

Marlène Schiappa's bill against sexual and sexist violence as a response to the "#balancetonporc" movement (Part 1)

Sexual offenses have rocketed into the limelight in recent months. The societal phenomenon #*balancetonporc* (#*balancetonporc* is the French equivalent of #*MeToo*) has led Marlène Schiappa, French Minister of State for Gender Equality, to work on a draft bill to combat sexual and sexist behaviors.

With the strengthening of the existing legislative arsenal and the creation of a new criminal charge, what has been the impact of the #*balancetonporc* movement on the protection of victims of sexual offenses?

The current criminal legislation

The current legislative arsenal criminalizes and establishes penalties for various sexual offenses, the most common of which are listed below:

- Rape, defined as *"any act of sexual penetration, whatever its nature, committed against another person by violence, coercion, threats or surprise"* and punished by *"fifteen years' imprisonment"* under Article 222-23 of the French Criminal Code;
- Sexual assault, defined as *"any type of sexual abuse committed with violence, constraint, threat or surprise"* by Article 222-22 of the French Criminal code and punished by *"five years' imprisonment and a 75,000 euros fine"*) under Article 222-27 of said Code;
- Sexual abuse, defined as *"the commission by an adult, without violence, constraint, threat or surprise of a sexual offence on a minor under fifteen years of age"* and punished by *"five years' imprisonment and a 75,000 euros fine"* under Article 2227-25 of the French Criminal Code;
- Sexual harassment, defined as *"the fact of repeatedly imposing on a person remarks or actions that have a sexual connotation and that affect such person's dignity because of their degrading or*

humiliating nature or that creates an intimidating, hostile or offensive environment for such person” and as “any form of intense pressure, even if not repeated, with the actual or perceived purpose of obtaining sexual favors” and punished by “two years’ imprisonment and a 30,000 euros fine” under Article 22-33 of the French Criminal Code.

As such, the French Criminal Code penalizes not only any and all acts of sexual penetration and any touching of body parts with a sexual connotation, but also any conduct of a sexual nature that affects the person’s dignity or that put him/her in an intimidating situation.

Victims of the aforementioned conducts can file a criminal complaint directly at the police station or by writing a letter to the Public Prosecutor. However, the rest of the process is really an obstacle race during which the victim is required to provide concrete evidence of the offence (such evidence being sometimes hard to gather) and to confront with the assaulter several times (at the police station, in the office of the investigation judge and during the trial).

It is in this context - and probably to bypass the aforementioned difficulties associated with the filing of a criminal complaint - that the societal phenomenon *#balancetonporc* has emerged, serving as an alternative to the prosecution of sexual offenses before courts of law.

The “#balanceTonPorc” societal phenomenon

On October 5, 2017, the New York Times reported many allegations of sexual harassment against Harvey Weinstein, one of Hollywood’s most powerful film producers.

A few days later, on October 13, 2017, the French New York based journalist Sandra Muller started the hashtag *#BalanceTonPorc*, and encouraged women to speak out and name the sexual predators who have had an inappropriate conduct, primarily in the employment context. This was the birth of the *#BalanceTonPorc* movement relayed since then on the social networks.

Victims are now speaking out more openly on what is becoming a “Trial by social media”.

Surge in the number of complaints following the launch of the “#BalanceTonPorc” movement

According to the “Insecurity and Delinquency” Report issued by the French Minister of Home Affairs and the statistical data for year 2017, the number of criminal complaints for rape and other sexual abuses has risen drastically (+12% and +10%, respectively), in particular at the end of the year (+31.5 %), i.e. after the Weinstein scandal and Sandra Muller’s first tweet with the Hashtag *#BalanceTonPorc*.

The authors of the Report explain, however, that this surge does not mean that the number of sexual offenses has risen. It rather reflects “*an increasing reporting of facts by the victims*”.

Marlène Schiappa’s bill against sexual and sexist violence

The bill presented by Marlène Schiappa, French Minister of State for Gender Equality, (the “Bill”) is described

as a response to the *#balancetonporc* movement.

The main measures provided for in the Bill focus on the following four areas.

- *Extension of the statutes of limitations applicable to sexual offenses against minors*

The Bill proposes to extend the statute of limitations applicable to sexual offences against minors and to bring it to 30 years - as opposed to 20 years currently - after the victim has turned 18.

This proposal comes after two highly publicized cases^[1] that clearly showed that certain victims need sometimes more time to speak out. This new extension of applicable statutes of limitations faces the obstacle of the preservation of evidence which concretely speaking results in drop of charges, dismissal orders, discharge or acquittal.

In any event, the proposed extension would at least enable to restore the distinction that used to exist between crimes against adults (that were subject to a 10-year statute of limitations) and crimes against minors (that were subject to a longer statute of limitations period) before the statute of limitation reform in criminal matters introduced by the Law of February 27, 2017^[2]. By establishing a 20-year limitation period for crimes, this reform incidentally aligned the limitation period for crimes committed against adults with that applicable to crimes committed against minors. Marlène Schiappa's Bill proposes to restore this difference in the treatment of these two types of offences, thereby underlining the seriousness of crimes committed against minors.

- *The creation of a presumption of non-consent in case of sexual intercourse between an adult and a minor under the age of 15*

The Bill also proposes to create a presumption of non-consent according to which it would be presumed that a minor under 15 cannot consent to sex with an adult. Under 15, the minor would be considered as too immature to give his/her informed consent to sexual intercourse with an adult.

Here again, these measures have been designed in the context of two high profile cases in which men accused of having sex with 11-year-old girls finally escaped prosecution or conviction because the girls were presumed to have consented to sexual activity as they did not defend themselves.

While the *Cour de Cassation* (French Supreme Court) had already ruled^[3] that the lack of consent could be inferred from the very young age of the victim, this solution was not applicable to older minors.

The presumption of non-consent proposed by Marlène Schiappa sparks debates as it would make it easier to prove that a rape has been committed on a minor but it would also mean that any adult having sexual intercourse with a minor under the age of 15 will be presumed to have committed a rape (since the sexual intercourse will be deemed unwanted).

This presumption would not be an irrebutable one and it will be up to the defendant to bring the evidence of

consent, which will not be easy in many cases.

However, by making the crime “automatic”, the Bill undermines the sovereign discretion of judges and jurors who will have to impose the same sentence on adults who had sexual intercourse with a 14-year-old teenager and adults who had sexual intercourse with a 3-year-old child in the absence of any proof that consent was given.

In addition, one may wonder about the need to create such a presumption whereas a more severe assessment by criminal courts of the elements that constitute the offence of rape could be sufficient to get convictions without disproportionate infringement of the rights of the defense and of the presumption of innocence (in particular by relying on the “surprise” criteria when the victim was in a state of paralysis, or on the existence of mental coercion when the victim was faced with sexual advances by an older adult). Moreover, the Bill does not solve this problem of lack of strict enforcement of existing legislation for adult victims who would not benefit from a presumption of non-consent. It would have been advisable for the Bill to address the issue of the definition of rape and the application of such definition by courts in order to strengthen also the protection afforded to adult victims.

- *The creation of on-the-spot fines in case of street harassment*

French Minister of State for Gender Equality further proposes the creation of on-the-spot fines for street harassment, also referred to as “sexist insult” by French Minister of Justice.

This offense would be punished by a 90 euros fine, increased up to 3,000 euros in case of repeated offenses, and offenders will have to be caught in the act by police officers.

This proposal - inspired by the offences of sexual and moral harassment and/or insult (i.e. a serious offence that impairs the honor and dignity of the victim) - is being criticized for two reasons.

First, some legal authors consider that the existing legislative arsenal - which includes the offenses of sexual or moral harassment that also apply in the public space and the offence of insult - is sufficient to punish conducts targeted by the Bill.

On the other hand, the creation of such offense raises an evidentiary problem wherever the offense is committed without any police officer being present. As such, it seems that this proposal is for educational/deterrent purposes only and has no practical applicability given the foreseeable lack of effective enforcement.

- *Broadening of the definition of moral and sexual harassment*

Lastly, Marlène Schiappa proposes to broaden the definition of the offenses of moral and sexual harassment as such offenses could be established wherever “*words or conducts are imposed to the same victim in a concerted manner by several individuals even if such individuals have not acted repeatedly*”.



This new provision would make it possible to prosecute and convict offenders who have not acted repeatedly.

In conclusion, Marlène Schiappa's Bill aims at providing a legal response to the *#balancetonporc* societal phenomenon by strengthening the set of laws that punish sexual offenses.

In our forthcoming May e-newsletter, we will analyze the *#balancetonporc* movement in the context of the freedom of expression principle, and discuss the defamatory excesses created by this Hashtag on the social networks.

[1] Cf. for instance the Flavie Flament case or the Père Preynat case.

[2] Cf. our article entitled "[Statute of limitation reform in criminal matters](#)" published in our [June 2017 e-newsletter](#).

[3] Criminal Chamber of the *Cour de Cassation*, December 7, 2005, n°05-81.316

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