



RESILIENCE:
For Media Free of Hate and Disinformation

NATIONAL REGULATORY AND SELF-REGULATORY FRAMEWORK AGAINST HATE SPEECH AND DISINFORMATION

FACTSHEET

Anida Sokol

BOSNIA AND HERZEGOVINA

RESILIENCE : For Media Free of Hate and Disinformation

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1. INTRODUCTION

1.1. Criminal codes in BiH

The prohibition of hate speech in Bosnia and Herzegovina is not fully regulated or aligned with international standards. The criminal legislation criminalizes public incitement to national, racial and religious hatred, discord and hostility. According to the Criminal Code of Bosnia and Herzegovina, whoever publicly incites or inflames national, racial or religious hatred, discord or hostility among the constituent peoples and others who live in Bosnia and Herzegovina shall be punished by imprisonment for a term between three months and three years (Article 145a, 7).

The criminal codes of the Federation of Bosnia and Herzegovina and the Brčko District also prohibit public incitement and inflaming to national, racial and religious hatred, discord or hostility among the constituent peoples and others living in the Federation and the Brčko District, respectively. According to these laws, whoever publicly incites or inflames national, racial or religious hatred, discord or hostility among the constituent peoples and others who live in the Federation, i.e. Brčko District, shall be punished by imprisonment for a term between three months and three years (Criminal Code of the Federation of BiH, Article 163, 1) and between one and five years of imprisonment (Criminal Code of Brčko District, Article 160, 1). Both these laws specify that whoever perpetrates these criminal offences by employing duress and abuse, jeopardizing safety, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, or desecrating monuments or graves shall be punished by imprisonment for a term between one and eight years (Criminal Code of the Federation of BiH, Article 162, 2; Criminal Code of Brčko District, Article 160, 2). If the offence is committed by abusing an official post or authority or if that act resulted in riots, violence and other grave consequences to life of constituent peoples and others who live in the Federation, i.e. Brčko District, shall be punished by imprisonment for a term

between one and ten years (Criminal Code of the Federation of BiH, Article 162, 4; Criminal Code of Brčko District, Article 160, 3).

The three criminal codes are limited to the prohibition of inciting and inflaming hatred on national, racial and religious grounds, but not on the grounds of skin colour, gender, sexual orientation, disability and other grounds (Blažević 2019, 10). Furthermore, these legal provisions only sanction public incitement and inflaming of national, racial and religious hatred, discord or hostility towards persons living or residing in BiH (Criminal Code of BiH) and towards persons living in the Federation and Brčko District, respectively (Criminal Code of the Federation of BiH and the Criminal Code of Brčko District). If public incitement of national, racial or religious hatred, discord or hostility refers to persons who do not live or reside in BiH at the time the act was committed in BiH, the perpetrator cannot be punished (Filipović 2019, 6). In addition, the laws contain the discriminatory term “among the constituent peoples and others” (Omerović and Hrustić 2020, 49).

On the other hand, the Criminal Code of Republika Srpska prescribes a punishment of imprisonment for a term not exceeding three years for whoever, by using the press, radio, television, a computer system or a social network, at a public gathering or at a public area or otherwise publicly calls for, incites or inflames or makes available to the public leaflets, images or any other materials that call for violence or hatred against a certain person or groups on account of their national, racial or religious or ethnic affiliation, skin colour, sex, sexual orientation, disability, gender identity, origin or other properties (Criminal Code of RS, Article 359, 1). If the offence is committed by employing coercion, duress, abuse, endangering the safety, exposing national, ethnic or religious symbols to derision, damaging other people’s belongings, or desecrating monuments, memorials or graves, shall be punished by imprisonment for a term of up to three years (Criminal Code of RS, Article 359, 2), and between two and 12 years in the event that the offences have resulted in riots, violence or any other serious consequences to the coexistence of the constitutional peoples and others who live in Republika Srpska (Criminal Code of RS, Article 359, 3). Given that this law, in addition to calling for, inciting and inflaming violence and hatred on national, racial and religious grounds, incriminates such an act on other grounds such as gender identity, disability and origin as well, non-governmental organizations also called for other criminal codes in BiH to be aligned with this one.¹ In addition, this code lists what is considered public space, which is not specified in the other three criminal codes (Omerović and Hrustić 2020, 37), and also criminalizes making materials calling for violence and hatred available to the public (Filipović 2019, 15). However, the RS Code does not prescribe stricter sanctions if the offence is committed through abuse of position, which is an oversight considering that the offence is not of the same gravity if committed by a private person and if it is committed by a government official (Omerović and Hrustić 2020, 50).

¹ See for example the Proposal of amendments to the Criminal Code of the Federation of BiH of the Coalition for the Fight against Hate Speech and Hate Crimes: https://www.vzs.ba/images/stories/ba_word_slika_pdf/najava-dogadjaja/DODATAK_UZ_DOPIS.pdf

These provisions show that the regulation of hate speech and the prescribed penalties are not uniform in criminal codes within BiH, nor are they in line with international standards. In its report from 2016, the European Commission against Racism and Intolerance (ECRI) recommended that BiH, among other things, should add language, colour, citizenship, sexual orientation and gender identity to the enumerated prohibited grounds of inciting and inflaming; criminalize racist insults, defamation and threats, as well as the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of race, colour, language, religion, nationality, or national or ethnic origin; sanction the creation or leadership of a group which promotes racism, as well as the support for such a group and the participation in its activities; prohibit the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material with racist content (ECRI 2017, 35). One of ECRI's recommendations was also to criminalize the public denial, trivialization, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes (ECRI 2017, 35; Sali-Terzić 2019, 6), which was done in July of 2021.

1.2. Prohibition of condoning, denial and justification of crimes of genocide, crimes against humanity and war crimes

By the Decision Enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina, the High Representative in Bosnia and Herzegovina amended Article 145a of the Criminal Code of BiH with new provisions.² These provisions prohibit public condoning, denial, gross diminution or attempts to justify the crimes of genocide, crimes against humanity and war crimes established by final judgments,³ directed against a group of persons or a member of a group determined by race, colour, religion, background or national or ethnic origin, in a manner that could incite violence or hatred directed against such a group of persons or a member of such a group by imprisonment for a term between six months and five years (Article 145a, 3). In addition, these amendments introduce a prison sentence of three months to three years for public incitement to violence or hatred directed against a group of persons or a member of a group determined by race, colour, religion, origin, or national or ethnic origin (Article 145a, 2). Imprisonment sentences are higher if said acts are committed in a way that makes leaflets, pictures or other materials available to the public or distributed to them (at least one year) (Article 145a, 4), if the offence is carried out in a manner likely to disturb public peace and order or which is threatening, abusive or insulting (at least

² Only the Criminal Code of FBiH provided for a sentence of three months to three years in prison for inciting and inflaming national, racial and religious hatred, discord or intolerance by publicly denying or justifying genocide, crimes against humanity or war crimes established by a final decision of the International Court of Justice. International Criminal Tribunal for the former Yugoslavia or a domestic court (Articles 163, 5).

³ By a final judgment in accordance with the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 or the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal or the Court of Bosnia and Herzegovina (Article 145a, 3).

three years of imprisonment) (Article 145a, 5), or if the perpetrator is an official or responsible person or employed in an institution of authority or any body financed through public budget (at least three years of imprisonment) (Article 145a, 7). Apart from that, a minimum of three years of imprisonment is the prescribed sentence for anyone who gives a recognition, award, memorial, any kind of memento, or any privilege or similar to a person sentenced by a final judgement for genocide, crimes against humanity or a war crime, or names a public object such as a street, square, park, bridge, an institution, building, municipality or a city or similar, or registers a brand, after or under a name of a person sentenced by a final judgement for genocide, crimes against humanity or a war crime (Article 145a, 6).

These amendments to the criminal law are a precedent in Bosnia and Herzegovina, given the large presence of denial, diminishment, justification, glorification of crimes established by final verdicts and persons who committed them,⁴ and for many years there were calls, initiatives and several proposals to amend the laws or introduce new ones (Gačanica and Finkeldey 2019, 21-23). It is important to note that these amendments do not prohibit all condoning, denial, gross trivialization or attempts to justify crimes of genocide, crimes against humanity or war crimes, but only if it is directed against a group of persons or a member of a group defined by reference to race, colour, religion, descent or national or ethnic origin, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Gačanica 2021). Article 6, which prohibits the glorification of persons convicted of genocide, a crime against humanity or a war crime, does not have such an element of conditionality, i.e. that this act incites violence and hatred, which means that this act can be prosecuted more quickly, which is significant given that the glorification of war crimes is a serious problem in Bosnia and Herzegovina (Gačanica 2021).

It is necessary to see the implementation of these changes.⁵ In response to the amendments, the RS National Assembly adopted the Law on Non-Application of the Decision of the High Representative Enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina as well as Amendments to the Criminal Code of RS. The Law states that the Decision of the High Representative will not be applied on the territory of RS (Article 1) and that the competent authorities of RS will not cooperate with the competent authorities of BiH regarding the application of the Decision of the High Representative (Article 2.1), with the goal of protecting the citizens of RS (Article 2, 2). In addition, an amendment has been introduced to the Criminal

4 *The monitoring of the Srebrenica Memorial Centre for the period from May 2020 to 2021 showed that 234 acts of genocide denial were recorded in the public and media space in BiH and the region: in Serbia (142), in BiH (60, of which 57 in RS) and Montenegro (19). Monitoring has shown that the three most common tactics used to deny genocide are: challenging the number and identities of victims, conspiracy theories and questioning courts, and triumphalism and national historical revisionism (Cvjetičanin et al, 2021, 4).*

5 *Monitoring of the Srebrenica Memorial Centre has shown that, since the amendments to the article of the criminal code entered into force, the denial of genocide has been carried out less explicitly and directly in BiH and that the number of such acts has decreased. However, it was also stated that politicians continued to deny genocide, mostly in the media in Serbia, whose statements were then transmitted by the media in BiH (BiH Memorial Centre 2021).*

Code of RS, stipulating prison sentences of up to three years for publicly exposing to ridicule, contempt or grossly disparaging Republika Srpska, its flag, coat of arms, emblem or anthem (Article 280a, 1),⁶ which might affect the freedom of speech in RS.

It is also important to point out that the amendments to the Criminal Code of BiH missed the opportunity to include in Article 145a, 2 – which prohibits public incitement to violence or hatred directed against a group of persons or a member of a group or ethnicity – other grounds such as sexual orientation, gender identity and disability.

1.3. Other legal provisions for sanctioning hate speech

In addition to these provisions, there are other provisions in criminal law that can be used to sanction hate speech. The criminal laws of the Federation and the Brčko District prescribe a fine or imprisonment for a term of up to three years (Criminal Code of FBiH, 363) and up to one year (Criminal Code of Brčko District, 357) for whoever, by severely violating the standards of professional conduct of media and journalists, uses inciting or animosity language that obviously calls for or incites to violence or national or ethnical conflicts, and thereby brings public peace and order into danger. The problem in provisions formulated in this way is the interpretation of terms such as gross violation of standards and determination of the content of inflammatory speech, and the crime is limited to television and radio stations, to invoking ethnic and national and not other types of conflicts, and leads to endangering public order and peace (Filipović 2019, 18-19).

The Code of Republika Srpska, on the other hand, prescribes a sentence of imprisonment for a term between six months and five years for anyone who behaves in such a way or shouts slogans or carry placards at a sporting event or public gathering as to provoke national, racial, religious or some other kind of hatred or intolerance based on some discriminatory grounds, which resulted in violence or a physical altercation with participants (Criminal Code of RS, 363, 1).⁷ Nevertheless, this provision refers to sporting events and public gatherings, and does not include the media (Filipović 2019, 17).

Other laws regulating this area are the Law on Prohibition of Discrimination of Bosnia and Herzegovina, Article 2, which defines discrimination and its grounds from race and colour to sexual orientation and the Law on Gender

⁶ *If this act is committed in a way that marks the RS as an aggressor or genocidal creation or its peoples as an aggressor or genocidal, the perpetrator shall be punished by imprisonment for a term between six months and five years (Article 280a, 2), and if the offence is committed by a responsible person or a person in government institutions or a body financed from the public budget shall be punished by imprisonment for a term between two and ten years (Article 280a, 3). Three to fifteen years in prison are envisaged for the commission of these acts if their aim is to change the constitutional order of the RS, its territorial integrity or independence (Article 280a, 4).*

⁷ *If the act is committed by a group, the perpetrator shall be punished by imprisonment for a term between one and eight years, and the leader of the group by three to twelve years (Article 363, 2-3). If the act caused a riot in which a person was seriously injured or property of greater value was damaged, the perpetrator shall be punished by imprisonment for a term between two and ten years (Article 363, 4).*

Equality in Bosnia and Herzegovina, Article 3, which defines discrimination on the basis of gender. Article 5 of the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in Bosnia and Herzegovina prohibits discrimination on the basis of religion or belief, as well as activities or acts aimed at inciting religious hatred against any church or religious community and its members (c), and inciting, condoning or calling for religious intolerance and hatred (g), but no sanctions are prescribed, which means that protection should be achieved through channels of criminal law (Ivandić-Ninković 2021, 32).

Some cantonal laws on information, such as the Law on Public Information of the Tuzla Canton, state that public information shall not directly or indirectly encourage racial, national or religious hatred and intolerance, but do not prescribe penalties or other prohibited grounds, such as gender and disability (Article 5).⁸ In addition, some cantonal laws on the protection of public order and peace provide for sanctions for public insult of religious and national feelings and feelings of racial affiliation (Law on Public Order and Peace of Tuzla Canton, Article 3, 6) by way of fines ranging from BAM 100 to BAM 1000 or 60 days of imprisonment (Article 7, 2). The RS Law on Public Order and Peace prescribes a fine of BAM 200 to BAM 800 for gross insult on political, religious or national grounds that causes a feeling of physical threat or distress (Article 8). These legal provisions refer to insulting, not spreading, approving and inciting hatred based on intolerance, and as such may impede freedom of speech.

1.4. Election Law of BiH – Sanctions for hate speech during the election campaign

The Election Law of BiH prescribes a fine in an amount from BAM 1,000 to BAM 100,000 for political subjects who use language which could provoke or incite someone to violence or spreading of hatred, or publish or use pictures, symbols, audio and video recordings, SMS text messages, internet messages or other materials that can have such an effect (Article 19.9, paragraph j). This law also prohibits the conduct of an election campaign by way of electronic and printed media where the contents are stereotypical and offensive against men and/or women or which encourages any stereotype and offensive behaviour on the grounds of gender or any humiliating attitude against the members of different genders (Article 16.14, paragraph 3). This law is particularly important given that hate speech is often used in the election campaign to get voters to vote for ethno-nationalist parties (Dragičević 2019, 10),⁹ but the provisions apply only if such acts occur within 30 days before the date of the elections. In addition, only expressions that

⁸ Public information is defined as the activity of legal entities in disseminating information, the aim of which is to inform the public about social phenomena, events and personalities in order to form public opinion and take a stand towards phenomena, events and personalities (Article 2).

⁹ During the 2020 local elections, the Coalition Pod lupom recorded 53 cases of inappropriate speech, content or speech that could incite religious, national or intolerance on other grounds. According to the report, most cases relate to extremely inappropriate speech or intolerance based on political affiliation, especially on social networks (Coalition Pod lupom 2021, 37).

incite or inflame violence or the spread of hatred are prohibited, but not those that spread, promote or justify hatred. The legal provisions also do not specify the grounds on which incitement or inflaming violence or hatred must be based, such as race, skin colour, origin, etc. (Dragičević 2019, 9-10). Because of this, the ECRI recommended an extension of the Central Electoral Commission's mandate to monitor the use of hate speech during the entire duration of election campaigns, not just for thirty days before the date of the elections (ERCI 2018, 35).

1.5. Prohibition of hate speech in the Code of the Communications Regulatory Agency

Hate speech is prohibited in the content of radio and television broadcasters according to the Code on Audio-Visual Media Services and Radio Media Services of the Communications Regulatory Agency (CRA). Article 4 of the Code states that it is prohibited to humiliate, intimidate or incite hatred, violence or discrimination against a person or group on the grounds of sex, race, ethnicity, nationality, religion or belief, disability, special needs, age, sexual orientation, social origin or on the basis of any other circumstance which has the purpose or consequence of preventing or endangering any person's recognition, enjoyment or exercise on an equal basis of their rights and freedoms (Article 4, paragraph 1).¹⁰ It is also stated that radio and television broadcasters shall not create a clear and immediate risk of inciting hatred, violence or discrimination against a person or group on these grounds, or which may be interpreted by the public as incitement to hatred, violence, disorder and unrest, or which could provoke or incite crimes (Article 4, paragraph 2). The Code also emphasizes exceptions when such works are part of scientific, authorial or documentary work and/or form part of objective journalistic reporting and are published with the intention of critically pointing out such actions (Article 4, paragraph 3).

These rules apply to radio and television stations and not print and online media, which is problematic because the majority of cases of hate speech are present in the online space (Sokol 2020, 4). During 2021, the CRA prepared draft amendments to the rules on the provision of audio-visual media services and radio media services, which extend the responsibility of licensees for television and radio broadcasting to content published on websites under their logo. The provisions of the Code that would apply to this content govern programme standards relating to the prohibition of the spread and incitement to hatred, violence or discrimination, the transmission of a clear and immediate risk of adverse consequences for human safety and health, the protection of minors, including the protection of their privacy, and the right of reply. The draft is in the public consultation phase, but the opinions of media representatives are divided, especially considering that these changes would not include all other online media outlets that are not part of public radio and television broadcasters (Tomić 2021a).

¹⁰ The CRA Commercial Communications Code also does not allow hate speech according to the same definition given above (Article 3, 4b).

2. PROSECUTION OF HATE SPEECH UNDER CRIMINAL AND OTHER LAWS

Cases of hate speech processing in Bosnia and Herzegovina are rare. From 2004 to 2019, 27 judgements were reached in BiH for criminal offences of inciting national, racial and religious hatred, discord and intolerance against 26 persons, of which in 12 cases the person was found guilty, and in 14 cases the accused were acquitted of charges (Ferhatović and Trlin, 2019, 143-145).¹¹ Out of the 12 cases in which persons were found guilty, only three criminal offences took place via the internet (two via Facebook profiles and one via a website), which indicates a small number of criminal proceedings for these offences on the internet. The other 9 cases concerned offensive content sent in a public place, graffiti and damage to a religious building, letters of offensive content placed in front of the door of a religious building, and distribution of leaflets with offensive content in front of a primary school (Ferhatović and Trlin, 2019, 144-145). The imposed sanctions ranged from educational measures of intensified supervision by parents in the cases of two minors, to three prison sentences, one of which was replaced by a fine, and the other by community service on probation (Ferhatović and Trlin, 2019, 144-145). The number of initiated cases is rather small in relation to the large presence of hate speech on the internet and the large number of acquittals, which is the result of broad definitions of criminal offences in criminal law and the failure of prosecutors to prove important elements of criminal offences (Ferhatović and Trlin, 2019, 144-145). Analyses of the first case law additionally show that most practitioners at the state level do not understand the essence of the concept of hate speech, and that hate speech cases are not treated with due seriousness (Lučić-Ćatić and Bajraktarević Pajević 2017, 366). However, on the other hand, the authors state that the number of indictments and convictions has increased since 2017, and as one of the reasons they cite the project Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe of the Council of Europe and the European Union, “Jufrex” (Tadić-Stojisavljević and Trlin 2021, 100). We should also keep in mind the position of the European Court of Human Rights, which requires states to ban hate speech, but states that only serious and extreme examples should be criminalized (Constitutional Court 2018, point 33).

2.1. Practices of the Court of BiH for processing hate speech

In September 2021, the Prosecutor’s Office of BiH filed two indictments for inciting national, racial and religious hatred: against Fatmir Alispahić, who, according to the indictment, is charged with continuously publishing texts and

¹¹ 16 first instance judgements, 9 second instance judgements, one judgement of the Supreme Court of the RS and one Decision of the Constitutional Court of Bosnia and Herzegovina. In cases where persons were indicted, in relation to three persons, the court decision was made on the basis of a plea agreement, while in other cases, evidentiary proceedings were conducted (Ferhatović and Trlin, 2019, 144-145).

videos that abound in statements that encourage and spread hatred towards migrants and the migrant population, as well as between the constituent peoples of BiH on several occasions during 2019 and 2020, through the online portal *Antimigrant.ba* and on social networks (MCOOnline, 2021), and against Jasmin Mulahusić, who is accused of using social networks and the internet to produce and place various photo and video montages that spread national and religious hatred and intolerance between the peoples of Bosnia and Herzegovina (Tomić 2021b).

In the period from 2015 to 2021, the Court of BiH had only two final judgments under Article 145a of the Criminal Code of BiH (MCOOnline, 2021). The first case at the Court of BiH for statements made in one media outlet was against the president of the Association of Families of the Missing of the Sarajevo-Romanija Region Milan Mandić and employees of ELTA 1 TV HD, including the editor-in-chief and editor of the news programme. The accused was charged with inflicting additional pain on survivors of the Srebrenica genocide and the families of the victims in one television programme, as well as fear that something similar might happen again “with such minimization and justification of such a serious crime” (Court of BiH 2017, 3-4). The Court of BiH acquitted the accused on the grounds that the Prosecutor’s Office of BiH had not proved that essential elements of the criminal offence under Article 145a had been acquired, and that it could not be inferred from his statements that he had acted with intent and intended to provoke or incite national, racial or religious hatred, discord or intolerance among the constituent peoples (Court of BiH 2017, 27-34). The Court noted that the accused’s statements could be interpreted more as inappropriate speech and represented freedom of expression, and referred to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Court of BiH 2017, 29-30). It also stated that expressing opinions on historical facts should not be banned or punishable, and justifying war crimes should be punishable when they clearly constitute incitement to hatred or violence (Court of BiH 2017, 30).

2.2. Practices of other courts

In 2012, the Basic Court of Brčko District issued a one-year prison sentence, suspended for a period of three years, for inciting national, racial and religious hatred, discord or intolerance due to a series of posts on a publicly accessible online forum, in which the accused made statements on the manner in which Bosniak citizens of the Brčko District of BiH should act in the event of war and secession of Republika Srpska (European Court of Human Rights, 2016, 2). The accused complained that the forum could not be considered a public place, and that he did not incite hatred, but only expressed his opinion, and that the case became known only after the media reported on it. In 2012, the Court of Appeals of Brčko District upheld the Basic Court’s ruling, arguing

that the content of the forum was accessible to everyone¹² and that the statements were not an expression of free opinion, but a very inappropriate form of dialogue advocating a strategy of behaviour towards one ethnic group (European Court of Human Rights, 2016, 3). The Constitutional Court and the European Court of Human Rights dismissed the appellant's appeals.

2.3. Practices of the Central Election Commission

Under the Election Law, the CEC imposed sanctions on political entities for the use of language that could lead or incite someone to violence or the spread of hatred. The CEC annulled the candidacy of the political entity *Ujedinjena Srpska* in the 2020 local elections and fined it BAM 10,000 for broadcasting a video in which members of the constituent peoples and minorities in BiH are portrayed in a stereotypical and insulting manner (*Coalition Pod lupom* 2021, 37).¹³ The Court of BiH annulled this decision because the video was broadcast before the start of the official campaign, which suggests that it is necessary to define the rules of conduct of political entities in the period before the official start of the election campaign (*Coalition Pod lupom* 2021, 37). In 2018, the CEC fined the political candidate of the *Demokratska fronta* party for using language on his Facebook profile that could lead or incite someone to violence or spreading of hatred. The Court of BiH rejected the appellant's appeal, not accepting the allegations of the appeal that the views expressed on the candidate's private profile were not intended for the general public (Court of BiH 2018, 2).

2.4. Practices of the Communications Regulatory Agency

Cases of sentencing television and radio broadcasters for spreading hate speech in recent years are rare. In 2020, the Agency issued written warnings to TV Igman and TV Podrinje for violating the Basic Principles of the Code (Article 3) which stipulate that a media service provider shall not provide content that includes any discrimination or prejudice based on gender, race, ethnicity, religion or beliefs, disability, special needs, age, sexual orientation, social origin, as well as any other content that has the purpose or consequence of preventing or endangering any person's recognition, enjoyment or exercise on an equal basis of their rights and freedoms. Written warnings to television stations were issued for broadcasting of the programme *Defte Hefter sa Fatmirom Alispahićem* due to the author's comments on the differences between Bosniaks and Serbs (in the case of TV Igman), as well as the author's comments on the threat to Bosniaks resulting from the arrival of migrants (in

¹² In another case, the BiH Constitutional Court overturned a ruling by the Livno Cantonal Court dismissing an appeal against a Basic Court ruling finding a person guilty of inciting ethnic, racial and religious hatred by posting a photo on Facebook. Among other things, the Constitutional Court cited the case law of the European Court of Human Rights that the expression of an individual to a small and limited group of Facebook users does not have the same weight as the statement published on the mainstream website (BiH Constitutional Court 2018, point 33).

¹³ In the video, three young men (Albanian, Serb and Bosniak) express hatred towards Serbs, after which the President of the United Srpska, Nenad Stevandić, appears in the role of "saviour of Serbs", and three young men run away from the cafe where they were sitting.

the case of TV Igman and TV Podrinje). In its plea, TV Igman pointed out that the author expressed his opinion based on the principle of freedom of expression, but the regulator's decision stated that the right to freedom of expression cannot be considered absolute, especially not in cases where such expression affects prejudice and encourages discrimination (CRA, 2021,7). Although the regulator did not impose a penalty for violating Article 4 on hate speech, in both cases it is stated that "taking into account the context of the current migrant crisis, this approach to migrants can encourage intolerance and hostility, as well as fear of the other and the different, which can ultimately lead to negative consequences such as discrimination and hatred" (CRA, 2021, 8).

In 2019, the Agency ruled a violation of Article 4 on hate speech by HTV Oscar, which rebroadcast the programme *Bujica* of Zagreb's Z1 television, in which the host of the show made xenophobic and racist statements against migrants, and in addition to the host, the guests also expressed extreme attitudes towards migrants. The regulatory agency issued HTV Oscar C a fine of BAM 6,000 (CRA, 2020a, 10).

It should be emphasized that the regulation managed to reduce the war-inciting rhetoric of the 90s and that cases of hate speech on television and radio stations are rare. However, other forms of hateful narratives are present on broadcasters, which are not limited to humiliation, intimidation and incitement to hatred, but include biased reporting on certain groups, such as migrants and refugees, constituent peoples, and reporting on war events from the 1990s (Sokol, 2021).

2.5. Other mechanisms for protection against hate speech

Other mechanisms for combating and protecting against hate speech are the Institution of the Human Rights Ombudsman of BiH, the Ministry of Human Rights and Refugees of BiH and the Agency for Gender Equality of Bosnia and Herzegovina (Gender Centre of Republika Srpska and Gender Centre of the Federation of Bosnia and Herzegovina) (Ivandić-Ninković 2021, 33).

According to the Law on Prohibition of Discrimination (Article 7), the central institution competent for protection from discrimination is the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, which, among other things, receives individual and group complaints of discrimination, provides persons who have filed a complaint against discrimination with the necessary information on their rights and obligations and possibilities in terms of judicial and other types of protection, collects and analyses statistics on cases of discrimination, issues recommendations to competent institutions for further action in cases of discrimination. Competent institutions in BiH are required to cooperate with the BiH Ombudsman Institution and present their responses and notifications in writing (Article 7).

The BiH Ombudsman Institution receives a number of hate speech complaints each year. In 2020, 288 complaints were received in which citizens invoked discrimination and the Law on Prohibition of Discrimination, of which seven related to hate speech,¹⁴ and in 2019 there were 206 such cases, three of which related to hate speech (Ombudsman Institution 2020, 17; Ombudsman Institution 2019a, 111).

In 2019, for example, the Ombudsman Institution issued a recommendation to the Prosecutor's Office of BiH, the Communications Regulatory Agency and the Federal Police Administration to act in accordance with its powers regarding the operation of the *Antimigrant* portal. This was done after the Institution determined that the articles on the *Antimigrant* portal are full of statements that spread and incite hatred both towards migrants and among the constituent peoples of BiH (Ombudsman Institution, 2019b).

In addition to that, in 2018, the Ombudsman Institution sent a recommendation to a private optician from Banja Luka to immediately remove the Instagram post in which they announced that their stores would show a large inscription "stop migrants" and that in the future when posting on their Instagram page they must fully respect the Law on Prohibition of Discrimination (Ombudsman Institution 2019a, 111).

The extent to which the recommendations of the Ombudsman Institution are being implemented is shown by the data that, for example, in 2020 the Ombudsman issued 23 recommendations regarding discrimination in relation to 31 cases, of which only seven cases were implemented, and in 2019 it issued 42 recommendations and handled seven cases (BiH Ombudsman Institution 2020, 16-17; 2019a, 111). Individual examples, however, suggest that it is possible to act in the field of combating hate speech as seen in the *Antimigrant* case, given that the Prosecution has filed an indictment for the activities of this media outlet.

¹⁴ In 2020, it received a total of 2,716 complaints, the largest number of which related to violations of civil and political rights.

3. REGULATION OF DISINFORMATION

3.1. Defamation Law and Law on Public Order and Peace

Bosnia and Herzegovina does not have an adequate system or strategy for regulating disinformation. Through the entity defamation laws of Brčko District, it is possible to punish individuals who spread disinformation if they damage the reputation of a natural or legal person, but there are no specific regulations for sanctioning disinformation. Entity laws for protection against defamation and the law of the Brčko District regulate civil liability for damage caused to the reputation of a natural or legal person by presenting or passing on the expression of untrue facts by identifying that legal or natural person to a third party (Law on Protection Against Defamation of FBiH, Article 1; Law on Protection Against Defamation of RS, Article 1; Law on Protection Against Defamation of Brčko District, Article 15).¹⁵ Although the decriminalization of defamation was very important for media freedoms in BiH, the practice has shown that defamation lawsuits are often brought in order to intimidate journalists¹⁶

In addition to that, some cantonal laws on public order and peace include the misdemeanour of presenting false news or allegations that cause harassment of citizens and endanger public order and peace, such as the Law on Public Order and Peace of Tuzla Canton Article 3, 10; Law on Public Order and Peace of Una-Sana Canton Article 3, 10. According to the Law on Public Order and Peace of Tuzla Canton, for example, a natural person will be fined from BAM 100 to 1,000 or imprisoned for 60 days (Article 7, 2), and a legal entity from BAM 200 to 2,000 (Article 10) if they commit this offence. The Law on Public Order and Peace of the Herzegovina-Neretva Canton defines “dissemination of false news” as “intentionally presenting or transmitting false news or allegations, thereby disturbing public order and peace and tranquillity of citizens”, but does not specify sanctions (Article 3, e). Article 10 of the Law on Public Order and Peace of Brčko District states that “whoever presents or transmits false news, rumours or allegations which may cause disturbance of citizens or endanger public order and peace, shall be fined in the amount of BAM 100 up to 500” (Article 10).

Although no cases of punishment due to these provisions are known, such a legal framework enables abuses and restrictions on freedom of expression. During the Covid-19 pandemic in 2020, there were attempts to introduce special provisions to prevent the spread of panic. The Government of Republika Srpska adopted (Government of RS 2020a) and then, after criticism from local and international organizations, revoked an order banning the presentation or transmission of false news or allegations that cause

¹⁵ All three laws defined the essential elements of defamation in the same way, only with differences in wording (Halilović and Džihana 2012, 132).

¹⁶ Data from the Association of BH Journalists show that 289 active defamation lawsuits against journalists and media have been registered in the last five years (Džekman 2021).

panic or seriously disturb public order or peace or disable or significantly interfere with the implementation of decisions and measures of state bodies and organizations exercising public authority, and fines for individuals were between BAM 1,000 to 3,000 – for legal entities from BAM 3,000 to 9,000. In the period from March to April 2020, several orders and fines were issued for spreading disinformation and panic under this regulation in the RS, such as on social networks, and after criticism from international and local organizations, the RS Government repealed this regulation (Government of RS 2020b). Such examples show that it is necessary to approach the regulation of disinformation carefully because the provisions can easily be used to suppress freedom of speech.

3.2. Prohibition of fake programmes and alternative medicine in the Code of the Communications Regulator Agency

The Code of Audio-visual Media and Radio Media Services does not contain terms such as “disinformation” or “fake news”, but through certain articles of the Code it is possible to sanction certain forms of disinformation. Article 5 (Fairness and impartiality) states that radio and television programmes shall ensure the accuracy of the information presented, and that all observed errors shall be corrected in a timely manner. Article 7 (Fake or misleading programmes) states that audio-visual and radio programmes shall not offer any content that is known or can be found to be fake or misleading on the basis of common sense or routine verification, or for which there is a reasonable presumption that false or deceptive. This article also states that if a programme subsequently turns out to be fraudulent or misleading, a correction will be published as soon as possible.

The Code also contains special articles for content dealing with paranormal and parapsychological phenomena (Article 12), alternative medicine (Article 13), and quackery (Article 14). Article 12 states that all contents dealing with paranormal and parapsychological phenomena will be specially balanced in terms of comparing scientific and non-scientific settings related to these phenomena, and that contents dealing with the promotion of paranormal and parapsychological phenomena and similar phenomena will be used as methods of solving health and other life problems, especially those in which individual advice is given to the public, to be broadcast only between 24:00 and 06:00. However, the Code states that these restrictions do not apply to content displayed with technical protection, nor to on-demand media services.

In addition to this, the Code also states that all content dealing with alternative medicine must contain clear and unambiguous indications that these are treatments that are not based on current medical doctrine, and will not promote such treatments as the only or best ones. The code states that it is desirable to ensure the opinion or participation of an authorized expert

in the field of medicine in this type of content. The Code also stipulates that content dealing with quackery shall not be released, unless its harmful consequences are indicated.

However, insight into the measures imposed by the Agency shows that these provisions are rarely used, much less to sanction disinformation. In 2020 and 2019, the regulator imposed several fines and warnings for violating Article 7 (False or misleading programmes, Article 7), but because information on the collection of citizens' invitations to participate in prize games was misrepresented in certain television broadcasts, i.e. calls were charged by duration but not by minute (CRA 2021, 11).

During the Covid-19 pandemic, the Communications Regulatory Agency of BiH received complaints about the FACE TV programme *Centralni dnevnik* due to the guest appearance of Semir Osmanagić, in which he presented conspiracy theories about the coronavirus and advised the use of alternative medicine. The Regulatory Agency found that there was no violation of the provisions of the Code, but pointed to the need for a more responsible and professional approach to topics related to the coronavirus pandemic, among other things in order to prevent the spread of disinformation that could adversely affect human behaviour and safety (CRA 2020b, 15). In assessing the subject content, the fact was taken into account that in the entire programme, broadcasting daily information from the country and the world, and the participation of relevant interlocutors in the field of economy, health and safety, the FACE TV licensee provided timely information to viewers (RAK 2020b, 15).

4. SELF-REGULATION OF HATE SPEECH AND DISINFORMATION

Hate speech and inaccurate content are not allowed under the Code of the Press and Online Media Council. More specifically, Article 3 of the Code (Incitement) states that journalists will at all times be aware of the dangers that arise when the media incites discrimination and intolerance through hate speech and do their best not to incite hatred and/or inequality based on ethnicity, nationality, race, religion, gender, sexual orientation, physical disability or mental condition, and will not in any circumstances incite crime or violence. Also, the Code requires accuracy and fair reporting (Article 5) and that journalists do not publish inaccurate or misleading materials in the form of photographs, texts or other materials, that photographs and documents must not be falsified and/or used in a misleading manner, and that journalists have a professional obligation to correct in a timely manner any published information that is found to be inaccurate.

The online media, especially readers' comments on online media, are full of hate speech. In 2020, the Council, for example, received 915 complaints, of which 712 were hate speech complaints, mostly related to comments from website visitors (Press Council 2020). The outcomes of these complaints in large numbers result in the comments containing hate speech being deleted and the profile banned. In 2020, according to a report by the Press Council, 240 comments containing hate speech were deleted, and in 186 cases the user profiles were banned. The second most common reason for complaints are requests for the publication of rebuttals and corrections, and often such complaints are made by people who have been covered by the media, as well as public institutions such as the prosecutor's office. The Council does not verify the published information, but acts on the basis of citizens' complaints and submitted corrections and denials.

The Press and Online Media Council acts as a self-regulatory body and has no possibility to sanction those who violate the provisions of the code. The reach of self-regulators is limited, especially with regard to the activities of anonymous media and those who do not follow professional norms, and the Council is not responsible for comments on social networks and blogs.

There are also two platforms in BiH that deal with the verification of published facts: *Istinomjer*, which deals with the verification of the credibility of politicians' statements and the fulfilment of election promises, and *Raskrinkavanje*, which verifies the accuracy of media content. *Raskrinkavanje* checks the content of online media and social networks, and operates according to a methodology that recognizes 15 forms of problematic media

content including disinformation and fake news, but not hate speech.¹⁷ Since its establishment in 2017 until today, the fact-checking platform has uncovered thousands of examples of problematic media content on portals and social networks, especially during the Covid-19 pandemic. In 2020, the platform started working in partnership with Facebook, wherein, after fact-checkers mark content as fake, Facebook puts a mark on the disputed content and reduces the reach of these posts, also informing those who spread the questionable content.¹⁸ In this way, the public is warned about problematic content, and the reach of those who spread disinformation and thus their financial resources are reduced, but media representatives have complained that labelling content as fake is done without prior warning (Stokić 2021).

17 Satire, clickbait, product placement, error, biased reporting, conspiracy theories, pseudo-science, manipulation of facts, disinformation, spin, fake news, transmitting fake news, corrected, censorship, unverified. In the methodology, disinformation is described as a media report that contains a "mix" of facts and inaccurate or semi-true content, and the media do not necessarily be aware of inaccurate information, and fake news as an original media report that contains factually false claims or information created with the intention of misinforming the public. About the methodology: <https://raskrinkavanje.ba/metodologija>

18 For details on the programme, see: <https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works>

5. CONCLUSION AND RECOMMENDATIONS

The legislative framework for the regulation of hate speech in BiH is fragmented and unaligned with European standards, and there are few cases of its processing. Ways to combat disinformation mainly rely on self-regulatory frameworks and fact-checking platforms, and there are no comprehensive strategies to combat disinformation. Given the large presence of hate speech and disinformation, especially in the online sphere, which can affect the democratic processes in the country, it is necessary to improve the legislative, regulatory and self-regulatory frameworks and ways of their application. Bosnia and Herzegovina is obliged to adopt appropriate solutions in accordance with international conventions, recommendations of international bodies and standards of the European Court of Human Rights.

Recommendations:

- Harmonize and improve criminal laws for the processing of hate speech according to the ERCI instructions: add language, colour, citizenship, sexual orientation and gender identity to the enumerated grounds for inciting and inflaming hatred; criminalize racist insults, defamation and threats, as well as the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of race, colour, language, religion, nationality, or national or ethnic origin; sanction the establishment or leadership of a group which promotes racism, as well as support for such a group and the participation in its activities; prohibit the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material with racist content.
- Adopt a strategy to combat hate speech. According to the ERCI guidelines, the strategy to combat hate speech should include better cooperation between the competent institutions and the self-regulatory body, the establishment of monitoring for hate speech and the involvement of the authorities in campaigns against hate speech. Authorities need to adopt a similar strategy to combat disinformation.
- Public officials should publicly condemn blatant examples of hate speech and disinformation.
- Extend the mandate of the Central Electoral Commission during the entire period of the election campaign.
- Improve the codes of the Communications Regulatory Agency and the Press Council, wherein disinformation would be more precisely defined.
- Prevent the abuse of regulations by restricting freedom of speech. In the laws on protection of public order and peace, repeal the provisions prohibiting the dissemination of fake news.

- Authorities, civil society organizations and regulatory and self-regulatory bodies should establish a coalition to combat hate speech and disinformation that would propose activities, make recommendations for the regulatory, legislative and self-regulatory framework, and cooperate with various actors, including representatives of social networks.
- Media and information literacy should be strengthened through education, the media and civil society organizations. Education should also include the development of skills for detecting and reporting disinformation and hate speech.
- In cases of amendments to the legislative and regulatory framework, care must be taken not to bring into question the issue of freedom of expression.

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