

**FREEDOM OF EXPRESSION AND
HATE SPEECH**

Freedom of expression and hate speech

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Introduction

Freedom of speech and expression is fundamental human right, playing vital role in exercising and protecting other rights. Possibility to express opinion and to share information is a value indicator for the democratic capacity and institutional commitment to democracy in the societies. Concepts of both citizenship and pluralism cannot be attained without the possibility to freely express thought and the objective competition of opposing political ideas. Tolerance of thought of the other and different one provides for co-existence in modern multicultural societies.

However, freedom of expression can be abused in certain situations and it transfers into a completely opposite phenomenon. Certain individuals and groups can express ideas on superiority of a certain race, religion or nation, with the intention to humiliate all those not belonging to „their“ group, as well as to incite to exile, isolation and even genocide. In such cases, freedom of expression is interpreted too broadly and transfers into a hate speech. These phenomena highlight the discussion on freedom of expression, its limitations and abuse of this freedom. “The transition we are in and the situation with the media, including the poor “word” culture, is fertile ground for such public dissemination or fuelling of hatred, without any sense of responsibility for the uttered word, which becomes the main generator of the social climate of intolerance and prejudice on national, ethnic and other grounds, which is emerging as a general psychological framework for expansion of all forms of hate crimes- from physical to verbal and psychological violence:”¹

To the end of undertaking educated actions against such circumstances, the idea of this Brochure is to make distinction, both from terminology and legal point of view, between freedom of expression and hate speech, as well as to differentiate them from other related concepts, such as defamation and insult. All statements in the Brochure will be presented through the national legislation, as well as the case law of the European Court of Human Rights. All explanations should contribute to recognizing, isolating and condemning the antonyms of free expression.

The Brochure is prepared with the support of OSCE Mission to Skopje extended to the Institute of Journalism, Media and Communications, within the Faculty of Law „Iustinianus I“ within „Ss. Cyril and Methodius,, University in Skopje.

It is intended, above all, for journalists, journalism students, media and their editors, as well as the general public, dealing with the issues of freedom of expression, hate speech, defamation and insult, as well as the legal framework in the country.

¹ Legal Analysis on the Concept of Hate Crime and Hate Speech, OSCE, Polyesterday, Skopje, 2012, p. 37.

1. FREEDOM OF EXPRESSION

Freedom of expression, as a right, actually stems from the idea for equality in the freedoms and the rights of all people. This right has a long five-decade philosophical-ethical and legal-political history². History of this freedom corresponds to the history of democracy in Europe and North America and the fight for freedom of the press, i.e. freedom of the media.

As far as the 20th century is concerned, both the affirmation and the considerable importance of the freedom of expression are especially emphasized following large social traumas (the period between the two World Wars, the Holocaust, the Cold War, the fall of the Berlin Wall). Numerous papers dedicated to this right quote *John Stuart Mill* thought: freedom of expression secures us against corrupt and tyrannical government. This freedom is one of the *fundamental guarantees* for an open and pluralistic society.

Following the fall of the Berlin Wall, what was mainly expected was ensuring freedom of speech and information, ensuring competition, pluralism and market economy, enjoying the human rights, as well as individuality. However, freedom of expression, as a right, was also radicalized in all of its aspects, especially in Southeast European countries. The media was occupied with direct political speeches, demonstrations, pamphlets, free interviews, analytical articles, while free communication between governments and citizens was to be established as main principle of democratic equality.

1.1 Defining Freedom of Expression

By analyzing international documents (listed below: UDHR³, Article 19; ICCPR⁴, Article 19; ECHR⁵, Article 10; ECHR, Article 11⁶; ADRDM⁷, Article iv; ACHR⁸, Article 13 and ACHPR⁹, Article 9), which actually set the basis for this right, one comes to the conclusion that freedom of expression is fundamental civil and political right.

This right is qualified as a framework right. Its manifestations range from the freedom of opinion and the free individual expression of opinion to the institutional

² US Declaration of Independence, French Declaration of the Rights of Man and of the Citizen dated 1789 (Article 11), Virginia Declaration of Rights dated 1776 (Article 12), The Constitution of the United States of America dated 1791 (First Amendment).

³ Universal Declaration of Human Rights.

⁴ International Covenant on Civil and Political Rights.

⁵ European Convention on Human Rights.

⁶ Charter of Fundamental Rights of the European Union.

⁷ American Declaration of the Rights and Duties of Man.

⁸ American Convention on Human Rights.

⁹ African Charter on Human and People's Rights.

freedom of the media. Freedom of opinion is an absolute civil right, meaning no one can jeopardize or limit human thinking, whereas freedom of expression of opinion is treated as a political right. As a political right, it can be subjected to certain restrictions or limitations that have to be closely interpreted and in line with certain legally set objective goals, which will be elaborated below.

Legal theory also treats this right as a compilation of several rights (such as the right to freedom of thought, conscience and religion or belief, right to public expression of thought, right to participate in cultural life, right to privacy), due to which certain vagueness in the concept appears.

Freedom of expression is treated as a dual right as well. In fact, *first*, the right to send, disseminate or express opinions and ideas of any kind (political, artistic, commercial expression) and *second*, the right to seek and receive information in any form (orally, in writing, in the form of art, or through any other media, including new technologies).

Being set as such, this right is *an integral part of the right to communicate*. Being defined as such, this right is to be of interest, above all, to the policy creators, those designing the policies pertaining to legal, economic and political matters. Hence, the emphasis here is also put on the creation of media policies and therefore, for instance, broad scope of activities is observed to be undertaken in the light of this context by the Council of Europe, which manages, to a considerable extent, to regulate part of the basic principles regarding the issues such as the freedom of expression and privacy. Thus, the Council of Europe, as well as the European Court of Human Rights, have played a role similar to the role of the constitutional courts in some national jurisdictions¹⁰.

As regards the terminology and legal meaning of the freedom of expression, the European Convention on Human Rights (Article 10) is of importance to us. Firstly, the Convention was treated as reflection of the identity of Western European liberal democracies and a means by which the countries could protect against internal threat of authoritative conduct by lodging an application to an international court (European Court of Human Rights). "However, since the beginning of the 21st century, the Convention's principle roles are to articulate an "abstract constitutional model" for the entire continent, including and especially for the newly-admitted post-Communist countries, and to provide a device for promoting convergence in the deep structure and function of public institutions at all levels of governance in Europe."¹¹

¹⁰ See: *Regulating the Changing Media, A Comparative Study*, David Goldberg, Tony Prosser and Stefaan Verhulst, Ars Lamina, Skopje, 1998, pp. 155-184.

¹¹ European Convention on Human Rights, Steven Greer, Prosvetno Delo, Skopje, 2009, p. Xv.

1.2 International Standards

Status of freedom of expression stems from the international legal acts. Minimum standards derive from the international binding acts at both general international level and regional level. Firstly, obligation of states is to incorporate freedoms and rights in the national legislation and to provide for remedies in case of their violation, however, positive obligation to provide for enabling environment for exercising the envisaged human rights is also important. Accordingly, freedom of expression can be found in most of the Constitutions as part of fundamental rights and freedoms.

1.2.1. United Nations

Following the Second World War, legal grounds for the freedom of expression were established with the UN core acts, such as the **Universal Declaration of Human Rights** dated 1948¹², which is considered to be the core international legal document on standards of human rights and it applies to all UN Member States. This act was the initial international legal reaction to what the world experienced following the two World Wars.

Article 19¹³ of the Universal Declaration of Human Rights clearly sets that everyone has the right to freedom of opinion and expression, whereby this right also includes freedom to hold certain opinion, as well as to seek, receive and impart information and ideas through any media.

Article 19 of the Universal Declaration of Human Rights dated 1948:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Pursuant to Article 29 of the Universal Declaration of Human Rights, exercise of rights and freedoms is subject to the national law. According to the legal interpretation, limitations on the right should be determined restrictively, meaning that the core right should not be underestimated and the limitation should not exceed the need to protect the rights and the basic public goods. At

¹² UN General Assembly Resolution, no. 217(III) of 10th December 1948, <http://www.un.org/en/documents/udhr/>

¹³ ARTICLE 19 is a London-based organization founded in 1987, with the aim of cooperating with international government institutions, such as United Nations Organization and OSCE, as well as with international NGOs. The mission of the Organization is to realize the three tiers of the freedom of expression contained in Article 19 of the Universal Declaration of Human Rights, as follows: 1. Freedom of expression as a right to speak, i.e. to voice political, cultural, social and economic opinions. The right of each individual to dissent certain opinions and it makes electoral democracy and builds public trust in administration; 2. Freedom of expression is freedom of the press (freedom of the media), i.e. the right to free and independent media to report without fear, interference, persecution or discrimination. Building media systems to provide knowledge, give voice to the marginalised and to highlight corruption. This would, on the other hand, create an environment where people feel safe to question government action and to hold power accountable; and 3. Freedom of expression is the right to know, which means access all media: Internet, art, academic writings, information held by government, etc.

the same time, United Nations are at the position that there cannot be freedom without any responsibility and that freedom without any limitations could lead to violation of other human rights, such as the right to privacy. The states should elaborate the restrictions, accompanied by legally substantiated reasons, which can be discussed on a public debate and approved by the court institutions so as to be processed later on.

International Covenant on Civil and Political Rights is a multilateral treaty adopted by the United Nations General Assembly on 16th December 1966, and in force from 13th March 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of expression, freedom of assembly and association, electoral rights and the right to fair trial. International Covenant on Civil and Political Rights dated 1966¹⁴ guarantees the freedom of expression in Article 19.

Article 19 of the International Covenant on Civil and Political Rights dated 1966:

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a) for respect of the rights or reputations of others; b) for the protection of national security or of public order, or of public health or morals.*

Pursuant to Article 19 of the International Covenant on Civil and Political Rights, freedom of expression includes all stages of identification and dissemination of information, as well as of ideas as processed information, regardless of the format or the media on which they appear. Such freedom of expression is subject to duties and responsibilities, which are determined by the national legislation, as well as the codes of professional ethics. Restrictions on the freedom of expression should be provided by law and are necessary: for respecting the rights and reputations of others; for protecting the national security or the public order, or the public health or morals.

Article 19 is inevitably related to Article 20 of the ICCPR, which supplements and additionally limits the expression which propagates war or advocates hatred, discrimination and violence. Such formulation is a qualificatory protection of the freedom of expression, as well as protection against the most severe forms of abuse of free communication.

¹⁴ UN General Assembly Resolution, no. 2200A(XXI) of 16th December 1966, which entered into force on 23rd March 1976.

Article 20 of the International Covenant on Civil and Political Rights:

1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Implementation of the International Covenant on Civil and Political Rights by the Member States is monitored by the **Human Rights Committee**, which is a body composed of independent experts. Member States are obliged to submit regular reports to the Committee as regards the quality of implementing the rights envisaged therein. After examining each report, the Committee provides its recommendations to the Member States in the form of “concluding observations”. In addition, the Committee publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work. In 1983, UN Human Rights Committee adopted a general comment on Article 19 of the ICCPR. Later on, in 1993, recognizing the role of the new communications and the power of the media, UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression was appointed.

As an UN act, **International Convention on the Elimination of All Forms of Racial Discrimination** dated 1965¹⁵ is also of relevance – Article 4 of the Convention requires the Member States to declare all dissemination of ideas based on racial superiority or hatred as an offence punishable by law. In addition, the Convention prohibits incitement of ethnic or racial discrimination, hatred and violence.

In addition to these international legal act, which are relevant at universal level, there are three regional systems for protection of human rights and, more specifically, freedom of expression, sublimated in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10), the African Charter on Human and People’s Rights (Article 9) and the American Convention on Human Rights (Article 13).

1.2.2. Organization for Security and Cooperation in Europe (OSCE)

OSCE, as a regional organization for cooperation and security in Europe, plays a pivotal role in exercising the freedom of expression, as well as preventing the hate speech, mainly through numerous acts (declarations, resolutions) that pertain to using this right. Therefore, important documents in the light of this context are the Decision of the Committee of Ministers on Tolerance and Non-Discrimination condemning manifestations of hate speech, as well as the Concluding Document from the Conference on Human Dimension held in Copenhagen in 1990¹⁶.

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination dated 1965.

¹⁶ As regards more detailed review of OSCE commitments for freedom of expression, freedom of the media and free flow of information, please see: Freedom of the Media, Freedom of Expression, Free Flow of Information; Conference on Security and Co-operation in Europe (CSCE) and Organization for Security and

In order to ensure observance of the commitments for freedom of expression and freedom of media, Office of the OSCE Representative on Freedom of the Media¹⁷ was established in December 1997. The function of the Representative is to observe relevant media developments in OSCE Member States with a view of providing early warning on violations of freedom of expression. In addition, the Representative's second main task is to assist Member States by advocating and promoting full compliance with OSCE principles and commitments regarding freedom of expression and freedom of the media.

In March 2010, Dunja Mijatovik was appointed as OSCE Representative on Freedom of the Media, and she was reappointed for a second three-year term in March 2013. Office of the OSCE Representative on Freedom of the Media is based in Vienna.

1.2.3. Council of Europe

Council of Europe (Strasbourg) is an international organization established in 1949, including 47 Member States at the moment. Objective of this organization is to advocate democracy, protection of human rights and the rule of law in Europe. Republic of Macedonia is a member of the Council of Europe since 1995.

Hence, a relevant document for the Republic of Macedonia is the **European Convention on Protection of Human Rights and Fundamental Freedoms** of the Council of Europe dated 1950¹⁸, where Article 10 guarantees the right to freedom of expression.

Taking into account the tradition of the European policy in nurturing democratic values, simultaneous protection of the national identity and nurturing cultural differences and pluralism, freedom of expression is one of the core rights in the Convention, which is the basis of the European policy on public information. This Convention, in particular, Article 10 therein, which has become symbol of freedom of thought and freedom to hold opinions, protects the freedom of thought, but also defines the requirements for its limitation. Convention signatory states bear the responsibility to protect this right.

Article 10 of the European Convention on Protection of Human Rights and Fundamental Freedoms:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Co-operation in Europe (OSCE) 1975-2012, 2nd Edition - Vienna: OSCE Representative on Freedom of the Media, 2013, p. 56 <http://www.osce.org/fom/99565>.

¹⁷ <http://www.osce.org/fom>

¹⁸ <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

The exercise of these freedoms, since it carried with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

When evaluating whether limitation of freedom of expression by the state is legitimate or not, the Court determines it through criteria set in Article 10 itself, paragraph 2, which need to be met:

1. Prescribed by Law

Prescribed by law means that limitation on the freedom of expression can be imposed solely on the basis of previously established and stipulated rule, as well as on the basis of the common law which is clear enough for the individual to be able to assume that sanction will be imposed for his/her action. Such formulation of “prescribed by law” also includes the continental legal systems with codified law, as well as the Anglo-Saxon case law. The idea of this formulation is to avoid possible limitation which is not envisaged in the legal system, but is rather arbitrary and without any legal basis.

In addition, the idea behind this first criterion is “First, the law has to be adequately accessible – the citizens have to be knowledgeable/informed, adequately to the circumstances, of the legal rules applicable to a particular case. Second, certain rule cannot be considered as a law, unless it is formulated precisely enough so as to enable the citizen to comply its behaviour, who has to be able, with an adequate advice if necessary, to predict the level, which is reasonable in given circumstances, of the consequences that can occur as a result of a certain action. These consequences should not be absolutely predictable, experience shows it is unattainable”.¹⁹

2. Legitimate Aim

Limiting the freedom of expression, unless prescribed by law, can refer to the reasons indicated in paragraph 2, Article 10, being the following: national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

¹⁹ Slagjana Dimiskova, p. 18, Freedom of Expression and Democracy, Vecer Press Doo Skopje, Cetus Print, 2008, Skopje.

3. *Necessary in a Democratic Society*

The qualification “necessary in a democratic society” is especially important. This criterion measures whether the restriction on the freedom of expression is a fair and proportionate measure in a democratic society or a government reaction is too strict of a sanction to a specific expression of thought. An important legal principle in the light of this context is the “margin of appreciation”, allowing the national authorities to determine and value whether restrictive measures are proportional. However, this margin is limited depending on the cases (whether limitation on the freedom of expression prevents violence, assault or whether such limitation is too strict). This associates the freedom of expression with the concept of open and pluralistic society, governed on the basis of democratic principles. In fact, European Court of Human Rights highly appreciates the freedom of expression as compared to the personal interests to protect the reputation of public officials included in the political process²⁰.

As regards exercising freedom of expression, Article 17 is also important, which prohibits the abuse of the rights in the Convention, envisaging that nothing in the Convention may be interpreted as implying for any State, group or person, any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth therein or at their limitation to a greater extent than is provided for in the Convention. As regards the limiting of the freedom of expression, European Court of Human Rights applies Article 17 to prevent totalitarian groups to abuse the rights in the Convention. Hence, statements advocating violence or racial hatred can be excluded from enjoying the freedom of expression by referring to Article 17 as well. Such cases can be observed when advocating totalitarian regime²¹, Holocaust denial²², hate speech on the basis of racial discrimination²³, as well as advocating intolerance against Muslims²⁴.

Scope of the freedom of expression is more clearly defined through the case law of the European Court of Human Rights in Strasburg. “Freedom of expression ... is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

²⁰ Mr. Lingens was an editor who was fined for publishing comments about the behaviour of the Austrian Chancellor, such as “the basest opportunism”, “immoral” and “undignified”. The editor was accused of damaging the reputation of the Chancellor and was fined pursuant to the Austrian laws. The Court held that, although the limitation on the expression of Lingens was prescribed by law and had a legitimate aim, an active politician should accept negative value judgments for him/herself with a greater tolerance than the ordinary citizens, since public interest for adequate information is necessary for attaining a sound democratic process.

²¹ Communist party (KPD) v Federal Republic of Germany, Decision of European Commission of Human Rights, 20th July 1957.

²² Honsik v Austria, European Commission of Human Rights, Application No. 25062/94, Report of the Commission 28th October 1997.

²³ Glimmerveen and Hagenbeek v Netherlands, Applications N° 8348/78 & 8406/78.

²⁴ Norwood v United Kingdom, Application no. 23131/03 Decision on admissibility, 16th July 2003.

shock or disturb the State or any sector of the population" (*case of Handyside*²⁵ v. the United Kingdom).

European Court of Human Rights, through its case law, has also determined the scope of protection of freedom of expression in the Convention "Article 10 does not protect the expression which refers only to speech, but it also pertains to pictures, ideas and actions intended to present information or ideas. This Article does not protect only the content of the ideas, but their form as well. Printed documents, broadcasting, drawings, films or electronic information are also protected under this Article."²⁶

States have a positive obligation to secure the use of the freedom of expression, rather than just not to interfere in exercising of this right. As regards the positive obligation of the State to secure enabling environment to exercise the freedom of expression, the case of *Özgür Gündem v. Turkey*²⁷ is often cited, where the Court concluded that the Government had failed to comply with their positive obligation to create an enabling environment to exercise this freedom.

States have positive obligation to secure freedom of expression, i.e. horizontal application of Article 10 in relation to individuals. Individuals have to use their right to communicate, whereas access to information has to be provided to them. Public interest needs to be observed in the light of the interests of the individual, i.e. a balance has to be struck. In determining whether or not a positive obligation of the State exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.

Judgment in the case of *Eon v. France*²⁸ is a good example of political expression in the light of freedom of expression. The applicant Mr Hervé Eon was French citizen who, in 2008, during a visit to Laval by the President of France, Nicolas Sarkozy, waved a small placard reading "Get lost, you sad prick". This phrase was practically the same one which the President Sarkozy himself used several month previously at an Agricultural Show in response to a farmer who had refused to shake his hand. On 6th November the same year, the Laval *tribunal de grande instance* found the applicant Eon guilty of insulting the President pursuant to Article 30 of the Freedom of the Press Act dated 29th July 1881 and fined him EUR 30, a penalty which was suspended later on.

The Court held that France violated Article 10 of the Convention and held that

²⁵ *Handyside v. the United Kingdom*, Application no. 5493/72, Judgment 7th December 1976.

²⁶ Slagjana Dimiskova, p. 12, *Freedom of Expression and Democracy*, Vecer Press Doo Skopje, Cetis Print, 2008, Skopje.

²⁷ *Özgür Gündem v. Turkey*, Application no. 23144/93, Judgment 16th March 2000. In fact, *Özgür Gündem* was a Turkish newspaper with a circulation of some thousand copies, reporting on the Turkish-Kurdish conflict. Its journalists, editors and distributors were victims of constant attacks, and there were even murders that were not adequately processed by the police and the prosecution. Turkish government accused the newspaper of separatist propaganda of the Kurdistan Workers' Party, however, the Court held that the authorities had the obligation to undertake actions to systemically protect the expression of freedom.

²⁸ *Eon v. France*, Application no. 26118/10, Judgment 14th June 2013.

the finding that France was convicted of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The main point of the hearing in the Court was “the balance that has to be struck between limiting the freedom of expression and the right to free discussion of questions of public interest”. Hence, the Court concluded that “the phrase used by the applicant had not targeted the President’s private honour ... nor had it simply amounted to a gratuitous personal attack against the President”. The Court concluded that “the verbal attack” in its essence was of political nature and that possible limitations on political discussion, pursuant to Article 10 of the Convention, were very rare. The Court further concluded that the fact that the phrase used by Eon, which attracted extensive media coverage, much of it being in satirical tone, clearly pointed out that “verbal attack” in this case could be treated as a political satire. Political satire, by its very nature, is aimed at provoking and mockery. Hence, according to the Court, founding Eon guilty could have a negative effect on the “satire as a way of discussing questions of public interest”, and such type of discussion is the foundation of each democratic society. Therefore, the Court concluded that “criminal penalty pronounced against Eon was disproportionate to the aim pursued in Article 10 and hence unnecessary in a democratic society”.

Compared to the political expression, the Court sets a lower level of tolerance for artistic expression. Such claim does not mean that, a priori, all artistic expressions, which can be interpreted as unfavourable for any structure in the society, are disputed, but on the contrary, the Court acknowledges the contribution of art to the development of a healthy democratic society. Still, works of art can be offensive to religious or moral beliefs of people. Under such circumstance, legitimate aim to protect public moral or rights of others can be considered as justification for certain measures against artistic expression (the case of *Otto Preminger Institut v. Austria*²⁹). In cases when the honour of other persons is affected, special attentions is to be paid to the nature of the offensive elements (including the tone of the accusation), public status of the person recognized in the work of art, as well as its detrimental effects. Circumstances under which prevention of artistic activities is defended with public interest for prevention of crime, disturbance of public order or protection of national security, cause controversies. Literature or pictures can serve as a medium to communicate certain political messages, which can also be considered to incite violence. However, the standpoint that artistic expression can be limited on the basis of its nature to incite hatred or violence among opposing religious or ethnic groups seems to be unjustifiable in the liberal democracies³⁰.

As regards the documents of the Council of Europe pertaining to freedom of expression, *Convention on Criminalisation of Acts of Racist and Xenophobic Nature Committed through Computer Systems* (Convention on Cybercrime) dated 2001³¹

²⁹ *Otto-Preminger-Institut v. Austria*, Application no. 13470/87, Judgment 20th September 1994.

³⁰ *Ibid.*

³¹ Additional Protocol dated 2003 to the Convention on Criminalisation of Acts of Racist and Xenophobic

is to be mentioned. This Convention, together with the Additional Protocol, also envisage an obligation to establish as criminal offences the dissemination of racist and xenophobic materials through computer systems (Article 3), as well as an obligation to establish as criminal offences racist and xenophobic motivated insult committed through a computer system (Article 5). Article 6 envisages the following conduct to be established as criminal offences: denial, gross minimisation, approval or justification of genocide or crimes against humanity.

European Commission against Racism and Intolerance (ECRI) is established by the Council of Europe as an independent specialized body, comprising independent and impartial experts to monitor human rights with respect to racism and intolerance. Within its activities, ECRI monitors each country separately, analyzing the situation concerning the manifestations of racism and intolerance, and provides proposals and suggestions as to how the countries might deal with the problems identified. Report was prepared for our country within the fourth monitoring cycle in 2010, while the conclusions on implementation of the recommendations are adopted in 2013³².

In addition to the function to prepare special reports, ECRI, as a monitoring and advisory body of the Council of Europe regarding racism, xenophobia and other forms of intolerance, has issued several general policy recommendations which, although not legally binding, contribute to setting standards, which are referred to in the decisions of the European Court of Human Rights. Following recommendations³³ are of significant relevance:

- ECRI General Policy Recommendation No. 1: Combating racism, xenophobia and intolerance, adopted by ECRI on 4th October 1996;
- ECRI General Policy Recommendation No. 6: Combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet, adopted on 15th December 2000;
- ECRI General Policy Recommendation No. 7: National legislation to combat racism and racial discrimination, adopted on 13th December 2002.

4. Institutional Setup for Protection of Freedom of Expression

Any person, non-governmental organization or group of individuals can lodge an application to the **European Court of Human Rights in Strasburg**, claiming that their rights guaranteed under the Convention are breached. The Court can only deal with the matter after all domestic remedies have been exhausted and within a period of six³⁴ months from the date on which the final national decision was

Nature Committed through Computer Systems (Convention on Cybercrime) dated 2001.

³² Documents can be found at http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Former_Yugoslav_Republic_Macedonia/FormerYugoslavRepublicMacedonia_CBC_en.asp.

³³ Recommendations are available at <http://www.coe.int/t/dghl/monitoring/ecri/library/publications.asp>.

³⁴ Pursuant to Article 4 of Protocol 15 to ECHR, period of six months will be reduced to four months

taken. Certain application may not be dealt with if it is submitted anonymously, if it is substantially the same as a matter that has already been examined by the Court, if it has already been submitted to another procedure of international investigation or the application may not be dealt with if it is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application³⁵. Applications on breach are awarded to individual sections. First of all, a committee of three judges is composed to examine the application, which may, by unanimous vote, declare the application inadmissible, without further examination. Once the application is examined by the committee, hearing is held and judgment is adopted by all members of the Chamber. Cases which raise serious issues of general importance can be referred to be decided upon to the Grand Chamber. Each judgment of the Court is binding for the Member States and has to be abode by, except in cases of an advisory opinion.

As regards a delivered judgment, both parties may request referral of the case to the Grand Chamber within three months. Should such request be rejected, the case is to be re-examined.

Execution of the court judgments is supervised by the **Committee of Ministers** of the Council of Europe, though it has no formal means of using force against Member States in order to comply. However, the ultimate sanction of non-compliance is expulsion from the Council of Europe.

The **Commissioner for Human Rights** is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for freedom of expression and other human rights in Council of Europe Member States. The initiative for setting up the institution was taken by the Council of Europe's Heads of State and Government at their Second Summit held in Strasbourg in October 1997, while in May 1999, the Committee of Ministers adopted a resolution which instituted the office of the Commissioner and elaborated the Commissioner's mandate. The Commissioner's work focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. Commissioner has the competence to gather information on violation of the freedom of expression and other human rights violations suffered by individuals. Therefore, the Commissioner co-operates with a broad range of international and national human rights monitoring bodies, as well as other universities and other bodies which focus on these issues.

Main goals of the Commissioner for Human Rights are the following: to foster the effective observance of human rights, and assist Member States in the implementation of Council of Europe human rights standards, to promote education in and awareness of human rights in Council of Europe Member States;

when all 47 Member States will ratify the Protocol <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/213.htm>.

³⁵ Article 35 of the European Convention on Human Rights.

to identify possible shortcomings in the law and practice concerning human rights, to facilitate the activities of national ombudsperson institutions and other human rights structures and to provide advice and information regarding the protection of human rights across the region.

1.2.4. European Union

“In recognising that its policies could have an impact on human rights and in an effort to make citizens feel ‘closer’ to the EU, the EU and its Member States proclaimed the EU Charter of Fundamental Rights in 2000. The Charter contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and the universal human rights treaties, such as the UN Convention on the Rights of the Child.”³⁶ By 2009, The Charter was merely a ‘declaration’, which means that it was not legally binding. The 2009 Treaty of Lisbon altered the status of the Charter of Fundamental Rights to make it a legally binding document.

Article 11 of the Charter of Fundamental Rights of the European Union, titled as “Freedom of Expression and Information” also underlines the freedom of expression.

Article 11 of the Charter of Fundamental Rights of the European Union:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
2. *The freedom and pluralism of the media shall be respected.*

What is of special importance as regards freedom of expression is that, inter alia, this Charter is aimed at responding to the problems stemming from the on-going and future development of the information technology. “It abolishes the distinction that existed so far made by European and international books between civil and political rights, on one hand, and economic and social rights, on the other, and lists all rights grouped according to the basic principles: dignity, freedom, equality, solidarity, civil rights and justice.”³⁷ European Union institutions are legally bound to respect the Charter of Fundamental Rights of the European Union, including its provisions on non-discrimination. When they apply the EU law, Member States are to comply with the Charter.

“As regards the instruments of the Council of Europe, pursuant to Article 6 (2) of the Treaty of Lisbon, European Union will accede to the human rights instrument of the Council of Europe: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession

³⁶ Handbook on European Non-Discrimination Law, European Union Agency for Fundamental Rights, Council of Europe, 2010, p. 17.

³⁷ Introduction to European Law, Desche Stiftung für Internationale Rechtliche Zusammenarbeit E.V., Magor Doo, Skopje, p. 102.

shall not affect the Union's competences as defined in the Treaties."³⁸

An important document within the European Union legislation is the **Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law** of 28th November 2008³⁹, aimed at establishment of a common criminal-law approach in all EU Member States, requiring the Member States to review whether their existing legislation is in line with the Framework Decision⁴⁰. The Decision was a novelty in the Union, since, although the European Union cannot adopt a universal criminal code, the Decision binds the Member States to govern the criminal-law issues and to envisage these offences as a criminal offence in all criminal codes, introducing effective, proportionate and dissuasive penalties for the persons having committed such offences. These criminal offences include public incitement to violence or hatred, public dissemination or distribution of tracts, pictures or other material, public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity, war crimes, Nazi crimes.

In 2007, the European Union established the **European Union Agency for Fundamental Rights**, as one of its bodies. It was established within the European Monitoring Center on Racism and Xenophobia, headquartered in Vienna. The Agency should provide assistance and expert analysis to the relevant institutions and bodies in the Member States when implementing the EU law, pertaining to the fundamental rights. The Agency has no competence at examining individual applications.

It is independent and cooperates with both national and international bodies, especially the Council of Europe, as well as civil society organizations.

1.3 National Provisions on Protection of Freedom of Expression

Fundamental freedoms and rights of the individual and the citizen, recognized by the international law and established in the **Constitution**, are one of the fundamental values which constitutional order in the Republic of Macedonia rests on (Article 8 of the Constitution).

As regards the freedom of expression, it is guaranteed under Article 16 of the Constitution of the Republic of Macedonia.

Article 16 of the Constitution of the Republic of Macedonia

³⁸ Introduction to European Law, Desche Stiftung fur Internationale Rechtliche Zusammenarbeit E.V., Magor Doo, Skopje, p. 104.

³⁹ EU Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law of 28th November 2008.

⁴⁰ Racist and xenophobic conduct has to constitute a criminal offence in all Member States. Such forms of conduct include public incitement to violence or hatred; public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia; public denying or trivializing crimes of genocide, crimes against humanity and war crimes, when such conduct is carried out in a manner likely to incite to violence or hatred against a group of persons or a member of such a group defined by reference to race, colour, descent, religion or national or ethnic origin.

Freedom of personal belief, conscience, thought and public expression of thought shall be guaranteed.

Freedom of speech, public address, public information and establishment of institutions for public information shall be guaranteed.

Free access to information and freedom of receiving and imparting information shall be guaranteed.

Right of reply via the mass media shall be guaranteed.

Right of correction in the mass media shall be guaranteed.

Right to protect a source of information in the mass media shall be guaranteed.

Censorship shall be prohibited.

With respect to the limitations on the freedom of expression, above-mentioned Article 16 of the Constitution of the Republic of Macedonia should be viewed in correlation to other provisions in the Constitution which guarantee the political freedoms and rights and which this right may conflict with in terms of the forms hatred manifests, as follows: Article 19, paragraphs 1 and 2 (freedom of religion and public expression of religion); Article 20, paragraph 1 (freedom of association); Article 20, paragraph 3 (programmes and activities of political parties and other associations of citizens may not be directed at violent destruction of the constitutional order) and Article 25 (guaranteeing the privacy of the citizen, as well as his/her dignity and reputation).

Article 110 of the Constitution of the Republic of Macedonia, in addition to listing the competences of the Constitutional Court, also stipulates that the Constitutional Court protects the freedom of expression.

Article 110 of the Constitution of the Republic of Macedonia:

“Constitutional Court of the Republic of Macedonia ... protects the freedoms and rights of the individual and the citizen relating to the freedom of belief, conscience, thought and public expression of thought, political association and activity, as well as to the prohibition of discrimination among citizens on the grounds of sex, race, religious or national, social or political affiliation...”

Constitutional Court of the Republic of Macedonia manifests, through its case law, a positive tendency towards indirect referral to international principal and auxiliary sources, consulting, in the decision-making process, relevant international conventions, “soft” rules and/or judgments of international courts when applying the constitutional or legal norms, in particular in the light of the European Convention on Human Rights and the case law of the European Court of Human Rights in Strasbourg.⁴¹

⁴¹ Application of the Law of the European Union in the Republic of Macedonia in the period prior to Accession to the EU, National Scientific Research Project, Faculty of Law, Ss. Cyril and Methodius University, BoroGrafika, Skopje, p. 65.

Law on Civil Liability for Insult and Defamation⁴² was adopted in 2012 and it decriminalized the crimes previously encompassed in the Criminal Code – Chapter 18 “Crimes against Honour and Reputation”. Since this Law is important in relation to the freedom of expression and hate speech, it is necessary to present its legal solutions in more details.

Goal of this Law is to regulate civil liability for a harm caused to the honour and the reputation of a natural person or legal entity with an insult and defamation.

The Law prescribes that the freedom of expression remains guaranteed and that possible restrictions are subject to strict requirements in line with the national legislation, as well as the international treaties in force, such as the European Convention on Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights. This provision only acknowledges the high importance and the level of protection of the freedom of expression, since even without separately referring to the European Convention, as well as the case law of the Court in Strasburg, they are still legal sources and are part of the law in force in the country.

The legislator sets that insult can be caused through a word, gesticulation, drawing, sound or in any other manner, as well as that in addition to natural persons, legal entities, groups of individuals, as well as a deceased person, fall within a protected category.

The Law also stipulates that author of a statement given, the editor or a person replacing him/her in the mass media and the legal entity can be held liable for an insult committed via a mass media. The plaintiff, when filing the lawsuit, is free to decide against whom of the persons referred to in this paragraph to file the lawsuit for determining the liability and compensation for damage caused by the insult. The journalist as author of the statement is not held liable if the statement obtained an insulting character by inserting headlines, sub-headlines, photographs, taking parts of the statement out of the context, by announcements or in any other manner by the editor or the person replacing him/her.

Article 7 sets in more details certain cases when there is no liability for an insult. These are, among others, the cases when the statements are given when participating in the work of the Assembly of the Republic of Macedonia and the local municipal councils, in the course of court procedures and the procedure before the Ombudsman, when opinions contained in official documents are communicated, as well as when opinions presented at public gatherings or public events are communicated. In addition, no liability for an insult is held if the humiliating opinion is stated against a public office holder, if such statement contains justified criticism or inciting a debate of public interest.

As regards liability for defamation, the Law stipulates that “A person shall be

⁴² Law on Civil Responsibility for Insult and Defamation (“Official Gazette of the Republic of Macedonia”, no. 143/2012).

held liable for defamation if he/she presents or disseminates, before a third party, false facts harming the honour and reputation of another person with an established or apparent identity, with the intention of harming his/her honour and reputation, while knowing or has been obliged to know and may know that the facts are false.” It also prescribes that “liability for defamation shall also exist if the false statement contains facts harmful to the reputation of a legal entity, a group of persons or a deceased person.”

This shows that for a defamation to exist, it is necessary for the following three elements to be met: existence of intention to harm the honour and the reputation, presenting false facts which he/she was obliged to or could have known to be false, as well as presenting such facts before a third person. Should false facts be presented only before the person whose reputation is harmed, than it may be a matter of insult, rather than a defamation.

Since falseness of the facts is one of the essential elements of defamation, the defendant is obliged to prove the truthfulness of the facts presented in his/her statement. Upon exception, burden of proof falls upon the plaintiff, if he/she is a public office holder, when the public office holder is legally obliged to provide explanation for the facts related to the public office, if the defendant proves that he/she had reasonable grounds to present a statement in the public interest. Proving the facts is also generally excluded as regards the personal life of the plaintiff, except in cases stipulated in Article 9.

Pursuant to the Law, a journalist against whom a lawsuit is being filed as regards liability for insult and defamation cannot be requested to reveal his/her secret source of information for the facts he/she is obliged to prove. The court may request for the relevant information to be disclosed for the purpose of determining the truthfulness of the information without identifying the source of such information. Still, if the defendant rejects it, such rejection cannot be deemed as his/her confession of guilt or it cannot be basis of the conclusion that the defendant failed to prove the truthfulness of the facts.

When filing a lawsuit for damage compensation for insult and defamation, the Law stipulates measures to mitigate such damage by requesting an apology and public retraction of the statement on the media and in the form in which the insult and the defamation were committed. If the insult and the defamation are committed via a mass media, the aggrieved party has the right to submit a request for publishing a response, disclaimer or correction.

Compensation for a non-pecuniary damage for insult is awarded if the person committing the insult has not apologized and has not publicly retracted the insulting statement or if he/she has repeated the insult following the court ruling prohibiting such repetition. Amount of the pecuniary damage compensation should be proportionate to the damage caused to the reputation of the aggrieved party and, when determining it, the court should take into account all circumstances of the case, as well as the financial status of the

defendant. Compensation for a proved material damage can consist of pecuniary compensation of the actual damage and the lost profit.

Compensation should be proportionate to the damage caused and should include non-material damage caused to the honour and the reputation of the aggrieved party, as well as proved material damage as actual damage and lost profit. When determining the amount of the pecuniary compensation, the court should take into account all circumstances of the case, as well as the financial status of the defendant. The circumstances that suggest gaining material or any other benefit by the defendant by the commitment of the act are regarded as special circumstance by the court. For the purpose of reducing the damage, the defendant may prove that he/she has apologized, offered an apology or in any other manner has made a serious attempt to eliminate the harmful consequences of the defamation.

Pursuant to this Law, the procedure under a lawsuit for determining the liability for insult or defamation and compensation for damage is urgent. If the insult or defamation is committed via the mass media, the competent court is obliged to initiate the procedure within a time period not exceeding 30 days as of the day on which the lawsuit is submitted to it. The court is obliged to carry out the procedure without any delay, within a reasonable time, with the least possible costs and to prevent any abuse of the rights which the parties in the procedure are entitled to.

Law on Free Access to Public Information⁴³ governs the terms and conditions, the manner and the procedures for exercising the right to free access to public information held by the state authorities and other bodies and organizations determined by law, the municipal bodies, the bodies of the City of Skopje and the municipalities of the City of Skopje, institutions and public services, public enterprises, legal entities and natural persons performing public competences, established by law (hereinafter: holders of information).

Law on Broadcasting⁴⁴ points out the importance of the right to freedom of thought and expression, in particular performing the broadcasting activity ensures freedom of public expression of thought, freedom of speech, public appearance and public information.

⁴³ Law on Free Access to Public Information ("Official Gazette of the Republic Of Macedonia", nos. 13/2006, 86/2008 and 6/2010).

⁴⁴ Law on Broadcasting ("Official Gazette of the Republic of Macedonia", nos. 100/2005; 19/2007; 103/2008; 152/2008; 6/2010; 145/2010; 97/2011; 13/2012 and 72/2013).

2. HATE SPEECH

Freedom of expression, in its essence, provides for exchange and pluralism of ideas so as to have affluence of the thought and to realize democracy and political discourse through communication. That is why its limitations should undergo a strict filtering for it not to be jeopardized or even abused.

When examining the cases on limitations on the freedom of expression, one can identify cases when certain expression can harm the goals that are legitimately protected. Such mechanism provides for the freedom of expression not to be abused and not to be directed towards the very opposite of the freedom itself, such as the hate speech, which is the most severe abuse of the possibility for expression.

Hate speech causes unpleasant and complex problems to the modern societies devoted to respecting and nurturing cultural pluralism and tolerance. Regulating the hate speech is, to a great extent, a phenomenon of the period following the Second World War. Instigated by the obvious relations between the racist propaganda and the Holocaust, many international treaties, as well as individual states, underlined the hate speech as unacceptable and contrary to the rights protected under the Constitution. Debates about the hate speech today are ever more a reaction to the constant discussions about the growing migration, dedication to pluralism and respect for the diversity in the modern constitutional democracies.

2.1 Defining Hate Speech

Hate speech is expression of hatred against a certain group. It is used to insult a person on the account of that person's race, ethnic, religious or other group to which he/she belongs. Such speech generally seeks to condemn or dehumanize the individual or the group or to express anger, hatred, violence or contempt toward them. It brings the message of inferiority of the members to the concerned group and condemns, humiliates and is abundant in hatred. Practically, all racist, xenophobic, homophobic and other related declinations of identity assaulting expression could be classified under the term "hate speech".

Implicit definition of hate speech is contained in Recommendation No. R (97) 20 of the Committee of Ministers on "hate speech" dated 1997. Appendix to the Recommendation points out that the term "hate speech" is to be understood as a term covering 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 origin⁴⁵.

European Court of Human Rights takes this definition of hate speech or its understanding as a speech that covers “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”⁴⁶ as a starting point in its judgments pertaining to hate speech. For instance, in the case of *Gündüz v. Turkey*, the Court refers directly to the recommendation of the Committee of Ministers from 1997, as well as to the definition of the term “hate speech” therein⁴⁷.

When talking about the term “hate speech”, it is also necessary to mention that, despite the frequent use of this term, there is no universally accepted definition. A synthetic definition, which will, above all, be used as a doctrine, can be drawn from the discussion held by experts and numerous proposals for defining “hate speech”:

Hate speech is a kind of expression designed to promote hatred on the basis of race, religion, ethnicity, national origin, gender, sexual orientation, class/social origin, physical or mental disability.

- target of this speech can be one or more individuals associated with a group that shares particular characteristics; or the group itself
- protected characteristic is a common characteristic/feature shared by the group, such as “race”, religion, ethnicity, nationality, sexual orientation or any other similar common factor that is fundamental to the identity.

More precisely, hate speech, as a concept, refers to a whole spectrum of a negative discourse, stretching from expressing, inciting or promoting hatred, to abusive expression and vilification, and arguably also to extreme forms of prejudice, stereotypes and bias. In addition to direct speech, hate speech also includes many other forms of expression, such as:

- public use of insulting symbols (for instance, swastika);
- their explicit presentation at parades, protest, public address, etc.;
- burning crosses (this is characteristic for the Ku Klux Klan in the USA);
- burning flags;
- writing graphite⁴⁸;

⁴⁵ Recommendation No. R (97) 20 of the Committee of Ministers on “hate speech” http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281997%29020&expmem_EN.asp.

⁴⁶ *Erbakan v. Turkey* (Application no.59405/00), Judgment 6th July 2006, § 56.

⁴⁷ *Gündüz v. Turkey* (Application no. 35071/97), Judgment 4th December 2003, § 22.

⁴⁸ It is interesting to point out that contrary to the obvious hate speech, there are also subtle cases of such offensive expression. In fact, on the door of a LGBT organization, unknown perpetrators wrote “Tremiti” with a spray, which obviously did not sound as hatred against anybody, however, the Isole Tremiti was a place where Mussolini deported the homosexuals in Italy. This common toponym has turned into a hate speech against the LGBT community.

- putting up posters;
- distribution and dissemination of leaflets with such contents;
- expression through TV and radio;
- and from recently, expression via Internet.

2.2 Elements of Hate Speech

European Court of Human Rights has developed several elements of hate speech in its case law: intent, contents, i.e. context of expression, and proscribed results⁴⁹.

- **intent to spread hatred against a certain group.** Hate speech means an expression behind which there is an intention to incite, promote or justify hatred towards persons associated with a certain group (racial, religious or ethnic group, LGBT community, etc.). Such intention to incite or promote intolerance, racism, homophobia, violence or other hatred should be distinguished from the intention to inform the public on issues of general interest (hence, in the case of *Jersild v Denmark*⁵⁰, broadcasting a documentary of a racist organization does not constitute hate speech; it rather intends to present a social phenomenon of general interest to the public)⁵¹.
- **contents/context of a specific expression.** Assessment of whether certain expression represents a hate speech will depend on both the contents of what is being expressed and the specific circumstances of the case, i.e. in addition to the contents, the context of a specific expression also matters. For instance, whether the statement is given by a politician, a journalist, an artist, ordinary citizen, under which circumstance, at which place and time, etc.
- **consequences/proscribed results arising from hate speech.** Hate speech, in addition to offending the dignity of the person(s) whom it is directed to, is also a speech with the ability to disturb public peace and order or incite violence, such as instantaneous incidents or stirring up violence between the respective groups in the society, as well as hate crime towards persons previously targeted with the hate speech. Proscribed result covers all socially detrimental consequences caused by such expression, may it be only hatred against others, even though the actual acts of causing more severe consequences are lacking⁵².

⁴⁹ Also see Mirjana Lazarova Trajkovska, *Legal Analysis on the Concept of Hate Crime and Hate Speech*, OSCE, Polyesterday, Skopje, 2012.

⁵⁰ *Jersild v Denmark*, Application no. 15890/89, Judgment 23rd September 1994.

⁵¹ Mirjana Lazarova Trajkovska, *Legal Analysis on the Concept of Hate Crime and Hate Speech*, OSCE, Polyesterday, Skopje, 2012.

⁵² *Ibid.*

2.3 Protected Characteristics

The issue of protected characteristics is one of the key aspects of the hate speech concept. Although there is no precise answer as to which characteristics should be included and the decision must be made with regard to the needs of each state, there are still certain factors that need to be taken into account:

- ***immutable or fundamental characteristics*** Hate speech targets the aspects of a person's identity that are unchangeable or fundamental to a person's sense of self. Such characteristics are usually evident, such as race or skin colour. In addition, these characteristics should function as markers of group identity. Not all immutable or fundamental characteristics are markers of group identity. For instance, blue eyes may be an immutable characteristic of a person, but blue-eyed people do not identify themselves as a group, nor do others see them as a group, hence eye colour is not typically a marker of group identity.

- ***social and historical context*** Determining the protected characteristics also requires an understanding of the history of oppression and discrimination in a particular state, as well as its current social problems. Hence, protected characteristics should also include the characteristics that have been the basis for past discrimination or oppression, as well as the ones that are the basis for the present or contemporary incidents of discrimination or oppression. In the case of the previous example, blue-eyed people have not experienced history of oppression, nor they experience oppression or discrimination at the moment, hence the expression targeting this characteristic will not/cannot be treated as a hate speech⁵³.

Compared to the prohibition of discrimination, there is a list of protected characteristics envisaged in the national and the international instruments for protection of human rights:

For instance, Article 14 of the European Convention on Human Rights and Article 1 of the Protocol No. 12 to the European Convention envisage an open and exhaustive list of protected characteristics pertaining to the prohibition of discrimination, such as: gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Although the Convention does not mention sexual orientation, physical or mental disability or age in the list of protected characteristics, European Court of Human Rights has applied Article 14 with respect to the characteristic not being explicitly mentioned therein (for instance, as regards sexual orientation, the judgment dated 21st December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*).

Article 3 of the Law on Prevention and Protection against Discrimination of

⁵³ Lawrence, Frederick M., *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, Cambridge, Massachusetts, 1999. Also in OSCE, *Hate Crime Laws: A Practical Guide*, Published by ODIHR, Warsaw, Poland, 2009, pp 38-39.

the Republic of Macedonia also envisages a broad and open list of protected characteristics, including: sex, race, skin colour, gender, belonging to marginalized group, ethnicity, language, citizenship, social origin, religion or religious belief, other types of belief, education, political affiliation, personal or social status, mental and physical disability, age, family or marital status, property status, health condition or any other basis envisaged by law or by ratified international agreements.

Hence, the term/concept of hate speech refers only to several of the protected characteristics out of the wide range of protected characteristics envisaged in the national and the international instruments for protection of human rights. Taking into account that hate speech means racist, xenophobic, homophobic and other related declinations of identity assaulting expression, the list of protected characteristics as regards hate speech would be limited to the following:

- race, skin colour, religion or religious belief, ethnicity, national origin, citizenship, language
- gender, sex, sexual orientation
- physical or mental disability
- class/social origin

In fact, as pointed out above, hate speech targets the aspects of a person's identity that are unchangeable or fundamental to that person. Such is the belonging to a certain culture. This basis: belonging to a particular culture is also used as an umbrella term, which explains the nature of certain identity characteristics, such as: race, skin colour, ethnicity, religion, national origin, citizenship or language. Their application varies and they often interweave or are used in turn. Identity or protected characteristics also encompass the gender, the sex, the sexual orientation, the class/social origin (characteristic for societies with a history of class division), as well as the physical and the mental disability.

Protected characteristics as regards hate speech do not include, for instance, political affiliation of the person or his/her political belief, as well as the economic or financial status, marital status, education, etc. They can certainly be basis for discrimination against an individual, however, insult on the basis of affiliation to such group (for instance, membership in a political party), will not be deemed as hate speech. It is so because such affiliations do not function as "markers" of the fundamental identity of the individual and/or do not have history of previous oppression.

Cases of hate speech from the European Court of Human Rights case law

How does hate speech look like?

- Daniel Féret was a member of the Belgian House of Representatives and the Chairman of the political party Front National-Nationaal Front in Belgium. During the election campaign, its Party distributed several types of leaflets, carrying the slogans as following: "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home". Mr Féret was convicted of incitement to racial discrimination. He was sentenced to community service and was disqualified from holding parliamentary office for 10 years. He appealed before the European Court for a violation of his right to freedom of expression. In the Court's view, Mr Féret's comments were clearly liable to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public. His message, conveyed in an electoral context, carried heightened resonance and clearly amounted to incitement to racial hatred. His conviction by the national authorities is justified in the interests of preventing disorder and protecting the rights of others, namely members of the immigrant community. The Court held that there had been no violation of Article 10 (Féret v. Belgium, Application no. 15615/07, judgment dated 16th July 2009).

- Denis Leroy, a cartoonist, presented the attack on the World Trade Center in New York in one of his drawings published in a Basque weekly newspaper on 13th September 2011, with a caption which read: "We have all dreamt of it ... Hamas did it." Having been sentenced to payment of a fine for "condoning terrorism", Mr. Leroy appealed before the European Court of Human Rights that his freedom of expression had been infringed. The Court considered that, through his work, the applicant glorified the violent destruction of American imperialism, expressed moral support for the perpetrators of the attacks of 11 September, commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims.

Despite the newspaper's limited circulation, the Court observed that the drawing's publication had provoked a certain public reaction, capable of stirring up violence and of having a demonstrable impact on public order in the Basque Country. The Court held that there had been no violation of Article 10 (Leroy v. France, Application no. 36109/03, judgment dated 2nd October 2008).

- In the case of *Vejdeland and Othres v. Sweden*, the applicants were convicted of distributing in an upper secondary school approximately 100 leaflets considered by the Swedish courts to be offensive to homosexuals. The applicants distributed leaflets by an organisation called National Youth, by leaving them in or on the pupils' lockers. The leaflets contained information and statements that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS. The applicants claimed before the Court that they had not intended to express contempt for homosexuals as a group and stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education in Swedish schools. The Court found that these statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful acts. The Court concluded that there had been no violation of Article 10 (*Vejdeland and Others v. Sweden*, Application no. 1813/07, judgment dated 9th February 2012).

- Pavel Ivanov wrote and published a series of articles portraying Jews as the source of evil in Russia. He accused them of plotting against the Russian people, and the tenor of his remarks was markedly anti-Semitic. He was convicted of incitement to ethnic, racial and religious hatred. In European Court of Human Rights's view, the applicant, who had sought in his publications to "incite hatred towards the Jewish people" and advocated violence against a particular ethnic group, could not claim the protection of Article 10. The Court declared the application inadmissible (*Pavel Ivanov v. Russia*, Application no. 35222/04, decision on admissibility dated 20th February 2007).

- Mark Anthony Norwood displayed in the window of his apartment a poster representing the Twin Towers in flame, accompanied by the words "Islam out of Britain – Protect the British People". The poster was supplied by the British National Party (BNP), of which Norwood was a member. As a result, he was convicted of aggravated hostility towards a religious group. Mr. Norwood argued that his right to freedom of expression had been breached. European Court of Human Rights found that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination, and that Mr. Norwood could not claim the protection of Article 10 of the Convention. The Court declared his application inadmissible (*Mark Anthony Norwood v. the United Kingdom*, Application no. 23131/03, decision on admissibility dated 16th November 2004).

2.4 Identifying the Hate Speech

Indicators of prejudices are one or more factors showing that the respective speech can be based on prejudices which categorize it as hate speech. These indicators provide for objective criteria on the basis of which judgment can be reached as regards the possible hate speech. However, the indicators presented below are not explicitly listed, nor are they listed as requirements to be cumulatively met for a particular expression to be identified as hate speech. Therefore, we use them as soft indicators.

It is important to mention that there is no consensus among the states in the OSCE region as regards statements motivated by hatred or a prejudice. Some participating States criminalize only those forms of expression that represent a real and immediate threat of violence towards a particular individual. In many other countries, laws criminalize oral, written or symbolic communications that advocate for or incite hatred founded on discrimination . These differences can also influence a particular country on its choice of indicators.

Indicators of prejudices are useful for the judges, the prosecutors, the media, the journalists, as well as the civil society organizations, when analyzing whether certain expression represents a hate speech. Below is a list of indicators of prejudices, which is not exhaustive and is compiled on the basis of elements of hate speech:

Intent indicators:

“Intent” indicators are aimed at determining, as much impartially as possible, whether the speaker’s intention is to insult, cause violence, degrade or in any other manner humiliate particular group of individuals. It could be determined through the opinion of the victim of the hate speech, the witness of the event, as well as the broader public (experts and/or civil society organizations). This is important when it is a matter of especially vulnerable or marginalized categories, which are still not in a position to articulate the violation caused with such speech.

Possible indicator would be the differences (ethnic, religious, national, gender, etc.) that exist between the author of the statement and the victim’s group, as well as whether a history of violence and intolerance exists between the two groups. This is especially relevant if, during the hate speech incident, certain individual was engaged in promoting activities of the group to which he/she belongs (for instance, during Pride Parade, LGBT community is often a victim of hate speech).

Contents/context indicators:

Each speech is interpreted mandatory according to its contents, as well as within the context in which it is expressed. Therefore, it is necessary to always assess the context in which the expression is made. It is usual for a hate speech of a person belonging to a dominant majority group in the society to be more alarming than a hate speech of a person belonging to a vulnerable and discriminated minority.

However, hate speech can be targeted by a minority towards another minority or vulnerable group in the society. For instance, hate speech of a person belonging to a discriminated ethnic minority targeted towards a gay community or LGBT population, expression of sexism, chauvinism or misogyny.

It is common for the statements and the expression made by state representatives (as well as by influential political representatives) to be less protected compared to even more explicit examples of hate speech of a marginalized/outsider group having no credibility in the society. In brief, higher state function/position means less protection as regards the expression. In the light of this context, the line between official statements of state representatives and the expressions made when not in such capacity is blurred, and the tendency is all of them to be equally relevant. The case is similar with the other creators of public opinion as opposition leaders and religious dignitaries.

In addition to explicit expression of hatred, hate speech can also appear in the form of coded messages which might not express an insult explicitly, but anyhow are designed to express hatred towards a particular group. Such as, for instance, the denial/negationism of the Holocaust or the denial of the past, which signify serious violations of human rights of a particular community. Hence, denial/negationism is also considered to be a hate speech. In the case of *Garaudy v. France*, the European Court of Human Rights pointed out that “denying crimes against humanity is ... one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.”

Thereby, in order to determine more precisely the contextual framework, location at which the hate speech took place is of relevance (at home among friends, in the park in front of a small audience, on the Internet available to everyone or in an intercommunal environment, etc.), as well as the circumstances under which that person appeared or the context of the expression, for instance, whether the incident occurred on a date of special significance (during a national holiday of the ethnic group targeted with the hate speech, immediately prior to or during a Gay Parade, etc.).

Consequences/proscribed results indicators:

Here, we are talking about racist and Nazi slogans on the Internet (Facebook profiles, blogs, etc.) that incite to violence against individuals belonging to a particular ethnic group; racist slogans and chanting at football matches which incite to incidents of violence among the supporters; hate speech targeted towards particular ethnic communities in the media, accompanied by incidents of violence towards the individuals belonging to those ethnic communities in the schools, public transportation, etc.

2.5 Detrimental Consequences Stemming from Hate Speech

Hate speech causes great damage to both a particular individual, i.e. group, it is targeted to and the society as a whole.

Hate speech causes emotional and psychological suffering to the victims, affects the social mobility and the career prospects: psychological responses to such verbal attacks consist of the feeling of humiliation, isolation, self-hatred and self-doubt. The affected person may react by seeking escape through alcohol, drugs or other forms of anti-social behaviour.” Additionally, humiliation can manifest itself in such social symptoms such as approach to parenting which diminish self-confidence of the child and acknowledges the expectations of social failure. All these symptoms can stem from the humiliation contained in the hate speech.

Hate speech hurts the “market of ideas” itself, the educational environment and ideal of equality – the equal treatment and the principle of non-discrimination, which are the fundamentals of each democratic society: hate speech bears no other meaning than an attitude for essential inequality among the people, it is a form of social and political exclusion, declaration of hostility towards one segment of the citizens in the society.

Hate speech potentially leads to hate crime, which can also lead to genocide: when a particular group will be humiliated or dehumanized and will be kept outside “the community of equals” due to such hate speech, it can easily become object of physical attacks and violence. In addition, language-based classification or symbolization is one of the measurable steps towards genocide .

Hate speech has detrimental effects on the order and peace in the society and the quality of life of the community: by making the members of the victimized communities fearful, angry and suspicious towards other groups and towards the structure of power that is supposed to protect them – this kind of speech has the capacity to seriously damage the social fabric and to divide the communities.

3. DIFFERENTIATING HATE SPEECH FROM RELATED CONCEPTS

3.1 Hate Speech and Discrimination

Incrimination of hate speech is generally related with racism, xenophobia, anti-Semitism, chauvinism, homophobia, etc., as well as with the concept of discrimination.

Discrimination is to be understood as different treatment of an individual/group in similar situations without any objective or reasonable justification. Hence, the concept of discrimination refers to a less favourable treatment of the individual on a prohibited basis, such as racial or ethnic origin, etc. On the other hand, hate speech as a speech spreading hatred can include advocating or inciting discrimination, and the hate speech itself can also be/mean/be treated as discrimination. For instance, in the case of *Aksu v. Turkey*, the European Court of Human Rights, observing whether there were elements as for the case to be considered from the aspect of prohibition of discrimination, was determining whether the concerned publications including expressions and notes expressing anti-Roma feelings had “discriminatory intent or effects”.

This means that, in the fight against hate speech within a national context, provisions from the Law on Prevention and Protection against Discrimination dated 2010 can be effectively applied as well, in particular: Article 9 which prohibits advocating and inciting discrimination and Article 7 which prohibits harassment and degradatory behaviour that offends the dignity of any individual or group of individuals, which stems from discriminatory basis and which aims to or results in offending the dignity of certain individual or creation of threatening, hostile, derogatory or fearful surrounding, approach or practice.

3.2 Hate Speech and Hate Crime

The term hate crime means criminal offences in which the perpetrator is motivated by prejudices towards a group membership of the victim, in other words, towards racial, ethnic, religious, etc., identity of the victim. For a criminal offence to be pronounced as hate crime, it is necessary for it to include two elements (criminal base offence and bias motive to commit it). Unlike hate crime, hate speech, as a discourse that insults or degrades on certain basis, is an expression that is prohibited because of the particular contents, however, the expression itself would not be a criminal offence without that specific prohibited contents. Therefore, hate speech lacks the first essential element of hate crime, i.e. the criminal base offence (if the bias motive or contents were removed, there

would be no criminal offence). Direct and immediate incitement to criminal offences is universally prohibited. Where such incitement occurs with a bias motive, it should be categorized as hate crime because there is a criminal base offence .

In any case, hate speech may constitute evidence of committed hate crime. In other words, racist or biased speech before, during, or after a crime, may constitute evidence of motive of the perpetrator and should form part of the criminal investigation for the hate crime. For instance, it would be ethnic insult preceding or accompanying the physical attack or writing of graphite with racist contents on a religious facility that was damaged. In such cases, insults and graphite are evidence of bias motive, and the attack, i.e. the vandalism in this case will be treated as hate crime.

3.3 Hate Speech and Insult and Defamation

Hate speech is prohibited for the harm it causes. It, above all, harms the dignity of the individual as a member of a group. And causing harm to the dignity of the individual cannot be simply characterized as insult or defamation.

Pursuant to the Law on Civil Liability for Insult and Defamation dated 2012, insult occurs when the person with the intention to humiliate, by means of a statement, behaviour, publication or in any other manner, expresses a demeaning opinion for another person that harms his/her honour and reputation. Defamation, on the other hand, means that a person presents or disseminates, before a third party, false facts harming the honour and reputation of another person, with the intention of harming his/her honour and reputation, while knowing or has been obliged to know and may know that the facts are false .

Protected category under the Law on Civil Liability for Insult and Defamation are natural persons, legal entities, group of individuals, as well as a deceased person, while as regards hate speech, only one characteristic is protected, which is determined by the group itself, or denial/negationism of a particular event, which is/was of significant influence on the characteristic of the group itself, is prohibited (denial/negationism of the Holocaust or other event of that type).

Insult and defamation are scourge on the society due to the harm they cause to the victim in the eyes of others. They harm their social status, as well as their reputation. Unlike insult and defamation, hate speech humiliates the individual for a certain characteristic that may not be perceived as socially unacceptable (race, gender, ethnicity, religion), meaning that his/her self-respect is harmed.

Such as when, for instance, a person publicly states that another person is dishonest, unintelligent or immoral, that other person is or can be insulted with such statement, but when the very same public statements are related to his/her identity characteristics (for instance, ethnicity, gender or sexual orientation), that person is offended in a very different way, in other words, that person is

humiliated.

Identical situation is seen at differentiating between hate speech and defamation. When a person presents false facts about another person before third parties, that person may be defamed, but if such false facts are intended to discredit as regards his/her inherent nature, in that case we are talking about hate speech.

In fact, it is true that hate speech can insult/defame a particular individual. However, he/she is not insulted as an individual, but rather as a member of a particular community, with which he/she shares certain identity characteristics. This is called “indirect rejection” – not a direct rejection of the individual, but rather a rejection of the group to which that individual belongs, which group, on the other hand, sets the manner in which the individual shapes his/her life as a human being. It changes the key components of his/her self-understanding, such as gender, race or culture, into object of ridicule and attack. This is the source of harming the dignity or the humiliation caused by such speech. Thus, the manner in which the individual expresses him/her self as a human is rejected. Hence, such individual is rejected as a human.

These differences between hate speech and insult and defamation lead to differences in the judicial protection and determining the damage compensation. Unlike insult and defamation which are treated under the civil law, hate speech is treated under the criminal law which also means expression of social condemnation of racism, religious, ethnic and other forms of intolerance. In fact, incrimination/regulation not only shows the boundaries between what is allowed and what is prohibited, but also shows what is condemned and what is accepted in the society. Regulating the hate speech under the criminal law sends a message that equality and respect of cultures and other (identity) differences are among the highest values in the society.

3.4 Hate Speech and the Internet

Internet has become a new front for spreading hatred. Anonymity and mobility provided by this means of communication have made the expression of hatred easy in a broad and abstract space which goes beyond the area of the traditional application of the law. Now, the message of hatred can reach millions of people through a network which, additionally, allows the previously different and fragmented groups to connect, producing the sense of community and shared identity.

In its strive for dealing with hatred via Internet, in 2001, Council of Europe adopted the Convention on Cybercrime, which is the first multilateral treaty seeking to address computer crime by increasing the cooperation among the states, harmonizing their national laws and investigative techniques. In 2003, Council of Europe also adopted Additional Protocol to the Convention on Cybercrime as regards hate speech via Internet, the objective of which is dual:

- 1) to harmonize criminal law in the fight against racism and xenophobia via

Internet; and

2) to promote international cooperation in this field.

According to this Protocol, racist or xenophobic material means: any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

Hate speech via Internet, according to this Protocol, means:

- racist and xenophobic motivated threat through a computer system
- racist and xenophobic motivated threat through a computer system
- denial, gross minimisation, approval or justification of genocide or crimes against humanity.

3.4.1. Liability and Responsibility of ISPs for third-party content

One issue of particular importance in the debate on regulating online hate speech is the liability and responsibility of ISPs for third –party content hosted on their services. In this regard, the recent October 10 ECtHR ruling *Delfi as vs. Estonia* is of a particular importance, because it significantly deviates from this approach, enshrined in the EC e-commerce directive and places a higher burden of liability on the ISPs, even in cases they have the notice-takedown mechanism in place.

On 10 October 2013, the European Court of Human Rights handed down judgment in *Delfi AS v. Estonia* (no.64569/09), a case concerning the liability of a news portal, Delfi AS for third-party comments made on its website. The Estonian courts found that Delfi AS had editorial control over the comments’ section on its news site and should have prevented clearly unlawful comments from being published, notwithstanding the fact that Delfi had taken down the offensive comments immediately upon being notified of them.

In a unanimous judgment, the First Section of the Strasbourg Court concluded that the domestic courts’ findings were a justified and proportionate restriction on Delfi’s right to freedom of expression. The Chamber of the First Section concluded that there had been no violation of Article 10 ECHR and endorsed the reasoning of the domestic courts.

It was not disputed that the comments posted by readers were defamatory or even unlawful. Nor was it contested that the applicant company promptly removed the ‘infringing’ comments. The key issue was whether Delfi’s civil liability for the defamatory comments was a disproportionate interference with its right to freedom of expression. In addressing this question, the Court first examined the context of the comments. Although the Court acknowledged that the news articles itself was balanced and addressed a matter of public interest, it considered that Delfi “could have realised that it might cause negative reactions against the shipping company and its managers” and there was “a higher-than-average

risk that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech.” Accordingly, the Court concluded that Delfi should have exercised especial caution to avoid liability.

Next, the Court examined the steps taken by the applicant company to deal with readers’ comments. In particular, the Court noted that Delfi had put in place a notice-and-takedown system and an automatic filter based on certain key ‘vulgar’ words. However, the Court concluded that the filter in particular was “insufficient for preventing harm being cause to third parties’. Although the notice-and-takedown system was easy to use – it did not require anything more than clicking on a reporting button – and the comments had been removed immediately upon notice, the comments had been accessible to the public for six weeks. The Court considered that the applicant company “was in a position to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made public”. Since the actual writers of comments could not modify or delete their comments once posted on the Delfi news portal, Delfi effectively exercised sole control over the publication of comments even if it did not exercise such control to its full extent.

The Court went on to note that Delfi had been given leeway by the domestic courts as to how it should ensure the protection of third-parties rights. Indeed, the domestic courts had not prescribed prior-registration of users or pre-moderation of comments. Rather, they had imposed a fine of 320 euros, which given Delfi’s position as a professional operator of one of the largest Internet news portals in Estonia was ‘by no means’ disproportionate.

Finally, the Court considered that it would be disproportionate to put the onus on complainants to identify the authors of anonymous comments. By allowing comments to be made by non-registered users, Delfi had assumed a certain responsibility for them. The Court further noted that “the spread of the Internet and the possibility – or for some purposes the danger – that information once made public will remain public and circulate forever, calls for caution”. In the Court’s view, it was a daunting task to identify and remove defamatory comments at the best of times, including for the applicant. It would be even more onerous for a potentially injured person, “who would be less likely to possess resources for continual monitoring of the Internet”.

The Court concluded that there had been no violation of Article 10 of the Convention.

Even though this decision does not affect the position of ISPs as intermediaries under the EC e-commerce directive, because it did not deal with this issue as such, it caused quite animated reaction in many circles. The reason for this controversy is the fact that it could set a precedent in other cases involving comments on websites and shift the balance in regards to freedom of speech and

the responsibility of ISPs. as intermediaries. It remains to be seen whether this decision will be upheld also at the Grand Chamber, or it will be reversed.

4. PUNISHING HATE SPEECH

Punishing hate speech differs in its scope. While some jurisdictions punish the speech that incites to hatred or insults certain groups, others refer to prohibitions on speech/expression that deny honour and dignity of an individual or the whole nation.

National legislation contains provisions that criminalize the speech due to its particular contents. Criminal law prohibitions to hate speech are focused on incriminating the abuse of the freedom of expression that incites to violence or other violations of the equal freedoms and rights of others or expression of discriminatory behaviour towards others.

Pursuant to the Criminal Code, hate speech is criminalized under specific terms and conditions. In fact, paragraph 3 in Article 417 prescribes that

“A person who spreads ideas about the superiority of one race above some other, or who advocates racial hatred, or instigates to racial discrimination, shall be punished with imprisonment of six months to three years.”

Provision that incriminates hate speech through a computer system is contained in Article 394-d.

“A person who spreads in the public, through a computer system, any racial or xenophobic written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, national or ethnic origin, as well as religion, shall be punished with imprisonment of one to five years.”

Certain elements of hate speech can be also found in Article 179 and Article 319 in the Criminal Code. Article 179 prescribes, in particular, that

“A person, who with the intention to ridicule, shall publicly make a mockery of the Macedonian people and the members of the communities that live in the Republic of Macedonia shall be punished with a fine.”,

while Article 319 prescribes that

“(1) A person who by force, mistreatment, endangering the security, ridicule of the national, ethnic or religious symbols, by damaging other people’s objects, by desecration of monuments, graves, or in some other manner causes or excites national, racial or religious hatred, discord or intolerance, shall be punished with imprisonment of one to five years.

(2) A person, who commits the crime from item 1 by misusing his position or authorization, or if because of these crimes, riots and violence were caused

among people, or a property damage with a large extent was caused, shall be punished with imprisonment of one to ten years. “

Law on Prevention and Protection against Discrimination dated 2010 prohibits harassment and degradatory behaviour that offends the dignity of any individual or group of individuals, which stems from discriminatory basis and which aims to or results in offending the dignity of certain individual or creation of threatening surrounding, approach or practice (Article 7); invoking and inciting discrimination (Article 9). The Law regulates more precisely that any active or passive behaviour of any person by the public authorities, as well as by legal entities and natural persons from the private and public sector within the public life, which exposes any individual to unjustified or degrading behaviour in relation to other individuals in similar situation on any of the discriminatory basis is considered to be discriminatory behaviour or acting.

Law on Broadcasting dated 2005 prohibits programme contents aimed at inciting national, racial, gender or religious hatred and intolerance in the programmes of broadcasters, as well as the programmes retransmitted via public commercial networks (Article 69).

5. MASS MEDIA AND HATE SPEECH

In 1978, UNESCO adopted Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War. Autonomous and powerful position of the mass media, as a single and absolute institutional channel for social communication, makes the mass media a priority topic when talking about hate speech. Mass media cannot be qualified as creators of hate speech, however they are an instrument, a channel and a means to spread it. They also can create a context, situations, as well as favourable climate to spread hatred or its eastheticization.

The mass media system becomes one of the criteria for democraticity of a society, the use and the protection of human rights. Professional standards and requirements on operations of the mass media, as well as the very important media culture that is directly dependent on the political culture as well, depend on the set-up of the mass media system in a country.

Analyses and debates about the democraticity of the mass media systems are aimed at two directions: structuring the mass media system and abusing the communications in manners and through techniques by which the public opinion and understanding of the citizens is shaped and created so as to come to and maintain the power.

Strategic objectives of the European type of the mass media system are the following:

- mass media system rested on quality public broadcasting center;

- pluralism of the mass media;
- guaranteeing independence of the mass media;
- introducing standards in the journalist profession, i.e. professionalization and intellectualization of the journalist.

Legislators can envisage, in the legislation governing the mass media, national monitoring bodies such as press or mass media councils that regulate the mass media-related issues, which are usually comprised of experts and/or representatives from the civil society. As for a mass media system to be regulated, certain standards on quality have to be set and competitiveness has to be supported and stimulated. The state can request for certain licences, which have to be issued on a non-discriminatory basis. Monitoring by the state has to be carried out through several mechanisms.

Professional organizations, such as the International Federation of Journalists, the International Press Institute and the International Association of Publishers have comprehensive information on the state-of-play as regards the freedom of the media in different countries and regions throughout the world and provide their members support against limitations. In addition, they pay attention to situations when freedoms are neglected so as to launch campaigns or urgent appeal actions and prepare reports on certain problems such as mass media concentration and transparency in accordance with the freedom on information regulations or corruption. In doing this, they are supported by civil society organizations specialized in freedom of the press and the mass media, like the “ARTICLE 19” Organization as regards Reporters without Borders, as well as by non-governmental organizations the field of interest and the scope of operations of which are common human rights, such as Amnesty International, International Council on Human Rights Policy, etc.

5.1 Responsibility of the Journalists

Hate speech and expressions containing its elements are even more detrimental if spread through the mass media, which additionally increases the responsibility of the journalists.

Journalists constantly write about diversities, differences based on religion, race, gender, sexual orientation, social origin, culture. Dominant patriarchal and conservative values also affect the work of the journalists. It can be pointed out, as a general perception, that journalists fundamentally are careful about the division on ethnic and religious basis, while clear discriminatory tendencies on the basis of gender and sexual orientation can be observed.

Therefore, efforts are put, internationally, to eliminate non-professionalism of journalists. International Federation of Journalists obliges the journalists, with a Code of Ethics, to humanity and protection of human rights. The journalist is expected to act according to his/her conscience in the exercise of journalism.

Analysis of codes of ethics in the Republic of Macedonia also shows that prohibition of hate speech, as well as decency and respect of human rights and freedoms, are highlighted on a declarative level.

Journalism makes immense number of information available to the public through the mass media, thus directly influencing the public and the actual decision each individual, as consumer, or political entity is to make. Hence, certain states and conditions are disclosed and the problems are highlighted.

High intellectual level of the audience, educated active journalists and development of public journalism put fabricated and biased information under pressure and they are also the main factors bringing about the need for quality and interpretative information, the basis of which is comprised of facts and argumentation. Such quality of information can only be a result of a new journalism, which appeared at the end of the 20th century, the basis of which is the educated and the investigative journalist.

These conditions reflect on the status and the assessment of this profession within social framework. "In the course of the recent decades, in conditions of growing competition, professionalism in the journalism has also grown, although, when it is a matter of this activity, one cannot yet talk about strict rules on professionalization".

A journalist has to be moral, and to accept "ethics in given circumstances". He/she should be motivated to serve the readers, the listeners, the viewers and the democracy, patient enough to follow the story by its very end and be persistent with the sources of information. He/she should own reliable sources of information and contacts which can help the analysis, as well as the investigative abilities. The journalist may show respect to the politicians, but he/she must not show favour to anybody in particular and should understand the personality of the politician.

6. APPROACH TO FIGHT AGAINST HATE CRIME

Hate speech causes great harm to both particular individuals it is targeted to and the society as a whole. It harms the ideal of equality or the equal treatment and the principle of non-discrimination, which are the fundamentals of each democratic society. Hate speech has detrimental effects on the order and peace in the society and the quality of life of the community - this kind of speech has the capacity to seriously damage the social fabric and to divide the communities. And finally, hate speech potentially leads to hate crime, which can also lead to genocide.

Taking into consideration the harm hate speech causes, it is clear why its regulating is generally accepted in terms of its punishing at various levels. European experience is aimed at strengthening the principle of non-discrimination with the right not to be discriminated against (Protocol 12 of the European Convention on Human Rights) and the attempt to expand the "promotion of equality" principle.

These two principles require far greater engagement by the state in eliminating the more subtle forms of indirect discrimination and creation of conditions for effective equality of opportunities. This especially reflects on hate speech in terms of far greater sensitivity to dangers arising from public expressions containing intolerance and xenophobia (see, in particular, ECRI recommendations, Council of Europe recommendations). Experience in Europe shows acceptance of legal outcome for the overlapping rights: right to freedom of expression and right not to be insulted on ethnic and cultural grounds.

Additionally, such “legal outcome” takes the indivisibility and universality of human rights as a starting point, which confirms the affirmative relationship between freedom of expression and equality. In fact, freedom of expression and equality have a complementary and essential contribution to securing and safeguarding human dignity. Hence, “narrowing” the freedom of expression by prohibiting the hate speech provides for a greater social space for freedom of expression for all groups in the society, i.e. it enables a vibrant multi-faceted public interest debate giving voice to different perspectives and viewpoints. And vice versa, when racist, homophobic or xenophobic speech is free, the speech of some groups in the society is suppressed. Right of everyone to be heard, to speak and to participate in the political, artistic and social life is an integral part of attaining and enjoying equality. When people are denied public participation and voice, their issues, experience and concerns are rendered invisible and they become more vulnerable to bigotry, prejudice and marginalization .

All this points out that standards of constitutionally permitted regulation of hate speech should be adjusted to the fundamental principles that go beyond geographical, cultural and historical boundaries, at the same time remaining open enough to adjust to the specific circumstances in the society. The fixed principles are: openness to pluralism and respecting the most elementary level of autonomy, equality, dignity and reciprocity. Variables, on the other hand, include: specific history and nature of discrimination, status of the minority or the majority group and the relative power or powerlessness of those expressing hate speech and their target groups in a particular society.

Fight against hate speech should be based on a three-tier approach: development of positive policies; protection through administrative and civil laws/procedures and envisaging criminal sanctions. Each of these represents an irreplaceable link in the efforts of the society to tackle hate speech and protect pluralism and diversity. Positive role of the state in creating an enabling environment for pluralism and diversity is equally necessary as its sanctioning or penalizing approach. In addition, not all types of expressions within the “hate speech” require application of criminal provisions. It could lead to too broad and unnecessary limitation of the expression as regards: political comments and debates; religious disagreements, comments or criticism; as well as artistic expressions (in the case of *Handyside v. the United Kingdom* , the European Court of Human Rights decided that freedom of expression also referred to information or ideas that

“offend, shock or disturb”). The Camden Principles on Freedom of Expression and Equality are a useful guide to positive policies and measures guaranteeing freedom of expression and equality in the society.

- **positive policies and measures for attaining freedom of expression and equality in the society** mean existence of a comprehensive framework to protect the freedom of expression, anti-discriminatory legislation and implementation, building institutional knowledge and information campaigns. Very important segments are both the civil sphere and the mass media. Their capacity for sensitivity to hate speech in all of its forms should be developed through provisions in the Code of Ethics for Journalists, action programmes of their unions, and be a constant subject of discussions on their channels. In fact, the last one can be called internal monitoring of the state-of-play as regards hate speech. Education is an area of exceptional influence. Most sophisticated programmes and curriculum have to be developed for the high education. However, such programmes have to be developed at all levels down to kindergartens. Interventions in all these projects have to have a single goal: getting to know the culture of the other and attempting to understand it as a way of enriching your own culture.

- **Civil and administrative procedures** are also important means that actually give voice to the vulnerable and deprived groups in the society and provide for them to come to light. They enable the victims to seek redress independently and should be available together with other mechanisms for support of victims (for instance, legal aid to victims, right of associations of citizens to represent the victims, etc).

- **Criminal sanctions** should be applied in cases of incitement to hatred. However, the scope of the term “incitement” is not precisely determined and depends, to a great extent, on the legal and judicial approach of individual countries. Several elements indicated in the Camden Principles on Freedom of Expression and Equality (see in particular Principle 12) are crucial for understanding and defining “incitement”: definition of the terms (hatred, hostility, advocacy, incitement), recognizing that no exhausting grounds exist and the severity of the criminal offence. Assessment of the “severity” of the criminal offence (or determining whether incitement exists or not), on the other hand, includes examining the following: the intent of the speaker to incite to discrimination, hostility or violence; contents of the expression in terms of the action advocated, extent of the expression – in terms of the position of the speaker and the audience (public debate versus private conversations); imminence – in terms of the time scale of the advocated discrimination, hostility or violence occurring; likelihood/probability of discrimination, hostility or violence as a result of the expression; and the context of the expression – in terms of broader societal context of the speech .

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