

#ReForMediaMKD

*The Effectiveness of the Legislation for Protection
Against Hate Speech*

**THE LAW OVERSHADOWED BY THE POLITICAL
TOLERANCE OF HATE SPEECH**

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Publisher: Macedonian Institute for Media

For the publisher: Biljana Petkovska, Director

Author: Ph.D. Nenad Živanovski

Expert Reviewer: Brankica Petkovic, Peace Institute, Ljubljana, Slovenia

Translator: Martina Kimovska

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THE EFFECTIVENESS OF THE LEGISLATION FOR PROTECTION AGAINST HATE SPEECH

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Author: Ph.D. Nenad Živanovski

1. INTRODUCTION

Hate speech is a phenomenon in the communication processes that has been present in Macedonia since its independence, with varying intensity on the extent of public manifestation. Significant escalation of the problem with hate speech was registered during the 2001 military conflict, with marked antagonism in the interethnic relations. Fortunately, the short duration of the conflict meant a short presence of aggressive hate speech in the public discourse.

The second extensive manifestation of hate speech has been registered more intensely since 2009, and its impact is evident even today. This hate speech is characterized with heterogeneity, with a wide spectrum of reflection on the social groups and communities: from inter and intra ethnic conflict in the public discourse, to hatred towards groups differentiated by religious (un)conviction, political affiliation, gender diversity or sexual orientation.

According to some analyses, the letter sent in 2009 from the then prime minister and president of VMRO-DPMNE, Nikola Gruevski, to the members of the party in which he asked the entire membership to mobilize so as to start the last battle with the remainder of the transition and its politicians, is considered as a turning point for the escalation of this hate speech.¹

The political agenda for conflict in public speech formulated at that time has been continuously present to date. As a result of the called for party mobilization, in the past years, the citizens of Macedonia witnessed not only hate speech, but also its transformation into hate violence, for which there are many examples: physical violence against the students protesting the building of a church on the main square, the demolition of the Municipality of Centar, the verbal and physical attacks on several journalists critical towards the work of the Government led by VMRO-DPMNE, to the latest incursion in the Assembly and the attempt to lynch MPs from the new parliamentary majority on 27 April 2017.

This multi-year social environment, which is still present, inevitably raises the question of the legal possibilities of the citizens for protection from hate speech, the extent to which the Criminal Law of the Republic of Macedonia sanctions the social deviations in public speech and, finally, the agility of the prosecution and the judiciary in applying the existing legislation.

These issues are extremely relevant both for the academic and professional public, as well as for the wider population. For these reasons, numerous analyses, monographs, surveys, reports and scientific papers have been published over the past decade. The high volume of publications on hate speech leads to the conclusion that the problem with the abuse of public speech and hatred, materialized through verbal and other forms of expression, is a serious problem for the Macedonian society, for the development of democracy, but also for nurturing and practicing civilized public discussion and debate.

¹ Belichanec, R., (Ed.) *Black Book*, Foundation Open Society Institute – Macedonia, Skopje, 2010. Pg. 12-15. Available at: <https://okno.mk/sites/default/files/048-Crna-kniga.pdf>.

This research will provide an overview of the existing legislation in the legal system of Macedonia with respect to the sanctioning of hate speech, analyses of expert interlocutors about the weaknesses in its implementation and efficiency, resulting from the inconsistency of the legal provisions and the selective approach of the (politicized) judiciary. It will also address the ever-controversial issue with respect to where the right to freedom of speech ends and where hate speech begins, illustrated by a concrete case from the Macedonian media reality.

The survey, which is part of the project # ReformMediaMKD – Citizens, CSO's and Institutions Reforming Media in Macedonia, was conducted from February to June 2017. Secondary data from relevant sources were used for the needs of the research, and surveys, analyses, reports and other publications from national and international organizations were considered. Additionally, four interviews were conducted with experts from the academic community, the judiciary and the civil sector.

2. THE NOTION AND THE DEFINITION OF HATE SPEECH

Even though it was used earlier, in the so-called colonial discourse, it was in the 20th century, with the horrors of the Holocaust and what preceded the final clash with the Jews in Germany, which initiated the organized spread of insults and humiliation towards an entire ethnic group, that hate speech began to be treated separately in several sciences, and require a denomination that would identify the various manifestations of hatred towards individual social groups differentiated on various grounds.

Historically speaking, hate speech was preceded by several different terms and denominations. In the late 20s and early 30s of the twentieth century, hate speech was known as racial hatred. At the beginning of the 40s, it was called group libel, reflecting the specific legal question of whether the defamation law should be extended to include groups, not just individuals.² The notion of hate speech, which more precisely defines the significance of the more general expression of abusive speech, temporarily appeared in general use only at the end of the eighties and, most of all, during the nineties of the last century, parallel with the decay of the block divide and the establishment of the new world order. The origins of the term comes from the Anglo-American *hate speech*, which means speech that contains hate. The Anglo-American origin of the notion of hate speech points to the fact that the public debate on hate speech was historically, first and foremost, an American feature.³

However, the adoption of the new coinage hate speech was much easier to achieve in comparison to the universal definition that would specify its meaning. In the broadest sense, the notion of hate speech can be defined as “any statement calling for violence, hatred and discrimination against individuals or groups, usually based on their racial, religious or sexual affiliation”.⁴ According to the scientific literature for hate speech, the volume of which since the nineties of the twentieth century has risen sharply, the definitions of the notion of hate speech can be summarized in the following: „Hate speech includes statements that intimidate, offend or disturb individuals or groups or statements that call for violence, hatred or discrimination against individuals or groups. The reasons for hatred or discrimination are mainly “race, religion, gender or sexual orientation”.⁵ The basic notion of hate speech as a term is the public labeling, disqualification and satanization of a particular social group, which can often be (especially in war conditions) a warning of possible physical liquidation.⁶

However, the search for a universal definition of hate speech is futile, because, in reality, the social categories towards which hate speech was directed increased over time. This development was also recognized by the organization Human Rights Watch, which defines hate speech as “any form of expression

² Walker, S., *Hate Speech: The History of an American Controversy* 8, University of Nebraska Press, 1994.

³ Beham, M., “Govor mržnje u politici i medijima”, published in Vacic, Z. (ur.), *Etika javne riječi u medijima i politici*, Centar za liberal-no demokratske studije, Beograd, 2004.

⁴ Ibid.

⁵ Bruggen, W., “Verbot oder Schutz von Hassrede? Rechtsvergleichende Beobachtungen zum deutschen und amerikanischen Recht“, *Archiv des öffentlichen Rechts*, vol. 128, 2003. Pg. 372-411.

⁶ Beham, M., “Govor mržnje u politici i medijima”, published in Vacic, Z. (ur.), *Etika javne riječi u medijima i politici*, Centar za liberal-no demokratske studije, Beograd, 2004

that is considered offensive to racial, ethnic and religious groups and other minorities and women". For the American jurist **Rodney Smolla**, "hate speech is a generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion and sexual orientation or preference".⁷

No matter how clear and obvious the definitions, it is difficult to determine in practice what exactly comprises the actual situation of hate speech, since we are dealing with a complex communication, cultural and socio-psychological processes. Therefore, the more specific definition of hate speech depends on the wider social, historical and political context. Thus, in the United States, the definition of hate speech is firmly bound to the right to freedom of speech, which is protected in the First Amendment of the US Constitution. In Europe, the distinction between concepts of freedom of speech and hate speech is much clearer, so the most relevant definition is that given by the Committee of Ministers of the Council of Europe in 1997 in its **Recommendation R (97) 20**. There, hate speech is defined as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".⁸ Accordingly, the European Court of Human Rights in Strasbourg defines the term as "all forms of expression which spread, incite, promote or justify hatred based on intolerance, including religious intolerance".⁹

It is important to note that this is an "autonomous" concept, since the European Court does not consider itself bound to the classifications of the domestic courts. Sometimes they even refute classifications adopted by national courts, but sometimes they even classify certain occurrences as 'hate speech' even when domestic courts had not adopted such a classification. This means that there may be a difference in the cases considered by the Court as hate speech, which might not be considered like that by the national courts. To avoid this, the recommendation is to take the verdicts made by the European Court as a practice which should be applied by the domestic courts.¹⁰

Parallel with the discussion on the establishment of a clear and applicable definition of hate speech, the controversy regarding where the right to freedom of speech ends, and where hate speech begins was and is still a burning topic. The debate revolves around whether their relationship is inevitably conflicting and whether the right to free expression means freedom to offend the other, but also, whether the state's ability to ban hate speech does not imply exercising state censorship and suspending the right to freely express a wide range of opinions and positions? The question is complex and there is no simple answer. The degree of polarization has reached its ceiling: on the one hand is the American approach, which allows for a broad interpretation of the right to free speech, often including hate speech, apparent even in the First Amendment to the US Constitution, enacted in 1787, guaranteeing that "Congress may not pass laws that restrict freedom of speech and press".¹¹ On the other hand, the European experience with fascism and national socialism makes the continent intolerant of any kind of promotion of racial, ethnic and other discriminatory ideas and attitudes in public discourse. If we allow ourselves to generalize, we could conclude that the United States tolerate hate speech almost absolutely, while European and international law prohibit it and punish it in many cases.

Although the modern liberal approach covers these two ideally-typical models, still, the question of the relationship between freedom of speech and hate speech is not a black and white dichotomy, so neither hate speech is consistently allowed in the United States, nor it is always banned in Europe.¹² There is no dilemma that any democratic government will use a lot of resources, including the law, to guarantee freedom of speech to its citizens, but freedom of expression does not mean that everyone can say what they want at the price of offending the other. The strongest argument for this is that if speech is aggressive

⁷ Walker, S., *Hate Speech: The History of an American controversy* 8, University of Nebraska Press, 1994.

⁸ Council of Europe, "CoE Hate Speech Factsheet". Available at: www.coe.int/t/DC/Files/Source/FS_hate_en.doc.

⁹ Ibid.

¹⁰ The study and definition of hate speech are part of the extensive elaboration published in the book of Živanovski, N., *Hate speech theoretical study and research Bulgaria in the Macedonian media*, Bata Press Publisher, Skopje, Macedonia, 2014.

¹¹ U.S. Constitution -First Amendment. Available at: https://www.usconstitution.net/xconst_Am1.html.

¹² Brugger, W., *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 2002.

and abusive, it can jeopardize the freedom of the other.

But, this is a topic reserved for a separate theoretical debate, in which this research will not go into detail.

3. ANALYZING THE TREATMENT OF HATE SPEECH IN THE LEGISLATION OF THE REPUBLIC OF MACEDONIA

There are provisions in the legislation of the Republic of Macedonia that criminalize this speech for its special content. Punitive hate speech restrictions are focused on incriminating abuses of freedom of expression that involve incitement of violence or other violations of the equal freedoms and rights of others, or expressing a discriminatory attitude towards others.

In the comprehensive *Legal Analysis of the Concept of Punishment of Hate and Hate Speech*, **Academician Vlado Kambovski and Ph.D. Mirjana Lazarovska-Trajkovska** underline that the Macedonian Criminal Code (1996)¹³ provides for several incriminations of hate speech.¹⁴ Endangering security is one of the more severe types of endangering delicts (CC, Article 144, paragraph 4). According to the model of insult, the **Criminal Code** provides two special acts of insult on a discriminatory basis. The first is the heavier form of insult (Article 173, paragraph 2), which consists of the public exposure of another to ridicule via the computer system for his affiliation to a group that differs according to race, skin color, nationality or ethnic origin, or exposure to mockery of a group of persons distinguished by one of those characteristics (the penalty for the harder form is a fine or imprisonment of up to one year). The public insult by means of a computer system contains the following elements that distinguish it from the original act: public exposure to ridicule, which implies one or more offensive statements and other degrading procedures by means of a computer system; and motivation to exposure to ridicule with the specific attitude toward the affiliation of the victim to a group that is differentiated by race, skin color, nationality or ethnic origin, or to a group of persons distinguished by one of those characteristics. For the existence of this form of insult, which is a form of “hate speech”, all special conditions of the general offense should be cumulatively fulfilled, and causal relationship (“because of”) needs to be established between the public exposure to ridicule and the victim’s affiliation to a particular group, that is, the peculiarities of the group itself (discrimination).

A special, more serious type of offense is the act of exposing the Macedonian people and members of communities living in the Republic of Macedonia to ridicule (CC, Article 179). The act consists of public humiliation display with the intention of ridiculing the Macedonian people and members of other, non-majority communities, that, as parts of other nations (included in the Preamble of the Constitution of the Republic of Macedonia) live in the Republic of Macedonia. The passive subjects are the Macedonian people and the non-majority communities; in case of exposure to the ridicule of an individual, the perpetrator may be responsible for the more serious form of the offense (Article 173, paragraph 2) or, if the ridicule is committed for the purpose of provoking national intolerance - the act of causing national, racial and religious hatred, discord and intolerance (Article 319). Similar to this are the incriminations of the violation of the reputation of the Republic of Macedonia, its flag or coat of arms (Article 178) and public exposure of the offense of a foreign country (Article 181).

The act of causing national, racial and religious hatred, strife and intolerance (Article 319) has a mixed nature: basically, it is a hate crime, but it also contains forms that comprise hate speech. Its complex act of execution (Article 1) encompasses not only real actions (coercion, harassment, damage to objects, etc.), which causes or intensifies national, racial or religious hatred, discord or intolerance, but also verbal acts such as the exposure to ridicule of national, ethnic or religious symbols, which cause such a consequence.

As a typical act of hate speech, also foreseen in other legislation, is the incriminated spreading of racist and xenophobic material through the use of a computer system (CC, Article 394-d). The act in question is incrimination that consists of spreading racist and xenophobic written material, pictures or another presentation of an idea or theory that assists, promotes or incites hatred, discrimination or violence against

¹³ Criminal Code of the Republic of Macedonia (1996). Available at: <http://www.pravda.gov.mk/documents/KRIVI-CEN%20ZAKONIK%20precisten%20%20tekst.pdf>.

¹⁴ Kambovski, V. and Lazarova-Trajkovska, M., *Legal Analysis of the Concept of Punishment of Hate and Hate Speech*, OSCE, Skopje, 2012. Available at: <http://www.jpacademy.gov.mk/upload/PDF%20Files/Pravna%20analiza.pdf>

any person or group on the basis of race, skin color, national or ethnic origin, as well as religious conviction, in public, through a computer system. The person that commits the offense by other means of public information shall also be punished, and the punishment for the crime is even more serious if it is committed by abuse of position or authority, or if due to these acts there has been disorder or violence against people or property damage of large proportions. Regarding the act of hatred that consists of violence against an individual or group on a discriminatory basis, this incrimination appears as a “prior” offense. This can be an occasion for hate crimes if the perpetrator succeeds in spreading racist or xenophobic material to incite hatred in individuals, which will appear as a decisive motive for committing acts of violence. The law restricts this goal of the perpetrator to aiding, promoting or encouraging hatred, discrimination or violence against another or a group determined by race, skin color, national or ethnic origin and religious affiliation. The dissemination of material that incites hatred against a group with other characteristics (political, social, linguistic, gender, etc.) is excluded from the scope of this provision.

Typical incrimination of hate speech is also the more serious form of racial and other discrimination (Article 417, paragraph 3). The act can be done through three alternative forms of execution: spreading ideas for the superiority of a race; propagating racial hatred; or incitement to racial discrimination. These actions are directed towards a wider circle of people, aimed at accepting the position for inequality and violation of the freedoms and rights of people on a discriminatory basis. Such actions may result in different more severe forms of discrimination, which may consist of committing more serious acts against the freedoms and rights (genocide, war crimes, etc.). However, the legal essence of the act does not involve causing any consequence. The act is completed by the very propagation of fascist ideas or propagating and inciting hatred and racial discrimination. According to the object of protection, this incrimination does not differ from the act of violating the equality of the citizens (Article 137).¹⁵

Apart from the Criminal Code of the Republic of Macedonia, there are other legal regulations that can also be used to protect against unethical and unprofessional content of speech.

Thus, the **Law on Prevention and Protection against Discrimination**¹⁶ prohibits harassment degrading treatment, which is a violation of the dignity of a person or a group of persons arising from a discriminatory basis and which has the purpose or effect of violating the dignity of a particular person or creating a threatening environment, approach or practice (Article 7) and invites and incites discrimination (Article 9). More precisely, the Law determines that any active or passive behavior of a person will be considered as discriminatory behavior and action by the public authorities, as well as by legal and private individuals from the private and public sector in the public life, which exposes a person to unjust and degrading treatment compared to other persons in a similar situation, based on any of the discriminatory grounds (Article 5, Article 4).¹⁷

Moreover, the **Law on Audio and Audiovisual Media Services**¹⁸ prohibits audio and audiovisual media services from containing programmes that jeopardize national security, encourage violent demolition of the state’s constitutional order, call for military aggression or armed conflict, encourage or spread discrimination, intolerance or hatred based on race, gender, religion or nationality (Article 48).¹⁹ One of the main remarks of this law is that, although it provides restrictions, it does not contain any sanctions for the perpetrators that incite or spread discrimination, intolerance or hatred based on race, sex, religion or nationality. This practically means that the media regulator, the Agency for Audio and Audiovisual Media Services, will not be able to take other measures against the media that violate the restriction, except to react publicly or to address and notify other competent institutions. In contrast to the inability to sanction domestic media, it is contradictory that the Agency can, according to the Law, take appropriate measures,

¹⁵ Kambovski, V. and Lazarova-Trajkovska, M., *Legal Analysis of the Concept of Punishment of Hate and Hate Speech*, OSCE, Skopje, 2012. Available at: <http://www.jpacademy.gov.mk/upload/PDF%20Files/Pravna%20analiza.pdf>.

¹⁶ Law on Prevention and Protection against Discrimination (2010). Available at: http://mtsp.gov.mk/WBStorage/Files/diskriminacija_konsolidiran.pdf.

¹⁷ Mihajlova, E., Bachovska, J. And Shekerdziev, T., *Freedom of expression and hate speech*, OSCE, Skopje, 2013

¹⁸ Law on Audio and Audiovisual Media Services (2013). Available at: http://www.avmu.mk/images/Redakciski_precisten_tekst.pdf.

¹⁹ Ibid

which can temporarily restrict the freedom of reception, i.e. retransmission of audio and audiovisual media services from other countries, if the programme services of broadcasters from other countries“ evidently, seriously and severely” violate the provisions of Article 48 and incite racial, gender, religious or national hatred and intolerance (Article 45, paragraph 2).

In the sphere of media self-regulation, the **Code of Journalists of Macedonia**²⁰ contains an explicit provision (item 10) regarding the use of hate speech or encouragement of discrimination of any kind by journalists. However, this restriction is given only as a moral obligation, for the violation of which no sanctions, disciplinary procedures or other forms of reaction to the violation of professional standards have been provided. Also, the media and journalists, that are not members of the Association of Journalists of Macedonia can exempt themselves from applying the Code in their work, regardless of the fact that it promotes universally accepted ethical values for the journalistic profession.

According to the above stated, there is no doubt that the legislative framework in the Republic of Macedonia sanctioning hate speech is in line with the international standards and documents. However, when comparing the legislation with the current court practice, serious inconsistency in the applicability of the laws by the Public Prosecutor’s Office and the judiciary is evident when hate speech occurs, which is noted in several domestic and international reports, and which will follow as a conclusion from the discussions conducted with the interviewed interlocutors in this text.

4. WAY FORWARD TO MORE EFFICIENT LEGAL REGULATIONS

Despite the declarative and formal commitments that arise from the legislation, the media reality in Macedonia in recent years has been far from decent. On the contrary, it is increasingly going down on the media freedom lists, for which the unauthorized use of hate speech in media discourse has its contributions. The most lenient evidence of the desperate situation in the media sphere in Macedonia comes from the Report of the organization Reporters Without Borders, where Macedonia was ranked 111th, and is called the “Balkan Bad Boy”.²¹As a reminder, the state was on the 36th place in 2006.

Regarding the existing legislation that incriminates hate speech in the Republic of Macedonia, discussions were conducted with several experts from the legal and media sphere who gave their assessments and recommendations on how to improve the situation. Thus, the attorney **Filip Medarski**²² assessed that the regulation is inadequate for the fight against hate speech, which, as a phenomenon, has been extremely common in recent years. The general impression of the former judge at the European Court of Human Rights, **Margarita Caca-Nikolovska**²³ is that under the Criminal Code, hate speech is not sufficiently clearly incriminated, because greater criminal responsibility is prescribed only in some criminal acts in case the concrete crime was committed with hatred, and no separate criminal offense is envisaged by itself. *“From the information available to date, it is obvious that this type of incrimination is not sufficiently clearly implemented in the national criminal justice jurisprudence. Therefore, there is a need of an extensive debate, which would contribute to the improvement of the legislation in this direction”*.

For the hate speech researcher in the Helsinki Committee for Human Rights of the Republic of Macedonia, **Elena Brmbeska**,²⁴ the problem is that the Criminal Code does not contain one consistent article that allows the prosecution of hate speech. *“Quite the contrary, the Criminal Code contains five articles that refer to the spreading and promoting hate speech (Articles 179, 319, 417, paragraph 3, 394-d and Article 407-a), including the spreading of hate speech through a computer system and the denial of genocide. In essence, the lack of one consistent article on hate speech prevents the effective prosecution of perpetrators. However, we consider that, although there is no single article on hate speech, the existing articles provide a sufficient*

²⁰ Ibid.

²¹ Reporters Without Borders, “Balkans’ bad boy“, RSF, 2016. Available at: <https://rsf.org/en/macedonia>.

²² Answers to questions received electronically on 7 March 2017.

²³ Answers to questions received electronically on 22 March 2017.

²⁴ Answers to questions received electronically on 13 March 2017.

basis to *initiate legal proceedings against those who spread hate speech*".

The co-author of the book *Freedom of expression and hate speech*, **MA Tome Shekerdziev**,²⁵ has a similar position. His general impression is that the regulation is relatively well covered, although there is a terminological diversity for the same term.

We could conclude that the general assessment on the legal incrimination of hate speech is solid and aside from certain inconsistencies, which are also mentioned by Kambovski and Trajkovska in their analysis, *"the following cases of indisputable abuse of the freedom of expression remain outside the system of criminal justice: journalist articles or statements through the means of public information, speeches and statements by representatives of political parties that encourage or defend violence, nationalist and extremist outbursts during sports matches, burning national flags, violation of religious feelings on carnivals and other cultural events etc."*²⁶

The main dilemma imposed by the existing legislation is whether, and to what extent, the lack of a specific provision that incriminates hate speech in the Macedonian Criminal Code, instead of which separate articles that prohibit discrimination, racial hatred, nationalist intolerance, etc. are applied, presents a problem for the judicial practice to effectively sanction promoters of hate speech.

For the attorney Medarski, this is a serious problem, and the greatest indicator of the gravity of that problem is that **there is not a single effective verdict, according to which a person would be convicted of hate speech**. Brmbeska, who sees the problem mostly because of the broad interpretation and definition of hate speech, has the same position. *"The list of protected features is open and includes too many features that are impossible to be grounds for hate speech"*. Judge Caca-Nikolovska underlines that the very fact that this type of incrimination has been established for some time, and the national court practice is limited in terms of appropriately led procedures, clearly indicates that this creates a problem in practice, and therefore it is necessary first of all to improve the legislation, and then to apply it correctly in practice.

For Shekerdziev, the absence of a specific provision that incriminates hate speech should not constitute a significant obstacle because *"there are compulsory obligations (European convention and Strasbourg verdicts) and optional (soft) international obligations (OSCE commitments) that would easily fill in this gap. The specific character of hate speech is that if there was no hate in the speech, then it would be considered as free expression, but it is precisely the element of hate and prejudice that makes it specific and detrimental"*.

Undoubtedly, the application of other legal provisions, as a substitution for the non-existence of a specific provision that incriminates hate speech, is a shortcoming in the legislation, however not that extensive so as to prevent its effective sanctioning in the media discourse and giving legal security to the victims of hate speech. The main problem is the inconsistency and indifferent behavior of the prosecution and the judiciary towards the promoters of hate speech, whereby the dilemma is what is the reason behind that: whether it is their selective attitude towards the so called pro-government megaphones or the fact that hate speech is still not recognized in our society as a real and potential danger to social relations.

Brmbeska's comments on this impression is that *"according to our research, both dilemmas have been identified as problems, i.e. on one hand is the lack of acknowledgement of hate speech as a socially dangerous phenomenon that can cause negative consequences, i.e. acts of hatred, but, on the other hand is the selective approach in certain cases. Thus, for example, criminal charges filed against Milenko Nedelkovski, who is known to the public for spreading hate speech, have been rejected several times by the Public Prosecutor's Office and they were finally accepted after being returned for reconsideration by the Second Instance Court"*.

Medarski has the same opinion, according to him, the problem is in the selective approach of the law-enforcement bodies, that is, the protection of the hate speech promoters by certain political elites, as well as the lack of adequate regulation, and the lack of recognition of the dangers of hate speech. Caca-Nikolovska agrees with the above stated positions of the other interlocutors, adding that the indifference is

²⁵ Answers to questions received electronically on 15 March 2017.

²⁶ Kambovski, V. and Lazarova-Trajkovska, M., *Legal Analysis of the Concept of Punishment of Hate and Hate Speech*, OSCE, Skopje, 2012. Available at: <http://www.jpacademy.gov.mk/upload/PDF%20Files/Pravna%20analiza.pdf>.

obviously due to the greater inactivity and lack of will concerning the implementation of the competences of the Public Prosecutor's Office, which led to the establishment of the Special Public Prosecutor's Office.

This anomaly in the work of the prosecution and the judiciary is noted by Kambovski and Trajkovska, concluding:

*“The Macedonian practice shows that the authorities responsible for prevention and sanctioning of hate speech have a reserved attitude regarding the application of legal prohibitions, which is reflected in the insignificant number of registered cases of criminal prosecution or the undertaking of other legal measures. Therefore, the judicial and official statistics, cannot even remotely give an actual picture of the real dimensions of this evident social problem, which persists in conditions of high degree of political tension that have a negative impact on interethnic and interreligious relations. Their consequences are the various manifested forms of verbal and other expressions of public figures (politicians, public figures, media) that contain discriminatory messages or incite hatred and violence”.*²⁷

According to the two jurists, *“the reaction of the courts and other competent authorities to such behaviors is reduced to a sporadic and cautious application of the prescribed legal measures, followed mostly by media explanations of the incriminated event as an isolated case”.*²⁸

With its inconsistent and selective attitude towards the hate speech promoters, the judiciary and the prosecution not only contribute to the poor ranking of Macedonia, but, more importantly, they also participate in creating a climate of uncertainty of publicly labeling and attacking victims of hate speech without the possibility of receiving legal protection. The interviewed interlocutors made recommendations as to what should be the future position of the prosecution and the judiciary towards the emergence of hate speech?

“The relationship should be extremely proactive, first by the prosecution, and then by the judiciary, in terms of the processing. This is necessary primarily for the purpose of reducing and preventing hate speech in the future. The non-processing and impunity for perpetrators only leads to encouragement to the spreading of hate speech on a broader social level”, says Caca-Nikolovska.

According to Brmbeska, *“taking into account the social context, which is one of the key elements in determining hate speech, as well as the socio-political developments in the country, it is necessary to prosecute hate speech urgently and promptly. More and more cases of hate speech that result in hate crimes have been observed in the last period. Therefore, the responses of the competent institutions must be quick, and the punishment of perpetrators should be proportional, in order to contribute to prevention in general”.*

Shekerdziev also advocates for consistent implementation of the law demanding strict observance of the stipulations of the Criminal Code and the Law on Criminal Procedure. *“If there are indications that show the essence of a certain act of crime, appropriate steps should be taken”.*

According to Medarski, the judiciary and, above all, the prosecution should have a more active approach with respect to the recognition and sanctioning of hate speech.

From the established factual situation, the question arises as to whether a legal amendment and an amendment to the Criminal Code is necessary in order to emphasize the punishability of hate speech, or it

²⁷ Kambovski, V. and Lazarova-Trajkovska, M., Legal Analysis of the Concept of Punishment of Hate and Hate Speech, OSCE, Skopje, 2012. Available at: <http://www.jpacademy.gov.mk/upload/PDF%20Files/Pravna%20analiza.pdf>.

²⁸ Ibid.

is sufficient only to ensure a more adequate application of the existing provisions.

According to Caca-Nikolovska, there is a need of an extensive debate, raising awareness on a wider social level followed by the proper improvement of the legislation in the direction of ensuring the clearer definition of hate speech as a crime, as well as the punishments of the perpetrators. Elena Brmbeska agrees that legal amendments are needed in order to stipulate one single article which will derive the definition of hate speech. *“Additionally, the penalties provided for hate speech, fines or imprisonment, may be complemented with alternative penalties (such as community service, volunteering, etc.), which will be directed towards overcoming the prejudices of the perpetrators and the essential influence on them, rather than just the bare application of the punishment, which can give rise to the opposite effect”.*

According to Filip Medarski, *“a new incrimination, which would capture all forms of hate speech, must be absolutely introduced”.*

Tome Shekerdziev, however, believes that the legal practice will bring the legal errors on the surface. *“If amendments are made to the laws, without the current regulation being tested in practice, then all this activity may be superficial.”*

To these proposals by the interviewed interlocutors, we would also add that the supplements to the Criminal Code of the Republic of Macedonia regarding the hate speech would have to be preceded by a review of the legal regulations that incriminate hate speech in certain more referential legal systems in the European countries and beyond, in order to get a better quality draft text for the new legal provision.

5. „THE CASE OF MILENKO NEDELKOVSKI“ – PARADIGM OF A MEDIA REALITY

For the majority of the general public, the journalist Milenko Nedelkovski is the most recognized public figure who used hate speech, defamation, insult and aggressive language in his public appearances towards those whom he considered critical of the Government, the VMRO-DPMNE political party, and its leader, Nikola Gruevski. The start of his publicly expressed views, whether through his television show, his blogs or posts on his facebook profile, coincides with the mentioned letter from Gruevski to his membership from 2009. Since then, Nedelkovski, using the above mentioned means of communication with the general public, insensitively used hate speech, slander and insults on various grounds: national (calling Albanians with the offensive “Shiptars” and tribe), political - towards the opposition, led by SDSM (declaring them traitors, and asking for the most prominent members to be buried under a concrete slab), sexists (publicly addressing the former Ambassador of the Kingdom of the Netherlands in the Republic of Macedonia with a sexual connotation because of her physical appearance, while at the same time insulting another journalist because of her physical appearance). Proclaiming many public figures as slanderers working for foreign services, and collaborators of the former Yugoslav Security Service (UDBA), etc., and he does not deter in discrediting certain journalists and politicians, in a pejorative sense, according to their sexual orientation, even though they have not publicly stated their sexual preference.²⁹

Despite the long-standing and intense harassment of the general public with his unscrupulous positions, based on hate speech, insult, libel and threat, this journalist, who claims to be a close friend of the former Prime Minister and president of VMRO-DPMNE, Nikola Gruevski, and on whose TV show *“Milenko Nedelkovski show”*,³⁰ in his capacity as Prime Minister, Gruevski was a guest several times, not once was he tried in court, although, according to the current legislation, there were bases for this, on several occasions.³¹ The farthest thing that was done with respect to his public work was the drafted Report of the Agency for

²⁹ For additional information see: *“Scandal: Milenko Nedelkovski publicly stated the names of homosexuas and promiscuous journalists”*, online media Exclusive. Available at: <http://exclusive.mk/articles/27685/skandalozno-milenko-nedelkovski-javno-ob-javi-koi-se-homosek-sualci-i-promiskutetni-novinari-ki>.

³⁰ The show was aired on the commercial TV channels on a national level TV Sitel, TV Kanal 5 and TV Alfa, considered as progovernmental media.

³¹ For additional information see: *“How long will the media bullies go unpunished for inciting violence?”*, online media Nova TV, 2 May 2014. Available at: <http://novatv.mk/do-koga-mediumskite-siledjii-nekazneto-kje-pottiknuvat-nasilstvo/>.

Audio and Audiovisual Media Services³² dated 8 March 2016, in which it was concluded that *“through the content of several editions of the ‘Milenko Nedelkovski show’, Kanal 5 television violated the restriction on hate speech from Article 48 of the Law on Audio and Audiovisual Media Services [...] by subsequently making editorial decisions to allow the author of the show to encourage and spread discrimination, intolerance and hatred based on sexual orientation”*.³³

In their response to this Report, on 16 March 2016, Kanal 5 television referred to the fact that, *“since it is a completely external project, Kanal 5 is distancing itself from the personal views expressed on the show, and the question is why would we be held accountable in the first place. [...] Kanal 5, professionally used a ‘bleep censor’ for the words considered immoral and unsuitable with a high-frequency signal, thus demonstrating to the entire Macedonian public that they disagree with the terms used by the author of this show”*.³⁴

To this explanation by Kanal 5 Television, the Agency responded on 18 March 2016: *“[...] once again, you are neglecting the fact that the Report precisely explained why this (referring to the ‘bleep censor’ with a high frequency signal – authors note) does not absolve the media from the responsibility concerning the editorial decision to make such content an integral part of Kanal 5’s programme scheme, thus Kanal 5 helps their dissemination to the general public”*.³⁵

On 8 March 2016, the Agency for Audio and Audiovisual Media Services sent a request for action against the television to the Commission for Protection against Discrimination, for several editions of the *“Milenko Nedelkovski show”* broadcasted in January and February 2016. On this occasion, on 17 October 2016, the Commission replied: *“[...] The Commission for Protection against Discrimination is not competent to deal with ‘hate speech’ and ‘hate crime’ as well as acts against honour and reputation, that is, slander and hatred. The latter shall be decided in a procedure before the competent court. In the text that you sent us, it is evident that the issue is related mostly to such qualifications [...]”*.³⁶

As noted above, one of the reasons the Agency was unable to sanction derived from the Law on Audio and Audiovisual Media Services (2013), which does not provide for the possibility of punishment.

In addition to the (mis)use of the television to publicly state his views, Milenko Nedelkovski has been continuously present with his awkward posts on his facebook profile (which, according to Article 394 of the Criminal Code, is considered a “computer system” or “other media”). Thus, in his post from the beginning of 2016 he wrote:

*“When we come out with the crowds on the street, when *hit hits the fan, and this will happen soon, together with my group, I will go in this order: to BG’s house to fix his eyesight. Then, to the family from Brajchino with the Shquiptar bride. Now, there’ll be some serious trouble. Then I will visit the midnight stoner. Then SO, along with his brother VO... And finally at Berovich Beton, to order cement for the plate. I have the 12 mm iron “.*

In its Decision, the Higher Instance Public Prosecutor’s Office expressed the opinion that in this facebook status Milenko Nedelkovski does not encourage hatred and violence with his threats against several

³² AAVMS, “Written report on the conducted programme oversight”, AAVMS, 8 March 2016. Available at: http://www.avmu.mk/imag-es/Izvestaj_KANAL__DOOEL_Skopje.pdf.

³³ AAVMS, “Hate speech on Kanal 5 Television”, AAVMS, 9 March 2016. Available at: http://www.avmu.mk/index.php?op-tion=com_content&view=article&id=2646%3A-5-&catid=103%3Astari-info-srd-srd&lang=mk

³⁴ TRD Kanal 5 DOOEL, “Response to the report”, 16 March 2016. Available at: http://www.avmu.mk/images/Odgovor_na_izvestuvanje_za_konstatacii_od_programski_nadzor_od_TV_Kanal_5_Skopje.pdf

³⁵ AAVMS, “Response to the reaction related to the finding of the programme oversight”, AAVMS, 18 March 2016. Available at: http://www.avmu.mk/images/Odgovor_na_reakcija_vo_vrska_so_konstatacii_od_programski_nadzor_do_TV_Kanal_5_Skopje.pdf.

³⁶ Commission for protection against discrimination, “Response by the Commission for protection against discrimination“, CPD, 20 October 2016. Available at: http://www.avmu.mk/images/Izvestuvanje_od_Komisija_za_zastita_od_diskriminacija.pdf.

journalists, but rather only expressed his attitude for the individuals and thus denied the request for his criminal prosecution. Hence, the journalist **Zoran Bojarovski** rightfully concluded in his analysis that “the court and the prosecutor’s office established a phenomenon of impunity, which created legal insecurity among citizens and a high degree of mistrust towards the authorities competent for the administration of justice in the Republic of Macedonia. We are talking about hate speech, a very serious phenomenon that produces violence and acts of hatred”.³⁷

Milenko Nedelkovski’s public appearances as a host show commentator of the social and political events is an unprecedented and unknown phenomenon in the Macedonian media space, and for these reasons, the general public and experts were initially surprised and confused regarding their stance in the matter. Although the division of pro-government and pro-opposition journalists and media was present on the Macedonian media scene from the very independence of the state, such explicit use of hate speech and brutal black propaganda towards the opposition, based on arbitrary and, most often unsubstantiated positions, has not been seen not only in Macedonia, but also in the broader media space in the region, after the wars of the nineties.

The usurpation of the media consisted in the fact that without a sense of responsibility for the publicly expressed word and with complete ignorance of the legal regulations and professional standards, this journalist took the liberty to insult, slander, and use hate speech on various grounds of affiliation, without having to bear legal sanctions. However, his appearance should be seen as desirable by the government, arising from the general situation in a society of impunity of the people close to the ruling elite, which was present in all the years of Nedelkovski’s media action, and which was condemned even by the European Federation of Journalists.³⁸ This is the main reason behind the explanation of Nedelkovski’s irresponsible and unprofessional work. Attempts by the victims to legally protect themselves from his attacks and insults were not recognized by the public prosecutor’s office and the judiciary,³⁹ which in the Priebe Report was also assessed as unprofessional and dependent on the influence of the government.⁴⁰

We have to conclude that Nedelkovski’s appearance in the media space was not an autochthonous phenomenon or an incident derived from his personal convictions, but rather it was a well-designed, planned project of the ruling elite in the media space, as part of the overall ‘state of capture’ (a term used to describe Macedonia in the EU Country Progress Report⁴¹). Hence, if the country is released in all segments for which the Report indicates that has been captured (including the media), then one can expect that this or a similar example of a media space usurper would disappear from the public discourse, but also one would like to believe that similar processes would not be repeated in the future.⁴²

Actually, Milenko Nedelkovski was not the only such phenomenon - perhaps he was the most striking part of the system of the government’s media strategy for black propaganda against the opposition and the critical general public, but it included other journalists with their shows, such as “Jadi Burek”, edited and hosted by **Janko Ilkovski**, the TV Sitel central news edition, edited and hosted by **Dragan Pavlović-**

³⁷ Bojarovski, Z., “*Violence is only a step away from hate speech*”, Fact Checking Service, 24 June 2016. Available at: proverkanafakti.mk/od-govor-na-omraza-do-nasilstvo-ima-samo-eden-chekor/.

³⁸ “*Gutiérrez from the European Federation of Journalists: Gruevski incites hate speech*”, Fokus, 14 May 2014. Available at: <http://fokus.mk/gutierrez-od-evropskata-federatsja-na-novinari-gruevski-gopottiknuva-govorot-na-omraza>.

³⁹ For more information see: “*AJM: PPO is protecting Milenko Nedelkovski and tolerating the incitement of hate speech and violence*”, online media Libertas, 30 March 2016. Available at: <http://www.libertas.mk/znm-ojo-go-shtiti-milenko-nedelkovski-igi-tol-erira-govorot-na-omraza-i-pottiknuvaneto-na-nasilstvo/>.

⁴⁰ “*(INTEGRAL) Report by Reinhard Priebe on crime, corruption and wiretapping*”, online media Lokalno, 19 June 2015. Available at: <http://lokalno.mk/integralno-celiot-izveshtaj-na-rajnhard-pribe-za-kriminalot-korupcijata-i-prislushu-vanje-to-na-vlasta/>.

⁴¹ European Commission, “*Key findings of the 2016 Report on the former Yugoslav Republic of Macedonia*”, European Commission - Fact Sheet, 2016. Available at: http://europa.eu/rapid/press-release_MEMO-16-3634_en.htm.

⁴² In preparing this study we attempted to contact Milenko Nedelkovski so as to listen to his observations and positions concerning the content of his posts and publicly expressed positions in his show and the respective reactions. Unfortunately, there was no response to the mail dated 30 April 2017.

Latas and **Ivona Talevska**, the freelance journalist **Mirka Velinovska**, with frequent TV guest appearance on Nedelkovski's and Ilkovski's shows, as well as through her continuous articles and commentaries in the daily newspapers, Dnevnik and Nova Makedonija, and many other journalists-implementers of the government's black propaganda, which to date have not been legally sanctioned for their frequent use of hate speech.

6. CONCLUSION

For every democratic state it is imperative to guarantee the right to free speech to its citizens, whereby this right is provided both through formal regulation and through the overall social atmosphere of actual tolerance and respect for the other. However, the freedom of expression does not mean that everyone can say what they want at the expense of offending the other. It has been proven in the past, and it has been confirmed on many occasions even today, that if the speech is aggressive and abusive, it can endanger the freedom of the other. For these reasons, certain legal sanctions that would prevent the abuse of freedom of speech must exist, so as to ensure that it would not turn into hate speech.

There are several provisions in the legislation of the Republic of Macedonia that criminalize this speech because of its special content, whereas the penal and legal restrictions of hate speech are focused on the incrimination regarding the abuse of freedom of expression that involve the incitement of violence or other violations of the equal freedoms and rights of others, or expressing discriminatory attitude towards others. The Macedonian Criminal Code envisages several incriminations of hate speech, i.e. in Articles 137, 144, paragraph 4, 173, paragraph 2, 178, 179, 181, 319, 394-d, 417, paragraph 3. In the Law on Prevention and Protection against Discrimination, those are Article 5, paragraph 4, and Articles 7 and 9. In the Law on Audio and Audiovisual Media Services, the restrictions (still, without a sanction) can be found in Article 48.

However, the existing legislative framework, although generally compliant with the international standards and documents, is, as stressed by the interviewed interlocutors, partly inadequate for an effective fight against hate speech, because hate speech is not sufficiently and clearly incriminated in the Criminal Code, since it is not foreseen as a separate criminal offense. However, despite the fact that there is no one consistent article that will enable the effective prosecution of hate speech, this factual situation cannot be justified for the failure of the public prosecutor's office and the judiciary to act, which is evident by comparing the application of the legislation in judicial practice, where serious inconsistency is found in the applicability of laws when hate speech occurs.

Such a reserved attitude regarding the legal restrictions of the authorities in charge of preventing and sanctioning hate speech was reflected in the fact that today we do not have any effective verdict in which a person would be convicted of hate speech, although everyone agrees that over the past years, the use of hate speech in media discourse has been present as never before. Non-processing hate speech and impunity for perpetrators has led individuals to be encouraged to use and spread hate speech, and the victims of such speech are not able to legally protect themselves.

Also, the inactive approach of the judicial authorities, i.e. the impunity of the promoters of hate speech, as well as the lack of recognition of the dangers of hate speech as a socially dangerous phenomenon, is a serious problem that can cause negative consequences, that is, acts of hatred, which has been noted in many domestic and international reports. The example of physical violence against the students who peacefully protested the construction of a church on the main square is the best indicator of the manner in which the planned and systematic use of hate speech against a certain group can lead to an escalation of violence.

The non-sanctioning of hate speech has enabled the adoption of professional and ethically unsupported editorial decisions of some media outlets in the past years, which enabled show authors to encourage and spread discrimination, intolerance and hatred based on different affiliation and orientation, and rather than marginalize and isolate hate speech, thus they enabled it to become an important factor in the media discourse. The explanations that parts of the speech using hate and insult were 'beep censored' with a high-

frequency signal, are unacceptable, because the **promoters of the criminal act hate speech must not have access to the mainstream media, and not require alibis and justification for the editorial decision in the fact that the incriminated speech was not heard.**

Finally, the authors who used hate speech had the opportunity to manifest it in their shows and through other forms of expression, such as illustration, written speech or gesture (which in some cases they did), so the question remains as to how the television acted in such situations when, apart from the sound, the image had to be hidden from the viewers, i.e. what was the meaning and public interest in displaying such television content.

The overall media reality in recent years shows that the court, regulatory bodies, and self-regulatory bodies either did not want to impose sanctions on hate speech promoters or were powerless to do so. Instead of acting as a fence for the unprofessional and illegal work of certain journalists, both the judiciary and some media workers acted as their protectors and supporters of the free use of hate speech. That is why the media community advocates the position of amending the Law on Audio and Audiovisual Media Services (2013) and introducing sanctions for 'hate speech' or inciting violence in audiovisual programs in a misdemeanor procedure. The regulatory bodies in all European countries can initiate a misdemeanor procedure and sentence hate speech if they are broadcasted as part of the audiovisual content. Such provisions are in accordance with Article 10 of the European Convention on Human Rights.⁴³

However, despite all the remarks of the legislation, we would conclude that in the past years, hypothetically, even if the legislation in incriminating hate speech had been ideal, it could not have been applied impartially, because there was no political climate in the society for independent action of the judicial authorities and professional work of all media and journalists.

⁴³ Proposal for Urgent Democratic Reform, prepared and endorsed by 50 civil society organizations, Skopje, 2016. Pg. 28. Available at: http://respublica.edu.mk/attach/BP1_MKD_FINAL_08.07.2016.pdf.

7. RECOMMENDATIONS

1. Judiciary bodies should develop a consistent system of prevention and repression of acts of hate speech, which will demonstrate the determination and capacity of the state for the consistent respect of human freedoms and rights.

2. The relations between the judiciary and the prosecution should be extremely proactive. It is indispensable for the public prosecutor to urgently and hastily persecute hate speech, and for the judiciary to process cases, since in the recent period there have been more and more instances of hate speech that result in hate crimes.

3. There is a need of an extensive debate involving representatives of the media, journalists, professional media and journalist associations, representatives of the judiciary, civil sector and the government, which should offer guidelines for proper improvement of the legal regulations in terms of providing a more clear definition of hate speech as a crime and regarding the punishment of the perpetrators, taking into account the legal provisions and their application in certain more referential legal systems.

4. An extensive debate is also needed involving representatives of the media, journalists, professional media and journalist associations, representatives of the judiciary, civil sector and the government, which would contribute to raising awareness at on a broader social level in relation to the hate speech.

5. The legislator should make urgent changes to the Law on Audio and Audiovisual Media Services and introduce sanctions for “hate speech” or for inciting violence through audio-visual programmes, which the regulatory body would process in a **misdemeanor** procedure.

6. The penalties provided for hate speech, fines or imprisonment in the Criminal Code may be supplemented with alternative penalties, such as community service, which the court would pronounce and which would be aimed at overcoming the prejudices of the perpetrators and the essential influence on them, rather than just the bare application of the punishment, which can give rise to the opposite effect.

7. The civil sector, professional media and journalist organizations, relevant institutions, the academic community and other stakeholders should initiate legal changes in the existing regulations in order to anticipate one article which would give the precise definition of what falls under hate speech.

8. The court is recommended to ensure direct application of the European Court of Human Rights practice in the domestic legal proceedings, in particular the provisions relating to the right to freedom of expression and its limitations under Article 10 of the European Convention on Human Rights.

9. The Macedonian penal legislation should be reformed in the direction of consistent application of the system of criminal justice in accordance with the standards and criteria of the European Court of Human Rights.

10. Taking into account the fact that there is no court verdict for hate speech, professional media organizations and the NGO sector should draft and prepare a “Black Book”, which would contain a list of journalists and media outlets that have used hate speech, as well as a reprint journalist texts with such content. The objectivity of the record would be achieved by consistent application of the definition of hate speech adopted by the Committee of Ministers of the Council of Europe in Recommendation R (97) 20.

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Interview with Margarita Caca-Nikolovska, Judge, 22 March 2017, Skopje (interview via e-mail).

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Interview with Fillip Medarski, Jurist, 7 March 2017, Skopje (interview via e-mail).

NOTE ABOUT THE AUTHORS

Nenad Živanovski holds a PhD on Hate Speech in the Political Discourse in the Media. His academic and professional research is focused on the critical analysis of discourse, hate speech, media and journalism analyses, both theoretical and empirical, as well as international relations, with the accent on the geopolitical situation of the Balkans in its latest history.

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