

The Limits of Freedom of Expression in the Context of the Internet according to the ECHR

written by Nijat Mammadbayli Nicat Məmmədbəyli

The European Convention on Human Rights (ECHR), acceded to by Azerbaijan, ensures the protection of certain human rights and fundamental freedoms, including freedom of expression, which makes it an essential foundation of a democratic society and one of the basic conditions for its progress.[\[1\]](#) The Internet plays an important role in today's world among platforms where freedom of expression is practiced and tested. Internet platforms, which contribute to the process of democratization of freedom of expression, bring public debate to a wider audience. But there is a finite number of rules governing the Internet, both locally and internationally. Therefore, local and international courts play a major role in setting standards for protecting freedom of expression on the Internet.

Because ideas disseminated online can be hateful, harmful and offensive, most social networking platforms, for example, regulate their own rules of behavior for guidelines on the content and restraint, which also encourage users to follow these rules.[\[2\]](#) In addition, social media platforms use notification systems, content tagging, account deactivation, and content removal with automatic filters to curate user posts. Even in most cases when posts are deleted, users are not informed, and they have no way to challenge the decision.

In some cases, social media platforms (e.g. Facebook) remove posts completely, showing an extremely sensitive reaction to posts that it considers offensive or contrary to internal

rules. Facebook's decisions can sometimes lead to criticism, such as the lack of protection of freedom of expression by the platform.[\[3\]](#) A controversial aspect of such self-regulation in legal terms is that the entity that decides which standards to apply in determining their content is a private company. This issue has raised the question of the compatibility of Internet use with human rights and resulted in contentious cases in the context of freedom of expression as well as of privacy rights. These contentious cases have led to the development of *the judicial law* of what the European Court of Human Rights (ECtHR) has called *new technologies*.[\[4\]](#)

This article looks at the application of freedom of expression in the context of the Internet under Article 10 of the European Convention on Human Rights (ECHR), its limits, and the scope of restrictions on freedom of expression in this area according to ECtHR jurisprudence.

Freedom of expression in the ECHR context

Freedom of expression falls under the jurisdiction of Article 10 of the ECHR and is not an absolute right. Under this article, everyone has the freedom to hold opinions and to receive and impart information and ideas.[\[5\]](#) This right shall include, for example, everything from ideas expressed at any protest, to statements made in an article, book or pamphlet, on television or radio, expressions communicated through works of art, and information received and disseminated on the Internet and social media.

Apart from being a foundational principle of a democratic society, freedom of expression is also considered the main condition for the progress of society and individuals. Although freedom of expression may be subject to exceptions, those exceptions "must be narrowly interpreted and the necessity for any restrictions must be convincingly established." It is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive

or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there can be no “democratic society.” [\[6\]](#)

Since the general principles of the ECtHR relating to Article 10 also apply to freedom of expression, information or opinions that are published, imparted and received via the Internet also fall within the jurisdiction of this article. Freedom of expression applies to “everyone,” whether natural or legal persons.[\[7\]](#) It is clear from ECtHR case law that, because of its accessibility and its ability to store and transmit large volumes of information, the Internet plays a significant role in enhancing public access to news and the dissemination of information in general.[\[8\]](#)

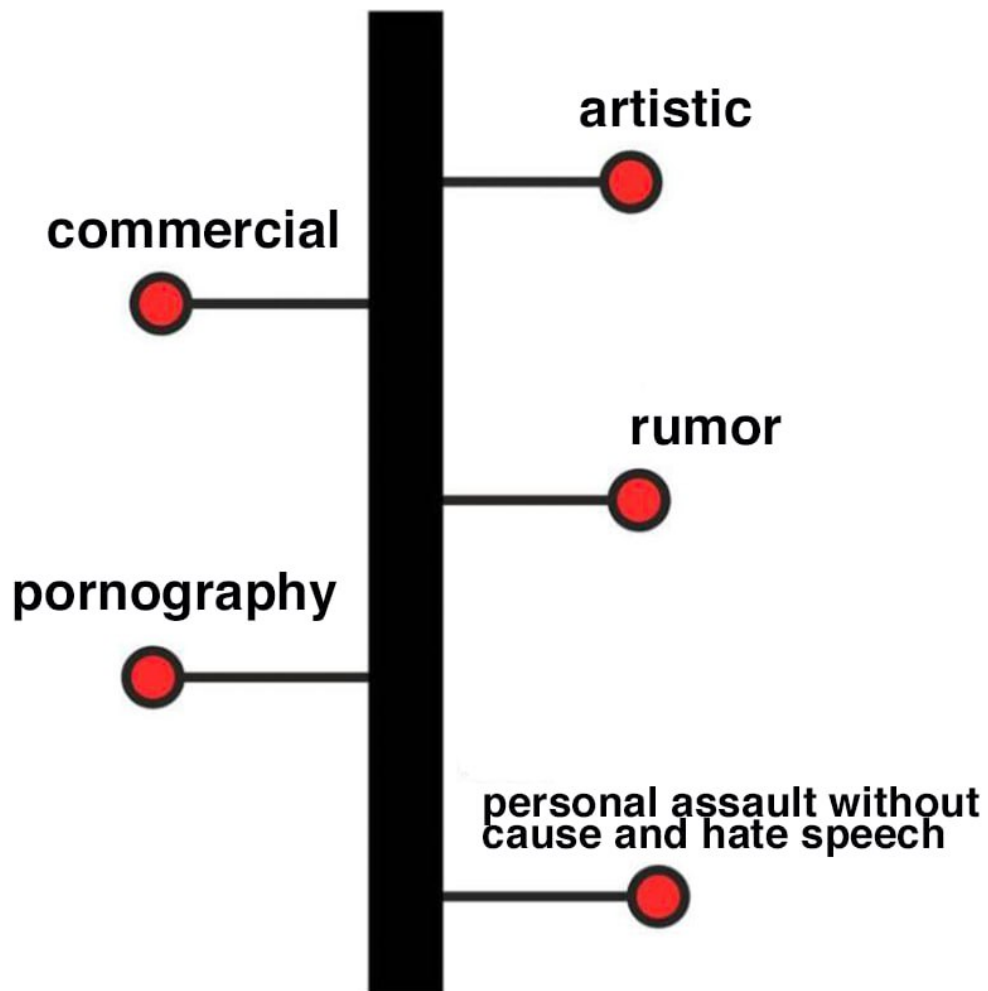
The obligation to ensure freedom of expression, along with other rights and freedoms, lies primarily within the responsibility of the state party to the convention.[\[9\]](#) Interference with this right is permissible in exceptional cases. The ECtHR notes that convention partner states have discretion in this matter in applying restrictions consistent with domestic law, taking into account their belonging to disparate cultural and historical as well as different legal systems. ECtHR jurisprudence justifies this by arguing that public authorities are in a more appropriate position than an international judge to express an opinion on the precise content of these claims, and on the need for restrictions or penalties designed to satisfy them.[\[10\]](#) However, in the context of freedom of expression, the state’s ability to exercise discretionary power is limited. Thus, the court also controls the consistency of the conduct of the state with the obligations arising from the convention.[\[11\]](#)

The restrictions that the state imposes on freedom of expression shall be provided for by law,[\[12\]](#) protect[\[13\]](#) one of its legitimate aims listed in Article 10 (2) of the ECHR (national security, territorial integrity or public safety,

prevention of disorder and crime, protection of health or morals, protection of the reputation or for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary),[\[14\]](#) and finally be necessary in a democratic society in order to protect them.[\[15\]](#)

Value of expression

Under ECtHR jurisprudence, in determining the value of expression, the court will have particular regard to the words used in statements under question and to the context in which they were made public, in light of the case as a whole, including the fact that the statements under question may have been oral statements reported by the press, thereby—presumably—reducing or eliminating the applicants' possibilities for reformulation, perfection or retraction before publication.[\[16\]](#) The concept of the value of an expressed idea was developed by the ECtHR. According to the ECtHR classification, the value attached an idea is basically diversified into six different areas: artistic, commercial, rumor, pornography, personal assault, and incitement to hatred.[\[17\]](#) A hierarchy of the values of freedom of expression can be described as follows:



A high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation (discretionary power), will normally be accorded where the remarks concern a matter of public interest.[\[18\]](#) A person engaged in a public debate of general interest may allow some degree of exaggeration or provocation in his expression, and may utter vulgar language.[\[19\]](#) However, if the statement containing exaggeration or provocation is not based on any facts, it may fall outside the protection of freedom of expression.[\[20\]](#) Also, concrete expressions constituting hate speech,[\[21\]](#) which may be insulting to particular individuals or groups, may be excluded from the protection of freedom of expression,[\[22\]](#) but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the court, style constitutes part of the form of expression and is, as such, protected together with the content of the expression.[\[23\]](#)

In addition, statements calculated to incite violence also fall outside the protection of freedom of expression.[\[24\]](#) (The issue of racist or hate speech may extend to both Article 10 and Article 17 of the ECtHR. Article 17 is mainly applied in the context of racist speech that undermines the values contained in the convention, such as tolerance and nondiscrimination. For example, the Facebook post by Qarabağ FK communications officer Nurlan Ibrahimov during the Second Karabakh War, “We [Azerbaijanis] must kill all Armenians” may be regarded as incitement to hatred on ethnic grounds.[\[25\]](#)

Also, a dismissal of a person of any profession for his political views[\[26\]](#) can be considered a violation of freedom of expression because, for the court, dismissal is disproportionate to the pursuit of legitimate aims, and therefore interference (dismissal) in a democratic society cannot be considered necessary.[\[27\]](#)

Examples of artistic or satirical expression that are considered indecent in society can also be protected by freedom of expression because this type of expression (artistic or satirical) can play a very important role in open discussion of matters of public interest, which is an inherent feature of a democratic society. Sometimes it also happens that the author voicing a sample of artistic or satirical expression is subjected to pressure or inadequate punishment, which leads to a threatening effect (a threatening effect is a threat or a legal sanction that prevents the legitimate exercise of natural and legal rights). This effect was recorded by the ECtHR in the case of Azerbaijani journalist *Eynulla Fatullayev v. Azerbaijan*, considering that both the applicant’s conviction and the particularly severe sanction imposed were capable of producing a chilling effect on the exercise of journalistic freedom of expression and dissuading the press from openly discussing matters of public concern.[\[28\]](#) Therefore, the court recommends that when restricting the fundamental rights of a legal entity or an individual, one should choose an approach that causes as

little damage as possible to the rights in question.[\[29\]](#) An important element to consider when evaluating the content of an argumentative statement in legal terms is the circumstances under which it is used, in addition to the form in which offensive and derogatory words are used in its content. A more important element, however, is the determination of the amount of harm caused by the statement.

The right to respect for private life vs. freedom of expression

Often, freedom of expression (ECtHR Article 10) may come into conflict with the right to respect for private life (ECtHR Article 8). In such cases, the ECtHR looks first at how the local court of the partner state struck a fair balance between these two rights.[\[30\]](#) To test the balance for fairness, the court analyzes whether the person concerned is a public person, his or her share of the discussion of general interest, the nature of the issue, the form and effect of the publication/posting, and the severity of the penalty imposed. In addition, the court has established the criteria it has developed—the impact (seriousness of the offense), the *basis/environment* (whether aspects of the rights in conflict relate to the basis of the human rights in question), *the relevance of additional rights* (when more than one or two rights clash), the relevance of the general interest, *the intention* (when rights are realized in a way that conflicts with the goal of the implied right) and, finally, the responsibility criterion. The court's purpose in analyzing these proportionality test criteria is not to find a solution to the conflict, but to determine which right should prevail. This is because the proportionality test must take into account the feasibility of the measure and the availability of fewer intervening measures to achieve the goal.

The court has developed certain criteria for assessing the proportionality of interference with an Internet platform containing any statements that do not involve incitement to

hatred and calls to violence: (1) the essence and content of the disputed comments, (2) the responsibility of the author(s) of the comments, (3) the precautions taken by the operators of the websites and the conduct of the victim, (4) the consequences of the comments for the victim(s) and (5) the applicant(s) (plaintiffs).[\[31\]](#)

The limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians or governments.[\[32\]](#) For example, to determine the limits of criticism directed at a politician, the court notes that a politician must have a high degree of tolerance for criticism, unlike an ordinary citizen. This is because they unwittingly present the expression or action they use for discussion by journalists and the public alike.[\[33\]](#) If the addressed expression refers to a public body, state or government, the expression has broader protection.[\[34\]](#) Every person who enters the public arena must also have a high degree of tolerance for criticism directed at him since they are automatically subject to public scrutiny.[\[35\]](#)

Conclusion

Given the above, it is clear that the law on freedom of expression protects expressions (with some exceptions) that do not themselves contain violence, discrimination or hatred. Of the enumerated forms of freedom of expression, the ECtHR, while attaching particular importance to freedom of political expression, notes that there is a narrow range of restrictions imposed on various forms and methods of political expression. On the other hand, the protection of individuals' right to freedom of expression is the responsibility of the state directly acceding to the ECHR.

Unfortunately, among the partner states to the convention also acceded to by Azerbaijan, there are still those who apply local legislation developed for traditional media to the Internet. But some of them have produced new legal norms

designed for online content (for example, to define the size of such concepts as “extremism,” “terrorist propaganda,” “incitement to terrorism,” “harmful content,” “racist content” and “incitement to hatred” in local legislation).

Notes and references:

[1] Thoma v. Luxembourg, Application no 38432/97, para 43, 29.003.2001.

[2] Community Standards of Facebook, <http://www.facebook.com/communitystandards>, son giriş: 01.02.2020

[3] L. Edwards, “The Fall and Rise of Intermediary Liability Online” in L. Edwards and C. Waelde (eds.), Law and the Internet (Oxford 2009) 73-76.

[4] Council of Europe, European Court of Human Rights Factsheet - New Technologies, 2020, https://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf son giriş: 01.02.2020.

[5] Council of Europe, European Convention on Human Rights, Article 10, 1953, https://www.echr.coe.int/Documents/Convention_Eng.pdf, 13.

[6] Handyside v UK, Application no 5493/72, para 49, 07.12.1976.

[7] Autronic AG v. Switzerland, Application no 12726/87, para 47, 1990.

[8] Times Newspaper Ltd v. UK, (1 and 2) Application no, 3002/002 and 23676/08, para 27, 10.03.2009.

[9] Ibid, 3, para 48.

[10] Mouvement raëlien suisse v. Switzerland, [Application no](#)

[16354/06](#), para 63, 13.07.2012

[11] [Sunday Times \(No. 1\) v. the United Kingdom](#), Application no [6538/74](#), para 59, 26.04.1979.

[12] *Ibid*, 13, para 53.

[13] *Ibid*, 5, page 12.

[14] [Observer and Guardian v. the United Kingdom](#), Application no [13585/88](#), para 67, 26.11.1991.

[15] [Barthold v. Federal Republic of Germany](#), Application no 8734/79, para 53, 13.07.1983.

[16] [Nielson and Johnsen v. Norway](#), Application no 23118/93, para 48, 25.11.1999.

[17] Accordingly, [Muller v. Switzerland](#), 13 EHRR 212, 1991; [Markt Intern v. Germany](#), 12 E.H.R.R. 161, 1989; [Thorgeir v. Iceland](#), Application no 13778/88, para 63, 25.06.1992; [Pryanishnikov v. Russia](#), Application no 25047/05, para 62, 10.09.2019; [Gorelishvili v. Georgia](#), Application no 12979/04, para 40, 05.06.2007; [Norwood v. UK](#), Application no 23131/03, 16.11.2004.

[18] [Morice v. France](#), Application no. 29369/10, para 125, 23.04.2015.

[19] [Willem v. France](#), Application no 10883/05, para 33, 16.07.2009.

[20] [Petrina v Romania](#), Application no 78060/01, para 48, 14.10.2008.

[21] [Gündüz v. Turkey](#), Application no 35071/97, para 41, 04.12.2003.

[22] [Skałka v. Poland](#), Application no 43425/98, para 34, 27.05.2003.

- [23] Case of UJ v. Hungary, Application no. 23954/10, para 20, 19.07.2011.
- [24] Leroy v. France, Application no 36109/03, para 42, 02.10.2008.
- [25] Paul Nicholson, "UEFA bans Qarabağ's Ibrahimov after call to 'kill' all Armenians", Inside world football, 04.11.2020, <http://www.insideworldfootball.com/2020/11/04/uefa-bans-qarabags-ibrahimov-call-kill-armenians/>, son giriş tarixi: 01.02.2020.
- [26] "Müəllimlər siyasi səbəblərlə işdən çıxarıldılar", Toplum TV, 28.04.2017, <https://toplum.tv/az/muellimler-siyasi-sebeblerle-isden-cixarildilar/#.X904bc1KhPY>, son giriş tarixi: 01.02.2020.
- [27] Vogt v. Germany, Application no 17851/91, para 52, 26.09.1995.
- [28] Case of Fatullayev v. Azerbaijan, Application no 40984/07, para 128, 4.10.2010.
- [29] Ibid, 6, para. 75.
- [30] Axel Springer AG v. Germany, Application no 39954/08, paras 87, 88, 07.02.2012.
- [31] MTE and Index.hu ZRT v. Hungary, Application no 22947/13, paras 72-88, 02.02.2016.
- [32] Ibid, 1, para 47.
- [33] Lingens v. Austria, Application no 9815/82, para 42, 08.07.1986.
- [34] Case of Castellás v. Spain, Application no 117/98, para 46, 23.04.1992.
- [35] Bodrožić v. Serbia, Application no 32550/05, para 54, 23.06.2009.