

# The European Union`s Framework Decision on the Use of Criminal Law to Combat Specific Types and Manifestations of Racism and Xenophobia and the Implementation of the Decision in the Latvian Law

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The fundamental issue that is addressed in this paper relates to so-called “memory laws,” which ban any interpretation of essential events in the history of a country and society in a way that is different from the officially accepted version. The author has looked at the necessity for such laws, as well as at the issue of how they correspond to the right to freedom of speech. The European Union’s Framework Decision on Combating Racism and Xenophobia, which was approved on November 28, 2008, is a vivid example of this issue, because it declares that member states are obliged to punish people who publicly deny, justify or grossly trivialise the Holocaust that was committed by the Nazi regime, as well as genocide, war crimes or crimes against humanity committed by other regimes. There were long debates among EU member states about the text of the decision, and this market out different priorities in the various countries. One issue was protection of human dignity in comparison to the freedom of speech. Diametrically opposed views about bans against the denial of international crimes also illustrate other factors which relate to each country’s history, political culture and traditions, and that gives reason to doubt whether a unified solution is appropriate in this regard. Member states initially proposed that the ban be applied only to the crimes of the Nazis, and that demonstrates the gap which still exists between Western and Eastern European countries when it comes to the identification and appropriate evaluation of crimes that were committed by the Communist regime.

The author has also reviewed the extent to which the ban against specific activities is in line with other international obligations such as the duty to guarantee a free exchange of views and academic freedom in relation to issues of history. The aforementioned issues will be analysed via a study of the way in which the framework decision was implemented in Latvia’s legal system, also looking at relevant amendments to Latvia’s Criminal Law and the initial practices of law enforcement institutions in applying these norms.

**Keywords:** European Union law, human rights, freedom of speech, bans against fomenting of hatred, implementation of EU laws in national laws.

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## Introduction

On November 28, 2008, after seven years of debate, the Council of the European Union approved the Framework Decision on Combating Racism and Xenophobia. The purpose has been to reduce the manifestation of racism and xenophobia, calling on member states to criminalise activities such as calls for hostility or violence on the basis of race, ethnicity, region or other characteristics cited in the decision. There are also to be punishments for any public denial, justification or gross trivialisation of genocide, war crimes, or crimes against humanity. This involved extensive debates among member states as to whether the new rules would correspond to other obligations in the area of human rights,<sup>1</sup> including constitutional rules related to the guaranteeing of the free exchange of views. Central and Eastern European countries also objected to the fact that the initial draft of the decision was not sufficiently all-encompassing, because it only applied to crimes that were committed by the Nazi regime. Though the framework decision is not applied directly by national courts, member states are obliged to introduce legal regulations that will ensure the implementation of the relevant goals. Latvia's Criminal Law has been amended for this purpose, but there is still the question as to whether the application of the new legal norms might violate the right to freedom of speech that is enshrined in Latvia's Constitution and in the international human rights documents that are mandatory for the country.

The framework decision also brings up the broader question of whether the officially accepted explanations which countries have about major historical aspects of the history of the relevant societies and countries require the protection and defence of laws, including criminal law so as to prevent the opportunity to publicise varying interpretations. Given this broader context of the issue that is to be analysed, the purpose of this paper is to determine whether the unified solutions that are defined in the framework decision in terms of banning any denial of the crimes that are committed by totalitarian regimes as an instrument aimed at eliminating racial and ethnic intolerance are appropriate for the situation of all EU member states. As an example, the author will review the extent to which the framework decision might affect legal regulations and the practices of law enforcement institutions when it comes to applying the relevant norms. First the author will offer a more detailed analysis of the obligations which are placed upon the shoulders of member states by the framework decision, also looking at the leitmotifs of how it was adopted, as well as the polemics which existed among member states in discussing the necessity, content and framework of the decision. From there, the author will review legal regulations in Latvia and the practice of law

enforcement institutions in the application of the relevant criminal norms. Finally, the author will correlate the main arguments in support of or against the application of a unified solution in all EU member states when it comes to the issues that are addressed in the framework Council decision.

## **1 The framework Council decision on the use of criminal law in the battle against specific types of racism and xenophobia, its contents, and discussions among member states**

The origins to the Council's framework decision can be traced back to 2011, when several member states asked the European Commission to bring criminal law from the various member states closer together so as to ensure a more effective battle against racism and xenophobia in all EU member states. The preamble of the framework decision states that "racism and xenophobia constitute a threat against groups of persons which are the target of such behaviour. It is necessary to define a common criminal law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences."<sup>2</sup> The draft decision submitted by the Commission led to fierce battles among member states, and this caused questions about whether the framework decision could be taken in the first place. Although the process was a long one, the fact is that after bitter debates at the Council of the European Union and the European Parliament, as well as after substantial amendments to the original text, a final version was approved on March 28, 2008.

Before reviewing the different views of member states about the text of the framework decision, it is necessary to look at the obligations which are placed upon the shoulders of member states by the decision. When it comes to the obligations of member states, Paragraph 1 of Section 1 of the framework decision is most important, because it defines crimes related to racism and xenophobia which must be banned by member states:

*"Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:*

- (a) publicly inciting the violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;*
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;*
- (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Article 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;*
- (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or*

*national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.”*

The fewest differences of opinion among member states related to Section 1.1(a) of the framework decision, which calls for the criminalisation of public calls for ethnic or religious violence or hatred. Countries face similar obligations in the context of the United Nations convention on the elimination of all types of racial discrimination,<sup>3</sup> as well as the UN pact on civil and political rights,<sup>4</sup> which all European Union member states have ratified.<sup>5</sup> It is also true that the European Court of Human Rights has handed down several rulings<sup>6</sup> which confirm that member states have the right to limit such types of statements.<sup>7</sup>

At the same time, however, there were fundamentally different viewpoints about the need to criminalise the public justification, denial or gross trivialisation of genocide, war crimes and crimes against humanity. These disputes illustrated the different attitudes that are taken in various European Union member states when it comes to the role of freedom of speech on the one hand and the protection of human dignity on the other.<sup>8</sup> There is also the fact that different European countries have had different historical experiences, and so people in some member states could not understand why the initial text of the framework decision only spoke to crimes referred to by the International Criminal Tribunal at Nuremberg, as opposed to the crimes which were committed by communist regimes.

Representatives of Great Britain in particular insisted that the framework decision could have a deleterious effect on the free exchange of viewpoints about history. The initial text of the decision was proposed by Germany, France and Luxembourg, and it spoke to the *per se* criminalisation of any denial or trivialisation of genocide, war crimes and crimes against humanity without any additional conditions.<sup>9</sup> The fact that this proposal was doomed to fail was soon quite evident, because a number of countries had objected to the inclusion of a similar norm in a protocol which the Council of Europe sought to attach to its 2003 convention on cybercrime – one which spoke to racism, xenophobia and similar processes in the use of computer systems.<sup>10</sup> The additional protocol did allow member states to partly or fully exempt themselves from the application of the norm which limited the freedom of speech, but many Council of Europe member states declined to sign up to it, arguing that the obligations enshrined in the supplementary protocol could be in conflict with free speech rights enshrined in the constitutions of the relevant countries.<sup>11</sup>

The result of all of this is that the final version of the framework decision includes a whole series of departures from the original draft, this done in order to win the agreement of all member states. The most important element in striking a balance between the bans in the framework decision on the one hand and the right to free speech on the other is the application of the ban only to purposeful activities. Punishments would apply not to the justification, denial or gross trivialisation of genocide, war crimes and crimes against humanity *per se*, but only to a situation in which such activities have been aimed at creating violence or hatred toward a group that is cited in the text of the framework decision or toward a member of such a group. Despite this attempt to place some balancing elements into the text of the framework decision, there are authors who express criticism about the idea that concepts such as “gross trivialisation” are very unclear,<sup>12</sup> which means that they might restrict discussions among historians whose goal is to find out the truth. In France, for instance, several historians published a manifesto in reaction to legal acts which do not allow anyone to question the military crimes which were identified by the

Nuremberg Tribunal<sup>13</sup> or deny that the mass murders which were committed by the Ottoman Empire against Armenians must be classified as genocide.<sup>14</sup> In the manifesto, the historians harshly criticised the fact that the state's official version about specific historical events is being enshrined in the law, adding that such legal acts endanger the research freedom of historians by threatening them with criminal sanctions and having the state pre-determine the results which historians must arrive at in their research.<sup>15</sup>

The initial draft of the framework decision which was proposed by the Commission led to debates which were no less harsh than the ones which focused on the possible threats which the decision could create for freedom of speech and research. The initial draft only spoke to crimes recognised by the military tribunal at Nuremberg. This means that the text initially applied most directly to statements which justify, deny or grossly trivialise the Holocaust. This proposal probably had to do with ever-increasing anti-Semitism in Western Europe and a movement of revisionists who denied or trivialised the Holocaust so as to facilitate hatred and violence against Jewish people.<sup>16</sup> In order to prohibit the rebirth of totalitarian ideas and to protect the security of members of the Jewish community, norms which ban the denial or trivialisation of the Holocaust were approved during the mid-1990s in European countries such as Germany,<sup>17</sup> Austria,<sup>18</sup> and France.<sup>19</sup>

The focus only on Nazi crimes in the text of the framework decision led to objections from Eastern European countries which had suffered under the rule of both totalitarian regimes. In the Baltic States, for instance, there were mass murders, torture and civilian deportations during the first year of the Soviet occupation, and that year is still known by Latvians as "the year of terror."<sup>20</sup> In those Eastern European countries which had similar legal acts, the rules were applied to the justification or denial of crimes committed both by the Nazi and the Communist regime.<sup>21</sup> In addition, a series of non-governmental organisations called for the framework decision to apply the ban to any justification or denial of genocide, war crimes or crimes against humanity.<sup>22</sup>

The final version of the framework decision was supplemented with various new elements, and the final version illustrates the many compromises which allowed all of the parties to achieve their interests at least in part in this controversial area. In order to yield before the demands of Eastern European countries which wanted a universal ban, the text of the framework decision is applied to any justification or denial of genocide, war crimes or crimes against humanity. It is also true that although countries from the former Soviet bloc did not succeed in getting the authors of the framework decision to make a direct reference to a ban on the denial or justification of crimes committed by the Communist regime, a declaration from the Council of the European Union which denounced all totalitarian regimes was attached to the framework decision.<sup>23, 24</sup> Of great importance to the Baltic States was the decision to include text in the preamble of the agreement which allows countries to expand its framework. Article 10 of the preamble:

*"This Framework Decision does not prevent a Member State from adopting provisions in national law which extend Article 1(1)(c) and (d) to crimes directed against a group of persons defined by other criteria than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions."*<sup>25</sup>

It must be added that the deportations which were carried out by the Communist regime in the Baltic States were mostly aimed at the regime's political enemies and wealthier people; they were not based on ethnic factors. Without the

opportunity to add criteria such as “social status” or “political convictions,” therefore, the principles of the framework decision could not be applied to such Soviet crimes.

At the same time, the framework decision also includes a separate norm related to the ban on justifying or denying war crimes, as defined by the international military tribunal at Nuremberg, thus reflecting the interests of Germany and other countries which wanted to emphasise these crimes in specific in the decision. The framework decision also allows those countries to apply the ban only on Nazi crimes. Article 1.4:

*“Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.”<sup>26</sup>*

Communist crimes have not been legally examined or recognised by an international tribunal, and that means that the application of the framework decision to these crimes is only possible in those countries in which national courts have recognised the crimes. In several Central and Eastern European countries, this is reflected in criminal bans on the denial of crimes committed not just by the Nazis, but also by the Communists.<sup>27</sup>

In the next sub-chapters, the author will analyse the changes that were implemented in Latvian criminal law when the text of the framework decision was implemented and how these changes can influence other international obligations faced by Latvia in the area of human rights and freedom of speech in particular. First, however, the author will review legal regulations and court practices in the area that is regulated by the framework decision before it was approved and the relevant amendments to Latvian criminal law were implemented. This makes it possible to conclude the extent to which the criminal law covered the crimes referred to in the framework decision before it was implemented into Latvian law.

## 2 Legal acts and court practices in Latvia before the implementation of the framework decision

Even before the implementation of the Council’s framework decision, Latvia’s Criminal Law included several legal norms which spoke to criminal liability for those who engaged in the activities that are listed in the decision. Most directly applicable here was Article 78 of the Criminal Law which, like the framework decision, bans knowing public calls for violence or hatred:

*“(1) For a person who knowingly commits acts directed towards instigating national or racial hatred or enmity, or who knowingly commits the restriction, directly or indirectly, of the economic, political, or social rights of individuals or the creation, directly or indirectly, of privileges for individuals based on their racial or national origin, the applicable sentence shall be deprivation of liberty for a term not exceeding three years or a fine not exceeding sixty times the minimum monthly wage.*

*(2) For a person who commits the same acts if they are associated with violence, fraud or threats, or if they are committed by a group of persons, a state official, or a responsible employee of an undertaking (company) or organisation, or if they are*

*committed with the assistance of an automated data processing system, the applicable sentence shall be deprivation of liberty for a term not exceeding ten years.*"<sup>28</sup>

In addition to Article 78 of the Criminal Law, government officials and some researchers<sup>29</sup> have argued that when activities libel an ethnic or religious group, the relevant criminal norms can be applied.<sup>30</sup> Here, however, we must recall that amendments to the Criminal Law which were adopted in 2009 decriminalised libel.<sup>31</sup>

Victims, however, can still file civil suits in response to libel<sup>32</sup> or seek compensation for moral damages caused by illegal activities.<sup>33</sup> The framework decision also says that criminal liability is not always necessary or appropriate in response to activities cited therein. Article 6 of the preamble:

*"Member States acknowledge that combating racism and xenophobia requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters. This Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law."*<sup>34</sup>

As far as the author knows, there have only been two cases in Latvian legal history in which the relevant norms from civil law were applied to statements seeking to instigate racial or ethnic hatred or discrimination.<sup>35</sup> The basic problem in applying the relevant norms rests in the fact that legal practice in Latvia does not recognise the concept of so-called "group or collective demands" at a time when most statements aimed at fomenting hatred are focused not on an individual, but instead on a racial, ethnic or religious group as such. This means that it is not clear whether each individual in such a group can use Article 2352(1) of the Civil Law if libel has occurred or Article 1635 of the law if the individual believes that he has suffered moral damages as a result of the activities that have occurred.<sup>36</sup> In one of the aforementioned cases, the Rīga Regional Court ruled that "the petitioners are correct in arguing that the advertisement included an idea which discriminates against black people, among whom the petitioners are, thus libelling them."<sup>37</sup> Existing court practice, however is insufficient to confirm that in similar cases, courts will identify links between illegal activities related to the fomenting of racial discrimination on the one hand and the libelling of people from the relevant racial group on the other hand.

Another obstacle against the successful use of civil norms in protection of rights existed for a long time – the anonymity of people who make offensive statements on the Internet. A civil lawsuit requires identification of the defendant, but those data were not available. It was only in June 2011 that the law on electronic communications was amended to state that the courts could demand such data from the relevant electronic communications company.<sup>38</sup>

The practices of law enforcement institutions in interpreting and applying the aforementioned criminal norms were initially fairly indistinct.<sup>39</sup> Irrespective of theoretical claims made by representatives of the government and various experts, the author is not aware of a single case in which the libelling of an ethnic or religious group has led to the application of the relevant norms from the Civil Law. After the adoption of the Criminal Law, the number of cases related to activities knowingly aimed at instigating national, ethnic or racial hatred or tolerance was between one and three a year,<sup>40</sup> and few of them ever came to trial.<sup>41</sup> Most cases, including ones related to activities which the framework decision obliges countries to ban, were ended during the pre-trial stage. Several human rights experts have criticised this.<sup>42</sup>

Possible reasons for why law enforcement institutions have been passive about this process include the heritage of the past and a lack of experience in investigating such cases. The ban against inciting national or ethnic hatred was nothing new in the Criminal Law; the ban existed in the criminal code of the Latvian SSR, as well.<sup>43</sup> The Soviet Union, however, was a country in which there was censorship, and crimes of this nature stood in opposition to the official ideology of the system. This meant that there was no way of expressing statements which fomented national or ethnic hatred or to discuss such crimes in public. Law enforcement institutions inherited from the Soviet era the belief that this norm of law is unimportant, as well as a lack of experience in dealing with such issues, and that remained true even after the restoration of Latvia's independence.

Another explanation for the small number of cases relates to the practices of law enforcement institutions in proving hate crimes. Article 68 of the Criminal Law states that the relevant criminal offences can be conducted only with full intention, and in practice, prosecutors have set up a very high threshold of evidence in this regard.<sup>44</sup> In the 2008 report from the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, it is stated that "(..) *criminal prosecution of incitement to hatred has formally demanded overly high thresholds of proof to show explicit intent to incite violence. This provision has meant, in practice, that the accused must individually confess to showing intent, while other relevant indicators have not been taken into account.*"<sup>45</sup>

One of the first cases of incitement to hatred to be received by the Latvian courts is the so-called Landmanis case. In January 2011, a court in Liepāja held a trial in which Guntars Landmanis, publisher of the monthly journal *Patriots*, was charged under the auspices of Article 78.1 of the Latvian Criminal Law. The court found that "between October 199 and January 2000, Landmanis distributed the first, second and third edition of the Latvian monthly *Patriots*, as well as the satirical magazine "Jokes About the Holocaust." Publications in these, particularly the article "On Ticks, Jews and the Repeal of the Death Penalty in Latvia" (3<sup>rd</sup> ed.), contained an offensive and scornful attitude toward the Jewish nation."<sup>46</sup>

The defendant denied distributing the magazine, claiming that "the monthly was just a form of correspondence with pen pals and acquaintances, and each month approximately 30 copies of each edition were sent or present to such people."<sup>47</sup> Landmanis also said this was merely an exchange of thought, arguing that "there was no intention to foment racial intolerance, because I only published the personal views of others with whom I corresponded."<sup>48</sup> He told the court that there was nothing anti-Semitic about the articles, and there was no intention to publish anything anti-Semitic. He also made reference to Article 100 of the Latvian Constitution, which speaks to the freedom of speech.<sup>49</sup>

After hearing the evidence, the court ruled that the monthly *Patriots* was meant for distribution, pointing to evidence such as a call for subscriptions and the fact that sometimes the journal was sent to persons who did not know the publisher and had never corresponded with him. In terms of the subjective aspects of the criminal offence, it has to be noted that the defendant denied any intent to incite national or racial intolerance or hatred." The court, however, ruled that "the collection, classification and laying out of specific articles in the journal could be performed only with knowing intent, i.e., Landmanis had to understand the dangerous nature of what he was doing."<sup>50</sup> The court's decision that there was knowing intent in the process was also based on the fact that the defendant engaged in the relevant activities



systematically and repeatedly. The court pointed to testimony and material evidence to confirm that the defendant was aware of the dangerous nature of what he was doing. The ruling that *Patriots* and the satirical magazine about the Holocaust contained negative, offensive and scornful attitudes toward the Jewish people and were aimed at fomenting national hatred and intolerance was based on linguistic expertise, eyewitness testimony, and other case materials.

In future years, law enforcement institutions began to devote increased attention to hate crimes, as was seen in a radical increase in the number of cases.<sup>51</sup> The groups in society which faced the most attacks in relation to hate crimes were foreigners with a different skin colour, Roma people and Jews. Later the attacks also focused on people with a non-traditional sexual orientation.<sup>52</sup> Possible reasons as to why investigatory institutions changed their practices include explanations given by the non-governmental sector about the threats which hate crimes create in relation to the peaceful functioning of society, training for law enforcement specialists in relation to the investigation of such cases, as well as criticism from foreign and international human rights organisations about the fact that Latvia's government was not doing enough to battle hate crimes.<sup>53</sup>

One of the few cases in which the circumstances included not just a classic example of inciting hatred, but also the ban against justification of Nazi crimes that is included in the framework decision, involved a person identified as A. J. On February 22, 2007, he and several supporters attended a conference that had been organised by the Latvian Anti-Fascist Committee at the Reiterns House in Riga – “Problems with Nazism, Neo-Nazism and Xenophobia in Latvia.” Toward the end of the discussion, A. J. answered questions that had been posed to him: “A. J. stood up, presented himself as a neo-Nazi, and was asked how many Jews and Roma people were in his organisation. There were several dozen people in the room, and he responded in Russian: *“Jews and Gypsies are not human beings, and that is why they are not members of our organisation.”*<sup>54</sup> He went on to express support for neo-Nazi activities in Russia and for ethnic cleansing, metaphorically comparing Jews and Roma people to gangrene which endangers other nations.

A. J. denied any intention to foment national hatred, arguing that he was just trying to exchange views with people who disagreed with him. This argument was rejected by the Riga Regional Court, which held the first trial of the man, and by the Department of Criminal Cases of the Latvian Supreme Court, which heard an appeal of his verdict.<sup>55</sup> The high court ruled that *“(.) there was sufficient evidence in the case to show that A. J. knowingly tried to do things which were knowingly aimed at inciting national hatred and intolerance. The case files show that the defendant and a fairly large range of supporters arrived at a discussion without any invitation – one which had not been advertised in the public arena. He understood that the event was organised by his ideological and political opponents, as stated in the defendant's appeal. He openly positioned himself as a neo-fascist, and he was self-confident in expressing the ideas of national hatred and intolerance, including the destruction of Roma people and Jews because of their ethnicity. He was aware of the fact that representatives of those ethnic groups were in the audience.”*<sup>56</sup>

The high court's ruling offers an important explanation of the objective aspects of the crimes referred to in Article 78 of the Criminal Law. It rejected the defence's claim that the objective aspects of a crime can only be manifested through actual activities or calls to engage in same. The court ruled that *“the disposition of Article 78.1 of the Criminal Law shows that the objective aspect of the crime referred to*

*therein is manifested through any activity which is knowingly aimed at fomenting national hatred or intolerance. Although the statements made by A. J. cannot be seen as a call to immediately act in pursuit of the stated goals, they must be seen as propaganda in support of national hatred and intolerance, with the defendant expressing public views about limiting the fundamental rights of individuals, including the right to live, so as to convince and obtain supporters.*<sup>57</sup>

The Department of Criminal Cases also rejected a much-criticised<sup>58</sup> prerequisite which law enforcement institutions insisted upon when it comes to criminal liability – the need for harmful consequences in relation to the things which are done: *“The fact that after A. J.’s statement, no other person in the audience attacked representatives of the Jewish and Roma people is of no importance in the presentation of a just ruling in this case, because the criminal offence referred to in Article 78.1 of the Criminal Law is a formal crime which is seen as being completed when the criminal offence is committed, without any requirement for harmful consequences in relation to same.”*<sup>59</sup>

These rulings show that when the relevant norms of the Criminal law are interpreted and applied appropriately, they cover the requirement in the framework decision that those who seek to incite racial or ethnic hatred or violence must be punished. Unlike the framework decision, however, the Criminal Law does not speak to criminal liability for those who call for violence or hatred against an individual or a group of people on the basis of their “origin” or “skin colour,” but in practice, the concept of “race” has been utilised in relation to hate crimes which are based on “skin colour.” This means that when it comes to the ban on inciting hatred on the basis of “skin colour,” the situation can be resolved on the basis of an interpretation of national law in the context of international legal acts which are binding to the Republic of Latvia.

In parallel to the ban on inciting hatred, however, the framework decision also obliges countries to take other steps against racism and xenophobia. The next subchapter is focused on the way in which these obligations have been added to Latvian laws and on the problems which may occur when these norms from the Criminal Law are applied in practice.

### **3 Discussions about the implementation of the framework decision of the Council of the European Union in Latvia’s legal system**

Several new legal norms were implemented in Latvia’s Criminal Law so as to ensure criminal liability for those who violate the terms referred to in the 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. Of essential importance here are amendments to Article 48.14 of the Criminal Law, which says that a criminal offence that is based on racial motivation is an exacerbating factor in determining criminal liability. This means that when deciding on a sentence, judges must take into account the fact that racial intolerance was the specific motivation for the crime. Because the term “racial discrimination,” as defined by international human rights institutions,<sup>60</sup> also includes ethnic differences, this norm can be applied in cases in which an individual’s ethnic origins have been the motivation for the criminal offence.

The most important innovation in the Criminal Law is the addition of Article 74.<sup>1</sup>, which refers to justification of genocide, crimes against humanity,

crimes against peace and the crime of war. The text states “*persons found guilty of the public denial or justification of genocide, crimes against humanity, crimes against peace or the crime of war shall be sentenced to a period of incarceration up to five years or to forced labour.*”<sup>61</sup>

True there are some differences between the framework decision and this norm in the Criminal Law. The objective side of Article 74.<sup>1</sup> means that a person faces criminal liability if the stated crime of publicly denying, praising or justifying a crime in and of itself. A similar version of the text, it must be added, was included in the first draft of the European Commission's decision,<sup>62</sup> but it was stricken after several member states categorically insisted that the framework decision would violate the principle of freedom of expression. In *Faurisson vs. France*,<sup>63</sup> the UN Human Rights Committee ruled that criminal liability related to nothing other than questioning of genocide, war crimes or crimes against humanity, as defined by international or national courts, may be in violation of the right of free expression.

The petitioner in the case, Robert Faurisson, was an academic who publicly disputed the policy of slaughtering Jews and the existence of gas ovens in Nazi concentration camps. He declared that this was a dishonest and imagined myth. Faurisson was tried and convicted on the basis of a French law which banned questioning of crimes against humanity. The UN committee declared that the so-called Gayssot Act in France, which declared as a criminal offence any questioning of the judgments and conclusions of the international military tribunal at Nuremberg, could lead to decisions or steps in violation of the Pact in cases other than the one which was being heard by the committee. With respect to the Faurisson case, however, the committee ruled that the limitations on freedom of expression that were applied to him were legal for two reasons. First of all, the committee accepted the French government's argument that the Gayssot Act was implemented with the purpose of battling against racism and anti-Semitism, adding that Holocaust denial had become one of the primary instruments for anti-Semitism in France. The committee also discussed the way in which French courts interpreted and applied the Gayssot Act in relation to Faurisson, but comments from the panel also suggest that it would object against limitations on the freedom of speech which are abstract and relate only to the content of statements – ones which could not be subject to an individual evaluation of the disputed statements.

It may be that these practices of the UN Human Rights Committee<sup>64</sup> and the objections from member states were the factors which led to the final version of the European Council's Framework Decision. The finalised text says that limitations on freedom of speech may be applied only if a denial of genocide, for instance, involves attacks against an individual or a group of people in relation to race, skin colour, religion, origin, national or ethnic belonging. Denial of genocide, war crimes or crimes against humanity must involve an attempt to incite violence or hatred against the relevant group or individual. Article 74.<sup>1</sup> of the Criminal Law is formulated more broadly in that it does not include such requirements before a person can be brought to criminal liability. That means that when the norm is implemented in practice, law enforcement must analyse the motivation of the person who made the relevant statements so as to avoid a situation, for instance, in which criminal sanctions are applied in relation to academic debates about the

interpretation of historical events that are a sensitive matter for various groups in society. This is different than the position that was taken previously.

Other elements in Article 74.<sup>1</sup>, however, are formulated in accordance with the framework decision when it comes to the composition of a criminal offense. In subjective terms, the formal composition of the offence is manifested as direct intent, i.e., the person knows that he or she is denying the relevant crimes and wishes to do so. This is similar to the framework decision's requirement that such activities be punished only if they have been intentional.<sup>65</sup> The Criminal Law also speaks to liability for praising, denying or justifying genocide and other criminal offences referred to in the law only if such activities are conducted publicly. This prerequisite for criminal charges is meant to ensure that government institutions do not interfere in the private lives of individuals to an excessive extent, nor do they limit the right of individuals to freedom of speech.

Because this new norm in the Criminal Law only took force on July 1, 2009, law enforcement institutions have not had much practice in applying and interpreting it.

There have been two cases in which a person has been charged with violating the requirements of Article 74.<sup>1</sup> in terms of statements which justify the deportations which the Soviet regime implemented on June 14, 1941. One defendant, defined only as "R", published a comment on the *www.gorod.lv* news portal in Daugavpils under the title "Deportations: An Excessive Expression of the Humanism of the Soviet Regime." The author expressed support for and justification of the Soviet deportations, "*describing the deportation itself as an expression of excessive humanism on the part of the Soviet regime and the way in which it was carried out as being too soft and incomplete.*"<sup>66</sup> The author went on to write that "*(..) the thing is that the deportation of June 14, 1941, was not organised so as to launch 'genocide against the Latvian nation,' as is claimed today. The Kremlin had a different goal. The deportation was a way of battling the 'fifth column' of Baltic nationalists who were linked to the Nazi special services.*"<sup>67</sup> Prosecutors concluded that "*in his article, R made statements which must be seen as ones which justify the deportation of civilians, thus justifying crimes against humanity, also making claims and interpreting historical processes in a manner which does not relate to the historical sources and known facts which are at the disposal of historians; R's conclusions are based on positions which do not relate to historical sources and justify the mass deportation of June 14, 1941, thus denying the crimes which the totalitarian regime of the USSR committed against the people of Latvia.*"<sup>68</sup> Evidence of guilt, the prosecutors declared, included conclusions drawn by experts who were asked to evaluate the facts of history in relation to the case. Interestingly, the defendant rejected the views of the experts, arguing that he "*did not write the text, which was just a quote from contemporary historians in Russia and, to some extent, in Latvia.*"<sup>69</sup> Prosecutors did not evaluate this argument, but even if we assume that some of the statements of the article really were based on the work of historians from the Soviet era or in present-day Russia, that cannot serve as any excuse for justifying the crimes which the Soviet regime implemented against the people of Latvia.

There can, however, be criticism about the prosecutorial decision to launch criminal proceedings against R. The decision states that he "*(..) publicly justified genocide and crimes against humanity.*"<sup>70</sup> The deportations which the Soviet regime implemented on June 14, 1941, have often been described as "genocide,"<sup>71</sup> but the fact is that in legal terms they were a crime against humanity<sup>72</sup> in that the deportations

were aimed against all of the people of Latvia, as opposed to just ethnic Latvians or some other ethnic group.

## Summary

Arguments among member states in relation to the European Council's framework decision led to a situation in which the text was amended on the basis of countless compromises. This means that there can be doubts about whether there is a need for a unified solution in all EU member states when it comes to criminalising the denial or justification of the Holocaust or crimes against humanity. The fact is that there are too many differences among member states when it comes to legal traditions, the issue of freedom of speech versus other fundamental rights, historical experience, and even understandings of history. There are also different goals which member states hoped to achieve in relation to the framework decision. The history of Germany and other countries which were allies of the Nazi regime, for instance, explains why the denial or trivialisation of the Holocaust is denied in the interests of national security and of protecting the rights of the victims of the Sho'ah. People in Eastern Europe suffered equally at the hands of the Nazi and Soviet totalitarian regimes in terms of the crimes that were committed. There, the primary aim in relation to the framework decision is to protect the honour of victims, to commemorate them, and to ensure international recognition of the crimes which were committed by the Soviet regime. In Britain, freedom of speech and press are of enormous importance in legal culture, and there are no historical experiences which would justify any ban against the denial of the Holocaust or other international crimes. People in the UK criticised the limitations that were included in the text of the framework decision.

The obligations which member states face in relation to the framework decision are also problematic for other reasons, including the fact that this process can violate the obligations of member states in terms of several international human rights treaties. The UN Human Rights Committee, which supervises the International Pact on Civic and Political Rights, has, as noted above, concluded that legal norms which only criminalise denial of crimes identified by the international military tribunal at Nuremberg or another international court may be a violation of the freedom of speech. It is also true that with the support of a majority of the public, politicians may be broadly tempted to expand the ban to include interpretations of sensitive historical issues which are not in line with official doctrine. Thus the limitations in the framework decision create questions about the interaction between historical research and the law. The question is whether legal norms should set limits on historical debate and research. The view that courts and judges are not the best elements in evaluating historical events that are viewed in contradictory terms among historians is fairly universal, but at the same time, international human rights institutions support those countries which seek to limit attempts by pseudo-historians and extremists to deny documented and universally recognised historical facts with the aim of fomenting intolerance toward a group in society. As has been seen in Latvia and other countries, however, such statements can in most cases be limited efficiently by applying international human rights agreements and national criminal norms which ban incitement to hatred or discrimination.

The Council's framework decision was probably based more on political factors than on any legal need, and that means that the legal consequences of the decision

can be difficult to predict in the various member states. It is also true that unified legal regulations will not be enough to achieve the main goal of the framework decision – to establish a unified position among all member states vis-a-vis denials of the Holocaust and other types of genocide and crimes against humanity. No less important in pursuit of this goal is increasing the knowledge and understanding of citizens in the European Union about not just the crimes which the Nazis committed, but also the ones which were committed by the Communist regime.

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