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## **FREEDOM OF EXPRESSION VERSUS HATE SPEECH: LIMITS AND THEIR CHANGEABILITY**

**Key words:** freedom of expression, hate speech, context, changeability

### **Summary**

The main issue discussed in the present article is, as follows: whether the freedom of expression may be restricted, and whether it has actually been restricted in order to avoid hate speech in the situation of threat? The answer to this question is both 'yes' and 'no'. 'No', because the criteria for distinction between freedom of expression and hate speech remains unchanged, and 'yes', because, firstly, the criterion of 'the context' becomes more 'intense' and 'sensitive', and, secondly, the 'intensity' and 'sensitivity' of the context may be reflected in national legal regulation by recognizing additional situations as hate speech. Meanwhile, 'the context' is always changing, therefore the borders between the freedom of expression and hate speech likewise vary perpetually.

### **Introduction**

The key issue discussed in this article is: whether the freedom of expression could be and actually is restricted in order to avoid hate speech in the situation of threat? The answer to this question could be both 'yes' and 'no'. 'No', because the criteria for distinction between the freedom of expression and hate speech remain unchanged, and 'yes', because, firstly, the substance of criterion 'context of expression' becomes more 'intense' or 'sensitive', and, secondly, the 'intensity' and 'sensitivity' of the context may be reflected in national legal regulation by recognising additional situations as hate speech. At the same time, the context is perpetually changing, hence, the border between the freedom of expression and hate speech likewise is subject to constant change.

## 1. The concept (definition) of hate speech

Presently, there are number of international agreements prohibiting hate speech, such as International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights, Additional Protocol to the Council of Europe Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems<sup>1</sup>, Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law<sup>2</sup>. However, none of them provides an exhaustive definition. At the same time, there are international soft law documents, which attempt to summarise this concept as stipulated by international agreements and documents of the bodies in charge of providing their interpretation.

Their most exhaustive definition is offered by European Commission against Racism and Intolerance (ECRI). ECRI is an institution of the Council of Europe, which specialises in questions relating to the fight against racism, discrimination, xenophobia, antisemitism, and intolerance in Europe.<sup>3</sup> In its General Policy Recommendation No. 15 on Combating Hate Speech<sup>4</sup>, ECRI in substance delivers a synthesis of existing international standards in relation to hate speech established by the UN, Council of Europe, European Union and other international organisations.

ECRI General Policy Recommendation No.15 on Combating Hate Speech defines the hate speech as:

*Hate speech is the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of “race”, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex,*

<sup>1</sup> Likums “Par Konvenciju par kibernetiskajiem un Konvencijas par kibernetiskajiem Papildu protokolu par rasisma un ksenofobijas noziedzīgajiem nodarījumiem, kas tiek izdarīti dator sistēmās” [Law “On the Convention on Cybercrimes and the Additional Protocol to the Convention on Cybercrimes on the Offenses of Racism and Xenophobia Committed on Computer Systems”]. Official Gazette No. 171, 26 October 2006.

<sup>2</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Official Journal L 328/55, 6 December 2008.

<sup>3</sup> ECRI European Commission against Racism and Intolerance. European Council, 2019. Available in English: <https://rm.coe.int/leaflet-ecri-2019/168094b101> [viewed 16.04.2024.].

<sup>4</sup> General Policy Recommendation No. 15 of the European Commission against Racism and Intolerance, 21 March 2016. Available: <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01> [viewed 16.04.2024.].

*gender, gender identity, sexual orientation and other personal characteristics or status.*<sup>5</sup>

European Commission against Racism and Intolerance also recognises that hate speech may take the form of public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and the glorification of persons convicted for having committed such crimes.<sup>6</sup>

As it follows from the definition, ‘hate speech’, firstly, requires an action, for example, advocacy, promotion of ideas, spreading of hatred, harassment, and, secondly, such actions must be based on a bias against a particular (vulnerable) group, or individuals belonging to the particular group (for example, Roma nationals, homosexuals, persons with disabilities).

## **2. The criteria for distinction between freedom of expression and hate speech**

In the context of hate speech, the most complicated issue has always been distinguishing between freedom of expression as one of the basic freedoms in any democratic society, and hate speech. None of international agreements provide an answer to this question. However, there are other relevant legal sources, such as documents adopted by the international bodies in charge of interpretation of international agreements. The most well-known documents establishing criteria for distinction between freedom of expression and hate speech is Rabat Plan of Action<sup>7</sup> adopted by UN Human Rights Committee on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This document sets down the guidelines on how to strike a balance between Article 19 of the Covenant, which provides for freedom of expression, and Article 20, which prohibits incitement of discrimination, hostility or violence. The Rabat Plan of Action, among other things, lists the criteria for identification of hate speech.

It lists the following criteria to be assessed in order to establish, whether an expression could be considered as hate speech: context, speaker, intent, content and form, extent of the speech act and likelihood, including imminence, of the consequences.

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<sup>5</sup> General Policy Recommendation No. 15 of the European Commission against Racism and Intolerance, 21 March 2016. Available: <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01> [viewed 16.04.2024.].

<sup>6</sup> Ibid.

<sup>7</sup> Rabat Action Plan, 22<sup>nd</sup> Session of the UN Human Right Committee, 11 January 2013. Available: [https://digitallibrary.un.org/record/746343/files/A\\_HRC\\_22\\_17\\_Add.4-EN.pdf](https://digitallibrary.un.org/record/746343/files/A_HRC_22_17_Add.4-EN.pdf) [viewed 16.04.2024.].

The criteria have been further developed by other human rights bodies, notably, European Court of Human Rights<sup>8</sup> and ECRI.<sup>9</sup>

Consequently, the following aspects must be assessed:

- The content and form of speech: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered;
- The extent of the speech act: the extent includes such elements as the reach of the speech act, its public nature, its magnitude, and size of its audience;
- The means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular, when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups;
- The speaker's position or status in the society, and the audience to which the speech is directed;
- The objectives of the speech and/or intent: whether the speech was intended to offend vulnerable groups or disseminate bias concerning them;
- Likelihood, including imminence, of consequences.

### 3. The context of the speech as a central element

The ECtHR has stated that the content of the expressions is not the sole important aspect, “but also the context in which they were made”.<sup>10</sup> Once again, this emphasises that the key criteria in establishing a distinction between the freedom of expression and hate speech are economic, social and political climate at the time of the speech, as well as historical and geographical context. The local situation is of an utmost importance. A good example of historical context relates to denial or trivialisation of Nazi crimes during World War II. The respective expressions are recognised as hate speech by numerous international organisations and tribunals including ECtHR, thus setting also geographical context, namely, the common understanding of such expressions as hate speech in the territory of Europe.<sup>11</sup>

As pointed out by the European Court of Human Rights, when it comes to whether or not statements are to be regarded as hate speech, it is essential to analyse the statements in their entirety, not abstractedly, because, even if

<sup>8</sup> See, for example, decision of the European Court of Human Rights (15 October 2015) in Case *Perincek v. Switzerland*, application No. 27510/08.

<sup>9</sup> General Policy Recommendation No. 15 of EC.

<sup>10</sup> See, for example, decision of the European Court of Human Rights, 5 December 2019 in Case *Tagiyev and Huseynov v. Azerbaijan*, application No. 13274/08, para. 41.

<sup>11</sup> See, for example, Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L. (eds). *Theory and Practice of the European Convention on Human Rights*. Intersentia, 2018, p. 1090.

a statement may appear amusing in one context, it may be regarded as hate speech in another.<sup>12</sup>

Likewise, the European Commission against Racism and Intolerance in its Recommendation No. 15 stresses – when assessing the context in which the respective hate speech is being used, it is crucial to establish, whether or not there are pre-existing serious tensions within the society to which this hate speech is linked.<sup>13</sup>

An important element in the identification of the hate speech is the fact that the expression is directed against vulnerable groups, thus, in establishing the context of the expression, it is crucial to acknowledge, which groups of society are in particularly vulnerable situation in the given socio-cultural context.<sup>14</sup> The internationally recognized characteristics of vulnerable groups include race, colour, language, religion, citizenship (nationality), and ethnic origin, religious or other beliefs, age, disability, gender, gender identity and sexual orientation. It is important to note that this list is not exhaustive, because the situation in the society is constantly changing.<sup>15</sup> Furthermore, according to the ECtHR, in addition to a particular characteristic of a persons or group, the status can also constitute the grounds for discrimination.<sup>16</sup>

In the times of complicated social and political situation, the criterion ‘context’ becomes more ‘intense’ and ‘sensitive’, thereby adding to the list topics which might lead to hate speech and likewise, augmenting the list the groups which might be subject to attack by hate speech.

#### 4. National context and legal regulation

As pointed out previously, in assessing the expression and identifying the presence of hate speech, the context is the central and leading element. Thus, acknowledgment of the local social, economic, political, historical and geographical situation is of an utmost importance.

The economic, social and political situation is constantly changing. As regards the recent years in Latvia, the society has faced COVID-19 crisis and the war in

<sup>12</sup> Benedek W., Kettermann M. C. Freedom of expression and the Internet. Council of Europe, 2<sup>nd</sup> edition, 2020, p. 100.

<sup>13</sup> General Policy Recommendation No. 15 of EC.

<sup>14</sup> OECD. A Practical Guide on Hate Crime Laws. 2009, pp. 38–39. Available: <https://www.osce.org/files/f/documents/3/e/36426.pdf> [viewed 16.04.2024.].

<sup>15</sup> Recommendation (20 May 2022) CM/Rec (2022) 16 of the Committee of Ministers to Member States on combating hate speech. Available: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a67955](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a67955) [viewed 16.04.2024.]; also ECtHR has stressed that list of non-discrimination traits is not exhaustive, see, for example, decision of the European Court of Human Rights, 28 November 1984 in Case Rasmussen v. Denmark, application No. 9118/80, para. 34.

<sup>16</sup> Decision of European Court of Human Rights, 25 July 2017, in Case Carvalho Pinto de Sousa Morais v. Portugal, application No. 17484/15, para. 46.

Ukraine, each of these factors contributing to economic hardship. Notably, in each country the historical and geographical context is different, and that may accumulate and become more sensitive in certain circumstances. For example, the war in Ukraine is of a specific importance in Latvia, taking into account the country's historical background, i.e., Soviet occupation and its geographical location next to the conflict zone. Such aspects increase the tension between and towards specific groups of society, in Latvian context, based on ethnic and national origin. For example, there is an increased tension between such ethnic groups as Latvians and Russian-speaking population<sup>17</sup>, as well as between Ukrainian civilians of the latter group residing in Latvia. On the other hand, the hybrid war operations organised by Belarus on Latvian border by inducing illegal immigration attempts has increased a xenophobic response of Latvian society in general. Furthermore, the social context is heated up by debates on legal recognition of partnership and ratification of Istanbul convention, spreading bias on account of gender and against homosexuals and transpersons, in the context where the bias against persons belonging to this group is already high.<sup>18</sup>

Taking into account this, the question is, how do Latvian legislator and legal regulation respond to it?

The basic legal regulation combating hate speech has been adopted already before the crises described above. In particular, Article 78 of the Criminal Law protects against hate speech based on nationality and race since 1998<sup>19</sup>, on ethnic origin – since 2007<sup>20</sup>, and religion – since 2014.<sup>21</sup> The Criminal Law was further amended in 2014 by Article 150 prohibiting hate speech on the basis of sex, age, disability, or any other trait.<sup>22</sup>

However, such legal regulation, according to the legislator's opinion, was insufficient taking into account a specifically historical context, thus, the Law on Administrative Penalties for Offences in the Field of Administration, Public

<sup>17</sup> Ambrasa I. *Petijums par naida runas un naida noziegumu atpazīšanas un izmekšanas prakses problemāspēkiem Latvijas Republikā* [A study on problematic issues related to identification and investigation of the hate speech]. Ombuds Office of Latvia, 2016. Available in Latvian: [https://www.tiesibsargs.lv/wp-content/uploads/2022/07/naida\\_noziegumu\\_un\\_naida\\_runas\\_izmeklesana\\_lv\\_2016\\_1496214733.pdf](https://www.tiesibsargs.lv/wp-content/uploads/2022/07/naida_noziegumu_un_naida_runas_izmeklesana_lv_2016_1496214733.pdf) [viewed 16.04.2024.]; see also Dupate K. (ed.). *Naida noziegumi un naida runa. Starptautiskie standarti un Latvijas tiesiskais regulējums un prakse* [Hate Crimes and Hate Speech. International Standards and Latvian Legal Regulation and Its Application in Practice]. University of Latvia, 2022. Available in Latvian: [https://www.jf.lu.lv/fileadmin/user\\_upload/lu\\_portal/fakultates/jf/Petijums\\_Naida\\_noziegumi\\_F.pdf](https://www.jf.lu.lv/fileadmin/user_upload/lu_portal/fakultates/jf/Petijums_Naida_noziegumi_F.pdf) [viewed 16.04.2024.].

<sup>18</sup> SKDS. *Petijums par attieksmi pret LGBTQ+ personām Latvijā* [Research on attitude towards LGBTQ+ persons in Latvia]. 2020, Mozaika. Available in Latvian: <https://www.dropbox.com/s/9vh64s1hnzcp9dl/2020.07.ataskaiteSKDS.publ.pdf?dl=0> [viewed 16.04.2024.].

<sup>19</sup> *Latvijas Republikas Krimināllikums* [Republic of Latvia Criminal Law], Official Gazette No. 199/200, 8 July 1998.

<sup>20</sup> *Grozījumi Krimināllikuma* [Amendments to the Criminal Law]. Official Gazette No. 107, 5 July 2007.

<sup>21</sup> *Grozījumi Krimināllikuma* [Amendments to the Criminal Law]. Official Gazette No. 204, 15 October 2014.

<sup>22</sup> *Ibid.*

Order, and Use of the Official Language<sup>23</sup> was adopted on 2020, prohibiting the use and displaying of symbols of U.S.S.R. and fascist Germany (Article 13). As a consequence of the war in Ukraine, the legislator adopted amendments prohibiting the use of symbols glorifying military aggression and war crimes in a public place (Article 13<sup>1</sup>).

It follows that Latvian legislator in combatting hate speech responds to the changing social and political context by recognising particular expressions as illegal.

Meanwhile, the central question of this article is whether, in the times of crisis, the freedom of expression becomes more restricted?

Considering Latvian legal regulation, it could be argued in affirmative – the freedom of expression becomes more restricted, because several new expressions (expressions on particular topics) are made illegal. At the same time, an answer in negative applies likewise – because the criteria of distinction between the freedom of expression and hate speech remain unchanged. However, it must be admitted that in tense social, economic and political context the substance of the most prominent criterion for identification of hate speech, namely – ‘context’ becomes more ‘intense’ or ‘sensitive’. It could be also argued that ‘intensity’ and ‘sensitivity’ of the social, economic and political context may be reflected in national legal regulation by recognising additional situations to the already defined ones as a hate speech.

## Conclusions

1. According to international law, the distinction between the freedom of expression and hate speech must be drawn on the basis of such criteria as context, speaker, intent, content and form, extent of the speech act and likelihood, including imminence, of the consequences.
2. The central and main criterion, however, is the context in which an expression has been made. The social, economic and political context is of a particular importance, because, as emphasised by the European Court of Human Rights, a statement may appear amusing in one context, whereas it may be regarded as hate speech in another.
3. The recent crisis that unfolded in Latvia, especially the war in Ukraine, is considered particularly ‘sensitive’, taking into account not only the social and political context, but primarily – the historical and geographical context. The history of USSR occupation and proximity of war zone exacerbated the tensions amongst different ethnic and social groups in Latvia, bringing them to the surface.

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<sup>23</sup> Administratīvo sodu likums par parkapumiem parvaldes, sabiedriskas kartības un valsts valodas lietošanas joma [Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language], Official Gazette No. 96, 20 May 2020.



4. The changing political and social context led to the recognition of certain forms of expression as illegal under Latvian law.
5. At the same time, the criteria for distinction between the freedom of expression and hate speech has remained the same, hence, from this perspective, it might be argued that in the time of crisis the freedom of expression does not become more restricted. However, it must be admitted that the main criterion for distinction between the freedom of expression and hate speech – the ‘context’ in the times of political and social tension becomes more ‘intense’ and ‘sensitive’. Therefore, it may be argued that the permissible borders of expression become narrower. The latter stance may also be substantiated by the fact that more ‘intense’ and ‘sensitive’ context may lead to prohibition of certain forms (topics) of expression as illegal.
6. Meanwhile, the context is perpetually changing, and consequently the border between the freedom of expression and hate speech is equally changeable.

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