



FRANCE

France

Author: Pierre François Docquir, Independent Researcher

Pierre François Docquir (PhD) is an independent researcher and expert whose work has focused on the protection of freedom of expression and media freedom in the changing context of contemporary media landscapes.

Country Summary: Against the backdrop of a series of terrorist attacks and intense social unrest, several restrictive laws were introduced in France between 2015 and 2022. The Penal Code, which already sanctioned hindering the exercise of freedom of expression, was amended to specifically target acts that seek to hinder artistic freedom or the diffusion of artistic creation, raising concerns over disproportionate restrictions on the right to association. Another law on disinformation created a summary procedure through which a judge can decide on the de-publication of massively distributed fake news that disrupt the electoral processes. It also allows the media regulator to impose sanctions on foreign-controlled media that broadcast disinformation. The state of emergency declared after the terrorist attacks of 2015 and during the Covid-19 pandemic resulted in measures such as the preventive arrest of potentially troublesome individual, the discriminatory application of derogatory measures and enabled the Minister of Interior to order the suspension of online communication that incited to, or advocated for, acts of terrorism. In 2021, France put enforced a series of legal provisions that, while maintaining the principle of limited liability, placed large online platforms under the monitoring of an independent administrative authority regarding moderating content, in addition to its power to impose sanctions, raising concerns of over-moderation.

Introduction

In January 2015, at the beginning of the period reviewed in this report, the satirical magazine Charlie Hebdo was targeted by two Islamist gunmen who killed 12 persons. After smaller aggressions in the course of the same year, Islamist terrorists killed 130 persons in a series of attacks in Paris. In 2020, high-school teacher Samuel Paty was assassinated and beheaded after he had shown two caricatures of the prophet Muhammad— those that had been published by Charlie Hebdo — while teaching a class on freedom of expression. These events explain that the need to defend the values of democracy and civil liberties against intolerance and radicalism, as well as the promotion of public security, have been driving forces in legislative activity.

Intense social protests have been another salient feature of public life.²⁵⁹ The Yellow Vests movement, which spontaneously emerged and organized outside of institutionalized channels, started in May 2018 as a reaction to economic inequalities and the high cost of living. After the end of the lockdown that was imposed during the Covid-19 pandemic, public protests have been motivated by various causes, including threats on the environment and most recently the legal reform of the law on retirement pensions. The country has constantly ranked highly in human rights indexes. France has scored constantly high at 90/100 in Freedom House reports on Freedom in the world from 2017 to 2022.²⁶⁰ France was ranked 26th out of 180 countries by Reporters Without Borders in 2022,²⁶¹ raising from the 38th position in 2015). In Justitia's Free Speech Index, France placed 14th out of 33 countries, with a score of 66 (medium approval).²⁶²

Nevertheless, serious concerns have been expressed by international organizations,²⁶³ global NGOs²⁶⁴ and by the independent national authority Défenseur des Droits²⁶⁵ in relation to the increasingly violent repression of public protests by police forces. Concerns have also been expressed in relation to the concentration of ownership²⁶⁶ in the media sector and lawsuits by powerful private actors²⁶⁷ that aim at silencing investigative journalism (a phenomenon known as strategic litigation against public participation or SLAPP). There were instances of threats,

²⁵⁹ In France, the right to protest is anchored in the protection of freedom of expression at Article 11 of the Declaration of Rights of 26 Aug. 1789 (see decision 2019-780 of the Constitutional Council).

²⁶⁰ Freedom House's reports on Freedom in the World are available from 2017 to today.

<https://freedomhouse.org/country/france>

²⁶¹ <https://rsf.org/en/index?year=2022>

²⁶² <https://futurefreespeech.com/interactive%20map/>

²⁶³ <https://www.france24.com/en/france/20230501-france-under-fire-at-un-for-police-violence-racial-and-religious-discrimination>; <https://www.coe.int/en/web/commissioner/-/manifestations-en-france-les-libertes-d-expression-et-de-reunion-doivent-etre-protégées-contre-toute-forme-de-violence>

²⁶⁴ <https://www.amnesty.org/en/documents/eur21/1791/2020/en/>

²⁶⁵ https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_des-risques-d-atteintes-aux-droits-et-libertes_20230414.pdf

²⁶⁶ <https://cadmus.eui.eu/handle/1814/74689>

²⁶⁷ <https://rsf.org/en/country/france>

violence and harassment against investigative journalism, such as the case of a female local journalist whose work focuses on the consequences of intensive farming.²⁶⁸

French laws set limits to freedom of expression to protect competing interests such as reputation and private life; they include prohibition for specific categories of content such as insult, incitement to hatred, discrimination and violence, apology of crimes against humanity, apology of terrorism, child pornography or copyright infringement. Within this framework, racist speech and incitement to hatred have remained a contentious issue — in a 2022 decision,²⁶⁹ the European Court of Human Rights (ECtHR) reiterated that the French authorities could legitimately repress Holocaust denial, in parallel with a generally problematic treatment of migrants.²⁷⁰

The regulation of online content has culminated in the adoption of a 2021 law that parallels the development of the EU's Digital Services Act. Other recent laws that raised concern in terms of restrictions on the free flow of information and ideas include laws on the state of emergency, the impact of measures justified by national security and a law on disinformation.

I. Legislation

Defending the values of the Republic

As a response to terrorist attacks, provisions that seek to protect the exercise of freedom of expression have been adopted. In 2016, Article 431-1 of the Penal Code, which already sanctioned hindering the exercise of freedom of expression, was reinforced to specifically target acts that seek to hinder artistic freedom or the diffusion of artistic creation.²⁷¹ With the aim of preventing campaigns that call for violence against particular individuals or manhunts that result in actual harm, a new criminal provision was incorporated in 2021 to punish the act of creating a danger for a person by revealing information about their private life.²⁷² The sanction is higher when the targeted person is a journalist.²⁷³ However, it is feared that the 2021 law to reinforce respect for the principles of the Republic²⁷⁴ will lead to discriminatory

²⁶⁸ European University Institute, Monitoring media pluralism in the digital era: application of the Media Pluralism Monitor in the European Union in the year 2021. Country report: France ; <https://cadmus.eui.eu/handle/1814/74689>

²⁶⁹ <https://hudoc.echr.coe.int/fre#>

²⁷⁰ <https://www.hrw.org/europe/central-asia/france>; <https://www.amnesty.org/en/location/europe-and-central-asia/france/report-france/>

²⁷¹ Law nr 2016-925 of 7 July 2016 on freedom of creation, architecture and heritage; Lepage, A. (2017). Un nouveau délit d'entrave dans le Code pénal : l'entrave à la liberté de la création artistique. *LEGICOM*, 58, 55-64. <https://doi.org/10.3917/legi.058.0055>

²⁷² Article 223-1-1 of the Penal Code, Law nr 2021-1109 of 24 Aug. 2021 "reinforcing the respect of the principles of the Republic".

²⁷³ Sanctions are higher when the targeted person is a minor, a person in situation of vulnerability, a representative of public authorities (such as a policeman) or a journalist. See Ader, B. (2022). Le nouveau délit de mise en danger : l'article 223-1-1 du code pénal. *Légipresse*, 67, 27-29. <https://doi.org/10.3917/legip.hs67.0027>

²⁷⁴ <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000043964778?>

application against Muslims²⁷⁵ and create disproportionate restrictions on the right to association.²⁷⁶

The State of Emergency and National Security

The French government has repeatedly resorted to declaring a state of emergency after the terrorist attacks of 2015 and during the Covid-19 pandemic. While measures such as the preventive arrest of potentially troublesome individuals and the discriminatory application of derogatory measures have been denounced by international organizations²⁷⁷ and NGOs,²⁷⁸ the impact of the state of emergency on freedom of expression remained ambivalent. In 2015,²⁷⁹ the possibility for the government to control the press during a period of emergency was removed from the 1955 law that sets the general framework²⁸⁰ for the determination of measures applicable during a state of emergency.²⁸¹ In a 2017 reform of the 1955 law,²⁸² journalists were given equal protection to lawyers in terms of the protection of their professional premises against search warrants. However, the 2015 reform also enabled the Minister of Interior to order the suspension of online communication that incited to or advocated for acts of terrorism.

The notion of apology of terrorism appears to be sufficiently vague as to be prone to abuse. In November 2020, four 10-year-old children were interviewed by police for hours²⁸³ on suspicion of advocacy of terrorism because it was alleged that they had questioned the decision of the murdered teacher Samuel Paty to show the cartoons caricaturing the prophet. Nevertheless, the European Court of Human Rights (ECtHR) has confirmed decisions by French courts relating to dressing a 3-year-old for school²⁸⁴ in a t-shirt that wore the words "I Am a Bomb" and "Jihad, Born on 11th September," and to a public declaration by a former member of a terrorist organization in admiration of the 2015 attackers.²⁸⁵ The European Court of Human Rights has confirmed that the notion of apology of terrorism is a clear legal basis that can support a restriction to freedom of expression.

²⁷⁵ <https://www.amnesty.org/en/latest/press-release/2020/11/france-is-not-the-free-speech-champion-it-says-it-is/>

²⁷⁶ Amnesty International, Annual Report 2022/203, at p. 176.

²⁷⁷ Monitoring media pluralism in the digital era, op. cit.

²⁷⁸ <https://www.amnesty.org/en/documents/eur21/3364/2016/en/>

²⁷⁹ <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000031503876/2015-11-21/>

²⁸⁰ <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000034115136/2017-03-02/>

²⁸¹ Terquem, F. (2017). État d'urgence et liberté d'information. *LEGICOM*, 58, 43-45.

<https://doi.org/10.3917/legi.058.0043>

²⁸² <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000034107742/2017-03-02/>

²⁸³ <https://www.amnesty.org/en/latest/press-release/2020/11/france-is-not-the-free-speech-champion-it-says-it-is/>

²⁸⁴ <https://hudoc.echr.coe.int/fre#{>

²⁸⁵ In the case of Rouillan v. France (23rd June 2022), the severity of the sanction (an 18-month imprisonment) was found to be disproportionate by the European Court of Human Rights; however, in the same decision, the Court confirmed that the notion of 'apology of acts of terrorism' could be considered a clear legal basis that pursued a legitimate aim.

Amnesty International and other organizations have expressed concerns at a preoccupying legislative trend that consists of turning the state of emergency into an ordinary and permanent law.²⁸⁶ On a related matter, the expansion of surveillance²⁸⁷ justified by security also undermines the right to freedom of expression and other fundamental rights such as that to privacy.

In a similar perspective, the Council of State dedicated its 2021 annual study²⁸⁸ to the question of states of emergency and recommended to circumscribe more precisely the definition of the notion of “situations of emergency,” notably by differentiating them from other approaches to crises.

The Law on Disinformation

Although the 1881 law on freedom of the press²⁸⁹ already included a provision on fake news, France adopted a 2018 law on the manipulation of information²⁹⁰ to counter disinformation during the electoral periods. It created a summary procedure through which a judge can decide within 48 hours on the depublication of widely distributed fake news that disrupt the electoral processes.²⁹¹ The law also allowed the media regulator to impose sanction on foreign-controlled media that broadcast disinformation. According to the Special Rapporteurs on freedom of expression (of the United Nations, the Organization for Security and Cooperation in Europe, the Organization of American States and the African Commission on Human and People’s Rights),²⁹² the vague and overbroad concept of “fake news” paves the way to abuses. The fight against disinformation should instead consist of supporting pluralism and diversity in the media landscape. That said, it seems that the new summary procedure has only been used in a very limited number of cases.²⁹³ The 2018 law also created an obligation for online platforms to submit to the regulatory authority (Arcom) an annual report on the measures they adopt to counter the circulation of disinformation.

²⁸⁶ <https://www.amnesty.org/en/latest/news/2017/09/france-mps-must-reject-permanent-state-of-emergency-2/>

²⁸⁷ <https://www.amnesty.org/en/latest/news/2023/03/france-intrusive-olympics-surveillance-technologies-could-usher-in-a-dystopian-future/>

²⁸⁸ <https://www.conseil-etat.fr/publications-colloques/etudes/les-etats-d-urgence-la-democratie-sous-contraintes>

²⁸⁹ <https://www.legifrance.gouv.fr/loda/id/LEGISCTA000006089701>

²⁹⁰ <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000037847559/>

²⁹¹ In a 2018 decision, the Constitutional Council provided indications on the interpretation of the law.

²⁹² <https://www.article19.org/resources/free-speech-mandates-issue-joint-declaration-addressing-freedom-of-expression-and-fake-news/>

²⁹³ Ader, B. (2022). Quelles réponses du droit ? Bilan judiciaire de la loi de 2018 relative à la lutte contre la manipulation de l'information et de la régulation. *Légipresse*, 67, 83-85. <https://doi.org/10.3917/legip.hs67.0083>

The Regulation of Online Content

After the controversial bill on hate speech known as the Avia law²⁹⁴ was judged unconstitutional by the Constitutional Council²⁹⁵ in a decision that reiterated the importance of the online sphere for participation in public life and the expression of ideas and opinions, the French legislator adopted a series of provisions in 2021²⁹⁶ that place large online platforms under the surveillance of an independent administrative authority (Arcom) which can develop a soft law approach in addition to its power to impose sanctions.

A very broad overview of the new provisions shows that while the new regime maintains the principle of limited liability for hosting services providers, there are new obligations for online platforms in terms of increased transparency towards public authorities and the public on measures adopted to moderate content, the creation of appropriate measures for users to flag problematic content, the creation of appropriate mechanisms to deal promptly with content that gets flagged, and the existence of internal remedies to follow up on content moderation decisions.

The approach aims to be systemic: Arcom will examine how platforms implement their obligations rather than hold them liable for individual pieces of content. Commentators have noted that a risk of over moderation still exists.²⁹⁷ Just like in the case of the EU DSA, the impact of the new regulatory regime will need to be analyzed in detail in the coming years.

II. Enforcement

Two important dimensions of freedom of expression still deserve to be briefly mentioned.

The Regulation of Media

Alongside its mission in the online sphere, Arcom's jurisdiction includes the regulation of audiovisual media. For instance, in a recent decision, the regulatory authority fined a television channel after the host of a show had violently insulted a guest in order to prevent him from criticizing a shareholder of the channel.²⁹⁸ The creation of the French press council in 2019 is noteworthy: known as the CDJM,²⁹⁹ it operates as a self-regulatory mechanism that seeks to serve the protection and promotion of ethical standards of journalism.

²⁹⁴ <https://www.article19.org/resources/france-the-online-hate-speech-law-is-a-serious-setback-for-freedom-of-expression/>

²⁹⁵ <https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm>

²⁹⁶ <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000043968703/2021-08-26/>

²⁹⁷ Bigot, C., La liberté de communication dans la loi du 24 août 2021, les nouvelles obligations de collaboration des plateformes sous le contrôle de l'ARCOM, *Légipresse* 2022/HS1 (N° 67), pages 31 à 43, DOI 10.3917/legip.hs67.0031

²⁹⁸ Blocman, A., ARCOM fines C8 for failing to control programme content and violating human rights, *IRIS* 2023-3:1/6

²⁹⁹ <https://cdjm.org/>

Representation of the Female Body

The Supreme Court decided that a Femen activist³⁰⁰ was guilty of exhibitionism for a bare-breasted protest against the Catholic church's opposition to abortion. The ECtHR considered that the condemnation amounted to a disproportionate restriction of the female activist's right to freedom of expression.³⁰¹ As noted by Mattiussi, this decision of the Court of Strasbourg may be interpreted as a hint that a female torso should not be seen as sexual.³⁰²

Conclusion

While the period under review opened with the image of a unanimous nation that proclaimed its attachment to freedom of expression in reaction to the murderous attack on Charlie Hebdo, it ends with the bleaker picture of a country where public authorities appear to have become less tolerant of criticism and are engaging into brutal repression of protests and a stricter control of public discourse. Recent incidents such as the detention of a woman for a Facebook post critical of the president³⁰³ or a local prohibition to carry saucepans³⁰⁴ verge on caricature and reveal a trend of deterioration of the state of freedom of expression in France. It is a relief, albeit limited, that higher courts appear to defend civil liberties and the rule of law. In addition to other decisions mentioned in the report, the Constitutional Council also rejected³⁰⁵ a draft provision that would have set up a prohibition for the public to share images of police forces in action.

³⁰⁰ <https://femen.org/about-us/>

³⁰¹ [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-13834%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13834%22]})

³⁰² Mattiussi, J., "La France condamnée pour atteinte à la liberté d'expression d'une militante *Femen* : un aboutissement pour les *Femen*, un commencement pour les femmes ?", *La Revue des droits de l'homme*, Actualités Droits-Libertés, DOI: <https://doi.org/10.4000/revdh.15948>

³⁰³ <https://www.lalibre.be/international/2023/03/29/une-francaise-devant-la-justice-pour-avoir-insulte-emmanuel-macron-sur-les-reseaux-sociaux-JX6DF2EFC5CIVJHHQIWI62QHBY/>

³⁰⁴ <https://www.politico.eu/article/local-french-authorities-crack-down-on-saucepans-during-macron-visit/>

³⁰⁵ <https://www.conseil-constitutionnel.fr/decision/2021/2021817DC.htm>