, killing twelve and wounded eleven people.

69 Hochmann, 2022, p. 11.

70 Cour de cassation 14 mai 2024 Pourvoi n° 23-84.323.

account of her origin, for those who defend the police force denounced as violent and racist' and that this expression 'was in fact contemptuous of her, defined solely by her supposed origin and designated by an outrageous term, so that, constituting an insult, it exceeded the permissible limits of freedom of expression'.⁷¹ The judgment of the Supreme Court may go down as a landmark decision and have significant political impact. This time, namely, the legal argument was not between a party coming from the majority society versus and another representing a minority. Instead, two different visions within the same ethnic or cultural minority clashed: the offender viewed French social and political order as intrinsically racist and intolerant and insisted that anyone belonging to the same ethnic and cultural background as himself share his view. The Court now gave a boost to those with immigrant origin who have chosen the path of integration and loyalty to the Republic.

There are still some authors who are not entirely reconciled with the very concept of 'hate speech' let alone with its codification as an offence. Out of a handful of objections put forward by Brenaut, let me now choose two. The first regards the *exceptio veritatis* principle which is easily applicable to the classical case of insult and defamation under the Press Act but poses a challenge when they are motivated by racial or segregationist intentions, thus becoming 'hate speech'. Under the ICERD 'any doctrine of superiority based on racial differentiation is scientifically false...',⁷² an axiom the contrary of which cannot be proven in any trial. The second concern is the eventual clash between Article 10 and Article 17 of the European Convention of Human Rights. Article 10 safeguards free speech whereas Article 17 is meant to prevent the abuse thereof: 'no protection of the Convention for the enemies of the values of the Convention'. Yet the line between free speech and hate speech remains blurred and any hope to find objective criteria is likely to remain futile. At best, the defendant can try to claim that he has acted in good faith, without the intention of harm in the context of a debate of public interest or as a form of artistic expression (e.g. humour) and then call upon Article 10 to exonerate himself. Much is still left to case law and to the rather subjective assessment of the judge, each with his different convictions and sensitivities. So much so, that we may be faced with the 'freedom of expression *à la* Schrödinger': the same discourse can be both hate

71 December 19, 2023 Cour de Cassation n° 22-86.384 <https://www.courdecassation.fr/decision/6582bbc8747015f3f52007eb>

72 Preamble to the International Convention on the Elimination of All Forms of Racial Discrimination adopted 21 December 1965 by UN General Assembly Resolution 2106.

speech and part of a legitimate public debate until the judge ‘opens the box’ and discerns its content.⁷³

The maxim ‘no liberty for the enemies of liberty’, attributed to St. Just⁷⁴ can have grave legal consequences as in the case of Imam Mahjoubi whose expulsion was ordered by the French Minister of Interior after his heinous public remarks about the French tricolour and the Jewish people. He applied to the Paris Administrative Court to overturn the measure but the judge found that the comments made by the applicant were sufficiently serious to justify his expulsion from France, even though he had lived for a long time and had strong ties there.⁷⁵ In a similar case, another imam was condemned because an inflammatory sermon in which he included quotations from the Koran that incite the killing of Jews because of their ‘moral corruption’. The Supreme Court later confirmed the verdict ‘declaring the accused guilty of incitement to racial hatred, making it also clear that the issue at stake was not to assess the validity of a religious text, but the use that may have been made of it, its meaning and scope, in the context of preaching’.⁷⁶

Hervieu points out the decisiveness of case law in this regard. Again, how to distinguish between apology for terrorism and what could be part of a public debate? A rigid definition could be counterproductive: ‘an overly theoretical definition would, after all, either prevent any penal repression of comments exalting terrorist violence; or, on the contrary, it would further encroach on freedom of expression by fuelling self-censorship.’ Ultimately, nothing makes legal sense without a case-by-case analysis of the comments made: contexts, intention, the personality of the perpetrator are all to be assessed. In any case, the guidance provided by the ECHR in *Handyside v. the United Kingdom*⁷⁷ remains a key reference: freedom of expression applies also to ‘ideas that offend, shock or disturb’. It is worth noting that until 2014, the criminal offence ‘justification of terrorism’ was included in the Press Act after which it was transferred to the Penal Code. This implied the removal of a number of guarantees linked to press offences which used to take better account of freedom of expression. Creating new guarantees should be considered to avoid political instrumentalisation of criminal proceedings, the prohibition of any automatic summons by the police of persons reported for apology for terrorism until the public prosecutor or, better still,

⁷³ Brenaut, 2024.

⁷⁴ Ibid.

⁷⁵ Tribunal administratif de Paris N° 2404728/9 Ordonnance du 4 mars 2024 <https://rb.gy/wk6c60>

⁷⁶ Cour de cassation Pourvoi n° 22-87.200 paragraph 7. <https://www.courdecassation.fr/en/decision/6582bbc8747015f3f52007ea>

⁷⁷ *Handyside v. the United Kingdom* (Application no. 5493/72) 7 December 1976.

a judge has seen the file. There are concerns that judges are increasingly forced into the role of arbiter in political debates taken to court in the form of legal proceedings. In the aftermath of Hamas's terrorist attack on Israel on October 7, 2023, e.g., there has been a marked increase in the number of prosecutions for justification of terrorism.⁷⁸

2. Cyberbullying: *sui generis* offences vs. qualifying circumstances

2.1. *Digitalization of criminal offences*

Since 2003, the Penal Code carried a fine or even a prison sentence for anyone who would disturb the peace and quiet of others by making malicious telephone calls. Judicial practice extended this to text messages, until the legislator himself felt it necessary to update the norms so as to take account of the proliferation of new electronic devices of every kind. In 2014, it added 'repeated electronic messages' to the offence of telephone calling. The standard penalty is up to one year's imprisonment and a fine of up to 15,000 euros.⁷⁹ This could have given rise to a separate criminal offence: online harassment. But the legislation went in a different direction, as we shall see momentarily.

Before taking a look at the rules governing cyber bullying or online harassment, it's worth saying a few words about harassment in general. The French Penal Code defines three types of harassment:

- a) sexual harassment (*harcèlement sexuel*);⁸⁰
- b) moral harassment (*harcèlement moral*);⁸¹
- c) school harassment (*harcèlement scolaire*), as a specific kind of moral harassment.

However, one would look in vain for online harassment under this title of the Penal Code or anywhere else. This does not mean that the conduct in question goes unpunished. This subject has its own legislative evolution, which is probably far from over.

⁷⁸ Hervieu, 2024.

⁷⁹ Penal Code, art. 222-16.

⁸⁰ Penal Code 222-33, para 6°.

⁸¹ Penal Code art. 222-33-2-2, para 4°.

With the digital revolution, more and more offences can be committed via the Internet. French criminal law responds to this development in four main ways:⁸²

- a) Committing the offence online is specified in the law as *modus operandi*. Examples include identity theft, which also covers digital identity.⁸³
- b) The order of criminal liability is subjected to sector-specific rules: the regime of subsidiary liability for press offences committed by electronic means is modified in relation to that of the printed press.⁸⁴
- c) Committing the offence online or by means of the Internet is a special aggravating circumstance for certain forms of harassment (this is the most relevant to our subject, so we shall deal with it in more detail below).
- d) The case law of the French Supreme Court assesses the digital *modus operandi* and determines the consequences.⁸⁵

The Penal Code therefore considers the use of the Internet an aggravating circumstance for certain offences. These include rape, indecent assault, human trafficking, forced prostitution of a minor, receiving stolen goods. For these four offences, the penalty is more severe if the first contact between the perpetrator and the victim was established via the Internet.⁸⁶ In the case of child pornography, the online diffusion of contents entails a harsher punishment and the very acts of subscribing to or habitually consulting a website transmitting child pornography constitute an offence.⁸⁷

The situation is similar for sexual harassment and moral harassment. The current penal provisions on sexual harassment are the result of a 2018 amendment on combating sexual and gender-based violence.⁸⁸ The legislation was adopted following a comprehensive report on online violence against women published in early 2018 by the Commission for the Promotion of Equality between Women and Men set up under President François Hollande.⁸⁹ This report concluded that the perpetrators of such violence remain largely unpunished. The

⁸² Mesa, 2022, p. 125.

⁸³ Penal Code, art. 226-4-1.

⁸⁴ Audiovisual Communications Act article 93-3. For further details, see the section on Responsibility of service providers and institutions below.

⁸⁵ For example, according to the jurisprudence of the Supreme Court, it is not necessary for the author to have physically obtained the data medium, even partially, in order to establish data theft. Mesa, 2022, p. 125.

⁸⁶ Penal Code art. 222-24, 8°; 222-28, 6°; 225-4-2, 3°; 225-12-2, 2°; 225-7, 10°.

⁸⁷ *Ibid.* art. 227-23.

⁸⁸ Loi n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes art. 11.

⁸⁹ HCE, 2017; Quemener, 2018.

report's starting point is to clarify two concepts: online violence against women (*violences faites aux femmes en ligne*) and virtual violence (*cyberviolences faites aux femmes*), preferring the former of the two formulas because it better expresses the fact that violence is real in terms of the harm caused, only the *modus operandi* or the 'place' in which the violence is committed is specific. The report then looks at two phenomena in particular. The first is a specific form of domestic violence online, where one of the parties (usually the man) exercises digital control or domination over the other: the perpetrator follows the other's every move in virtual or even real space, using various tracking devices (*cyber-contrôle dans le couple*). This is a latent but widespread behaviour, on which there are no precise statistics in France. The other particularly widespread form of harassment is the so-called digital raid (*raid numérique*). Typical victims are often female politicians or influencers who themselves defend women's rights or dignity. The report cites several concrete cases. In a particularly egregious instance, a youtubeuse who has gained notoriety for her investigation of street harassment received a shocking 40,000 messages, several of which included threats of murder or rape.. Penalizing this practice, however, posed a number of problems for legislators. The difficulty lay in the subjective behaviour of the perpetrators. One of the constituent elements of harassment is its repetitive nature. In this case, it takes the form of words or gestures with sexual or sexist connotations, which humiliate or degrade the victim, with the aim of placing him or her in a situation of fear, hostility or insult.⁹⁰ In the case of digital raid, the individual perpetrator does not necessarily repeat the act, but the victim is nevertheless subjected to a series of attacks. For the offence to be constituted, it is not even necessary for the perpetrators to agree to act in concert; it is enough for them to know that other people are also posting similar comments about the victim. The standard punishment is two years' imprisonment and a fine of 30,000 euros. In addition to the classic aggravating circumstances (offence committed against a person under the age of fifteen or a person subordinate to the offender or otherwise vulnerable, or in a group), the 2018 law added the offence committed online. If the aggravating circumstances are met, the penalty is increased to three years and 45,000 euros. Perpetrators of this type of group harassment are nevertheless difficult to prosecute. A circular letter from the Minister of Justice explaining the law asks prosecutors to take action against at least the instigators

90 'Sexual harassment is the repeated imposition on a person of sexual or sexist proposals or behaviors that either violate their dignity because of their degrading or humiliating nature, or create an intimidating, hostile or offensive situation.' Penal Code Art. 222-33.

or main perpetrators.⁹¹ The Penal Code extends the offence of digital raid not only to sexual harassment, but also to harassment in the workplace.⁹²

The Penal Code includes an offence similar to online harassment among the offences of invasion of privacy, when the offender discloses conversations, words or images of sexual content of another person without his or her consent. It should be noted that, although it is nowadays on the Internet that insults of this kind nowadays typically happen, the legislator makes no distinction between offline and online modes.⁹³

2.2. Moral harassment at work, at home, at school... anywhere

The structure of the section of the Penal Code on moral harassment is somewhat peculiar. It reflects an evolution that appears historical rather than dogmatic which manifests itself in a series of responses the legislator gave to the emerging new forms and modalities of abusive conduct – just as I attempted to describe them in the previous paragraph. The basic definition in Article 222-33-2 reveals the origin of the provision whose objective is to penalize that kind of conduct which can make one's life in the workplace unbearable 'by repeated comments or behaviour with the purpose or effect of causing a deterioration in working conditions likely to infringe on their rights and dignity, alter their physical or mental health or compromise their professional future.' The maximum punishment for this is two years in prison. This offence has not been 'digitalized': there is no reference to committing it online. Then the text goes on to apply this, *mutatis mutandis*, to domestic abuse committed against a current or former spouse, civil partner (*partenaire lié par un pacte civil de solidarité*) or common-law partner.⁹⁴ Here the definition becomes already more articulate, though. The basic punishment is three years in prison and a considerable fine (€45.000). This article envisages some aggravating circumstances including various degrees of incapacity for work as an effect or the presence of a minor. If the harassment results in an attempted or completed suicide, the punishment increases to ten years in prison. No digital *modus operandi* is mentioned here, either.

The next article (222-33-2-2) carries the most comprehensive and general definition of harassment. It retains and completes the constituent elements of

91 Circulaire du 3 septembre 2018 relative à la présentation de la loi n°2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes. Available at: <https://www.legifrance.gouv.fr/circulaire/id/44010>.

92 Penal Code, article 222-33-2-2.

93 Penal Code, article 226-2-1.

94 Article 222-33-2-1 of the Criminal Code.

moral harassment used by the two previous articles but does not restrict the group of potential victims to any category of persons or a particular context. The two new constituent elements were added in the context of combating digital raids, as mentioned above. Therefore, the offence is also constituted when the abusive ‘comments or behaviour are inflicted on the same victim by several persons, in concert or at the instigation of one of them, even though each of these persons has not acted repeatedly’, or when the offence is committed against ‘the same victim, successively, by several persons who, even if not in concert’, are aware that their comments or behaviours constitute a repetition. The basic punishment is up to two years in prison with a substantial fine. The statutory aggravating circumstances are:

- a) Incapacity to work for more than eight days as a result;
- b) The victim is a minor;
- c) The victim is a person whose particular vulnerability, due to age, illness, infirmity, physical or mental deficiency or pregnancy, is apparent or known to the perpetrator;
- d) If the offence is committed by the use of an online public communication service or through a digital or electronic medium;
- e) The offence was committed against an elected official (*titulaire d’un mandat électif*);
- f) A minor was present and witnessed the offence.

The punishment is increased to three years in prison and to €45,000 if at least two of these conditions are met. So here we are in front of the ‘digitalization’ of harassment. (With no ‘suicide clause’ is attached, though.)

In 2022, the French Parliament passed a law on school harassment (School Harassment Act, SHA)⁹⁵, introducing it as an offence by adding a new article (222-33-2-3) to the section on moral harassment of the Penal Code. It refers back to the constituent elements of the previous article. However, here the victim can only be a pupil or student, while the perpetrator can either be a pupil or a teacher. To the previously mentioned aggravating circumstances, the lawmaker added suicide with the same wording as in the case of domestic abuse. By contrast, the digital *modus operandi*, i.e. cyberbullying at school is missing.

The SHA amended several provisions of the Code of Education. The latter already included a specific title on health protection in schools, including a separate chapter on abuse prevention.⁹⁶ It now requires all teachers to undergo spe-

⁹⁵ Loi n° 2022-299 du 2 mars 2022 visant à combattre le harcèlement scolaire.

⁹⁶ Code of Education art. L.542-1 to L.542-4.

cific training in youth protection, including a course on sexual offences against minors and their consequences. School bullying as an offence as well as the obligation to take more specific measures against it, have been introduced into the Code of Education. As noted above, the Code of Education nowhere uses the term ‘cyberbullying’, but in literature and legal practice it is considered implicit in the concept of school harassment.⁹⁷ The same applies to the question of whether disciplinary or more severe sanctions are attached to offences committed outside school walls.⁹⁸ A case in point is an appeal brought by a father whose son had been expelled from a high school after sending indecent videos to a female fellow student. The father asked the administrative court to annul the measure on the grounds that his son committed the offence outside the school, at a party, and therefore could not have breached school discipline. But the administrative court ruled that the act was inseparable from the offender’s status as a high school student and from the condition that the offender and his victim were students at the same school. The behaviour therefore caused an inevitable and serious disruption to the life of the school. A ministerial circular note pointed out that the proliferation of social media is increasingly blurring the boundaries between students’ lives inside and outside school.⁹⁹

The SHA integrated the overall prohibition of harassment, i.e. the ‘right to a harassment-free school environment’, into the general provisions of the Code of Education. The long, detailed definition, as if wanting to leave nothing to chance (or to the judge?), says: ‘No pupil or student may be subjected to harassment resulting from comments or behaviour within the school establishment or in the context of school or university life, which have the purpose or effect of undermining his or her dignity, altering his or her physical or mental health or compromising his or her academic progress. These acts may constitute the offence of school harassment as provided for in Article 222-33-2-3 of the Penal Code’.¹⁰⁰

Another group of provisions of the SHA reinforces the material and procedural instruments of criminal law to combat harassment in schools and universities. Amending the Penal Code, it establishes the criminal offence of school harassment, as described above. Under the Code of Criminal Procedure (CCP),

⁹⁷ Article L.511-1. The *Commentaire Dalloz* is available by subscription in the publisher’s online library: <https://www.dalloz.fr/documentation/Document?id=EDUC003000>

⁹⁸ *Ibid.*

⁹⁹ Lettre de la direction des affaires juridiques du ministère de l’éducation nationale et du ministère de l’enseignement supérieur, de la recherche et de l’innovation LIJ N°202 – May 2018. Available at: https://www.education.gouv.fr/lettre-information/lettre-information-juridique/PDF/LIJ_2018_202_mai.pdf

¹⁰⁰ Code of Education art. L.111-6.

the investigating or prosecuting authority may seize the computer of the suspect/accused and the data stored on it in the case of an Internet offence.¹⁰¹

As there is a specific Penal Code¹⁰² for Minors in France, the law has also included certain provisions on bullying at school. E.g. a secondary sanction may be imposed on the bully, such as an obligation to complete an internship or practical training.¹⁰³

3. Right to a harassment-free environment

The potentially tragic consequences of cyberbullying are well understood by lawmakers, law enforcement agencies and the public. Numerous articles in the French press explain that these consequences can go as far as suicide.¹⁰⁴

A Ministry of Education circular in 2013 was the first to take stock of possible ways of preventing and dealing with the problem. It identifies them mainly in terms of raising awareness and maintaining a climate of trust; e.g., by making students aware that cyberbullying is unacceptable, and that it can lead to disciplinary or even penal consequences. Channels must be set up in all educational establishments to enable victims to come forward and seek help quickly, easily and confidentially. The circular reminds school principles of the toolbox at their disposal, including, in the most serious cases, the possibility of filing a criminal complaint.¹⁰⁵

The French ombudsman (Défenseur des droits) addressed the issue of harassment at school and online in his 2021 communication and report. The report points out that in recent years, political decision-makers have grown aware of the seriousness of the situation and, as a result, society, children and students now have more tools at their disposal to protect themselves: anti-harassment counsellors in all schools, free helplines and forums, action plans and teaching materials. Nevertheless, the problem persists, with the number of cases stagnating at a high level. The reasons for that include the persistence of an attitude that trivializes verbal and physical violence, to some extent regarding it as part of

101 SHA art. 12, which amends several provisions of the CCP.

102 Code de la justice pénale des mineurs.

103 SHA Art. 15.

104 The subject is examined in depth in an international study by Leiden University researchers published in 2014: van Geel-Vedder-Tanilon, 2014.

105 Circulaire n° 2013-187 du 26-11-2013 in Le bulletin officiel de l'éducation nationale, de la jeunesse et des sports n° 44 du 28 novembre 2013. Available at: https://www.education.gouv.fr/bo/13/Hebdo44/MENE1329057C.htm?cid_bo=75290

life; in other cases, the educational establishment deems it sufficient to transfer either the bully or the bullied to another school.¹⁰⁶

In February 2024, the findings of the first comprehensive national survey of the phenomenon were published, based on anonymous questionnaires filled in by a representative number of pupils and high school students. The victimization index is defined as the number of repeated attacks suffered. The survey shows that 3% of elementary school pupils have experienced eight or more assaults; 5% of middle school students have experienced five or more assaults; 3% of high school students have experienced five or more assaults.¹⁰⁷

The Code of Education, among its aforementioned provisions on a bullying-free school environment, requires primary, secondary and higher education facilities, both public and private, to take appropriate measures to combat the phenomenon, with an emphasis on prevention. It is the responsibility of the teaching community to create an atmosphere in which it is easy to detect harassment, provide effective response, counsel victims, wrongdoers and witnesses alike, and direct them to institutions that can help them. The Code of Education also makes it compulsory for pupils, students and parents to organize at least one annual awareness-raising session on the dangers of harassment, particularly digital.¹⁰⁸ The Code of Education now entrusts an important role to the health, citizenship and environment education committees of public secondary schools whose mission is to work with parents and other players outside the school to combat truancy and other harmful phenomena, using social mediation and artistic and cultural education in particular. Since March 2022, the law has therefore included the fight against bullying among the missions of this committee.¹⁰⁹ The scope of the Code of Education extends not only to public, but also to private education.¹¹⁰ The SHA not only amended the Code of Education, but also made awareness-raising and training mandatory in all sectors, so that all professionals likely to be confronted with school bullying are aware of its existence and are able to protect victims and manage their traumas. Doctors, nurses, social workers, judges, teachers and other educational staff, sports, cultural and recreational staff, police and gendarmerie receive training in the

106 Avis du Défenseur des droits n°21-10, Paris, le 12 juillet 2021. Available at: https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=20852, as well as Rapport 2021. Santé mentale des enfants: le droit au bien-être Available at: https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=21061

107 Premiers résultats statistiques de l'Enquête harcèlement 2023. Available at: <https://t.ly/VbHm7>

108 Code of Education Art. L.111-6.

109 Code of Education art. L.421-8.

110 Ibid. art. L.442-2, L.452-3-1.

prevention, identification of and assistance to victims, witnesses and offenders. Such training should be offered to all professionals working in educational establishments.¹¹¹ Guidelines on how to prevent and confront harassment in schools have to be defined in the school's statutes or curriculum.¹¹² It is also the responsibility of the school doctor to check, during routine examinations, whether the pupil or student shows signs of harassment suffered.¹¹³

However, the Code of Education not only deals with the issue of harassment in terms of health and mental health risks or criminal law aspects, but also introduces it into the school curriculum. The law dedicates a long article to defining the ethical and civic knowledge to be taught. The intention is to help students become 'responsible and free citizens who acquire a critical sense and the ability to act reflectively, including in their use of the Internet and online public communication'.¹¹⁴ The text in italics shows that, although the Code of Education does not use the term cyberbullying or online harassment, the legislator had not forgotten about it. Other subjects covered by ethics and citizenship include, e.g., the rights and equal opportunities of disabled persons, a preference for fair trade, free from child labour and the promotion of voluntary and community activities. The SHA also provides that students must be informed about who they can turn to, apart from the authorities, if they become victims of harassment. The law addresses not only victims but also potential offenders and seeks to prevent them from turning into actual ones.

The provisions of the Code of Education described so far apply mainly to secondary schools. However, the scope of the law also extends to universities. Book VIII of the Code, dedicated to 'university life', provides for the creation in universities of an environment conducive not only to academic, but also social advancement of students, including, where appropriate, social assistance. A favourable environment now includes the fight against harassment.¹¹⁵

'High school ambassadors against harassment' (*ambassadeurs lycéens contre le harcèlement*) have been appointed. This initiative dates back to 2015. There are currently around 5,000 'ambassadors'. The idea is simple: students will volunteer to monitor and detect harassment in their own environment, among their peers, to intervene if necessary, or to raise awareness in their communities by showing them examples of acceptance and cultural coexistence. In particular, they are responsible for ensuring the quality of personal relationships within

111 SHA art. 5.

112 SHA art. 5.

113 Code of Education art. L.542-2.

114 *Ibid.*, L312-15.

115 Act L.822-1.

the community, comforting and supporting victims of harassment, and taking action against bullies. The Education Ministry's website contains very detailed recommendations on how the 'ambassadors' should carry out their duties. They can organize, i. a., meetings with pupils about bullying, informing fellow students about how to recognize the phenomenon, who to contact, possible remedies, etc.¹¹⁶ One of the obvious advantages of student ambassadors is that young people are less ashamed to talk with each other about their experience than with adults, let alone the authorities. The institution of student ambassadors seemed also justified by some discouraging statistics. 5.6% of students reported having been victims of it. Seven percent of those regularly experience some form of cyberbullying.¹¹⁷

In a recent effort to keep up with the rapidly changing digital and digitalized social environment, the French Parliament in June 2023 passed a bill regulating commercial influence and combating the abuses of influencers on social networks.¹¹⁸ It amends, i. a., the Education Act setting the ambitious goal of educating and training people to the responsible use of digital tools and resources. It imposes this task on schools and educational establishments across a wide range of sectors, including, e.g., agriculture, health care, social services, etc. The education should cover the rights and duties associated with the use of the Internet, social media, also with regard to the protection of privacy and respect for intellectual property, freedom of opinion and the dignity of the human person and the image of women, as well as data protection. Lawmakers wanted to promote the 'development of critical thinking', contribute 'to the fight against the dissemination of hateful content online, to raising awareness of commercial manipulation and the risks of online scams, and to learning about digital citizenship'. Special training should be provided to teach users how to detect and report illegal content. The training also includes raising awareness of the prohibition of harassment committed in the digital space, ways of digital self-defence and the penal sanctions the wrongdoing entails. In sum, it promotes 'digital sobriety' (*sobriété numérique*) — a succinct expression, this. The latest amendment, in May 2024 extended risk awareness to AI. At the end of primary and

116 Available: <https://www.education.gouv.fr/devenir-ambassadeur-au-lycee-323018#edugouv-summary-item-4>

117 For less recent but more detailed research findings, see Blaya, 2018. For more details on student ambassadors, see <https://www.education.gouv.fr/non-au-harcelement/le-dispositif-des-ambassadeurs-non-au-harcelement-323021>

118 LOI n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux.

lower secondary school, they receive a certificate of successful completion of the training.¹¹⁹

4. Liability: service providers and institutions in a ‘cascade’

4.1. From printed press to social media: editorial responsibility sublimating

The question is how to enforce the authorities’ action against online crime, cyberbullying and hate speech. To overview French legislation in this regard is not devoid of challenge. In addition to the Press Act, other laws contain relevant provisions. Freedom of opinion and expression, on the one hand, and the prevention of hate speech, on the other, are two mutually contradicting desiderata. Between them the lawmaker has to perform a balancing act on a tightrope that is stretched each time at a new height over a new abyss. The relentless development of new media, devices, apps, platforms and whatnot, combined with new, sometimes eccentric forms of art, views, etc. also requires the ceaseless updating of relevant legislation. However, the French lawmaker is responding not only by amending the Press Act, but also by adopting new *sui generis* laws which, in turn, also update the fundamental source of the law, the very same Press Act.

The Press Act lays down the rules governing liability for offences committed through the press. According to these rules, the director of the publishing house (*directeur de publications*), the editor-in-chief or the co-editor-in-chief are considered primarily liable. If there are none, or if they are exempt from liability for whatever reason, the author (*auteur*), printer, distributor, poster (*afficheur*), etc. are liable, in that order (*responsabilités en cascade*).¹²⁰

The Press Act did not prove adequate in the face of the spreading of the new electronic audio-visual media. Under the 1982 Audio-visual Communications Act, where the offence is committed by electronic means, the publisher or co-publisher responsible for the publication is deemed to be the offender, failing which the author or, failing that, the creator of the entry is liable in the first instance. However, the author is liable as an accomplice in any event. The publisher is not liable for content uploaded to the site by users, provided that he

¹¹⁹ Code of Education art. L312-9.

¹²⁰ Press Act, art. 42.

had the offending content removed as soon as it was discovered and brought to his knowledge.¹²¹

The aforementioned Léotard Law on freedom of communication is an important piece of legislation. It originally covered the traditional audio-visual media, i.e. radio and television. In 2020, it was supplemented by a specific Title IV for online platforms, including provisions to combat online hate content. This defines in great detail the duty of cooperation that platform operators must have with ARCOM. ARCOM considers the risks specific to each platform and may adopt different guidelines and recommendations for each operator. These generally include the obligation to communicate service parameters and principles, taking into account restrictions on personal data. ARCOM can also require the operator to provide data. ARCOM can also impose a fine of up to six per cent of the previous year's turnover or a maximum of 20 million euros for failure to comply with the obligation to cooperate.¹²² Besides pecuniary sanctions, ARCOM has a toolbox at its disposal:

- a) Suspension of the publication, broadcasting or distribution of the service(s) of a program category, part of the program or one or more advertising sequences for one month or more;
- b) Reduction of the duration of the authorization or license agreement by up to one year;
- c) Withdrawal of the authorization or unilateral termination of the license agreement.¹²³

4.2. Addressing constitutional limits to immediate removal of illegal content

In the age of the printed press, the spread of illicit content was slow. Newspapers would be published once a day at best with only nationwide circulation. Things are very different in cyberspace: irreparable damage can be done with the speed of light among an audience as wide as the globe. How can even the most rapid justice system keep up? A civil process can take years while a quick harm would call for a quick fix. The Avia Law, also mentioned above, would have obliged operators of online platforms and search engines to remove blatantly illegal content, such as hate speech, racist or religiously defamatory content, within twenty-four hours of one or more complaints. In the case of terrorist content or child pornography, the deadline was set at one hour. However,

121 Loi n° 82-652 du 29 juillet 1982 sur la communication audiovisuelle Art. 93-3.

122 Léotard Law art. 62.

123 <https://www.arcom.fr/alertez-nous/comment-larcom-reagit-vos-alertes>

in June 2020,¹²⁴ the Constitutional Council ruled that most of these provisions were unconstitutional. On the one hand, it confirmed the legislator's power to punish abuses of freedom of expression when such expressions are contrary to public order or the rights of third parties. More than ever, it specified that the dissemination of pornographic images of minors constitutes a particularly serious infringement of this freedom, as does incitement to commit terrorist offences or the glorification of such offences. On the other hand, the Constitutional Council rejected the obligations imposed by the Avia Law on operators for several reasons. In the case of terrorist content or child pornography, the Constitutional Council considered that the illegality could only be established by a court and that the time limit of one hour was not sufficient for a court to formulate and notify its decision. This restriction on freedom of expression therefore failed to meet the combined requirements of proportionality and necessity. The Constitutional Council noted the risk that platforms and content providers might become overly zealous to remove all potentially controversial content, including what is deemed risky but may be legal, thus fostering a climate of self-censorship.

The French legal system continues to struggle with the question of how to eliminate vicious content from the Internet as rapidly as possible without getting caught in the net of the Constitutional Council again. As we saw above, the Separatism Act made an effort to overcome the constitutional hurdle, creating the possibility for the administrative authority to request the removal of illicit contents of the following kinds:

- a) contents that incite or condone (apologie) terrorist acts as defined by the Penal Code¹²⁵;
- b) images or representations of minors as defined in the same code¹²⁶.

The process of removal is the following, on the basis of the current text of the LCEN.¹²⁷

The administrative authority (ARCOM, typically) may request the editor, host or anyone who is in charge of the content and its online diffusion¹²⁸ to take action. (For the purposes of this paragraph, I shall refer to this first category as 'host'.) The authority simultaneously informs the pertinent ISP. The deadline of removal is 24 hours. If the deadline is not met, the administrative authority may

124 Décision n° 2020-801 DC du 18 juin 2020.

125 Penal Code art. 421-2-5.

126 Ibid. art. 227-23.

127 In particular, art. 6 to 6-5.

128 No matter if the service is provided free of charge.

notify the ISP to immediately prevent access to the problematic address. A third option is to notify the search engine or the directory of electronic addresses so that it may stop referencing the web site. Consciously false notifications with the purpose of having content removed is punished with remarkable severity: one year in prison and 15.000 euros in penalty. Even more serious punishments are involved for the hosts that fail to observe their obligations under the procedure above or to provide the information necessary for cooperation with the authorities and the public for the sake of suppressing illicit on-line contents. It seems clear to me that the legislator wanted to promote online transparency without which cyberspace would be doomed to become the place of highly dangerous activities.

The injunction to remove content or make it inaccessible can be challenged by the service providers in an administrative court within 48 hours; the court has seventy-two hours to decide about the legality of the removal order. Its decision can be appealed. The court of appeal has one month to decide.¹²⁹

The procedure just presented here applies to the justification of terrorism and online child abuse.

In May 2024, the latest major revision of the pertinent legislation took place when Parliament adopted Law no. 2024-449 to secure and regulate the digital space (SREN Law).¹³⁰ The SREN Law updates extensively a series of pertinent legislation, the LCEN and the Penal Code in particular.¹³¹ The text also strengthens penalties for people convicted of online hate, cyber-harassment or other serious offences (child pornography, pimping, etc.). The judge will be able to impose an additional penalty of suspension or ‘banishment’ from social networks for six months (or even a year in the event of a repeat offence). If the social network fails to block the suspended account, it will be liable to a fine of 75,000 euros.¹³² The online publication of hypertrucages or ‘deep fakes’ will be punished more severely. Schoolchildren are to be made aware of the dangers of AI-generated contents.¹³³ At the start of the school year, parents will be informed of the dangers of early and unsupervised exposure of children to screens and the risks

129 LCEN Art. 6-1-5. Among these provisions there are some that constitute a more rigorous regime with regard to explicitly terrorist content under Regulation (EU) 2021/784 of 29 April 2021 on addressing the dissemination of terrorist content online.

130 Loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l’espace numérique.

131 See also <https://rb.gy/d3gclu>

132 SREN art. 16.

133 Ibid. art. 21., Penal Code art. 226-8-1.

associated with the Internet. A ‘digital citizen’s reserve’, as a thematic part of the ‘civic reserve’¹³⁴ will be set up.¹³⁵

4.3. Collaboration of the platforms with users and authorities

The Separatism Act adapted the liability rules to take account of the constitutional objections and amended the LCEN accordingly. It maintained the scope of application of the Avia Law, platforms that transmit, distribute or reference online content produced by third parties. A platform or content provider falls within the scope of these provisions when the number of connections on French territory reaches a certain number, defined by decree, whether the service provider is established or registered in France or abroad. We note that the provision has been drafted to target the major platforms, which also happen to be the main vehicles of hate content: Facebook, X (formerly known as Twitter), Instagram, YouTube, etc.¹³⁶

The law requires the subjects to employ sufficient human and technological resources to ensure that they have the capacity to remove illegal content. The legislator wanted to prevent operators from leaving everything to algorithms. They are obliged to implement procedures and proportionate human and technological resources enabling them to collaborate with judicial and administrative authorities. Such collaboration covers the following elements:

- a) The platforms inform the authorities of the actions they have taken in response to injunctions issued by these authorities;
- b) They acknowledge receipt of requests from these authorities for the communication of data in their possession enabling the identification of users who have put the illicit content online and inform the authorities of the action taken;
- c) They temporarily store the content they have removed or made inaccessible, in order to make it available to law enforcement agencies.¹³⁷

Platforms have to designate a natural person as a contact point for communicating with the authorities through a single channel.

¹³⁴ This national ‘pool’ brings together offers of volunteer work from citizens aged 16 and over, wishing to contribute to missions proposed by associations, local authorities and public administrations. <https://www.jeunes.gouv.fr/la-reserve-civique-277>

¹³⁵ SREN art. 23.

¹³⁶ Bigot, p. 22.

¹³⁷ LCEN art. 6-4 para 2.

Platforms have to display their conditions of use, with special regard to the prohibition of illicit content. The information also should describe their moderation system designed to detect, identify and deal with illicit content, the human or automated resources employed for this purpose, as well as the measures they may take with regard to users who have put such content online, as well as the internal and legal remedies available to such users. In sum, legislation obliges the platforms to take action against its own users, if necessary, working with the authorities eventually even for their prosecution.¹³⁸ The law introduces a specific provision for the protection of minors. When a user under the age of fifteen subscribes to a service on the platform, the person with parental responsibility must be warned that if the minor publishes or shares hateful content, the parent will be held responsible.¹³⁹

The Separatism Act tackled the so-called mirror sites (*site miroir*), known to be used both to deflect hacker attacks and to republish content declared illegal on sites that look identical to the original. The removal of illegal content does not require a new procedure or court ruling, but can be requested on the basis of the previous judgment. A list of providers who have been convicted and ordered to remove access to hate content is also to be made public. In order to financially stifle rogue sites, the law obliges advertisers to indicate on their website whether they do business with a 'blacklisted' site, following the 'name and shame' principle, already known from the fight against pornography or tax evasion.¹⁴⁰

4.4. Compromises in the current liability regime

The current provisions of the LCEN regarding this subject are as follows. On the one hand, they exempt the service provider or the medium from civil liability if it was ignorant of the manifestly unlawful nature of the content it has published or stored on the Internet, provided it makes it inaccessible immediately after notified or becoming aware of it. A similar exemption applies to criminal liability. On the other hand, the lawmaker wanted to protect lawful contents from groundless or, indeed, abusive challenges: so the same provision also incriminates complaints made in bad faith with the sole aim of obtaining removal or inaccessibility. Notification or complaint concerning unlawful content may not be anonymous but must include basic information (name, address, etc.) about the person (natural person or a legal entity, including a public authority) who is filing it; a description of the contested content, its nature, its exact location

¹³⁸ Ibid. art. 6-4, para 3. Bigot, 2021, p. 24.

¹³⁹ Ibid. art. 6-5. Bigot, 2021, p. 25.

¹⁴⁰ Ibid. art. 6-3. Bigot, 2021, pp. 27-29.

on the Internet and the content of the contestation.¹⁴¹ In addition, the LCEN provides an explicit general exemption for service providers from the obligation to constantly monitor whether unlawful content is being put online. So, as we have just said, platforms and hosts only have to act on notification, and not by their own initiative. Contents liable to prosecution are listed: denial or trivialization (banalisation) of crimes against humanity; incitement to commit terrorist attacks or the exaltation of such acts; incitement to hatred based on race, sex, sexual orientation or identity, disability; child pornography; incitement to violence, in particular gender-based or gender-related violence; and offences against human dignity. This section is closely linked to the aforementioned Chapter IV of the Press Code on press offences, and to the relevant provisions of the Penal Code, in that it stipulates that the service provider must cooperate in the removal of such content, and is also subject to a reporting obligation if such content is discovered.¹⁴²

In the case of online harassment, the cascade of responsibility is different, and so is the procedure to be followed.¹⁴³ Unlike hate speech, where the primary local responsibility lies with the publisher or, in the case of online media, the content provider standing in for him (albeit with the restriction that he can claim ignorance of the illegal content), the primary responsibility for harassment on the Internet lies with its perpetrator. However, service providers who transmit the content in question (*intermédiaires techniques*) are also liable in this order:

- a) social media platforms (e.g. Facebook, X, games, blogs, file-sharing sites, etc.) that host or share content produced by a third party (*hébergeur*), or
- b) the Internet service provider.

However, the penal, administrative and civil liability of intermediaries and file sharers is limited and conditioned on notification and awareness. They can only be held liable if they, although knowing of the harassing content, have failed to remove it promptly. The Constitutional Council noted the risk that platforms and content providers would become eager to remove all potentially controversial content, including that which is deemed risky but may be legal, thus giving rise to self-censorship. Therefore, they are not expected to check the legality of countless messages, posts, images, etc., that are being shared. The victim can

¹⁴¹ Ibid. art. 6. Para I-2-5. Bigot, 2021, p. 19.

¹⁴² LCEN art. 6 para I-7. Bigot, 2021, *ibid*.

¹⁴³ A summary of liability rules and the procedure to be followed is available on the French public service portal: <https://www.service-public.fr/particuliers/vosdroits/F32075>. See also art. 6 of the LCEN and art. 93-3 of the Audiovisual Communications Act.

request the removal of the content, firstly from its author and, if this fails, from the platform, forum, etc. This request has not to be necessarily accommodated by the platform applying French laws but applying its own rules instead. Each major social media, file-sharing or other platform has its own rules on the formalities and conditions for requesting removal or blocking. If this procedure does not yield the expected result, the victim can refer the matter to the authorities, in accordance with French law. In urgent cases, an injunction (référé) can be requested from the court to stop the harassment immediately. If criminal liability is involved, the victim can also take such action. They can also file a complaint with the police or gendarmerie. An offence can be reported to the police even if the offender is unknown, as the identity of the perpetrator remains often hidden in cyberspace – in such case, the service provider is obliged to cooperate in identifying the abuser.

4.5. Competence and jurisdiction

Since social media is essentially a global network, the question of jurisdiction arises in the event of infringement. Content published on the Internet can be contested before a French court if the content in question

- a) is in France, available in French, or
- b) is intended for the French public, or
- c) affects the interests of a person living in France.

This is the case even when the author does not stay in France, or if the content is not on a French website. It may be a personal blog, a video or a social media post. Content can be prosecuted even when it is not accessible to all Internet users. For example, it may only be accessible to certain ‘friends’ on a particular platform.

In addition, for those who should find a police procedure too formal and rigid, it is also possible to lodge a complaint on an online platform, called Pharos, created for this purpose with the idea that anyone can be either victim or witness of cybercrime on social media. Pharos will, in turn, report the case to the police or the gendarmerie.¹⁴⁴

144 Available: <https://www.internet-signalement.gouv.fr/PharosS1/>

Summary

Freedom of speech and expression is a core principle of the French constitutional order. This freedom should be, however, accompanied by responsibility since the Declaration of the Rights of Man and of the Citizen. Restrictions on freedom of expression for reasons of public interest and overriding private interests may therefore be in line with the Constitution. But it remains a challenge for legislators, courts and other authorities alike to strike a delicate and ever changing balance. The most relevant legislative source for hate speech is the Freedom of the Press Act, passed in 1881 and still in force today, amended several times, which from the outset has contained penal sanctions for ‘classic’ press offences like defamation and insult. This may be regarded as a French particularity, given that in several other European countries penal sanctions cannot be imposed but in the penal code. The digital revolution and the proliferation of new online media has led to the proliferation of the expressions of hate. To combat racism and other forms of incitement against groups and communities has become a necessity in order to preserve social peace. The legislator has sought to respond to changing social demands by introducing new laws amending and updating the old ones. ‘Traditional’ offences like insult, defamation or pimping are being ‘digitalized’, which means they are easier to commit online. Harassment or bullying is another obvious example. There are other forms of illicit conduct that have been born with and on the Internet like ‘doxing’ and ‘digital raid’. Yet French lawmakers seem hesitant to define and introduce separate, *sui generis* cybercrimes. They prefer a different avenue, where the use of the Internet as *modus operandi* becomes a special or aggravating circumstance. The development of legislation generally takes place through comprehensive legislative amendments, in large interdisciplinary steps, reforming from time to time several areas of law and the legal norms that define them. In the case of hate speech, radio and television were included first, and then the Internet as the media that can be abused for the propagation of hate speech. In recent times, the French lawmaker has been compelled to intervene with increasing speed and frequency by adopting new provisions within the Press Act, the Penal Code, the Code of Education and in other sectors affected by expressions of hate such as telecommunication and the workplace also in an effort to boost confidence in the digital economy. Basically, the French legislature tackled the problem of racial hate speech and cyberbullying earlier than other European countries, but its responses in a rapidly changing social and political context cannot be considered definitive.

Liability rested with the newspaper editor in olden days for he was supposed to read all he would publish. In the age of online social media, the same cannot be

expected of any service provider. Instead of one single liable subject, we are now in the presence of a ‘cascade of responsibilities’ where liability largely hinges on the notification of the illicit content to the service or platform provider. The lawmaker’s attempt to impose the duty on Internet service providers and social media platforms to make hateful content immediately and almost automatically inaccessible has failed the constitutional test. The Constitutional Council was reluctant to approve solutions that may encroach on freedom of expression without robust judicial control. This leaves only the normal legal route and cooperation with service providers, whether voluntary, encouraged or forced. The internal policies of the major platforms generally prohibit illicit expressions themselves, so it is possible to ask them to remove those. Some non-legislative tools to prevent and combat cyberbullying are also available, mainly in the area of bullying in schools. The latter is characterized by a high level of government awareness among teachers, students and parents, and by strengthening students’ capacity for self-organization and peer empowerment by introducing the institution of student ‘ambassadors’ to combat cyberbullying.

All in all, France can boast an extensive and sophisticated set of legislative tools to combat a culture of hate, but a restless social and political environment, combined with the exaltation of freedom of expression as the most cherished constitutional achievement, leaves much of the balancing act to the courts.

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