

Challenging hate:

Monitoring anti-LGBT “hate speech”
and responses to it in Belarus, Kyrgyzstan,
Moldova, Russia and Ukraine

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Executive summary

This report presents the results of monitoring of public discourse about lesbian, gay, bisexual and transgender (LGBT)¹ issues in five countries: Belarus, Kyrgyzstan, Moldova, Russia and Ukraine, conducted in late 2016 and early 2017. In all five countries it finds “hate speech” to be widespread in the media, online and propagated by influential public figures, including politicians. This reflects widespread violence, discrimination and hostility against LGBT people, reinforcing and exacerbating existing prejudices.

The most effective means of challenging such “hate speech” is through informed and accurate debate and dialogue, aimed at exposing prejudice and building inclusive, diverse and pluralistic societies. Tackling homophobic and transphobic “hate speech” therefore requires a combination of positive policy measures, aimed at enabling factual and sensitive discussion of LGBT issues and ensuring LGBT people can speak and are heard in public discourse. This must be underpinned by legislation that properly protects the rights to equality and freedom of expression for everyone, including for LGBT people.

International human rights law requires states to protect and promote the rights to freedom of expression and the right to equality: one right cannot be prioritised over another, and any tensions between them must be resolved within the boundaries of international human rights law. States must prohibit particularly severe forms of “hate speech”: “incitement to genocide” and “advocacy to discriminatory hatred that constitutes incitement to violence, hostility and discrimination”. In exceptional circumstances, this can be done through the criminal law. Additionally, states may restrict other forms of “hate speech” through other types of legislation. They are also obliged to create an enabling environment for the exercise of the right to freedom of expression and the right to equality, and to enact a range of positive measures for protection of these rights.

The report assesses the compliance of the five countries’ legislative and policy frameworks with international standards on freedom of expression and equality. While the situation differs from country-to-country, no state included in the report is effectively responding to hate speech on the grounds of sexual orientation and gender identity. Non-discrimination legislation is weak; and LGBT people face significant obstacles to exercising the right to freedom of expression. In many cases, public officials have actively discriminated against LGBT people, often engaging in “hate speech” themselves.

In **Moldova** and **Ukraine**, where LGBT organisations and initiatives can operate with fewer restrictions, there have been a number of opportunities in recent years to push for progress regarding recognition of equal rights for LGBT people, particularly during the development of anti-discrimination laws. However, unfortunately these opportunities have largely been unsuccessful, with governments resisting calls for LGBT people to be included within the protective scope of equality laws. This reflects a very low level of acceptance of LGBT equality, from the government and those in positions of political power, as well as in society more broadly.

Moreover, Moldova is again considering a new “anti-propaganda” law under which the distribution of any kind of positive LGBT-related information could be forbidden for having a “negative impact” on children. In Ukraine, LGBT rights are popularly perceived as a forced measure, imposed in response to pressure from the European Union as part of the EU Association Agreement. This negative narrative is encouraged by religious and nationalist groups, which portray LGBT rights as “alien” to Ukraine.

In **Belarus, Kyrgyzstan** and the **Russian Federation**, authorities have created an environment entirely hostile to LGBT people. In 2013 Russia adopted a ‘homosexual propaganda’ ban,² which prohibits the dissemination of information about ‘non-traditional sexual relations’. Belarus has also adopted legislation preventing the dissemination of information that could ‘discredit the institution of family and marriage’ in 2016.³ In Kyrgyzstan a proposed law would introduce even more restrictive provisions than those included in the Russian legislation that inspired it.

In these countries, there is very little civic space for LGBT people to exercise their right to freedom of expression, and almost no remedies for the ongoing violations and abuses of this right that they suffer. Pervasive homophobia and transphobia is institutionalised and socially engrained, evident at all levels of society, including the criminal justice system, with the police complicit in some attacks against LGBT people. Even some human rights defenders and civil society organisations refuse to work with LGBT activists claiming there is no publicly-available evidence of human rights violations or abuses. Bias-motivated crimes against LGBT people are significant problems; however, there are few legal protections available to LGBT people.

Criminal provisions on “incitement”, ostensibly aimed at prohibiting “hate speech”, are routinely abused to prosecute dissenting and minority voices. For example, in Russia and Belarus, provisions on “incitement to hatred” are often used against bloggers and social media users who are not advocating *discriminatory* hatred against minority or marginalised groups at all, but merely calling into question government policy or action.

The situation is exacerbated by a highly restrictive environment for human rights defenders and civil society more broadly in the region, but particularly in Belarus and Russia. Although previously considered more open, Kyrgyzstan is currently considering a new ‘foreign agents’ law, similar to Russia’s 2012 ‘Foreign Agents Law’, which would impose significant restrictions on civil society operations.

Introduction

“Freedom of expression and equality are foundational rights, whose realisation is essential for the enjoyment and protection of all human rights. They are also mutually supporting and reinforcing human rights. It is only when coordinated and focused action is taken to promote both freedom of expression and equality that either can effectively be realized.”

The Camden principles on freedom of expression and equality

Lesbian, gay, bisexual and transgender (LGBT) people across Europe and Central Asia face widespread violence, discrimination and hostility, as well as “hate speech”, on account of their sexual orientation or gender identity. “Hate speech” in the media, online and propagated by politicians and other public figures both reflects and exacerbates existing prejudices.

This report presents the results of monitoring of public discourse about LGBT issues in five countries: Belarus, Kyrgyzstan, Moldova, Russia and Ukraine, conducted in late 2016 and early 2017. Sexual and gender minorities were frequently invisible in public discourse; however, monitoring also uncovered numerous examples of “hate speech” with a number of recurrent trends. LGBT people were often presented as an illness, a western-imposed threat and contrary to ‘traditional’ and or ‘religious’ values. In the worst incidences, monitoring uncovered various instances of “hate speech” constituting incitement to violence against people based on their sexual orientation and gender identity. Frequently, this was reported to create further barriers to LGBT people speaking out and being heard, including in response to “hate speech”.

The most effective means of challenging such “hate speech” is through governments and other sections of society showing solidarity with LGBT people and creating environments for informed and accurate debate and dialogue, aimed at exposing prejudice and building inclusive, diverse and pluralistic societies. Tackling homophobic and transphobic “hate speech” therefore requires a combination of positive policy measures. This means measures aimed at enabling factual and sensitive discussion of LGBT issues, ensuring LGBT people can speak and are heard in public discourse, while ensuring a clear legal framework that prohibits the advocacy of discriminatory hatred that constitutes incitement to hostility, violence or discrimination (‘incitement to violence’), in line with international human rights law. At the heart of such responses are strong guarantees for the rights to equality and freedom of expression for all, including for LGBT people.

The report contextualises the prevalence of “hate speech” and reactions to it against the broader situation for freedom of expression and equality for LGBT people in each country. It explores opportunities for LGBT people and allies to counter “hate speech”, identifying challenges to this, including censorship of discussion on diverse sexual orientations and gender identities and restrictions on the operation of LGBT advocacy groups. The report outlines the overall environment for LGBT people, examining levels of violence and discrimination, and providing a snapshot of the types of “hate speech” monitored in public discourse on this topic. It also explores the adequacy of national

legislative and policy frameworks to effectively tackle the root causes of “hate speech”, and promote freedom of expression and equality for all. It starts from the premise that this will only be achieved when the rights to equality and non-discrimination, and the right to freedom of expression are properly protected, as the basis for other positive measures to be taken.

The situation differs in each country; however, no country is adequately responding to homophobic and transphobic “hate speech”. Moreover, in many cases countries are promoting hostility towards LGBT people through homophobic and transphobic public discourse and restrictive policies and laws which undermine freedom of expression and equality. As long as this is the case, the environment for expression of LGBT people will remain hostile and dangerous.

The report concludes with country-specific recommendations for ensuring “hate speech” is addressed in a way that promotes equality, while reinforcing respect for freedom of expression.

Defining “hate speech”

While the term “hate speech” is regularly used, definitions of it can vary significantly. In its broadest sense, it may be used to capture any expression of discriminatory hatred towards people on the basis of who they are. Such expression denies the humanity of those it targets, and may seek to incite harm and even violence against them. It raises significant human rights concerns, in particular for minority and marginalised groups. However, there is no universally accepted definition of the term in international human rights law.⁴

The Council of Europe Committee of Ministers has defined “hate speech” to include:

“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 towards minorities, migrants and people of immigrant origin.”⁵

In its Recommendation CM/Rec(2010)5, the Committee of Ministers extended this definition to include “LGBT people” among the list of persons targeted by “hate speech”. In 2013, ARTICLE 19 released a policy paper setting out in detail the European standards on identifying and responding to “hate speech” against LGBTI people⁶.

Confusion over the term “hate speech” at the international level, and inconsistent approaches at the regional level, has meant that governments have taken significantly different approaches to its regulation.

National governments define “hate speech” in their own laws as a means to identify expression that should be restricted, often through the criminal law, in ways that do not comply with

international human rights law. Frequently, laws are framed so broadly that governments use them to target dissent, including the expression of marginalised groups who such laws should be protecting. At the same time, such laws are rarely used to hold accountable people in positions of power who engage in “hate speech” that actually reaches the threshold of advocacy of homophobic or transphobic hatred constituting incitement to violence.

While all countries have laws on “hate speech”, a common trend is that the protective scope of “hate speech” laws is under inclusive in terms of the protected characteristics they recognise. While many laws recognise a person’s religion or belief, or their race, as a protected characteristic, very few extend the same protections on the basis of sex, sexual orientation, or gender identity. This protection gap is a significant obstacle to LGBT people seeking to challenge “hate speech” in all of the countries included in this study.

At the same time, protected characteristics that are not recognised under international human rights law are nevertheless given protection in national laws, raising significant freedom of expression concerns. In particular, provisions protecting abstract entities like the nation state, or a particular religion as such, from criticism or “hatred”, are used to target legitimate dissent, including from LGBT people advocating for equality.

Responding to “hate speech”

Effectively responding to “hate speech” requires a variety of measures, which primarily challenge through more speech the prejudice and intolerance that “hate speech” is symptomatic of, rather relying solely on restrictive measures.

ARTICLE 19 proposes that responses to “hate speech” are premised on three complementary areas of actions for States:

- 1) Create an enabling environment for the exercise of the right to freedom of expression, and protect the right to equality and non-discrimination;
- 2) Enact a range of positive policy measures to promote freedom of expression and equality including in the fields of media regulation, education, social security, health care, access to goods and services, immigration, crime, sport and culture – for tackling prejudice and discrimination without limitations on freedom of expression;⁷
- 3) Limitations on expression should be considered only for the most severe forms of “hate speech”, i.e. incitement to hostility, discrimination or violence, in exceptional circumstances **that are in accordance with international human rights law.**

In addition, other stakeholders including civil society, the media and private businesses, should be encouraged to take voluntary initiatives to tackle the root causes of prejudice and intolerance, to contest and challenge “hate speech”.

An enabling environment for equality and freedom of expression

Guarantees for the human rights to equality and to freedom of expression must be at the core of States’ responses to “hate speech”. When these rights are protected for everyone, opportunities will be maximised for people to speak out against prejudice and discrimination, and ensure accurate and positive coverage of LGBT issues in the media and public discourse more broadly.

States must create an enabling environment for freedom of expression, in the media, with regard to civic space and online across all topics, including in relation to diverse sexual orientations and gender identities.

This requires the repeal or reform of laws that unduly limit the right to freedom of expression, including those that are discriminatory. A full list of such legislation is included in ARTICLE 19’s ‘Hate Speech Toolkit’.⁸

In this region, legislation of particular concern for the freedom of expression of LGBT people that limit opportunities for countering homophobic and transphobic “hate speech”, include:

- **Laws that limit the sharing of positive information relating to LGBT people, also known as ‘homosexual propaganda bans’.** These laws often rest on the stated objective of protecting ‘traditional values’, which is not an accepted purpose for limiting the right to freedom of expression under international human rights law, or rely on discriminatory understandings of protecting ‘public morals’, which similarly contravenes international human rights law. Other justifications include protecting the rights of children, which international human rights mechanisms have rejected for lacking any evidential basis (in fact, depriving children of age appropriate information about diverse sexual orientations and gender identities has been judged as harmful). ARTICLE 19 has set out in a separate policy document why these ‘propaganda bans’ violate international human rights law⁹.
- **Laws that require prior-authorisation for public assemblies, such as protests, or that ban spontaneous or counter-protests,** often granting excessive discretion to decision-makers to deny permission for gatherings where they disagree with the subject-matter, or hold discriminatory views about the organisers. They can be used to prevent individuals from collectively celebrating diversity and or challenging discrimination and intolerance.

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- **Laws restricting freedom of association** in ways that are discriminatory, unnecessary or disproportionate, inhibiting civil society organisations (CSOs) active in promoting equality or other human rights issues from forming or operating.

States also have an obligation to end impunity for crimes committed against people for exercising their freedom of expression rights. This includes attacks on independent and critical voices, including LGBT activists, to tackle climates of self-censorship and the recurrence of violence.

Freedom of expression must also be protected online. Legal or extra-legal forms of online censorship, including blocking access to certain content or requiring its removal by third parties, must comply with international human rights law. Discriminatory measures of this sort will never be justified.

States' constitutions and national legal frameworks must guarantee equality before the law and equal protection of the law. It is often in the absence of robust and effective anti-discrimination frameworks that individuals most impacted by "hate speech" have limited options for redress. In circumstances where there are few alternatives, proponents of equality may have to rely on criminal incitement laws to seek redress.

There are two prongs of action international human rights law requires States to take to ensure the right to equality:

- States should repeal all laws and policies that formally or informally institutionalise discrimination and exclusion on any of the protected grounds recognised under international human rights law. Their mere existence creates environments in which discrimination is ignored or even tacitly encouraged. This includes the homosexual propaganda bans referred to above.
- States must also enact or strengthen existing anti-discrimination legislation. It is essential that this applies in a broad range of contexts and includes sexual orientation and gender identity as a protected characteristics.

In addition, States must ensure that their criminal law frameworks fully recognise, and provide proportionate sanctions, for bias-motivated criminal offences (i.e. 'hate crimes'), and include in these laws the full range of protected characteristics recognised under international human rights law. States should also promote and protect the right to equality by establishing or strengthening the role of independent equality institutions and national human rights institutions.

Positive policy measures and initiatives by other stakeholders

No State included in the report has embraced positive policy measures to promote the equality of LGBT people. Rather, public officials have actively discriminated against LGBT people, often engaging in “hate speech” towards LGBT people, failing in their responsibilities to speak about against such discrimination.

ARTICLE 19 recommends that States take an active role in condemning “hate speech”, particularly when perpetrators are public officials. States should put in place policies to ensure that public officials at all levels avoid making statements that promote discrimination or undermine equality. For civil servants, this should be reflected in formal codes of conduct or employment rules.

Where discrimination is institutionalised and advancing equality through public bodies is challenging or not possible – as observed to varying degrees in all of the countries included in this study – the role of non-state actors takes on particular importance.

To be able to effectively tackle discrimination and challenge “hate speech” in such climates, it is crucial for LGBT organisations to work with broader civil society, human rights organisations, media organisations, journalists, independent media regulatory bodies and professional associations, faith-based actors, lawyers, and other actors, as well as with national human rights institutions and equality bodies. This report gives examples of such cooperation: for example in Belarus LGBT groups worked with civil society organisations working on human rights and equality more broadly, as well as media representatives, to discuss how to tackle “hate speech” while protecting freedom of expression. Solidarity and cooperation between different actors can be more effective than government-led initiatives in raising awareness about the impact of “hate speech” as a human rights issue. This cooperation can be reflected in joint social campaigns, publicly speaking out against “hate speech” and discrimination, dialogue meetings, trainings for journalists and media regulatory bodies on “hate speech”, equality and freedom of expression issues.

Media play a critical role in reporting on and challenging “hate speech”; however, any policy measures directed at the media should respect the fundamental principle that media regulation should be undertaken by bodies independent of political influence, which are publicly accountable and operate transparently. Unfortunately, in most of the countries, concentration of media ownership, State interference in the media, and a lack of independence in the media regulatory environment more broadly, make it difficult to address failings in ethical coverage of LGBT people and LGBT-related issues. At the same time, some examples of more recently established self-regulatory bodies show the potential for more positive contributions.

It is critical that marginalised groups are able to freely access and use media for the production and circulation of their own content. Moreover, mass media outlets should recognise that they have a moral and social responsibility to promote equality and non-discrimination, including on grounds of sexual

orientation and gender identity. With this in mind, they should develop their own codes of conduct that would prohibit discrimination on any grounds, including sexual orientation and gender identity; and ensure diverse work forces. Journalists also have a crucial role in raising awareness of the harm caused by discrimination and negative stereotyping and should avoid unnecessary references to race, religion, gender, sexual orientation, gender identity and other group characteristics that may promote intolerance in the society. Media self-regulatory bodies should guarantee a right to correction or reply to cases of discriminatory expression concerning individuals. More information on the role of the media in promoting equality can be found in ARTICLE 19's Hate Speech Toolkit.¹⁰

Restrictions on incitement to violence

It is only in very narrow circumstances that States are required by international human rights law to prohibit the most severe forms of “hate speech” – the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination or violence. “Hate speech” towards an individual or a group based on a protected characteristic can be divided into three categories:

1. “Hate speech” that must be prohibited: “Direct and public incitement to genocide” under international criminal law, and “Any advocacy of discriminatory hatred that constitutes incitement to discrimination, hostility or violence” under Article 20(2) of the International Covenant on Civil and Political Rights (IC-CPR).
2. “Hate speech” that may be prohibited: other forms of “hate speech” such as discriminatory or bias-motivated threats or harassment that individually targets an identifiable victim. Such restrictions must comply with the three-part test under Article 19(3) of the ICCPR.
3. Lawful “hate speech” protected under Article 19(3) of the ICCPR which does not meet the threshold of severity at which restrictions on expression are justified but which raises concerns in terms of intolerance, meriting a critical response by the State.

Establishing whether expression reaches the threshold for prohibitions under Article 20(2) of the ICCPR requires a nuanced analysis on a case-by-case basis, looking at the context, the position of the speaker, their intent, the context of their message, the audience of their message and the means of dissemination, and the likelihood and imminence of violence, hostility or discrimination. This is reflected in ARTICLE 19's six-part test,¹¹ incorporated to the OHCHR-supported Rabat Plan of Action¹², which assists States to determine which situations the danger of violence, hostility or discrimination is sufficiently present to justify prohibitions on expression.

Where it is clear that expression constitutes incitement to discrimination, hostility or violence, in line with the Article 20(2) of the ICCPR and the Rabat Plan of Action, the next step is to determine appropriate sanctions. The selection of sanctions should be guided by an assessment of the level of

severity of the offence. ARTICLE 19 believes that it is preferable to employ civil and administrative law sanctions, given the requirement of Article 19(3) of the ICCPR that the least intrusive means for achieving a legitimate aim should be employed when restricting speech.¹³ Moreover, the experience of many jurisdictions shows that civil and administrative law sanctions are better suited as responses to the harm caused by “hate speech.”¹⁴ Only in the most serious cases of incitement should States impose criminal sanctions.

Prohibitions that unnecessarily censor contentious viewpoints, even where these are offensive, are often counter-productive to the aim of promoting equality for LGBT people and fail to address the underlying social roots of the kinds of prejudice of which homophobia and transphobia are symptomatic. In most instances, equality is better promoted through positive measures to increase understanding and tolerance, rather than through censorship of views perceived as injurious to LGBT people or any other community.¹⁵ Recourse to criminal law should be avoided if less severe sanctions would achieve the intended effect; the experience of many jurisdictions demonstrates that civil and administrative sanctions are better suited as a response to the harm caused by incitement.

Research methodology

This report was produced as part of a regional project ‘Tackling the Roots of Hate against LGBTI people in Europe and Central Asia’ between ARTICLE 19 and LGBT organisations from Belarus (Dotyk, Journalists 4 Tolerance), Kyrgyzstan (Labrys), Moldova (GenderDoc-M), Russia (Russian LGBT Network) and Ukraine (Insight).

The aim was to strengthen cooperation between LGBT organisations, media and broader civil society in tackling “hate speech” that targets LGBT people, protecting the rights to freedom of expression and equality. The report, as one of the outputs of the project, will be used in advocacy promoting the rights to equality and freedom of expression in the region.

The research relied on media monitoring, literature review, legislative and policy analysis and key informant interviews. It employs a rights-based approach, using the methodological framework for identifying and responding to “hate speech” as outlined in ARTICLE 19’s tool kit ‘Hate Speech Explained’.

ARTICLE 19 engaged with researchers in each of the five countries. The research process involved three distinct steps: first, monitoring of online expression about LGBT issues in target countries, in order to generate an evidence base of the most common types of public expression about LGBT people and issues that dominate the online sphere, with a special focus on a public discourse of politicians and religious leaders. Second, identifying barriers to those seeking to challenge “hate

speech”, including an assessment of legislative and regulatory mechanisms for responding to “hate speech” and to what extent legislation on anti-discrimination and freedom of expression enables people to speak out. Third, examining a range of responses to “hate speech” by state actors, media and CSOs in practice.

Researchers conducted manual monitoring of online representations of LGBT people, in order to understand the nature of coverage and assess the extent of “hate speech”. The research did not have sufficient resources to conduct thorough monitoring of all incidences of expression about LGBT people/ issues and associated “hate speech” published online, even those restricted to a specific timeframe. Accordingly, the research is designed to be illustrative on the basis of the examples of “hate speech” monitored: researchers monitored selected online resources, including online media publications and social media accounts, in order to provide a snap shot of the context in a given country between December 2016 and April 2017. Researchers also conducted retrospective monitoring of coverage of between three and four events that provoked active coverage and discussion of LGBT issues in traditional and social media during 2016 (prior to the monitoring period).

Monitoring focused on content published on two types of platforms: (1) internet publications and online versions of various popular print media (approximately 20 per country); (2) the social media accounts of key influencers in the target country (approximately 20 public figures per country). We also conducted interviews with LGBT community leaders, people that identify as LGBT and civil society activists. These have been kept anonymous for security reasons.

There was limited capacity to conduct an in-depth analysis on discrimination of transgender and intersex people for the purpose of this report. ARTICLE 19 intends to further explore this in future analyses and monitoring of “hate speech” in the region.

The research was not intended to be comprehensive, but provides a base from which ARTICLE 19 hopes to further develop tools for monitoring “hate speech”, which would allow us to form conclusions and recommendations to better protect freedom of expression and equality for all people.

Belarus: Isolated, invisible and unprotected

“It’s better to be a dictator than gay.”

Aleksandr Lukashenko, President of the Republic of Belarus

Rights of LGBT People in Belarus

Homophobia is an entrenched problem in Belarus. In 2016, Belarus came joint second to last in the LGBTI equality score in Europe carried out by the International Lesbian and Gay Alliance (ILGA).¹⁶ A study conducted by the NGO Freedom House in 2015–2016 found that over 50% of Belarusians feel negatively towards LGBT people; but that they perceive LGBT people to be the social group that most frequently experiences unequal treatment.¹⁷ A recent poll by Pew Research Center, published in May 2017 suggests that 85% of Belarusians consider homosexuality as morally wrong¹⁸.

Discrimination, violence and other bias-motivated crimes against LGBT Belarusians are usually met with impunity, and reinforced by widespread homophobic rhetoric from the authorities.¹⁹ This is evident even at the highest levels of government. In 2012, President Aleksandr Lukashenko said in public that “it is better to be a dictator than gay”, and regularly uses homophobic slurs.²⁰ Police have raided and forced the closure of gay nightclubs, most recently in October 2017.²¹

There are no reliable statistics on the number of homophobic and transphobic hate crimes in Belarus; the majority of victims do not report violations to law enforcement and the authorities do not keep any statistics on crimes motivated by homophobic or transphobic bias. According to activists, in 2015–2016 there were at least 16 such hate crimes that they were aware of²².

Within the last three years there have been two high profile bias-motivated crimes on the grounds of sexual orientation and gender identity: the murder of a gay man, Mikhail Pishcheuski, and an entrapment case, perpetrated by a member of the Occupay Pedofilay movement, which harasses and extorts gay men. Described in detail below, both cases were widely reported on, sparking a discussion on the problem of homophobia in Belarusian society.

Public discourse about LGBT issues

Monitoring of representations of LGBT people in online media was undertaken between December 2016 and March 2017. Monitoring only identified 22 publications related to LGBT people and issues in the given period, therefore monitoring was extended to include all of 2016 and this section also refers to older incidences of “hate speech” from 2014–2016, that continue to shape the public discourse. Findings indicate that LGBT issues are relatively absent from media coverage in Belarus; however casual homophobia and transphobia are common among influential opinion makers, reinforcing negative attitudes.

18 online media outlets were chosen for monitoring, including state-owned (Vecherniy Mogilev, Narodnaya Gazeta) and independent (tut.by, naviny.by, charter97) outlets. Given the restrictive media environment in Belarus, independent publications operate more freely online, where they reach larger audiences than online state-owned media outlets.²³

State-owned media tended to cover LGBT issues less frequently but with more examples of “hate speech” and the use of inappropriate terminology to describe LGBT people. Independent, online media outlets did provide some coverage of international news stories related to LGBT people. For example, after the mass-shooting in a gay club in Orlando in June 2016, media monitoring found 29 articles on the matter in Belarus media outlets including from tut.by, Belarus Segodnya, Nasha Niva, Charter97. These tended to provide accurate and non-inflammatory reporting.

According to Journalists 4 Tolerance, an initiative working on “hate speech” in Belarus, the number of publications with accurate coverage of LGBT issues in Belarusian independent media has somewhat increased during last couple of years²⁴. They ascribe this to the two high-profile trials of hate crimes and the public discussion of inappropriate publications in a regional newspaper Vecherniy Mogilev (described below). These cases demonstrated to a broader audience that discrimination on the grounds of sexual orientation and gender identity in the context of Belarus is widespread and needs to be addressed. However, further and thorough monitoring must be conducted, using one agreed methodology, in order to get a complete picture of media coverage of LGBT issues, as this conclusion might be premature.

Case study 1: Vecherniy Mogilev

In Autumn 2014, local governmental newspaper Vecherniy Mogilev, published an article entitled 'Transsexual Detained in Belarus for the First Time in History'. The story focused on the detention of a transgender man, who had been arrested for alleged theft. His name was changed in the original publication, but the place and the year of sex-reassignment surgery he had undergone was indicated. The story linked the defendant's alcoholism and theft with his transgender status, and expressed outrage that he was raising three children. Calling him 'ono' ('it') and a 'weepy and hermaphroditic being', the story reflects on a 'blue lobbying' ('blue' is colloquial derogatory for 'gay' – Translator) and 'influences from the West flooding with pederasty elements'.

The article was noticed by other journalists. Tut.by published a response, criticising the newspaper for biased coverage and dissemination of false information²⁵. Nasha Niva published an article entitled: "It": How Mogilev newspaper made a monster out of a modest village transsexual man.²⁶

As a result, the media increased their coverage of transgender people in Belarus. In February 2016, online media outlet tut.by published an article about a transgender man affected by Vecherniy Mogilev²⁷ and Nasha Niva published an article about a transgender woman²⁸. Both articles aimed at showing the struggle of transgender people in daily life in Belarus.

In addition to media monitoring, 20 public opinion makers, including politicians, members of the opposition, journalists and bloggers, were chosen and their posts on social media were monitored, as well as interviews with them in online media outlets. Out of 20 personalities selected for monitoring, 10 made hateful or discriminatory statements about LGBT people, often intersecting with misogyny against women.

For example, in October 2016, Ihar Marzaliuk, Head of the Standing Commission of the Chamber of Representatives of the National Assembly on Education, Culture and Science told a newspaper: "I am strongly against propaganda of homosexuality. I do not think that perversion or deviation should be considered a norm. As a Christian, I support the traditional or normal system of values. I want Belarus to stay in the core of the normal Christian identity"; "I am sick of words gender or gender balance. [...] Feminists are women that have failed in their personal lives. These are either latent lesbians, or people that have not fulfilled themselves".²⁹

It is very difficult for public figures to speak out about discrimination, even among the opposition. On 4 June 2016, Marharyta Taraikevich a member of the organisational committee of the Belarusian Christian Democracy party (BCD), an unregistered opposition party, posted on Belarus Partisan portal, arguing for the compatibility of Christian religious beliefs and tolerant attitude toward homosexuals: “I don’t mean that same-sex marriages are OK. My point is that non-discrimination of LGBT [people] is rooted in love to a human being and aspiration to empower a person with a freedom to be happy”.³⁰ She also made clear that she did not agree with efforts to compare homosexuality and paedophilia. She risked being expelled from the party.³¹

Commenting on Taraikevich’s story, Pavel Seviarynets, Co-Chairperson of BCD, told Radio Liberty/Free Europe: “I understand why Radio Liberty is doing this. Because it promotes feminists, transvestites, homosexualists etc., and believes that it is normal. I do not think it is normal. The Bible said it is not long time ago”. “I feel pity for people that are ill with homosexuality or practice feminism. In my view, they are unhappy. Just unhappy. We have to sympathise them and help them to get back on healthy track. Other sins are even worse; e.g., adultery is not any better than homosexuality. However, we cannot call it a norm. The Lord has established the world order differently”.³²

Vitali Rymasheuski, Co-Chairperson of Belarusian Christian Democracy (BCD) party, Seviarynets’s party fellow, elaborated on Christian perception of homosexual relations. On his Facebook page, he quoted an interview with a priest of the Greek Catholic Church: “I would be an offender to beat a gay, but I would kick him out if he preached in my church.”³³

Public comments by influential figures have set a tone in Belarus in which “hate speech” against LGBT people, as well as bias-motivated crimes and acts of discrimination, are considered acceptable. For example, an individual on trial for a hate crime where hostility against homosexuals has been accepted as an aggravating factor stated, “I don’t understand such people; our President is also against gays.”³⁴

Framework for responding to “hate speech”

“The merger of all powers in the hands of the president is both the origin and the purpose of the country’s depressing state of human rights... Human rights have fallen prey to the maintenance of a state structure set up for the purpose of protecting his power. The result is the devastating human rights situation we see today.”³⁵

Miklós Haraszti, UN Special Rapporteur on the situation of human rights in Belarus

For more than 20 years, the Belarusian governance system has been based on an all-powerful State, driven by presidential decrees with the Executive controlling both the judiciary and the media. Belarus is not a member of the Council of Europe, and regularly ignores recommendations from international human rights bodies on the advancement of human rights. In an effort to redress this situation, the mandate of the UN Special Rapporteur on the situation of human rights in Belarus was established in June 2012; however, the Belarusian government refuses to properly cooperate with the mandate holder.³⁶

In this context, protections for human rights have been decimated, including the right to equality and the rights to freedom of expression, association and assembly, rendering a rights-based approach to addressing “hate speech” focused on garnering positive action from the government incredibly difficult. Nevertheless, Belarus’s struggling economy has precipitated efforts to re-engage with European partners,³⁷ providing some opportunities for reform if conditionality is duly applied by international partners.

Legal framework against discrimination

Belarus has no specific anti-discrimination law. While various pieces of legislation contain provisions prohibiting discrimination in specific incidences, there are no explicit protections against discrimination on the grounds of sexual orientation or gender identity.

In his report to the UN Human Rights Council in April 2017, the Special Rapporteur on the situation of human rights in Belarus deplored:

“The continuing absence of a specific anti-discrimination law in Belarus, which would prohibit discrimination based on the grounds of race, religion, sexual orientation and gender identity, language, political conviction or physical or mental disability. The Special Rapporteur has continued to receive information on cases of discrimination and regrets that victims have no legal remedies at their disposal”³⁸

Article 22 of the Constitution of Belarus guarantees that “all shall be equal before the law and entitled without discrimination to equal protection of their rights and legitimate interests”. No protected characteristics are elaborated under the non-discrimination articles of the Constitution and the term “discrimination” is not clearly defined. Sexual orientation and gender identity are therefore not expressly recognised as protected characteristics. However, the broad framing of Article 22 could be interpreted to be inclusive of sexual orientation and gender identity, as it applies to “all” people, though this has not been tested before the courts.

Article 190 of the Criminal Code prohibits “violation of citizens’ equal rights,”³⁹ establishing liability for any intentional direct or indirect violation of the “equality of citizens”. This is defined as the restriction of rights and freedoms or the granting of direct or indirect advantages for citizens, resulting in essential harm to the rights, freedoms and legitimate interests of citizens. ‘Citizen’ is understood to mean all people.⁴⁰ Article 190 elaborates an exhaustive list of protected characteristics: gender, race, ethnicity, language, origin, financial situation, official position, place of residence, attitude to religion, beliefs or membership of voluntary associations. Sexual orientation and gender identity are therefore not explicitly recognised as protected characteristics. The breadth of Article 190 raises concerns from a freedom of expression perspective, though it is not clear that it has ever been applied to criminalise expressive acts, such as “hate speech”.

Article 14 of the Labour Code from 1999 says: “The restriction of labour rights or preferential treatment, based on sex, race, ethnic or social origin, language, religious or political beliefs, participation or non-participation in trade unions or other public associations, property position, job title, age, place of residence, physical or mental limitations that do not preclude fulfilling relevant job duties, and other circumstances unrelated to professional qualities and specific features of the function of a worker in question is prohibited.”⁴¹ Unlike the Criminal Code, this ‘other circumstances’ may be interpreted to include an individual’s sexual orientation or gender identity. However, no Court has made this interpretation of the Labour Code, notwithstanding NGOs documenting numerous instances of discrimination in employment on these grounds.⁴²

Criminal law framework to address bias-motivated crimes

The terms ‘bias-motivated crime’ or ‘hate crime’ do not appear in national legislation, nor are they commonly used by members of the legal profession. Nevertheless, Article 64.9 of the Criminal Code of Belarus, recognises ‘aggravating circumstances’ for offences and functionally allow for bias-motivated crimes to be treated more severely because of their discriminatory nature. This consideration comes into play during the sentencing phase of proceedings, which arguably diminishes the recognition given to the discriminatory element of offences as bias-motivation is not something that requires proof during the trial.

Recognised aggravating circumstances include motives based on racial, ethnic and religious enmity or discord, political and ideological enmity, and motives of enmity or discord against a social group. In only one case, below, the Courts interpreted ‘social group’ to include persons defined by their sexual orientation.⁴³ The prevailing practice of both pretrial investigation bodies and courts is to either treat such acts as motivated by ‘hooliganism’, or to disregard bias-motivation altogether.

The case of Mikhail Pishcheuski: Pishcheuski was severely beaten after a gay party outside a nightclub in Minsk on 25 May 2014. The attack was provoked after a girl leaving the club complained to a group of men standing on the street that there were only gay men in the club.⁴⁴ Leaving the club, Pishcheuski reacted to homophobic slurs, after which he was attacked. Dzmitry Lukashevich, the offender, was found guilty of infliction of injuries out of negligence on 16 October 2014. As aggravating circumstances, the court accepted the alcoholic intoxication of the offender, but did not recognise hostility to homosexual people. The case was brought back to trial after the death of the victim, under new charges of manslaughter (infliction of death by negligence) and hooliganism. The court found Lukashevich guilty of both charges on 28 July 2016, but again did not recognise the crime as motivated by homophobia.⁴⁵ In total, he was sentenced to three years imprisonment; however, as he had served some of his punishment under the previous sentence, and with an amnesty that had cut one year from his sentence, he was only imprisoned for a further year.

The case of Artiom Shlahtiuk: Shlahtiuk was a member of the homophobic group ‘Okkupay Pedofilay’ (‘Occupy Paedophilia’), founded in Russia by nationalist Maxim Martsinkevich. Members of the group would lure gay men from online dating apps under false pretenses, to attack and publicly humiliate them. In November 2015, Shlahtiuk met a victim in Minsk and beat him, forced him to confess to homosexuality, which he recorded and threatened that he would make this video public. In February 2016, the court found him guilty of hooliganism and robbery, aggravated by homophobia. It was the first, and to date the only, case in Belarus where sexual orientation was recognised as a protected characteristic.

Legal framework for freedom of expression, association and assembly

Public discourse in Belarus is dominated by State controls. There are very few opportunities for dissent or the articulation of alternative viewpoints, including on matters related to sexual orientation and gender identity. Expression on this topic has been particularly targeted by authorities.

Recently introduced legislation, ostensibly aimed at ‘protecting’ children, may be used to restrict expression about diverse sexual orientations and gender identities. In May 2016, President Lukashenko signed Law No. 362-3⁴⁶ amending Article 37 of the Law on Children’s Rights “protecting children from information harmful for their health and development.” The amendments came into effect on 1 July 2017.

In contrast to Russia’s ‘homosexual propaganda ban’, Article 37-1 does not contain specific references to sexual orientation or gender identity, but prevents the dissemination of information that “discredits the institution of family and marriage” to minors. The vagueness of the phrase may be interpreted to restrict dissemination of neutral or positive information about LGBT issues.⁴⁷

The UN Committee on the Elimination of Discrimination against Women’s (CEDAW) has raised concerns that Article 37-1 could potentially be used to discriminate against lesbian, bisexual and transgender women. The UN Special Rapporteur on Belarus has also noted that the amendments could be a further deterrent to open discussion of diverse sexual orientations and gender identities.⁴⁸

The media and information environment in Belarus remains one of the most restrictive in Europe. Media are strictly controlled by the government, through legislation and discriminatory economic regulation that do not comply with international human rights law,⁴⁹ although a small number of Internet publications continue to criticise authorities. Belarusian law requires official registration of media outlets and allows the authorities to shut them down on the basis of even minor violations of the law⁵⁰. Journalists are subject to arbitrary detentions, intimidation and a restrictive accreditation process. The government owns Belarus’s only internet service provider, and authorities have repeatedly blocked access to independent media outlets⁵¹. Belarus’s Law on Mass Media prohibits the registration of mass media where foreign capital forms more than a thirty per cent share and requires the distribution of foreign publications to have a special permit and introduced the mandatory accreditation of foreign journalists.⁵²

Independent civil society also face major obstacles to operation. The process for registration is onerous and civil rights groups working across a range of topics are arbitrarily denied registration. In this context, LGBT organisations, just like many other human rights initiatives are unable to openly and effectively operate, greatly limiting opportunities for countering “hate speech” or for broader work on equality or freedom of expression.

There are currently no registered LGBT-rights groups in the country. The Identity and Law initiative group attempted to officially register between August and September 2017. The justice department in Minsk refused all applications, citing “contradictions to morality and the public interest” and “no indication of a specific field of activity”.⁵³ Article 193(1) of the Criminal Code criminalises activities by non-registered organisations, imposing sanctions of up to 2 years’ imprisonment. In 2013, Law Enforcement Agencies called the deputy head of GayBelarus organisation in for questioning, and warned him about criminal responsibility for acting on behalf of an unregistered organisation.⁵⁴

Belarus’s Law on Mass Gatherings imposes restrictions on the right to peaceful assembly that go far beyond what is permissible under international law. This includes a complicated procedure for gaining permission to hold protests, which has been widely criticised by the UN Special Rapporteur on Belarus,⁵⁵ the Venice Commission of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights.⁵⁶ Organisers of protests are regularly refused permission to organise public assemblies, risking criminal sanctions if they go ahead. Protests are dispersed using excessive force by police, and protesters arbitrarily detained on charges related to their participation.⁵⁷

The authorities also violate the freedom of assembly of LGBT people by refusing permits to organise rallies⁵⁸ and other assemblies. In cases of unauthorised rallies, activists have faced detentions. To date, only one rally, in February 2011, in support of LGBT community has been allowed by the authorities.

Restrictions on “hate speech”

Article 130 of the Criminal Code is the primary provision of Belarusian law prohibiting discriminatory incitement, proscribing “deliberate actions aimed at inciting racial, ethnic, religious or other social hostility or discord by reason of racial, ethnic, religious, linguistic or social background”.⁵⁹ ‘Actions’ should be read as including expression.

The prohibition of incitement to ‘social hostility’ and the protected characteristic of ‘social background’ were introduced via amendments to the Criminal Code in April 2016.⁶⁰ The punishment for these actions, if committed by a group of persons or if they have led to death of people or other grave consequences, is a prison term of five to twelve years. Further sanctions under Article 130 include a fine, or limitation or deprivation of freedom for up to five years. The same acts in combination with violence or committed by an official person with a use of her/his official powers is punishable by a deprivation of freedom for between three and ten years.

By prohibiting ‘hostility or discord’, Article 130 is broader than Article 20(2) of the ICCPR, which is limited to advocacy of discriminatory hatred constituting incitement to hostility, discrimination

or violence. The addition of ‘social group’ mirror developments to Russian legislation, though, as in Russia, the term is not defined.⁶¹ In practice, this can prove problematic, as broad interpretations can be applied to protect groups on bases not recognised under international human rights law, and who aren’t subject to discriminatory hatred (e.g. for public officials or law enforcement to be recognised as a ‘social group’, and criticism directed towards them therefore framed as criminal ‘incitement’). At the same time, the move could be positive insofar as it opens the list of protected characteristics, so that it could be interpreted to include sexual orientation and gender identity. This is more than a theoretical possibility, since this reading has been given to the term ‘social group’ in relation to aggravated circumstances for criminal offences under Article 64.9 of the Criminal Code (above). At the time of writing, however, no judicial decision had done this in relation to the offence of ‘incitement’ under Article 130.

The authorities’ approach to Article 130 rather highlights the danger that ‘incitement’ provisions can pose to civil society actors and journalists when abusively applied to silence critical voices.

In August 2017, three columnists Yuri Pavlovets, Sergey Shiptenko and Dmitry Alimkin were charged with incitement of “racial, national or religious hatred” for espousing pro-Russian views and support of union with the Russian Federation, and were placed in pre-trial detention. Their posts did not contain incitement to hostility, discrimination, or violence, but were purely political in nature. On 2 February 2018, they were released after 14 months in pre-trial detention; however, all were convicted and received five year suspended sentences.⁶²

In another example, Eduard Palchys, a blogger and owner of website 1863x.com was sentenced to a one year and nine month suspended sentence for “inciting racial, national or religious enmity or discord” and “distribution of pornographic materials”.⁶³ The Minsk City Court found “extremist materials” in nine articles commenting on political issues published on the website. Human rights groups have analysed the nine texts, and found them to contain “nothing more than the author’s views on certain historical events, facts, containing criticism of geopolitical concepts and the foreign policy of some states”.⁶⁴

Article 130 of the Criminal Code is supplemented by Belarus’s Law No. 203-3 on Countering Extremism (2007). Article 1.1 of the Extremism Law defines extremism (extremist activities) as “activities of citizens of the Republic of Belarus, foreign citizens or stateless persons or political parties, other public associations, religious and other organisations on planning, organising, preparing, and committing actions aimed at [...]inciting racial, ethnic, religious or other social enmity or discord.”⁶⁵ The law creates powers, much like similar legislation in Russia, for authorities to designate materials as ‘extremist’ and ban them, against international human rights law standards. The law has been found by the UN Special Rapporteur on Belarus among others to be highly repressive and effectively ban reporting on political or societal conflicts.⁶⁶ This severely limits the freedom to discuss issues relating to “hate speech”, in particular where such discourse may imply criticism of the State.

The law allows courts to assess materials and publications for 'extremism'. In 2011, Ashmiany District Court recognised “Belarus Photo Press 2011” album as extremist material as it contained photographs from street protests against state authorities in December 2010.⁶⁷ Though it has not been enforced to limit the expression of LGBT people directly, it contributes to a chilling environment for speech critical of the government or religious institutions in the country.

Positive policy measures by States

Belarus has taken very few steps to address the underlying causes of “hate speech” on any grounds, including against LGBT people.

Belarus currently has no ombudsman or national human rights institution, ignoring recommendations of UN bodies and other international stakeholders to establish one. The report from 2016, Special Rapporteur on the situation of human rights in Belarus “deplores the fact that no substantive progress has been made towards the creation of such an institution.”⁶⁸

Unsurprisingly, given the homophobia and transphobia espoused by the Belarusian government, there have been no positive examples from the authorities that clearly or effectively seek to address “hate speech” or discrimination on the grounds of sexual orientation and gender identity.

In October 2016, the government approved a ‘National Interagency Action Plan 2016–19’ on implementing accepted recommendations from its second Universal Periodic Review and the recommendations of UN human rights treaty bodies.⁶⁹ The government has been criticised for failing to properly involve civil society in consultations on the plan, as well as a lack of specifics regarding implementation.⁷⁰ The plan includes just three actions pertaining to equality and non-discrimination. Nevertheless, it provides some opportunities for cooperation towards the adoption of new, comprehensive legislation on non-discrimination.⁷¹ The plan has committed the National Centre for Legislation and Legal Research (NCCLR)⁷² to reviewing existing legislation pertaining to non-discrimination, and assessing whether any amendments are needed in order to protect against discrimination on all grounds. A representative of the NCCLR has since engaged with LGBT initiatives on non-discrimination legislation.⁷³

Voluntary initiatives by other stakeholders

Given extremely restricted civic space, there are few opportunities for voluntary initiatives to address “hate speech” and discrimination by other actors, however grassroots activists continue to operate where possible. One of Belarus’s journalist associations has also had some success in encouraging improved journalistic ethics, including in responding to incidences of “hate speech.” However, this is not systematic and does not cover the most widely spread governmental media outlets and publications.

Civil society initiatives:

Initiative “Journalists 4 Tolerance” was founded in 2011. It brings together journalists and activists whose aim is to improve the coverage of marginalised groups in the media and to address “hate speech”, focusing especially on LGBT people. The initiative conducts training for journalists on “hate speech” and tolerance, carries out monitoring on “hate speech” in Belarusian media and draws attention to the most severe cases of “hate speech”, initiating public discussion on how to tackle “hate speech” in a non-restrictive way, while protecting freedom of expression.

In September 2017 the initiative co-organised the first National Civil Society Consultation on Tackling Hate Speech, which gathered representatives of over 30 human rights organisations, including many which had previously excluded LGBT groups from their work. During the event the participants declared their willingness to work on the development of anti-discrimination legislation that would protect all marginalised groups⁷⁴. The active participation of LGBT initiatives together with ‘mainstream’ organisations is definitely a positive step towards further recognition of LGBT rights among human rights organisations and broader civil society.

LGBT initiatives also organise an annual anti-discrimination prize for journalists for articles with non-discriminatory coverage of issues related to marginalised groups⁷⁵. Among winners in the previous years there are journalists from Tut.by, Nasha Niva, Makeout, Naviny.by.

In December 2017 Belarusian LGBT initiatives produced a series of videos with relatives of LGBT people in which they speak out against discrimination and share their personal stories. The campaign was published on a news site Tut.by.⁷⁶

“Delo Pi” is an online campaign that was launched after the death of Mikhail Pieshcheuski⁷⁷. The aim of the campaign is to raise awareness about hate crimes on the grounds of SOGI and the need to add SOGI as protected characteristic to the Criminal Code in relation to bases of aggravated crime.

Independent media:

There are two professional associations of journalists in Belarus: the Belarusian Union of Journalists (BUJ) which includes journalists working for state-owned media; and the Belarusian Association of Journalists (BAJ)⁷⁸, which primarily comprises of journalists working with scarce independent media. The BUJ is not considered to be independent; and does very little with regard to journalism ethics.

The BAJ Declaration on Principles of Journalistic Ethics⁷⁹ states a commitment to prevent discrimination on multiple grounds, introducing an open-ended list of protected characteristics; their Commission on Ethics has considered cases of “hate speech” against LGBT people. The commission identified two violations of professional ethics by certain media or individual journalists.⁸⁰ The Commission’s meetings are held either on receipt of complaints or on its own initiative. The decision of the Commission is of a recommendatory nature, and therefore not binding. The decision contains a conclusion regarding the journalist’s adherence to professional ethics standards, as well as recommendations.

The BAJ website publishes all decisions by the Commission, based on their findings.

One of the cases concerned an above mentioned article published in the local newspaper Vecherniy Mogilev, entitled “Transsexual Detained in Belarus for the First Time in History”. Activists appealed to the Commissions on Ethics of the Belarusian Association of Journalists with a request to look into the story. The BAJ Commission found the story to conflict with journalistic ethics⁸¹.

A survey of more than 200 media workers undertaken by BAJ, the results of which were published in August 2017, considered the most frequent violations of ethics in the Belarusian media. Indications of nationality, citizenship, sex, race, human sexuality, “if it is not involved in the incident’ was cited as a key violation of media ethics.⁸²

Conclusions

Protections for equality and non-discrimination on all grounds are extremely weak in Belarus, with LGBT people made particularly vulnerable by the hostile social attitudes fostered by the political elite.

This is reflected in media and political discourse, where discussions on equality for LGBT people are largely absent. There were multiple incidences of homophobic and transphobic speech, both in the media and by public figures, which reinforce negative stereotypes and undermine nascent efforts to promote equality. Some of the most egregious incidences of “hate speech” did spark discussion in the few independent media, suggesting there is some space to initiate a public discussion on the rights of LGBT people. However, it cannot be understated the risks that such expression carries with it.

Given the tight restrictions on human rights in Belarus, opportunities for promoting equality and combating “hate speech” are limited. Protection for LGBT people through anti-discrimination laws are almost non-existent, and the Belarusian government tightly controls civic space, curtailing freedom of expression, association and assembly, which enable people to speak out in defence of equality. Legislation to prohibit the most severe forms of “hate speech” (incitement to hostility, discrimination or violence) is not fit for purpose, rather being abused to limit freedom of expression, rather than to protect minorities.

At the same time, efforts by civil society organisations have had a positive though limited impact on media discourse, with attitudes among some in the media, and the approach of the BAJ Commission, showing that there are opportunities, albeit limited, to work towards the promotion of more accurate and ethical coverage of LGBT issues.

A major obstacle to further progress is a complete absence of media freedom in the country, and an increasing range of laws to suppress criticism and dissent, to prevent peaceful assemblies, and restrict the registration of civil society organisations. Opening civic space, in particular for freedom of expression, while ensuring strong protections against discrimination, will be crucial if the prejudices underlying “hate speech” against LGBT people are to be addressed. This requires political leadership and support from religious actors that is currently not only lacking, but expressly geared towards promoting homophobia and transphobia for political ends.

The Belarusian authorities have committed to reviewing the need for new anti-discrimination legislation. While it is unlikely this will herald wholesale reform, this provides an opportunity for sectoral cooperation among human rights defenders and civil society representing the interests of different marginalised groups to collaboratively push for reform. Recent initiatives suggest there is an appetite for this. Such efforts must focus simultaneously on the development of comprehensive non-discrimination legislation, and the repeal of legislation and practices that limit the ability of civil society to operate and speak out against discrimination.

Recommendations

To the Government of Belarus:

- Refrain from engaging in homophobic and transphobic “hate speech”, and speak out against such incidences when they occur. Instruct politicians and other influential people in society on the importance of avoiding statements that might promote discrimination or undermine equality, including on grounds of sexual orientation or gender identity.
- Repeal Law No. 362-3 amending Article 37 of the Law on Children’s Rights on “protecting children from information harmful for their health and development”.
- Amend Article 130 of the Criminal Code on discriminatory incitement to conform with Articles 19(3) and 20(2) of the ICCPR, ensuring that it cannot be used against dissenting or minority expression, as outlined in the Rabat Plan of Action, and that it protects both freedom of expression and equality, including by:
 - Replacing references to “social hostility and discord” with a clear definition of intentional advocacy of hatred constituting “incitement to hostility, discrimination or violence”;
 - Adding sexual orientation and gender identity as protected characteristics.
- Ensure that Article 190 of the Criminal Code on ‘violation of equality’ are not used in cases of “hate speech”, which should only be tried under incitement provisions, according to the threshold established in the Rabat Plan of Action.
- Amend the law “On Countering Extremism” to ensure that it complies with international standards on freedom of expression, ensuring they only prohibit expression constituting intentional incitement to violent acts where the expression is likely to lead to such acts being incited;
- Repeal the law “On mass media” and replace it with legislation guaranteeing a free and independent media sector, in particular:
 - Revoke the authority of the Ministry of Information to sanction or close down media outlets and to block websites without a court order;
 - Remove requirements for media outlets to register.
- Amend legislation on peaceful assemblies to bring it in line with international standards, including by:

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- Repealing the law “On mass gatherings”, to establish a legal framework consistent with the State’s obligations on the right to freedom of peaceful assembly;
 - Removing discriminatory practices that prevent the organisation of LGBT rallies and ensure that law enforcement work to enable such rallies to take place.
 - Repeal or amend legislation inconsistent with Belarus’ international obligations on the right to freedom of association, in particular the law on “public associations”, to enable the operation of civil society organisations, including those defending the rights of LGBT people.
 - Develop and introduce a law prohibiting discrimination, including on the grounds of sexual orientation and gender identity, in line with international standards and with the full and effective participation of all stakeholders, including civil society.
 - Explicitly include sexual orientation and gender identity as grounds of bias-motivated crimes, including in relation to Article 64.9 (aggravated circumstances for criminal offences), and Article 190 (crimes against equality) and ensure that these provisions are not used in relation to limiting the right to freedom of expression.
 - Vigorously condemn at the highest levels all bias-motivated crimes against LGBT people, and ensure a prompt, effective and impartial investigation into attacks; and that perpetrators are brought to justice and remedies provided to victims/survivors.
 - Establish a mandate of human rights Ombudsman in line with CoE, UN, OSCE recommendations, in particular the UN Principles relating to the Status of National Institutions (The Paris Principles), including to monitor and address discrimination, “hate crimes”, and “hate speech”.
 - Provide trainings for public officials on non-discrimination and equality, including on the grounds of sexual orientation and gender identity. Develop and adopt ethical codes of conduct and ‘non discrimination’ policies for elected officials.
 - Introduce training for personnel working within the criminal justice system (including police, prosecutors and the judiciary) on international standards on equality and non-discrimination, including with regard to sexual orientation and gender identity.
 - Organise public information and education campaigns, in collaboration with civil society, to combat negative stereotypes of, and discrimination against, LGBT people. In particular, public information and education campaigns should be integrated into primary, secondary and tertiary education, and complemented with concrete anti-bullying policies, including the provision of support services for victims of bullying, including peer-led initiatives.

To media:

- Include sexual orientation and gender identity as protected characteristics in the Declaration on Principles of Journalistic Ethics of the Belarusian Association of Journalists, and to any charters of codes of conduct adopted by the Belarusian Union of Journalists.
- Individual media outlets should:
 - Consider adopting or amending internal ethics codes to reflect strongly the principles of free expression and equality, ensuring that “hate speech” against marginalised groups is unacceptable;
 - Educate journalists on “hate speech”, equality and non-discrimination to ensure objective coverage on LGBT-related issues;
 - Ensure that acts of discrimination and the harm caused by discrimination and negative stereotyping are brought to the attention of the public;
 - Give members of different communities an opportunity to speak and to be heard in a way that promotes a better understanding of them and reflects their perspectives.

To civil society:

- Support marginalised groups to develop counter-speech and publicly condemn cases of “hate speech” on all protected grounds, including sexual orientation and gender identity.
- Express solidarity with LGBT people following “hate speech” from representatives of the authorities or religious leaders.
- Develop alliances with media outlets, media organisations and journalists to address and react on the problem of “hate speech” in media and political discourse.

Kyrgyzstan: A taboo concealing widespread hatred and violence

Rights of LGBT people in Kyrgyzstan

Public discourse on the rights of LGBT people in Kyrgyzstan occurs in a broader environment of socially entrenched prejudice, institutional discrimination, as well as violence and impunity for human rights violations and abuses.

There has been limited research on public attitudes towards LGBT people in the country. However, research by the NGO Labrys found that 35% of lesbian, bisexual and trans (LBT) women believed that their sexual orientation or gender identity creates problems for them in society, while 56% of those interviewed stated that their families have tried to force them to change their sexual orientation or gender identity.⁸³ NGOs estimate that pervasive homophobia and transphobia in the country means that many, if not a majority, of LGBT persons in Kyrgyzstan keep their sexual orientation and gender identity a secret.

There are widespread reports of hostility, discrimination and violence against LGBT people. The government of Kyrgyzstan does not recognise within its criminal laws bias-motivated crimes that target victims on the basis of their actual or perceived sexual orientation or gender identity, or collect statistics thereon.

Violence and discrimination against LGBT people is monitored by civil society. A 2017 survey by NGO Kyrgyz Indigo found that 84% of LGBT respondents had experienced physical violence, while 35% experienced sexual violence.⁸⁴ LGBT NGOs and their staff are also vulnerable to attack; on 3 April 2015, Labrys itself reported an attempted arson attack on its offices, followed by no condemnation by government officials⁸⁵.

A 2014 Human Rights Watch report documented details of human rights violations amounting to possible torture by police officers of gay and bisexual men.⁸⁶ Labrys and Indigo also reported that 82% of LGBT respondents believe that police stations are the location where they are most likely to encounter violence⁸⁷.

Impunity for such crimes emboldens further abuses of power, including extortion of LGBT people through psychological, physical and sexual humiliation. As a consequence of this deeply entrenched institutional discrimination, and the dangers of revealing one's sexual orientation or gender identity to the police, many LGBT people are reluctant to report hate crimes to the police. Even where reports are made, an absence of legal recognition of any category of anti-LGBT bias-motivated crimes means the police refuse to take these factors into account when dealing with allegations.⁸⁸ Broader dangers of reporting hate crimes include forced public exposure of the victim's sexual orientation and gender identity, which coupled with social and even familial hostility towards LGBT people, may lead to further discrimination and re-victimisation.

In 2014, in its Concluding Observations on Kyrgyzstan, the UN Human Rights Committee expressed concern over “violence against lesbian, gay, bisexual and transgender (LGBT) persons by both State and non-State actors, and the failure on the part of the State party to address such violence”. The Committee recommended that Kyrgyzstan:

“Ensure that violence against LGBT persons is thoroughly investigated, that perpetrators are prosecuted, and if convicted, punished with appropriate sanctions, and that the victims are adequately compensated and protected against reprisals.”⁸⁹

No such steps have been taken by the Kyrgyz authorities. Indeed, apart from some minimal efforts by the Ombudsman to respond to violations of the rights of LGBT people, the government is doing almost nothing to respond to discrimination on the grounds of sexual orientation and gender identity.

Public discourse about LGBT issues

The media environment in Kyrgyzstan is more open, with greater pluralism than in other countries in Central Asia, and there are a number of critical media outlets. An increasingly restrictive legislative environment, and concentration of media ownership among members of the political elite advancing their political ends, is increasingly undermining media freedom. The authorities exert pressure on journalists to refrain from reporting on topics deemed taboo, particularly regarding tensions between ethnic Kyrgyz and Uzbeks and government corruption, including through legal harassment, such as malicious prosecutions and civil law suits.

In this context, there is some space, though little security, for open discourse on topics related to sexual orientation and gender identity. However, while there are no current legal provisions which expressly prohibit the dissemination or reporting of LGBT issues as such, calls for such bans, including the proposed ‘homosexual propaganda’ ban, create an environment of self-censorship among journalists who may otherwise be more sympathetic towards LGBT people. While our research observed that LGBT topics are largely ignored by the media, where reporting on the issue did arise, coverage often reflected the prejudicial views of individual journalists, editors, or media owners.

Monitoring of representation of LGBT people and issues in online media was undertaken between March 2016 and April 2017. The period was extended, as there was little coverage of LGBT issues between November 2016 and April 2017, demonstrating the extent of invisibility of LGBT people in public discourse. Monitoring identified references to LGBT people and issues in 95 articles in 12 media outlets; of which 48 were neutral or positive towards LGBT people, while the rest were identified as including “hate speech”.

Monitoring encompassed both more liberal online news outlets, including Azattyk (Radio Free Europe), Kloop, Vecherniy Bishkek and Zanoza, and more populist, conservative media like Gezziter.

Liberal media were more likely to report on LGBT issues, and tended to be more neutral in their coverage; nevertheless, several articles included homophobic and transphobic language, such as ‘homosexuality’, or ‘non-traditional sexual orientation’. There were also some examples where liberal media echoed common prejudices.

Several articles were related to LGBT issues abroad, and tended to be neutral in their coverage. Articles about domestic LGBT issues contained more directly discriminatory language. The research monitored three news stories relevant to the rights of LGBT people:

1. In May 2016, KTRK, the national television broadcaster, televised a talk show *Tolerance or Moral Values* with a participant coming out regarding their sexual orientation;

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2. Discussion of constitutional amendments, including Article 36, which restricts marriage to opposite-sex couples;
 3. Two programmes broadcast by TV Kaiguul with the participation of LGBT people.

In relation to these events, LGBT people were frequently portrayed as ‘foreign’, and therefore as a threat to Kyrgyz culture. Several articles suggested that LGBT identities were a construct of Western states, imposing values incompatible with Kyrgyz culture, under the guise of promoting human rights. Such arguments implied that civil society organisations are key agents of this supposed ‘alien’ culture, receiving international grants specifically to subvert Kyrgyz culture. LGBT people, and in particular civil society organisations, are portrayed as beneficiaries of international intervention.

Examples of “hate speech” against LGBT people observed in Kyrgyz online media include:

“The LGBT community must be celebrating, as the State Department branches in Kyrgyzstan are going to get more than 50 million USD for defence from terrorism and Russian propaganda. We all know how the US is fighting ISIS in Syria and Iraq and how they keep trying to replace ‘Putin’s propaganda’ by gay prides and other kinds of abomination, non-standard orientation activists, NGOs and their PR-agents are likely to get a large share of this 50 million. By the way, this amount is higher than last year by a third, with our liberals enjoying the biggest jackpot in Central Asia.”⁹⁰

The article, published in Vecherniy Bishkek in June 2016, is an opinion piece which covers a range of topics, including the case of summoning journalists of Kloop and KRTK by the National Security Service (described below). The author claims that normally no one would publicly share details of such summons, but thanks to making this public, the LGBT community can count on more funds from the US State Department.

“Who Defends Gays and Lesbians That Defame the Kyrgyz People?, published on 29 March 2017 on Gezziter as a journalistic opinion. The article gives the names of Kyrgyz activists and accuses them of promoting “gay propaganda”: [...] As we know, the Kyrgyz nation has never had the concept of same-sex marriages throughout its long history. As we know, we have faced these trends only as we entered the twenty-first century. Having only heard of some man marrying a man or a woman marrying a woman in a foreign country, now we are going to have such phenomenon at home. This is not something to boast about, of course. Unfortunately, some actors are willing to promote this obscenity, these shameless and inhuman practices.”⁹¹

Another headline stated: ‘Gays to Defend Freedom of Expression by Destroying Kyrgyz Moral Values?’⁹² In this opinion, the journalist gives the name of an activist who “understands freedom of expression as a means to promote gay propaganda”. They also claim that free speech “went beyond its limits, we kind of began to perceive gossip and rumors as freedom of speech”.

Secondly, support for LGBT people was frequently portrayed as a reputational smear, used against political opposition. For example, writing about Bekbolot Talgarbekov, a former Minister and now high profile representative of the opposition political party:

“Famously, the NGOs of Kyrgyzstan are active these days trying to promote same-sex marriages in society. They also keep arguing that LGBT people are discriminated against in Kyrgyzstan. Interestingly, the Talgarbekov-led ‘People’s Parliament’ has planned its rally for 17 May, the day of gay prides. Are they trying to use their rally as an excuse for a gay pride on the square with 50 thousand participants? Having destroyed the country’s agriculture, is Talgarbekov going to undermine our society’s fundamental [principles] now? Or maybe his orientation has changed during his 11 years of hibernation in lair?”⁹³ (*Published on Gezitter*)

A number of articles were sparked by a talk show broadcast on National TV1 (KTRK) in May 2016, entitled *Tolerance or Moral Values*⁹⁴, where a young person publicly declared that they were gay. Online media outlet Kloop published an article about the broadcast.⁹⁵ Public bodies claiming to defend so-called ‘traditional values’ protested against the TV’s editorial policy of giving a platform to his voice, and demanded the prohibition of LGBT topics in all media. On 19 May 2016 a protest was held in front of the Kyrgyz Public Radio and Television Corporation in support of a broadcast ban on LGBT topics.⁹⁶ The protest promoted messages such as ‘We Stand against the Gays’ and ‘Kyrgyz Nation vs Gays’. Following a request from members of the public, National Security Service summoned the journalists of KTRK and Kloop for an explanation. The journalists reported that it was suggested to them by the security services not to write about LGBT topics in the future⁹⁷.

In another incident in 2016, Kaiguul, a TV programme of the state-owned and operated broadcaster NTS covering the work of the emergency services, covered violently conducted police raids on a venue with sex workers, in which the faces of transgender sex workers were made deliberately visible. This coverage of what was undoubtedly a discriminatory abuse of police power made no attempts to conceal the identities of LGBT persons visible in the footage, while they did blur faces of others present. The journalists did not question the legitimacy of the police conduct, nor express sympathy with the LGBT people targeted in the raid, portraying it simply as a regular law enforcement response to criminal conduct. As part of a government-sponsored broadcast, it shows clear intent to publicly harass those who have already been victim of a human rights violation, taking the further step of normalising to the public such violence and discrimination against LGBT people.

“Hate speech” was also observed in comments on online articles, some amounting to incitement to violence against LGBT people.

Despite their relative frequency, physical attacks on LGBT people are rarely covered in national media. The general hostility towards LGBT people from media outlets explains this, and lack of coverage may also contribute to impunity for such human rights violations or abuses, and a lack of awareness of such incidents among the public.

Religious leaders and public figures in Kyrgyzstan also engage in “hate speech” towards LGBT people, including incitement to violence. A particularly concerning example is a religious decree (fatwa) issued by the Kyrgyz Muslims Spiritual Directorate in 2014, including a call “when you see a homosexual – kill him”⁹⁸. It is noteworthy that this clear incitement to murder gay people sparked a public debate⁹⁹, leading to the revision of the fatwa and then its removal from the website of the Directorate. However, the author of the decree, Mufti Maksat Hajji Toktomushev, later justified his words, arguing that they had been mis-translated.¹⁰⁰ No legal action was taken against him, notwithstanding that such expression is precisely what Article 20(2) of the ICCPR requires States to prohibit.

In 2017 the Directorate publicly condemned the first same-sex marriage between Muslim men in the United Kingdom: “The Koran bans same-sex love. It is also in the Bible. Everywhere the punishment for homosexual relations is described differently. For example, somewhere it is considered adultery, and somewhere a more terrible sin. Married men who have entered into such a relationship can be punished with stoning, and unmarried men – ‘rewarded’ by 100 blows with a stick. Of course, in our country the punishment should be within the framework of secular laws.”¹⁰¹ Media did not frame the condemnation as “hate speech” and discrimination towards LGBT people.

Framework for responding to “hate speech”

Notwithstanding Kyrgyzstan’s obligations under international human rights law to protect the rights to freedom of expression and equality, the national legal framework falls far short of this, in particular in respect of ensuring the rights of LGBT people. During Kyrgyzstan’s last Universal Periodic Review by the UN Human Rights Committee in June 2015, the country accepted a recommendation from Finland to ensure that ‘legislation protects the rights of everyone, regardless of their sexual orientation and gender identity, minority status or any other basis, to freedom of expression and assembly, freedom from discrimination and equality before the law’¹⁰²; however, this is yet to be actioned.

Legal framework against discrimination

There are no specific protections against discrimination on the grounds of sexual orientation or gender identity in Kyrgyzstan, although open-ended legal provisions could, were the judiciary so inclined, be read to include such protection.

Article 16 of the Constitution of the Republic of Kyrgyzstan¹⁰³ guarantees that “fundamental human rights and freedoms are inalienable and belong to each person from birth.” It states that the activities of all state bodies, local government bodies and their officials must adhere to this principle, and guarantees that everyone is equal before the law and courts.

The Constitution prohibits discrimination on a number of grounds, listing a series of protected characteristics, left open-ended by the recognition of protections “in other circumstances”. This would afford the government and judiciary flexibility to interpret the Constitution as prohibiting discrimination on the basis of sexual orientation or gender identity, but no such position has been taken. This same formulation is seen in legislation giving effect to Article 16, such as the Labour Code, at Article 9, and without legal protection, civil society report that discrimination against LGBT people in employment and other settings is widespread.¹⁰⁴

An amendment to Article 16 introduced further to the December 2016 constitutional referendum enables the government to introduce ‘special measures’, not only to further equal opportunities, but also to “ensure the highest values of the Kyrgyz Republic”. As has been observed by the Venice Commission, of the Council of Europe, the vague formulation of these “highest values”, which are enumerated in Article 1 of the Constitution, and include “love for the motherland”, “honor and dignity”, “state sovereignty”, “unity of the people”, “motherhood” and “fatherhood”, could be used to introduce further measures to further institutionalise discrimination and limit freedom of expression.¹⁰⁵

Constitutional amendments adopted by referendum in December 2016 are of concern. Article 36(5), which previously stated that “Persons reaching the age of consent shall have the right to marry and create a family,” was amended to restrict marriage to a “voluntary union between a man and a

woman.”¹⁰⁶ Through this amendment, the state introduced discriminatory legal provisions, particularly in the area of marriage and family life by excluding gay, lesbian and bisexual couples from marriage (and consequently adoption);¹⁰⁷ however, the amendments may also enable broader discrimination.

In a joint opinion, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe’s (OSCE) and the Venice Commission concluded that the proposed constitutional amendments “may de facto limit access to certain state or public benefits which are dependent upon ‘family status’ or official marriage (e.g. certain social security benefits, economic protection benefits, access to social housing, child and health benefits).”¹⁰⁸ The Constitutional change could also indirectly discriminate against same-sex unmarried partners who could be subject to intersecting forms of discrimination on the basis of both their sexual orientation and their family status.

Criminal law framework to address bias-motivated crimes

The Kyrgyzstan Criminal Code recognises a specific category of bias-motivated murder in Article 97 of the Criminal Code (1997, amended 2011).¹⁰⁹ However, this is limited to grounds of “ethnic, racial or religious hatred or enmity”.

Besides provisions on discriminatory incitement, analysed below, bias-motivation is only recognised in Article 134 of the Criminal Code. It provides an offence of “violation of the equality of citizens”, committed by the “direct or indirect violation of the rights and freedoms of persons and citizens” on the basis of an exhaustive listing of protected characteristics, including gender but not expressly including sexual orientation or gender identity. It also includes characteristics not recognised under international human rights law, such as “official capacity”.

There are no reports of attempts to use either provisions to prosecute discrimination on the basis of sexual orientation or gender identity, or other crimes motivated by bias on these grounds. This absence of legal protection, combined with evidence of law enforcement directly engaging in or being complicit in human rights violations and abuses against LGBT people, significantly deters reporting of crimes.

Legal framework for freedom of expression, association and assembly

While the environment for freedom of expression is relatively open in Kyrgyzstan in comparison with its immediate neighbours, a number of limitations on this right in national legislation do not comply with international human rights law, and restrict in particular the ability of minorities such as LGBT people to speak out, including in response to “hate speech”.

Article 31 of the Constitution states that “everyone shall have the right to freedom of expression of opinion, freedom of speech and press” and “no one may be forced to express his/her opinion or deny it.”

Despite this, Kyrgyzstan has sought to introduce restrictions on freedom of expression that would directly discriminate against LGBT people. Draft Law No. 6-11804/1 (2014) would criminalise the promotion of “non-traditional sexual relations”,¹¹⁰ against international human rights law.¹¹¹ Though it passed two rounds of parliamentary scrutiny, its final reading, scheduled for September 2016, was postponed and has not been rescheduled.

The draft law would make “creating a positive attitude towards non-traditional sexual relations with the use of the media” a criminal offence with fines and sentences of imprisonment of up to a year available as punishment, and aggravated penalties where media content is directed towards minors, or is a repeat offence. Analogous offences would be introduced to the law “on peaceful assemblies”, and grounds added to the law “on mass media” to prohibit media outlets that propagate such content.

The expressed purposes of the law, “the protection and defence of the traditional family, human, moral and historical values of Kyrgyz society”, are not legitimate bases for limiting the right to freedom of expression. ‘The family’ and ‘human, moral and historical values’ are not rights holders, and while freedom of expression may legitimately be limited to protect ‘public morals’, this concept cannot be invoked to justify censorship measures that are discriminatory.

The law would have the effect of muzzling all forms of advocacy for the human rights of LGBT people, as well as the sharing of any ‘positive’ portrayals of LGBT people, or content celebrating the diversity of sexual orientations and gender identities. It would similarly deprive the rights of all people, including LGBT people, of receiving such content.

Risking heavy criminal penalties, the law would strongly deter the media sector meeting its moral and professional duties to report on as well as challenge discrimination, as recognised in the Camden Principles¹¹² and the UN Rabat Plan of Action¹¹³, including as against LGBT people. Likewise, it would inhibit all other stakeholders from creating space for LGBT voices to speak and be heard, including through initiatives to identify and challenge “hate speech”.

For these reasons, the draft law has been widely condemned by international human rights bodies, including the United Nations Committee on Economic, Social and Cultural Rights (the treaty body for the International Covenant of the same name),¹¹⁴ various special procedures of the UN Human Rights Council,¹¹⁵ and the European Parliament.¹¹⁶

Even though this draft law was not enacted, censorship on the basis of sexual orientation or gender identity still persists. In 2012, for example, the General Prosecutor’s Office banned a screening in Bishkek of the documentary film “I am Gay and Muslim” about gay men in Morocco, after the State Committee on Religious Affairs assessed it to be both “extremist” and “inciting hatred”, in violation of

the Law on Countering Extremist Activity.¹¹⁷ The Pervomaysky District Court of Bishkek included the film to the list of extremist materials in its decision from 8 September 2012.

Limitations to the rights to freedom of peaceful assembly and of association further undermine the ability of LGBT people in Kyrgyzstan to express themselves.

Article 34 of the Kyrgyz Constitution ensures the right to a peaceful assembly for everyone. However, fearing violent attacks and lack of protection from the law enforcement, LGBT people do not organise many public events such as LGBT marches. In 2011, activists organised a “Rainbow flag” event on the International Day Against Homophobia, Transphobia and Biphobia which gathered 50 people who marched in six small groups to avoid publicity¹¹⁸.

Article 4 of the Kyrgyz Constitution ensures the right to association, and processes for establishing NGOs are simple. The country has a vibrant civil society sector, with thousands of NGOs operating in the country, despite government-led efforts to limit civic space in recent years.¹¹⁹ In May 2016, civil society finally succeeded in defeating a law seeking to restrict access to foreign funding;¹²⁰ however, government-led smear campaigns against high profile human rights defenders persist.¹²¹

In 2011, an LGBT organisation was refused registration by the Ministry of Justice due to the words ‘gays’ and ‘lesbians’ in the official name of the association.¹²² There are now two CSOs registered to work on LGBT rights in Kyrgyzstan. CSOs promoting the rights of LGBT people continue to operate, despite the strongly homophobic climate in the Kyrgyz society resulting in attacks against organisations. Some other more mainstream CSOs such as Human Rights Centre also work on defending the rights of LGBT people.

Restrictions on “hate speech”

While the Constitution and national legislation include protections against certain forms of “hate speech”, these provisions do not comply with Kyrgyzstan’s obligations under international human rights law.

Article 31 (4) of the Constitution prohibits “the propagation of national, ethnic, racial and religious hatred, gender as well as other social supremacy which calls to discrimination, hostility and violence.”¹²³ This provision largely reflects Article 20(2) of the ICCPR. The addition of “gender” as a protected characteristic is positive, and may be read to include protection against the propagation of homophobic or transphobic “hate speech”, though this approach has not been taken by the government or judiciary.¹²⁴ While “other social supremacy” may be interpreted similarly inclusively, it also poses the danger of being interpreted to protect public officials and other elites from criticism, which is not permissible under international human rights law.

Article 299 of the Criminal Code (1998) differs from the Constitution in its protective scope, establishing administrative and criminal liability only for incitement to “national, racial, religious or interregional hatred”. If committed in public or via mass media or internet, the penalty is between four and seven years.¹²⁵ More severe penalties of between six and 10 years’ imprisonment are foreseen where incitement is committed through the use or threat of violence, by a person acting in their official capacity, by an organised group, or by a person already convicted of ‘extremism’ offences.

Article 299 does not comply with international human rights law. Firstly, it prohibits the incitement of *hatred*, rather than incitement to the acts of *hostility, discrimination or violence*. This will likely lead to the prohibition of “hate speech” that does not meet the threshold of Article 20(2) of the ICCPR and raise concerns under Article 19(3) of the ICCPR. In any case, it does not provide protections on the basis of sexual orientation or gender identity, and the exclusion of gender (as compared to the Constitution) makes this more difficult to read into the provision. The addition of “interregional” hatred as a ground for limitation is also of concern. Distinct from the language of ‘national origin’ or ‘nationality’, as used in the ICCPR, this terminology may be misapplied so as to limit political expression of persons from regions with more antagonistic relationships with the central government.

In 2009, the Criminal Code was amended to introduce Article 299-1, which created an offence of organising activities aimed at inciting national, racial, religious or interregional hatred:

“The establishment and leadership of voluntary associations, religious organisations or any other organisations whose activities are linked to inciting national, racial, religious or interregional hatred, denigrating national pride or promoting the exclusivity, superiority or inferiority of citizens on the basis of their religion shall be punishable by imprisonment for between five and seven years, with forfeiture of the right to hold certain posts or to engage in certain activities for up to three years.”

Connected offences exist for organising and participating in activities with such voluntary associations, religious organisations or other organisations where they have been dissolved by a court order due to extremist activity (Articles 299-1 (2) and (3)).¹²⁶

This additional provision also contravenes international human rights law, for the same reasons stated above in relation to Article 299. Additionally, it introduces further grounds for limiting expression that are not recognised under international human rights law, by seeking to protect ‘national pride’ from denigration, and by seeking to limit religion or belief based superiority claims. This conflation may be abused to target minority expression, in particular when the government (and legal framework) treat ‘national pride’ as being intrinsically linked to singular ideas of ‘tradition’, a limited interpretation of what constitutes a ‘family’, and religion.

As such, Articles 299 and 299-1 pose risks to the freedom of expression rights of LGBT individuals, as well as other minorities, in particular those engaged in political organising through formal or informal associations.

For example, on 15 September 2010, Azimjan Askarov, an ethnic Uzbek human rights defender and journalist was sentenced under Article 299 to life imprisonment.¹²⁷ Askarov is believed to have been targeted for his investigations into police torture and other human right violations during the violence in 2010, documenting how police following the clashes took no action to stop violence and looting. Despite a UN Human Rights Committee decision in April 2016 finding Askarov to have been arbitrarily detained,¹²⁸ he remains in prison.

As sexual orientation and gender identity are not protected characteristics within Articles 299 or 299-1, it is not surprising that incidents of incitement to hostility, discrimination or violence have passed without accountability. One of the most egregious examples in recent years involves not incitement by the media, but incitement from religious figures.

In 2014, five civil society organisations appealed to the Kyrgyz State Committee on National Security and to the Prosecutor's General Office, regarding a religious decree (fatwa) issued by the Spiritual Office of Muslims of Kyrgyzstan, main religious institution in Kyrgyzstan with a call "when you see a homosexual – kill him". Civil society organisations requested legal examination of the decree. While one of the organisations, Labrys, was invited to the National Security Committee to explain the request, though no further action was taken by the authorities.¹²⁹ ARTICLE 19 considers that such a direct call for the murder of homosexuals from a religious leader in a position of this influence, in a context where LGBT people enjoy scant legal protection and widespread discrimination and violence, should have resulted in criminal liability and a proportionate sentence.

The Law on Countering Extremist Activity was amended in 2016. In its analysis¹³⁰, ARTICLE 19 raised concerns that the law is drafted in such vague language that it allows for disproportionate restrictions to be imposed on freedom of expression, freedom of association and assembly and freedom of religion. In particular, the Law fails to give a sufficiently precise definition of 'extremism'. Instead, it provides for a mishmash of terrorism-related language with references to incitement to discrimination, hostility or violence on discrimination grounds without ever defining any of those terms. The 2012 decision to ban the film "I am Gay and Muslim", described above, was based on this law – as inciting 'interethnic hatred'.

The laws concerning "hate speech" in Kyrgyzstan therefore enable an environment in which real acts of advocacy of hatred constituting incitement go unpunished, while incitement laws are at the same time used to suppress legitimate dissent by minority and marginalised voices.

Positive policy measures by States

While international human rights law places obligations on States to undertake positive action to tackle the root causes of “hate speech” against LGBT people, the trend in Kyrgyzstan has been for state actors and public officials to actively advocate hatred on the basis of sexual orientation or gender identity, or stay silent in the face of it. The only exception to this has been the creation of a National Human Rights Institution, which has taken small steps towards at least recognise that the government is failing in its obligations towards LGBT people.

National Human Rights Institutions:

The work of the Ombudsperson (Akyykatchy) of the Kyrgyz Republic is regulated by the Law on Ombudsman of the Kyrgyz Republic from 2002, has been accorded a “B” status by the Global Alliance of National Human Rights Institutions, meaning that it is only partially in compliance with the Paris Principles.¹³¹

According to Article 3(6), the goal of the Ombudsperson is “[the] prevention of any forms of discrimination against execution of rights and freedoms by an individual”¹³². The Ombudsperson’s annual reports did not include any references to violations of the rights of LGBT people until 2016, when the report included in a section on ‘women’s rights’ a call to abandon the draft law on ‘homosexual propaganda’, referred to a high level of intolerance in the society against LGBT people, and acknowledged cases of violence against LGBT people by law enforcement agencies.¹³³ LGBT organisations welcomed this step.¹³⁴ It is notable that the draft law condemned in the report has not progressed since late 2016.

While this was a positive development, there remains broad scope for deeper attention to the rights of LGBT people from the Ombudsperson’s office, in particular to collect statistics to substantiate what were otherwise generally stated concerns. Taking a more active preventative role in the field of discrimination, including to address “hate speech” through positive counter-speech measures, would also be within the scope of its Article 3(6) mandate.

Media regulation:

Media regulation is primarily undertaken by the Ministry of Culture and Information, which is responsible for overseeing licensing control in accordance with the Broadcasting Law.

Voluntary initiatives by other stakeholders

Despite rampant homophobia in Kyrgyzstan, voluntary initiatives developed by civil society and journalists provide a starting point for responding to “hate speech”.

Civil society initiatives:

Civil society organisations working to promote the rights of LGBT people continue to challenge the dominant and discriminatory narrative on sexual orientation and gender identity, in difficult and sometimes dangerous circumstances. Though there are examples of support and solidarity for LGBT organisations from other human rights organisations focused on equality, this support is not always forthcoming from civil society as a whole.

Independent media and self-regulation:

Since 2007, Kyrgyzstan has had an independent self-regulatory body, the Commission on Consideration of Complaints Against Media (CCCAM), which has, in rare cases, responded to “hate speech” on the grounds of sexual orientation and gender identity. This provides a starting point for fostering some of the positive examples of the media coverage of LGBT people and topics uncovered during media monitoring.

The CCCAM was established during the Republican Congress of Journalists in December 2007 by delegates from 120 various media outlets, NGOs and freelance journalists. It is responsible for overseeing the Ethical Code of Journalists, and issues decisions on complaints submitted as a means to find a peaceful resolution to disputes to avoid taking a case to a court. Complaints can be made against TV, radio and both online and offline press. Decisions of the Commission might be published in the media which was the target of the complaint, as well as in other media. Decisions are also sent out to faculties of journalism as education materials. However, decisions on the violation of journalistic ethics have no real impact as the Commission have no powers to order remedies other than publication and dissemination of its decisions.

The Ethical Code of Journalists of Kyrgyzstan addresses discrimination on the basis of sexual orientation and gender identity. It was adopted by the Republican Congress of Journalists on 8 December 2007 and amended at the Republican Conference of Journalists on 16 April 2009 and 8 December 2012.¹³⁵ Article 6 of the Ethical Code states:

“It is prohibited for the journalist to use mass media to the detriment of the society, human and civil rights, promoting war and violence, racial, ethnic, gender, regional, religious, sexual, social intolerance. In development of materials, the journalist shall avoid indicating certain identities of the person (groups of persons), as well as physical and mental characteristics of the person, except when the information is an integral part of the journalistic material”.

The Media Development Center, a CSO, together with the Commission on Consideration of Complaints Against Media publish joint monitoring reports of print media, including cases of “hate speech”. Examples of “hate speech” in the report are followed by information on which articles of the Ethical Code of Journalists and, where applicable, national laws were breached by the publication.

In monitoring published through the partnership in January 2017, there is a single case of “hate speech” towards LGBT people reported.¹³⁶ The case concerned an article from the newspaper *Dengi i vlast*, published in January 2017 where the Commission decided that the author “expresses deep intolerance towards sexual minorities and promotes discrimination on the basis of sexuality”. It found a violation of Article 6 of the Ethical Code of Journalists and violation of Article 16 (2) of the Constitution.

Conclusions

“Hate speech” against LGBT people is prevalent in Kyrgyzstan, reflecting deeply held prejudices within society, to which the government is failing to respond and in some cases actively fueling. Protections for equality and for freedom of expression, to create an enabling environment for people to openly discuss issues related to sexual orientation and gender identity, is essential.

Kyrgyzstan’s legal framework violates the rights to equality and freedom of expression in numerous ways and requires a comprehensive overall anti-discrimination legislation to address impunity for dangerous incidents of incitement to violence and to prevent abuse of laws to suppress legitimate dissent. Anti-discrimination legislation must be bolstered to fill the protection gap left by an absence of recognition of or protections for LGBT people. At the same time, provisions relating to discriminatory incitement must be overhauled to bring them into compliance with international human rights law.

Opportunities for open discussion on matters of sexual orientation and gender identity are limited. While LGBT organisations are able to operate, the environment they work in is dangerous, and marred by homophobic and transphobic violence, as well as other forms of censorship. LGBT Pride marches are not sanctioned, while repeated efforts by politicians to introduce a ban on ‘homosexual propaganda’ cast a chilling effect on freedom of expression. Openly identifying as LGBT, much less openly advocating for the rights of LGBT people, is left to a brave few individuals.

The media in Kyrgyzstan is mostly failing in its ethical and professional responsibilities to provide a platform to LGBT voices, and to challenge discrimination and “hate speech” against them. Of the limited media coverage of LGBT issues that research uncovered, some is accurate and respectful. However, for the most part, the media largely ignore issues affecting LGBT people, including human rights violations they face. Where LGBT issues do arise, media coverage is inaccurate or discriminatory, with media actors too frequently engaging in or repeating “hate speech” against LGBT people without challenge.

While it is positive that self-regulatory mechanisms recognise in their code of ethics duties related to the representation of LGBT people, more is needed to foster understanding of these duties, and to ensure their effective enforcement. This is particularly important, as while deeply unethical, the types of “hate speech” observed during this research indicate that self-regulatory responses from media bodies would be much more proportionate and in line with international human rights law, than responses through the criminal law.

The worst cases of “hate speech” identified in this report were those perpetrated by religious figures, including examples of incitement to violence, warranting a response through the criminal law and proportionate sanctions. More must be done by the government, together with faith-based actors and civil society, to tackle the prejudice these incidents of incitement are a symptom of, and create

the environment where others are able to speak out and set a clear example that such prejudice will not be tolerated.

The existence of a strong civil society in Kyrgyzstan creates opportunities to push back against “hate speech” targeting LGBT people. There is a need for increased solidarity between all organisations working against intolerance, to support more comprehensive responses to protect the human rights to freedom of expression and equality.

Recommendations

To the government of Kyrgyzstan:

- Refrain from engaging in homophobic and transphobic “hate speech”, and speak out against such incidences when they occur. Instruct politicians and other influential people in society on the importance of avoiding statements that might promote discrimination or undermine equality.
- Remove permanently from consideration Draft Law No. 6-11804/1, criminalising the promotion of “non-traditional sexual relations”.
- Amend Article 299 of the Criminal Code on incitement to conform with Articles 19(3) and 20(2) of the ICCPR, ensuring that it cannot be used against dissenting or minority expression, as outlined in the Rabat Plan of Action, and that it protects both freedom of expression and equality, including by:
 - Specifically limiting the prohibition to the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence;
 - Removing references to characteristics not protected under international human rights law, including the notion of “humiliating the Kyrgyz nation”, promoting religious superiority, and “inter-regional” hatred;
 - Adding sexual orientation and gender identity as protected characteristics.
- Amend the law “On Countering Extremist Activity” to ensure that it complies with international standards on freedom of expression, ensuring they only prohibit expression constituting intentional incitement to violent acts where the expression is likely to lead to such acts being incited.
- Ensure that LGBT people are fully able to exercise their right to freedom of peaceful assembly, including by ensuring adequate policing of pride marches, or other marches advancing the rights of LGBT people.
- Ensure that NGOs promoting the rights of LGBT people are able to register and operate freely in the country, including by ensuring prompt, impartial and effective investigations into any attacks on NGOs working on this.
- Explicitly include sexual orientation and gender identity as a protected characteristic in all relevant legislation on non-discrimination.

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- Sexual orientation and gender identity should be specifically included as grounds for aggravated forms of offences and the general provisions on aggravating circumstances under Article 97 of the Criminal Code; and Article 134 of the Criminal Code. Further amend Article 134 to remove references to “official capacity” as a protected characteristic, which is not recognised under international law.
 - Ensure that public officials at all levels vigorously condemn physical attacks against LGBT people when they occur, and ensure a prompt, effective and impartial investigation into attacks; and that perpetrators are brought to justice, and that effective remedies are provided to victims.
 - Ensure that the Ombudsman office has sufficient resources to collect comprehensive statistics on the degree and consequences of discrimination, hate crimes, and hate speech, including on the grounds of sexual orientation and gender identity.
 - Provide trainings for public officials on non-discrimination and equality, including on the grounds of sexual orientation and gender identity. Develop and adopt ethical codes and ‘non discrimination’ policies for elected officials.
 - Introduce training for personnel working within the criminal justice system (including police, prosecutors and the judiciary) on international standards on equality and non-discrimination, including with regard to sexual orientation and gender identity.
 - Organise public information and education campaigns, in collaboration with civil society, to combat negative stereotypes of, and discrimination against, LGBT people. In particular, public information and education campaigns should be integrated into primary, secondary and tertiary education, and complemented with concrete anti-bullying policies, including the provision of support services for victims of bullying, including peer-led initiatives.

To media actors:

- Strengthen the ability of the Commission on Consideration of Complaints against Media to ensure compliance with its decisions by strengthening its ability to impose sanctions for non compliance with its decisions.
- Individual media outlets should:
 - Consider adopting or amending internal ethics codes to reflect strongly the principles of free expression and equality, ensuring that the incitement of hatred against marginalised groups is unacceptable.

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- Educate journalists on “hate speech”, equality and non-discrimination to ensure objective coverage on LGBT-related issues.
 - Ensure that acts of discrimination and the harm caused by discrimination and negative stereotyping are brought to the attention of the public.
 - Give members of different communities an opportunity to speak and to be heard in a way that promotes a better understanding of them and reflects their perspectives.

To civil society:

- Support marginalised groups to develop counter-speech and public condemn cases of “hate speech” on all protected grounds, including sexual orientation and gender identity.
- Express solidarity with LGBT people following “hate speech” from representatives of the authorities or religious leaders.
- Develop alliances with media outlets, media organisations and journalists to address and react on the problem of “hate speech” in media and political discourse.

Moldova: Progress amidst polarisation and politicisation

Rights of LGBT people in Moldova

“I did not promise to be the president for gays.”

Igor Dodon, President of the Republic of Moldova

LGBT people in Moldova experience significant discrimination, hostility and violence, through human rights violations and abuses because of their sexual orientation and gender identity. This climate of hostility is reflected in public discourse.

Since Moldova’s laws do not recognise sexual orientation or gender identity as bases for bias-motivated offences, there is no monitoring or official statistics of such incidents. GenderDoc-M, a civil society organisation working to promote the rights of LGBT people, reports dozens of cases of hate-motivated violence and harassment every year, including beatings, shootings, and vandalism, often perpetrated by family members, neighbours, classmates, or co-workers of those targeted. Many more such incidents remain unreported.¹³⁷

In Moldova, discrimination in the justice system against people on the basis of their sexual orientation and gender identity is institutionalised.¹³⁸ Police officers are often reluctant to investigate allegations or are openly hostile to victims, failing to hold perpetrators accountable or provide redress to victims. The Prosecutor’s Office has refused to initiate several investigations to alleged bias-motivated crimes against LGBT people, claiming a lack of evidence, leading to a climate of impunity where perpetrators are not held to account, encouraging further violence.¹³⁹

There is a staggering lack of social acceptance of LGBT people in Moldova. According to a 2015 survey carried by the United Nations, only 18% of the population are willing to accept LGBT people as citizens and only 1% as family members¹⁴⁰. 80% think LGBT people should not be allowed to organise public events or appear in the media, 66% say they should receive medical treatment, 57% think homosexuality should be punished in some way, with 32% of those thinking it should be punished by prison. Only 7% of respondents said they know a gay or a lesbian person. Levels of reported acceptance have declined since 2010, possibly due to the Church’s very vocal and hostile reaction to anti-discrimination legislation drafted and adopted during that time. The percentages are only slightly better in the capital city, and acceptance of LGBT people positively correlates with respondents’ education and socio-economic status – the higher the education and socio-economic status, the higher degree of acceptance.

During the 2016 Universal Periodic Review, Moldovan government received 14 recommendations related to LGBT rights, discrimination and bias-motivated violence from nine countries. The government accepted all of them, but no further actions followed¹⁴¹.

Public discourse about LGBT issues

The media environment in Moldova is highly polarised and politicised, with media outlets often used to promote the political and economic aims of the politicians and oligarchs who are also media owners or closely affiliated to media. However, there are also media outlets which operate independently and are more open to covering LGBT-related topics. This situation enables more debate on LGBT-related issues, including the rights of LGBT people, than in other countries covered by this report. However, this relative visibility also comes with politicisation of LGBT issues, and consequently “hate speech” against LGBT people, including within the media.

Online media monitoring in Moldova for this report was carried out between October 2016 and April 2017, to better understand the coverage of LGBT issues and the nature of “hate speech” in the media. Monitoring covered the 15 most-visited news and information websites, according to the Moldovan Audit Bureau of the Press and the Internet,¹⁴² as well as news aggregator News.yam.md, Radio Free Europe in Moldova, press agencies Infotag and Info Prim Neo and the media platform Actualitati.md, linked to the Socialist Party.

A keyword search (‘LGBT’, ‘lesbian’, ‘gay’, ‘bisexual’, ‘transgender’, ‘homosexual’ (and derivatives), ‘same sex’ in Russian and Romanian) returned 208 articles in total, out of which little more than half (112) referred to events in Moldova, and the rest to foreign news. Of the coverage about Moldova, 55 (nearly half) referred to the presidential elections. Many articles, while not directly inciting violence or discrimination, used manipulative headlines and spread false and damaging information on LGBT-related subjects.

Researchers also examined discourse by political and religious leaders, focusing on speech around key developments, including the 2016 Presidential elections. The President, Igor Dodon, and various religious leaders, regularly engaged in “hate speech” against LGBT people, with some examples amounting to incitement to discrimination.

Case study 3: Presidential elections

The 2016 presidential elections marked the first time Moldovans elected a president by popular vote since 1996. The two main candidates were Igor Dodon from the Socialist Party, supportive of deeper integration with Russia; and Maia Sandu of the newly established Action and Solidarity Party, committed to further alignment with the EU. Neither candidate could be described as a champion of LGBT equality. The Socialist Party adheres to openly homophobic policies, including opposition to anti-discrimination legislation, the prohibition of LGBT events and the introduction

of a “homosexual propaganda” ban. The Action and Solidarity Party maintains a commitment to human rights, though is not proactively supportive of equality for LGBT people.

During the Presidential election campaign, Igor Dodon positioned himself as a “defender of Orthodoxy”¹⁴³, stating that:

“We [the Socialist Party] are categorically against these gay-parades and against the law on equality of opportunities that was adopted by the pro-European government. In this law, Article 7.1 says discrimination based on sexual orientation in employment is forbidden. This means that gays and other sexual minorities could be teachers in schools for our children, could work in hospitals and so on. These politicians, journalists who support this go to church and say they are Christian. But church law says those who promote homosexuality should not work in institutions that grow and educate the new generation. We should not allow this.”¹⁴⁴

Maia Sandu positioned herself as a practicing Orthodox Christian who prefers to keep her faith private. Early in the campaign, when asked for her opinion on LGBT Pride marches, she said her “party supports human rights, that everyone’s rights should be respected, and that more education and public discussion about tolerance was needed to create a society where everyone would feel good.”¹⁴⁵ However, when asked about her LGBT supporter(s) during TV debates, Sandu responded “I have nothing to do with this community. And my principles are based on respect for the rights of all citizens, regardless of their views and preferences.”¹⁴⁶

Despite this relatively neutral stance, her position was still invoked by both her supporters and opponents, politicising matters related to sexual orientation and gender identity, and precipitating both homophobic and transphobic rhetoric, including in articles condemning her stance.

Discourse on LGBT-related issues during the campaign period was triggered by a Facebook post by Angela Frolov, a well-known LGBT rights activist in Moldova, in which she encouraged support for Sandu. The post was widely reported in Moldovan media, generating exaggerated titles such as “sexual minorities are voting for Maia Sandu”, and “Maia Sandu is supported by the LGBT community.”

In Moldova’s polarised media sphere, the media reaction was predictably divided. Socialist press suggested a massive Pride parade would be held to celebrate Sandu’s victory were she to win,¹⁴⁷ while religious and socialist party leaders used sexist and homophobic “hate

speech” in their coverage of Sandu. Meanwhile, websites popped up overnight, with fabricated stories about Sandu and her prominent supporters having “secret meetings with LGBT” to discuss “legalisation of paedophilia” and “traveling to Europe for homosexual orgies.”¹⁴⁸

The incident also provoked domestic and international concerns about the use of “hate speech” by both media outlets and public figures. Criticism of “hate speech” from a range of civil society and media included *Mediacritica*,¹⁴⁹ *Newsmaker*,¹⁵⁰ *IPN*,¹⁵¹ *Amnesty International*,¹⁵² and *Promo-Lex*.¹⁵³ Notably, a traditionally conservative paper, *Timpul*, published an editorial entitled, “Homophobia and xenophobia in the electoral campaign”,¹⁵⁴ also writing to warn of the dangers of church involvement in politics and the sponsoring of hatred.¹⁵⁵ A petition criticising political campaigning, homophobic and misogynist “hate speech” by religious figures, and calling for church tax, gathered thousands of signatures.¹⁵⁶

The OSCE/ODIHR election observation also raised concerns about “hate speech” during the campaigning period, suggesting the authorities introduce a mechanism to address this.¹⁵⁷ More specifically, the European Network of Election Monitoring Organisations raised concerns about “homophobic and “hate speech” by Bishop Marchel of the Moldovan Orthodox Church at the press conference against the presidential candidate Maia Sandu”, which was not properly prosecuted.¹⁵⁸

Igor Dodon eventually won the election, and has continued his homophobic rhetoric in office, reacting negatively to the Pride March in Chisinau scheduled for 21 May 2017: “I didn’t promise to be the president for gays... You know my opinion. I am categorically against marches of sexual minorities and their registration in the Republic of Moldova. I’m for our traditions, traditional families, Orthodox faith.”¹⁵⁹

Case study 4: Metropolitan Vladimir

In a statement to the Moldovan Parliament on 27 April 2016, the Metropolitan Vladimir (Bishop) of the Moldovan Orthodox Church claimed, “we are a Christian country, according to surveys 98% said they are Christians, and 2% support sexual minorities; it is humiliating for us to be equal with these 2%.”¹⁶⁰ Many MPs from various factions applauded the statement. Immediately after, the leader of the Socialists Party, Dodon (now President), submitted an initiative to parliament to repeal Moldova’s anti-discrimination law. However, this failed on procedural grounds.

Although some media outlets reported the statement without further commentary, there was also a wave of criticism in the press,¹⁶¹ and on social media. A group of 18 civil society organisations, including mainstream human rights organisations issued a statement pointing out that discriminatory declarations in Parliament are unacceptable.¹⁶² In a campaign, GenderDoc-M sent the Metropolitan an Easter card on behalf of the 2% with a call to embrace Christian values of love, peace, and unity.¹⁶³ Feminist Initiatives Group and Fara Ura (the Moldovan chapter of the No Hate Speech Movement) ran a spontaneous social media campaign: “I am the 2% and I am equal to the 98%.” One of Moldova’s most popular online comedy shows, Lumina, ran a skit, ‘The Metropolitan and Discrimination’, that received over 2,000 likes and shares.¹⁶⁴ The subject generated dozens of critical comments towards the Metropolitan, most of them from people with little prior interest in the rights of LGBT people.

Framework for responding to “hate speech”

Since 2003, Moldova has declared an interest in closer association with the European Union, adopting a number of progressive laws promoting equality and freedom of expression, although these are not always implemented in practice. Protection of the rights to equality and freedom of expression in Moldova falls short of its obligations under international human rights law, creating an environment that simultaneously is conducive to “hate speech” while deterring expression to counter it.

Legal framework against discrimination

There has been some progress in securing legal protections against discrimination in Moldova, primarily thanks to legal battles fought by organisations promoting the rights of LGBT people, arguing for implementation of legislation in line with jurisprudence from the European Court of Human Rights (ECtHR). Accordingly, this has been developed ad hoc through the judiciary rather than through legislation, with the notable exception of the field of employment, where discrimination on the grounds of sexual orientation and gender identity is explicitly prohibited. The susceptibility of the judiciary to political pressure makes even these modest victories precarious; and even legislative improvements are subject to reversal by homophobic and transphobic politicians.

Article 16(2) of the Constitution states, “All citizens of the Republic of Moldova are equal before the law and the public authorities, without any discrimination as to race, nationality, ethnic origin, language, religion, sex, political choice, personal property or social origin.”

Law no. 121 on Ensuring Equality (2012) does not include express protections from discrimination on the basis of sexual orientation or gender identity.¹⁶⁵ During drafting of the law, references to sexual orientation were removed from Article 1(1) following pressure from religious and political groups.¹⁶⁶ Gender identity was never proposed as a protected characteristic.¹⁶⁷ Conversely, Article 7 includes sexual orientation as a protected characteristic in the field of employment. While this protection is positive, it raises concerns that this will limit the possibility for other provisions where it is not expressly included to be interpreted expansively.

Article 1(2) of Law No. 121 contains “exceptions” to the law, raising some concerns about protections from discrimination for LGBT people. It creates a broad exemption for religious organisations and “components related to religious beliefs”. To invoke the religious belief of any individual or organisation as justification for discrimination is not compatible with international human rights law. The Supreme Court of Moldova has relied on Article 1(2) to exempt a prominent religious figure from liability for “hate speech” in litigation brought under the law (more details below).

Article 2 lists the definitions used in the Law. In Article 2(g), “instigation to discriminate” is defined as “any behaviour through which a person applies pressure or manifests intentional conduct with

the aim of discrimination of a third party on the basis of criteria mentioned in the law.” The term “instigation” refers to actions more broadly, rather than expression or “hate speech”, per se, though it could feasibly be interpreted to apply to acts of expression. The law lacks related conceptions of “demonstrable intention to discriminate, instructing another to discriminate, and aiding another to discriminate.” According to Article 17, “acts of discrimination are subject to disciplinary, civil, administrative and criminal legislation in force.”

The Council of Europe expert has criticised the law for its vagueness, noting “the language used, at times, seems to suggest an approach extending the margin of appreciation recognised to States beyond the boundaries set by the ECtHR particularly when it to the prohibition of discrimination in relation to sexual orientation, an area of particular sensitivity in the Moldovan context.”¹⁶⁸

Criminal law framework to address bias-motivated crimes

Moldova has no comprehensive provisions recognising bias-motivation as a more severe category of offence as applied to all criminal offences, or as an aggravated form of liability to impose at the sentencing stage.

“Violation of equality of citizens’ rights” was added to Article 176 of the Criminal Code in 2012 to bring it into conformity with the Law on Ensuring Equality. It prohibits “aggravated discrimination” with an open list of characteristics, but it does not cover bias-motivated crimes specifically. This is too broad to be used against expression-related offences, and could be applied arbitrarily.

Bias-motivation is recognised an aggravating factor in a limited number of specific crimes, but only on grounds of “social, national, racial, or religious hatred”. This includes: Deliberate Murder (Article 145), Intentional Infliction of Severe and Less Severe Bodily Injury or Damage to Health (Articles 151 and 152), Deliberate Destruction or Damage to Goods (Article 197) and Profanation of Graves (Article 222).

Legal framework for freedom of expression, association and assembly

Article 32 of the Constitution guarantees freedom of expression of every citizen, although this is limited under part 3, which contains vague prohibitions of “all actions aimed at denying and slandering the State and people” and “instigation to sedition”. It also prohibits “national, racial or religious hatred” and “incitement to discrimination”, explored in detail below.

In practice, Moldova’s legal framework for freedom of expression contains a number of protections for media freedom; as well as provisions that could be used to persecute expression. In reality, these are rarely used; however, the media sphere is highly politicised. While the Broadcasting Code was amended in 2016 to limit the number of media outlets any individual can own, media ownership

remains severely concentrated in the hands of senior political party members and oligarchs, including for printed and online media.

In this environment, journalists are often subject to pressure to reflect owners' interests, which may affect portrayals of LGBT issues, as reflected in media coverage of the Presidential elections. However, there is an emerging number of new, independent media outlets, adding diversity to the media landscape and providing scope for more ethical coverage of LGBT issues.¹⁶⁹

The Moldovan authorities have repeatedly sought to introduce bans on the dissemination of information relating to sexual orientation and gender identity, similar to Russia's "homosexual propaganda" ban. This would clearly violate the right to freedom of expression.

In 2013 Moldova adopted an amendment to the Contravention Code prohibiting the "distribution of public information aimed at the propagation of prostitution, paedophilia, pornography, or of any other [intimate] relations [other] than those related to marriage or family". However, later that year a clause that barred the promotion of "relationships than those linked to marriage and the family" was removed by the Parliament, following international pressure.

There are currently two similar discriminatory "propaganda" bills tabled in the Parliament, and it is not clear whether they will be adopted.

- 1) On 28 April 2016, the Socialist Party tabled Draft Law No. 184, which would prohibit the 'propaganda of homosexual relations among minors'.¹⁷⁰ The bill seeks to amend the Code of Administrative Offences and the Law on the Rights of a Child, in order to prevent "propaganda of homosexual relations among minors by means of assemblies, mass media, Internet, booklets, brochures, images, audio-visual clips, films and/or audio-visual recordings, via audio recordings, amplifiers or other means of sound amplification.' The bill would impose fines of up to approximately 700 EUR for individuals, and approximately 1,200 EUR for legal entities.¹⁷¹
- 2) On 24 March 2017, eight members of Parliament from the Socialist Party tabled Draft Law No.86.¹⁷² The Bill seeks to amend the Law on Protection of Children 'from the Negative Impact of Information, introducing a definition of homosexuality as "a sexual perversion that constitutes a sexual attraction towards individuals of the same sex; pederasty, sexual inversion".' The bill would add information 'of a homosexual character' to the types of information identified as having a negative impact on children (Article 3). It would also prohibit the dissemination of "images that promote homosexuality" on TV and Radio (Article 4).

Freedom of association is specified in Article 41 of the Constitution which states that "All citizens are free to associate in parties and other social and political organisations". The Constitution do not mention other forms of association. This right is further elaborated in the 1996 Law on Public Associations. Civil society faces few barriers to association; however, some CSOs have been subject to

hostility by government authorities, undermining their activities.¹⁷³ LGBT initiatives generally operate freely in Moldova.

Article 40 of the Constitution defines freedom of assembly. Generally, the government upholds the right to assembly, but in the past LGBT marches were banned. The authorities continuously ignored the 2007 decision of the Supreme Court in Moldova that a ban of the 2006 LGBT Pride march violated the European Convention on Human Rights. In 2012, the European Court of Human Rights ruled that the ban of 2005 LGBT Pride march violated the right to assembly and the rights not to be discriminated against¹⁷⁴.

LGBT groups have organised an annual LGBT Pride march in the capital since 2013: these generally attract violent counter protesters, and participants of the march are evacuated by the police, who state that they are unable to provide the security of march participants, which is not in compliance with international human rights law.¹⁷⁵ Law enforcement should plan adequate resources to protect participants of the march to allow them to finish the agreed route despite counter protests.

Restrictions on “hate speech”

Law No. 64 on Freedom of Expression (2012) sets out the parameters of the right to freedom of expression as it relates to “hate speech”, but does not proscribe “hate speech” as such.¹⁷⁶ “Hate speech” is defined in Article 2 as “any form of expression which propagates, promotes or justifies racial hatred, xenophobia, antisemitism and other forms of hatred based on intolerance”. Article 3(5) states that the guarantees for freedom of expression do not extend to “speech that incites hatred or violence”, but it does not itself set out prohibitions. Article 7 covers the right to respect the honor, dignity and professional reputation. A person affected by defamatory or false information may request correction or retraction of the information, or publication of a reply, and moral and material damage caused.

The definition of “hate speech” set out in Law No. 64 is peculiar because the term is not used in any other provision, and this term is not the basis for restrictions in the criminal code. A broad definition for “hate speech” is not necessarily problematic if it is not used for the purposes of limiting expression. For example, the term may be used simply to identify forms of expression that raise concerns in terms of intolerance and discrimination. It is positive that by recognising “other forms of hatred based on intolerance”, it provides a basis for recognising as harmful “hate speech” against people on the basis of sexual orientation or gender identity.

Article 3(5) raises concerns in the way it broadly excludes “speech that incites hatred or violence” from guarantees for freedom of expression. This is a much broader formulation than the type of “hate speech” States are required to prohibit in Article 20(2) of the ICCPR. Article 3(5) uses the term “hatred” without specifying any discriminatory element, and may therefore be interpreted broadly to allow restrictions on all forms of vehement criticism or dissent. Its focus on “incitement of

hatred” is also too broad, as Article 20(2) of the ICCPR requires prohibitions only where advocacy of discriminatory hatred *constitutes incitement* to acts of discrimination, hostility, or violence.

It is concerning that the law on freedom of expression does not provide further guidance to ensure any prohibitions on “hate speech” are implemented in line with international human rights law. For example, there is no specification of the need for limitations to meet the requirement of Article 19(3) of the ICCPR. Likewise, there are no safeguards to specify that such provisions should not be applied in order to protect persons on the basis that the expression is offensive, or embarrassing to the government. The Rabat Plan of Action, launched by OHCHR the same year as Law No. 64 was enacted, elaborates that prohibitions on any “advocacy of [discriminatory] hatred” should require specific intent, with knowledge that it would be both *likely* and *imminent* that one’s audience would be incited to acts of hostility, discrimination or violence as a direct consequence of the expression.

Article 346 of the Criminal Code prohibits “deliberate actions and public calls, including through both printed and electronic mass-media, aimed at inciting national, racial, or religious hostility or discord, the humiliation of national honor and dignity, direct or indirect limitations of rights, or that offer direct or indirect advantages to citizens based on their national, racial, or religious affiliations.”

Article 346 does not provide protection against the advocacy of homophobic or transphobic hatred constituting incitement to hostility, discrimination, or violence, notwithstanding criticism from the Organisation for Security and Co-operation in Europe (OSCE) on this basis.¹⁷⁷ Various forms of incitement are also prohibited which are not required by Article 20(2) of the ICCPR and are not consistent with Article 19(3) of the ICCPR. “The humiliation of national honor and dignity”, is particularly subjective, and could feasibly be abused to limit advocacy of LGBT equality, especially in a context where LGBT equality is often portrayed in public discourse as against national and religious values.

In 2015, the Ministry of Justice drafted a new set of amendments to the Criminal Code and the Code of Administrative Offences that would expand the list of protected characteristics in Article 346 to include: “race, color, ethnic, social or national origin, sex, genetic characteristics, language, religion or belief, political or any other opinion, belonging to a national majority, minority or group, birth or ancestry, disability, health, sexual orientation, gender identity or any other criteria.”

While the new text would bring Article 346 closer to international human rights law, it would not resolve the vague terms “humiliation of national honour and dignity”, “direct or indirect limitation of rights”, or “conferring of advantages to citizens”, or “territorial discord.” It would also increase the possible prison sentence term for incitement, all of which could unduly restrict freedom of expression.

The draft was supported by seven parliamentary committees and voted in first reading in December 2016. However, the Parliamentary Human Rights Committee opposed the draft law on the basis that it provided protections to people on the basis of sexual orientation. They argued that “propagation of another “sexual orientation” different from traditional family relations is

degrading for human beings and damaging to human dignity, and thus violates the Constitution.” No date for the second reading has been set.

“Hate speech” on the grounds of sexual orientation or gender identity has been litigated in Moldova. Attempts to do so by NGOs such as GenderDoc-M, suggests courts are reluctant to impose sanctions, particularly where the defendant is a prominent political figure or religious leader.

For example in *GenderDoc M v. Bishop Marchel of Balti and Falesti*, GenderDoc M argued that a statement made by a Bishop during a TV interview in September 2012 constituted “incitement to hatred and violence” and “disseminated false information”, violating the Law no. 64 on Freedom of Expression.¹⁷⁸

The plaintiffs argued that the following statement from the TV interview with the Bishop constituted incitement:

“The equality law [...] has opened the gates of paradise for homosexuals [...] it] should not allow [LGBT people] employment in educational, health care and public catering institutions. Just imagine if a homosexual – 92% of them have HIV, are sick of AIDS – was employed at a blood transfusion centre, it would be a disaster.”

In a June 2014 judgment, the Balti court of first instance ruled that the Bishop’s statements amounted to “hate speech” and “incitement to discrimination against homosexuals.”¹⁷⁹ His statement was judged to be false and damaging to LGBT people. Bishop Marchel was required to make a public apology, using the following wording: “My statement that 92% of homosexuals carry or are sick of AIDS is false. I apologise to homosexuals for this false statement.” He was also required to pay 10,000 MDL (475 EUR) in moral damages and approximately 20,000 MDL in trial expenses (950 EUR). On 19 February, the Balti Court of Appeal rejected Bishop Marchel’s appeal and maintained the judgment issued by the Balti court of first instance on 9 June 2014. However, in September 2015 the Supreme Court of Justice (SCJ) reversed the earlier decisions.¹⁸⁰

The SCJ ruled that Marchel did not infringe any rights, and that his statement was within his right to freedom of expression. The SCJ argued that Marchel had the special status of a religious figure and that he promoted Orthodox teachings, and therefore he was excluded from incitement provisions (as established in Article 1(2)(c) of Moldova’s anti-discrimination law). The SCJ concluded that Marchel’s declaration did not contain incitement to discriminate, but an encouragement not to lead a sinful life. The SCJ also concluded that Marchel did not spread information about the HIV status of homosexual people, but relied on information published in the mass media (the SCJ included a link to an outdated Russian website).

The statements of Marchel are undoubtedly “hate speech”, propagating harmful stereotypes about LGBT people based on false information. As a prominent public personality, the Camden Principles

state that religious leaders like Marchel have a particular ethical responsibility to avoid statements that may promote discrimination.

When judging whether this “hate speech” is so severe that it requires prohibition, the court should have considered whether this expression constituted “advocacy of hatred” reaching the threshold of inciting its audience to engage in acts of discrimination, hostility or violence.

In ARTICLE 19’s view, the SCJ was wrong to consider that Marchel should be exempt from liability for incitement because of his status as a religious leader, or because the opinion he expressed was connected to deeply held religious beliefs. While international human rights law attaches particular importance to political expression, allowing for the expression of offensive or ill-informed views, it would still require any alleged incitement to hostility, violence or discrimination to be properly assessed.

The Rabat Plan of Action requires courts to pay particular attention to the identity of the speaker, especially when they are in a position of authority or influence over their audience. The SCJ seemingly refused to examine this, paradoxically relying upon the speaker’s prominent role in a deeply influential religious institution to provide a blanket exemption from liability, applying Article 1(2)(c) of the non-discrimination law.

If the SCJ had examined the case properly, they still may have assessed the expression at issue to not have reached the threshold of severity requiring prohibition. While his comments are clearly hateful, it is not immediately clear that they would directly incite acts of discrimination, hostility, or violence. Nevertheless, the use of Article 1(2)(c) to exempt powerful individuals from proper scrutiny is deeply concerning. Such exemptions are not foreseen under Article 20(2) of the ICCPR, and their use to shield particular individuals or institutions from accountability is not compatible with the convention.

The case has been lodged before the European Court of Human Rights where its status is pending.

In response to the ruling in the Bishop Marchel case, GenderDoc-M queried the Constitutional Court on the constitutionality of Article 1(2)(c) of the Law on Ensuring Equality, which creates an exception for religious cults. The Court maintained the article is constitutional, but outlined certain limits to how it should be applied.

In its **16 May 2016** ruling, the Court held that Article 31 of the Constitution asserts the separation of state and religious cults and upholds their autonomy.¹⁸¹ However, the exercise of the right to freedom of expressing religious beliefs or faith should respect public order and security, public health, public morals, as well as rights and freedoms of other people. Thus, the right to hold an opinion protects the person’s inner world and not external manifestation of their convictions. In this sense, the court underlined that Article 1(2)(c) of the Law on Ensuring Equality should be applied to the extent to which it refers to the teachings, canons and traditions of religious cults, which are applicable to their believers, or to

sacerdotal actions in spaces intended for this purpose, so that it does not contradict legislation and does not violate human rights and fundamental freedoms. As the contested provision refers to religious cults and their components in respect of religious beliefs, it does not contradict the Constitutional norms.

In its **13 December 2016** ruling validating the results of the 2016 Presidential elections, the Constitutional Court considered a claim from candidate Maia Sandu that “several representatives of the Moldovan Orthodox Church intervened abusively, contrary to legal provisions, in the process of electing the President of Moldova, by urging parishioners, with threatening calls, defamatory and untrue information, to vote for her opposing candidate.” In particular, it referred to statements by Metropolitan Vladimir and Bishop Marchel.

The Court noted that the principle of laicity, a neutral attitude towards religion, and promotion of pluralism were among the founding principles of the Moldovan state. Under Article 15.2 of the Law on freedom of conscience, thought and religion: “All religious cults and their component parts will refrain from publicly expressing their political preferences or favouring any political party or any socio-political organisations.”

The Court accepted the arguments of the claimant in regard to the aggressive involvement in presidential elections of religious leaders, which used an extreme, xenophobic, homophobic and sexist language in the address of an electoral candidate, these facts being of public knowledge and confirmed by the reports of national and international observers¹⁸².

Positive policy measures by States

Homophobic and transphobic statements by of senior politicians and government officials demonstrate the Moldovan government’s failure to promote equality. Nevertheless, some institutions are beginning to address discrimination on the basis of sexual orientation and gender identity, and there are initiatives in place to start to address “hate speech”.

National Human Rights Institutions:

Unfortunately, the Ombudsperson of the Republic of Moldova (People’s Advocate) is failing to respond to “hate speech”. It does not systematically collect data on violations of the rights of LGBT people. The only reference made in the Ombudsperson’s 2016 annual report, was in relation to freedom of assembly, casting doubt on the effectiveness of LGBT marches as a way to promote equality.¹⁸³ In its stakeholder report for the UN Universal Periodic Review of Moldova in 2016, the Ombudsperson made no references to discrimination against LGBT people.¹⁸⁴

Equality Council:

In 2013, the Parliament established the Council for the Prevention and Elimination of Discrimination and Ensuring Equality (CPEDEE), a collegial body established for the purpose of implementing

the Law on Ensuring Equality, preventing discrimination and promoting equality for victims of discrimination. Its competencies include advocacy and public policy; prevention of discrimination, including awareness raising; examining individual complaints; and issuing recommendations.

Since its establishment in 2013, the CPEDEE has delivered decisions on over 200 complaints, finding an act of discrimination in a third of cases. These numbers appear to indicate that the council offers a quick and accessible remedy to victims. However, there are concerns as to the effectiveness of the remedies CPEDEE is able to provide. The CPEDEE can only issue recommendations and or draw up a protocol regarding a misdemeanour, which it needs to bring separately to court in misdemeanour proceedings. This is therefore an ineffective mechanism for gaining meaningful accountability or redress for victims, or for deterring acts of discrimination.

While sexual orientation is not included as a prohibited ground in Article 1(1) of the Law on Ensuring Equality, there have been instances in which the CPEDEE has found discrimination on these grounds through the direct application of ECtHR jurisprudence.¹⁸⁵ No cases have been determined regarding discrimination on the basis of gender identity.

Decisions of CPEDEE concerning discrimination on the grounds of sexual orientation and gender identity:

1. On 18 May 2015, A moderator at Radio Noroc made the following statement on air: *“In a truly Orthodox state, this (LGBT) march would never take place, because neither authorities nor the people would allow it.”* The company claimed that its internal regulations forbid “intimidation or persecution on grounds of sexual orientation,” that the moderator no longer works for them, and that “this unfounded complaint with negative connotations is an attempt to self-victimise once again by the people in question and an attack on media freedom.” The CPEDEE found both the moderator and the company responsible for inciting discrimination and encouraged them to hold human rights trainings¹⁸⁶.
2. On 23 May 2014 blogger Hristofor Ciubotaru posted an article titled *‘Euro-sodomite parades in Chisinau: 9 key points’* on Publika TV’s Voxpublika.md blogging platform. The article criticised the police for actions aimed at ensuring public order, security, and protection of participants in the 2014 Equality March. It also criticised the mayor for not reacting to “the intention of extremist minorities to march through the centre of the capital,” and the Metropolitan of Moldova for inaction “in the face of homosexual aggression in the city centre.” The CPEDEE determined that the article constituted “hate speech” and incitement to discrimination, and required Publika TV to bring its regulations in line with the Law on Ensuring Equality, and review the blog posts on its platform¹⁸⁷.
3. The President of Moldova, Igor Dodon, made a statement during an interview for Pro TV channel on 12 May 2017: “I didn’t promise to be the president for gays”. On 25 September 2017 the Council made a recommendation to the President to publicly apologise for “discriminatory actions

and incitement to discrimination on the grounds of sexual orientation”¹⁸⁸. The President ignored the decision of the Council.

Media regulation:

The Audiovisual Coordination Council was created in 1996 as an autonomous public authority, having the status of a legal entity regulating the field of audio visual communication.

The Broadcasters’ Code of Ethics was adopted in 2007 by the Audio visual Coordinating Council¹⁸⁹. It includes “sexual orientation” among protected criteria and makes a direct reference to “hate speech” by broadcasters:

Article 13 of the Law provides that Broadcasters shall not discriminate against any person on the grounds of race, ethnicity, religion, sex, age, sexual orientation or disability, and shall not incite hatred or violence when reporting facts or expressing opinions.

These provisions have been applied at least once. On 3 December 2013, the Audiovisual Coordinating Council issued a decision imposing the maximum fine on Radio Journal TV for violating “human rights and fundamental freedoms with regard to the protection of privacy, data protection as well as for attempts to incite intolerance and discrimination”.¹⁹⁰ The decision was related to the disclosure during the live broadcast of personal data and the sexual orientation of an interlocutor. During the broadcast of an entertainment program, the moderator of the show contacted an LGBT person on the phone. The person did not know that the conversation was broadcasted live. The moderator made allusions about the sexual orientation of the person contacted, which led to disclosure of personal data of the person.

Voluntary initiatives by other stakeholders

Civil society initiatives:

LGBT groups are active in efforts to challenge “hate speech”, collaborating with a range of stakeholders, including broader civil society and journalists. This includes awareness-raising campaigns with prominent public personalities; training journalists, and video projects.

In 2016, LGBT activists led by the LGBT rights organisation GenderDoc-M designed a campaign “Without Fear”¹⁹¹ aiming to create a group of public personalities who would actively support LGBT rights, to offer the audience a common interaction context with LGBT people, and to change perceptions by speaking of things that unite, that are felt and experienced by all.

The campaign did not begin by addressing LGBT issues right away, but kicked off with a series of videos featuring well-known artists and media personalities, and later also LGBT people speaking about their personal fears and what they would do if the fear disappeared.

As a result, the Pride march (called “Solidarity march”) “Without Fear” organised in Chisinau in 2016 attracted twice more participants than the previous year’s march, it took place in a more central location, marched for a longer distance and lasted longer than any of the previous ones before the police protecting the demonstration from violent protesters evacuated the participants.

Other civil society projects collected videos and messages in support of LGBT people through a website (Egali.md), and blogs by LGBT equality activists Artiom Zavadovschi and Angela Frolov, showing their everyday lives and debunking common myths about homosexuality. In the videos also featured journalists, bloggers, psychologists and human rights defenders speaking about equality and non-discrimination, becoming allies of LGBT community.

Independent media and self-regulation:

The Moldovan Press Council is an independent self-regulatory institution of the Moldovan press, founded by six journalists’ associations and NGOs. In 2010, together with Council of Europe experts, they revised the 1999 Journalistic Ethics Code to reflect new media trends, international best practices, and recommendations. The new document has been signed by 88 media outlets and institutions.¹⁹²

The Code now includes a section on Tolerance and Non-Discrimination. Article 4.15 states that “The journalist shall equally treat all the persons with whom s/he comes in contact while exercising her/his work duties and shall not discriminate on grounds of sex, age, ethnicity, religion, social status, or **sexual orientation.**”

The inclusion of sexual orientation is a welcome step, but the Code does not make reference to “hate speech” by either journalists or the subjects of media coverage. The Council also produced a style guide with reference to ethical norms, a guide to best practices for online media, and a guide to the principles of tolerance and non-discrimination, which include examples and terms recommended for use by journalists when covering groups vulnerable to discrimination or “hate speech”, including on grounds of sexual orientation.¹⁹³ While encouraging these good practices is positive, these should be reinforced through more detailed provisions in the Ethics Code.

On 23 August 2013, the Council issued a decision concerning Radio Journal FM, described above. GenderDoc-M filed a complaint to the Council, arguing the programme violated ethical code of journalists and incited hatred and violence against LGBT people. The Council found violations of Article 4.1 (right to privacy and dignity of persons) Article 4.2. (Interference in privacy), Article 4.4. (The journalist shall report about the private behaviour of a private person only if such behaviour disturbs public order or violates the rights of other persons) and Article 4.15 (described above)¹⁹⁴. The Council urged the Radio to sanction the moderator and asked the Audiovisual Coordinating Council to issue its decision.

Conclusions

Public discussion on matters related to sexual orientation and gender identity in Moldova is reflective of widespread homophobic and transphobic beliefs. Orthodox Christian religious leaders and political leaders regularly engage in “hate speech”, casting LGBT identities as alien to Moldovan and Christian values. As demonstrated during the 2016 Presidential elections, politicians do not hesitate to exploit public prejudices for political gain. In the worst cases, such “hate speech” may amount to incitement to discrimination, hostility or violence.

Despite a highly polarised media sphere, there is space in mainstream media to engage in positive, accurate coverage of LGBT issues. Concentration of media ownership among conservative politicians and oligarchs, with their own agendas, makes engagement of some media in positive ways a particular challenge. Their instrumentalisation of the media for political gain in a context where rights of LGBT people is increasingly politicised, creates a media environment that is more often conducive to spreading “hate speech” than promoting equality. At the same time, self-regulation practices show promising non-coercive mechanisms for encouraging more positive media coverage.

Responding to “hate speech” requires strong protections for equality and freedom of expression aimed at challenging the root causes of prejudice against LGBT people. Moldova has made some progress in achieving this; however, this is fragile and subject to reversal, depending on Moldova’s political course.

Civil society, activists, independent journalists, academics, intellectuals and international organisations regularly publish on issues relating to sexual orientation and gender identity, particularly online; and also engage in sustained, focused work aimed at targeting the root causes of prejudice. LGBT rights are increasingly discussed within Moldova, and tentative signs of solidarity have emerged between LGBT rights activists and other groups. The number, diversity and prominence of voices who have shown their support to the LGBT community over the past year has helped LGBT people feel a little more secure, and made it easier and more acceptable for allies to speak up. This provides grounds for promoting equality, and responding to “hate speech”. However, while this debate against prejudice needs to be amplified, it would be severely undermined were a proposed bill outlawing “homosexual propaganda” passed through Parliament. Even the existence of such bills has a very negative impact on public discourse.

Moldova’s legal framework provides a starting point for combating discrimination and promoting equality and freedom of expression for LGBT people. While there are few explicit protections for LGBT people in the national legislation, courts have interpreted broader non-discrimination provisions and criminal provisions regarding hate crimes in line with ECtHR standards, providing protections for LGBT people, including for some “hate speech” cases. Nevertheless, this is inconsistent. Regular and sustained efforts by some politicians to block recognition of sexual orientation and gender identity as a protected characteristic and introduce directly discriminatory legislation suggest gains are vulnerable to reversal. Moreover, the blanket exemption within the

non-discrimination law to religious figures means that securing accountability for “hate speech” constituting incitement to hostility, discrimination or violence is impossible when religious leaders embark in violating fundamental freedoms.

At the same time, this must not become the sole mechanism for responding to “hate speech”; and must be reserved for the worst incidences, with longer term positive measures aimed at promoting equality and addressing the root causes of prejudice taking precedent.

Recommendations

To the government of the Republic of Moldova:

- Refrain from engaging in homophobic and transphobic “hate speech”, and speak out against such incidences when they occur. Instruct politicians and other influential people in society on the importance of avoiding statements that might promote discrimination or undermine equality.
- Remove permanently from consideration Draft Law No. 86 on Amending and Completing the Law on Protection of Children from the Negative Impact of Information and Draft Law No. 184 on Amending the Code of Administrative Offences and the Law on the Rights of a Child, which discriminate on the grounds of sexual orientation and gender identity.
- Amend provisions in Law No 64 on Freedom of Expression and Article 346 of the Criminal Code, aimed at preventing “hate speech” to conform with Articles 19(3) and 20(2) of the ICCPR, ensuring that it cannot be used against dissenting or minority expression, as outlined in the Rabat Plan of Action, and that it protects both freedom of expression and equality, including by:
 - Amending definitions of “hate speech” to prohibit the advocacy of hatred that constitutes incitement to discrimination, hostility or violence;
 - Including a broad definition of protected characteristics, including sexual orientation and gender identity.
- Ensure that references to ‘violation of equality’ in Article 176 of the Criminal Code are not used in cases of “hate speech”, which should only be tried under incitement provisions, according to the threshold established in the Rabat Plan of Action.
- Ensure that LGBT people enjoy the right to freedom of peaceful assembly, ensuring that adequate policing measures are in place to protect them from violent attacks by far-right groups.
- Amend Law No 121 on Ensuring Equality, to guarantee protections for LGBT people, and ensure no one is above the law, including by:
 - Including a broad definition of protected characteristics, including sexual orientation and gender identity;
 - Amending Article 1(2) to remove (a) references to religious figures, exempting them from the law; and (b) discriminatory provisions that restrict marriage to a union between a man and woman.

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- Adopt amendments that would develop the notions of bias-motivated crime and incitement of hatred, violence and discrimination, including based on sexual orientation and gender identity, in Articles 77(d) and 346 of the Criminal Code.
 - Provide trainings for public officials on non-discrimination and equality, including on the grounds of sexual orientation and gender identity. Develop and adopt ethical codes and “non discrimination” policies for elected officials.
 - Ensure that the Ombudsperson’s office and the Council for the Prevention and Elimination of Discrimination and Ensuring Equality are properly resourced to work on issues related to equality and non-discrimination, including with regard to sexual orientation and gender identity. Ensure that the CPEDEE is able to provide effective remedies and sanctions.

To the Ombudsperson of the Republic of Moldova and the Council for the Prevention and Elimination of Discrimination and Ensuring Equality:

- Mainstream protection of LGBT rights into all areas of competence, and ensure this is reflected in the National Human Rights Action Plan. Specifically:
 - Collect and publish statistics on cases concerning hate crime and incitement to hatred, violence or discrimination, motivated by homophobia and transphobia;
 - Draft thematic studies and reports on “hate speech”, including on the grounds of sexual orientation and gender identity;
 - Provide training on human rights, equality and inadmissibility of “hate speech”, including on grounds of sexual orientation and gender identity, to state officials, spokespeople and diplomats;
 - Ensure that education institutions provide suitable education on equality as a fundamental right. Provide regular trainings for teachers and administration of education establishments;
 - Introduce relevant policies and conduct training to ensure incidents and reports of bias-motivated crime and incitement to violence and discrimination are properly and promptly responded to by the police and prosecutors.

To media actors:

- Consider adopting or amending internal ethics codes to reflect strongly the principles of free expression and equality, ensuring that the incitement of hatred against marginalised groups is unacceptable.

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- Educate journalists on hate speech, equality and non-discrimination to ensure objective coverage on LGBT-related issues.
 - Ensure that acts of discrimination and the harm caused by discrimination and negative stereotyping are brought to the attention of the public.
 - Give members of different communities an opportunity to speak and to be heard in a way that promotes a better understanding of them and reflects their perspectives.

To civil society:

- Support marginalised groups to develop counter-speech and public condemn cases of hate speech on all protected grounds, including sexual orientation and gender identity.
- Express solidarity with LGBT people following ‘hate speech’ from representatives of the authorities or religious leaders.
- Develop alliances with media outlets, media organisations and journalists to address and react on the problem of “hate speech” in media and political discourse.

Russia: A state-led assault on equality

Rights of LGBT people in Russia

LGBT people in the Russian Federation face significant and rising discrimination, and yet they are almost entirely unprotected by non-discrimination laws. “Hate speech” against LGBT people is led by the state and reinforced by legislation that severely restricts opportunities for challenging the dominant, hateful narrative around diverse sexual orientations and gender identities. Legislation ostensibly aimed at preventing incitement to discrimination or violence is more likely to be used to prosecute than protect minorities.

Public discourse on sexual orientation and gender identity in Russia occurs in a broader environment in which LGBT people face persistent stigma, harassment, and violence. It is widely held that this intensified in 2013 following the passage of the anti “homosexual propaganda” laws. However, the absence of conclusive statistics on levels of bias-motivated crimes and discrimination more broadly makes it impossible to quantify. A 2015 survey by the Russian LGBT Network, an umbrella LGBT group, recorded 284 reported cases of violence and discrimination against LGBT people.¹⁹⁵ Civil society initiatives such as the Laboratory for Sexuality Research analysed some 5,000 media articles between 2011 to 2016: the Russian media reported on at least 363 instances of human rights violations and abuses against LGBT people.¹⁹⁶ These included attacks on gay clubs, homicides, extortion, violence during political demonstrations, and robbery.

In February 2017, Novaya Gazeta, an independent Russian newspaper, published credible reports that over 100 men had been detained, beaten and tortured by law enforcement agencies of the Chechen Republic on suspicion of being gay. At least 27 men were killed¹⁹⁷. Others were returned to their families barely alive from beatings. Law enforcement agencies encouraged relatives of those detained to carry out so-called “honor killings”.¹⁹⁸ The Russian Federal authorities’ response has been inadequate: although they did eventually agree to investigate the reports, their failure to condemn the regional-led violence reinforces a general climate of impunity for violence against LGBT people. Comments by the Chechen authorities following the media reports may amount to the incitement of further violence, explored below.

Since 2012, anti-LGBT vigilante groups have emerged across Russia: a network of radical, nationalist men who lure gay men and teenage children on the pretext of a date, hold them against their will, and humiliate, expose and blackmail them by videotaping the encounter. Hundreds of such videos have been posted online.¹⁹⁹

In 2016, the Equal Rights Trust published the results of the first legal study to examine the practice of Russian courts when dealing with LGBT rights cases. ‘Justice or Complicity’ analysed over 200 court cases dealing with a broad range of subjects, including employment, education, private life, freedom of expression and assembly, and anti-LGBT violence. The report concluded that the Russian courts are currently denying LGBT people in Russia access to justice by failing to provide adequate redress to victims of discrimination and also by contributing to prevalent discriminatory societal attitudes.²⁰⁰

Public discourse about LGBT issues

A lack of resources makes it impossible to reflect the full spectrum of viewpoints and coverage of LGBT people and issues across Russia in this publication. This section seeks to provide a snapshot of representations of LGBT people in Russia, based on monitoring of online media coverage and other online expression undertaken between December 2016 and April 2017, supplemented by additional desk research about media coverage on this topic.

Media monitoring sought to identify some of the worst cases of “hate speech” produced by Russian media and politicians. It also sought to generate a broader picture of how LGBT topics are covered, through monitoring of the three top-cited news agencies Interfax, Ria, and TASS, enabling an examination of how LGBT people and issues are discussed in the government-owned Russian media. Monitoring also looked at independent liberal media sources, which have a lower readership, including Meduza, Svoboda (Radio Svoboda), and Afisha, but may help to show what is missing from more mainstream coverage. Researchers also monitored the social media accounts of some well-known public officials.

Russian state officials regularly articulate hateful and discriminatory viewpoints about LGBT people; unsurprisingly, monitoring uncovered reporting on statements made by public officials; as well as statements published by officials on their own social media pages. Given the lack of independence of Russian media, it is unsurprising that many media outlets produce similar rhetoric in their coverage of LGBT issues. Some online media and press have more independence than TV media, which is entirely dominated by the state, and some articles on these platforms are more neutral and balanced. Nevertheless, the use of ‘non-traditional sexual orientation’ to describe LGBT identities is prolific, even in more neutral coverage, serving to further alienate and stigmatise LGBT people.

Monitoring identified a number of recurring themes. Statements by public officials were highly nationalist, portraying LGBT identities as contradictory to Russian and Orthodox values. LGBT identities are portrayed as a Western phenomenon, imposed by Europe as part of its agenda to weaken and alienate Russia.

Vitalii Milonov, a representative of the State Duma and member of the ruling United Russia Party, is perhaps the most well-known “hate speaker” of the Russian government, consistently engaging in “hate speech” against LGBT people through his social media, public speeches, and politics. His social media platforms were monitored from December 2016 – April 2017, demonstrating a persistent argument that LGBT people go against the essential, true Orthodox values of the Russian people. He posts responses to any LGBT activists’ presence in the public sphere, such as when LGBT activists joined a broader civic protest against the transfer of ownership of St Isaac’s Cathedral from St Petersburg city to the Russian Orthodox Church. Addressing the event, he stated that LGBT activists are: “Crazy faggots, pumped up by their leaders, who have nothing to do with our traditions.”²⁰¹

In March 2017, News47, an online media platform, reported on comments by the head of the town hall administration in Svetogorsk, Sergey Davidov, that there is no such thing as homosexual activity, arguing that “there never were any gay people and never will be, they will not invade, not even from the West.”²⁰²

Such viewpoints are reflected in pro-government media. The most obvious demonstration of this during the monitoring period was a TV-documentary, titled “Gay Over”²⁰³, produced by REN TV channel. Throughout the documentary, the journalists reiterate transphobic, sexist, and homophobic claims, claim that the whole existence of non-heterosexual people in Russia is unnatural, foreign, and falls under the notion of propaganda.

Another theme of media coverage is to equate homosexuality with HIV. This is another topic that Milonov has covered. For example, as the Chechnya crisis unfolded, Boris Konakov, a journalist and LGBT activist who recently made public his own HIV-positive status, chained himself to the Akhmat Kadyrov bridge in St Petersburg to show solidarity with the horrendous mass homicide of gay men in Chechnya.²⁰⁴ In response to this act of protest and of LGBT visibility, Milonov suggested that there is a need to “disinfect the bridge²⁰⁵” and suggested that Chechnya is far more progressive on certain issues than the rest of Russia²⁰⁶. With these words not only did he produce a hateful comment towards one particular person, he also justified and showed his approval of the hate crimes that were being perpetrated against LGBT people in Chechnya.

Finally, monitoring also raised concerns about the very low quantity of accurate media coverage on LGBT issues, and of coverage and discussion by media and politicians of violence against LGBT people and other problems that they experience.

The majority of media outlets only commented on major events that sparked mass news coverage (e.g. the Chechen crisis; the inclusion of a homosexual character in *Beauty and the Beast* – see case studies below). Liberal media (Meduza and Svoboda) cover LGBT-related issues that most of the mainstream media fail to address, for example violence against, and arrests of, LGBT activists at protests.²⁰⁷ Svoboda in particular, reported consistently on challenges faced by LGBT people, including looking at how legislators work on issues related to this topic; and on a number of regional protests.²⁰⁸

Case study 5: Chechen crisis

On 1 April 2017, Novaya Gazeta²⁰⁹ published an article about gay men in the Republic of Chechnya being persecuted and prosecuted, subjected to torture and other ill-treatment and even killed, based on their sexual orientation. Multiple media published a reference to the Chechnya crisis, yet the responses of Chechen officials were especially striking, as they claimed these accusations were false on the basis that there is no homosexuality in the region.

Member of the Chechen Human Rights Council, Kheda Saratova,²¹⁰ not only claimed that there were no homosexual people in the region but also argued that it was perfectly acceptable to kill gay people, and every person and every family should fight against the evil of homosexuality. She highlighted that no one would judge a family if they decided to kill a gay child, because it is a sin, and if a gay person filed a complaint to her, she would not take it into account. Other Chechen spokespeople, the press secretary, Alvi Karimov, and the head of the Ministry of Internal Affairs, Magomed Deniev, argued that this news might be an April Fool's joke.²¹¹ The Human Rights Ombudsperson of Chechnya, Nurdi Nuhazhiev, argued that this news story was a provocation, an attempt by the LGBT community to promote themselves and their 'non-traditional values' at the expense of Chechen people's morality.²¹²

On 1 April 2017 Alvi Karimov, a spokesperson for Ramzan Kadyrov, Head of the Chechen Republic, stated that: "You cannot arrest or repress people who don't exist. If such people existed in Chechnya, law enforcement wouldn't have any problems with them, as their own relatives would have sent them to a place they would never return from²¹³".

ARTICLE 19 considers Karimov's and Saratova's statements to be advocacy of discriminatory hatred constituting incitement to hostility and violence against LGBT people²¹⁴. The UN-backed Rabat Plan of Action²¹⁵ provides that "political and religious leaders should refrain from using messages of intolerance or expressions which may incite to violence, hostility or discrimination", and 'have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of "hate speech".'

Interfax published multiple articles on the Chechnya Crisis, as it was a major media issue for all news agencies. It used homophobic language in its reporting, yet coherently reported developments. The news agency TASS, on the other hand, had only two publications over the course of four months, barely covering the crisis.

ARTICLE 19 is not aware of any complaints lodged regarding incitement to violence by public officials in this case.

Case study 6: Beauty and the Beast

The Hollywood feature film *Beauty and the Beast* sparked coverage in Russian media. The remake of the famous Disney cartoon features a gay character, the first in the history of Disney. Milonov addressed the presence of a gay character as a "homosexual propaganda" and suggested that the Ministry of Culture must completely prohibit the film's screening in Russia.²¹⁶

"This is a movie that shows perverts; children shouldn't see these neoliberal mucks. Adults have the ability to assess how much they are interested in looking at these perverts. The purpose of this film is to instill in our Russian children new European tolerance standards, so that they consider all this to be the norm, but fortunately, thank God, the Ministry of Culture has shown its civic responsibility and addressed this problem."

Most of the articles published on this issue simply reported that Milonov spotted "homosexual propaganda" in a Disney movie.²¹⁷ Most publications, including both mainstream liberal media publications that mocked Milonov's stance and more conservative publications that approved of, or at least did not question, the politician's judgement, emphasised the fact that the gay character is a negative character in the movie. Articles suggested that gay characters can only exist in movies if they are negative characters, and that being 'gay' should be read as a threat to childhood if it has explicitly positive connotations. If the gay character is a negative character, parents, apparently, should not fear, as children will not admire the character anyway. The logic behind stating the negative traits of a fictional character open yet another side of homophobic discourse, suggesting that if representations of gay character are negative, they have a full right to exist in the public realm. In this, media publications follow a similar line of logic that Milonov and his allies postulate: there is no room for a positive representation of homosexuality in Russia.

Framework for responding to “hate speech”

Russia’s legislative and policy environment for responding to “hate speech” is inadequate. Not only does Russia fail to ensure equality for LGBT people, it maintains actively discriminatory legislative provisions. An ongoing assault on LGBT people’s rights to freedom of expression and association limit is also a huge problem, including as it gravely diminishes opportunities for counter speech to promote acceptance.

Legal framework against discrimination

There are no comprehensive anti-discrimination laws recognising sexual orientation and gender identity as protected characteristics and, with a few exceptions in relation to labour rights, the Russian courts have failed to apply international legal standards to protect the rights of this group. In 2016, Russia was ranked 48th out of 49 countries on the Rainbow Europe Map reflecting European countries’ legislation and policies guaranteeing LGBT human rights.²¹⁸

Sexual orientation and gender identity are not recognised explicitly as protected characteristics under Article 19(2) of the Russian Constitution, which ensures equality and prohibits discrimination. Its open-ended list of protected characteristics recognises that everyone should be equal “regardless of [...] other circumstances”, while prohibiting discrimination on “social” grounds. The same language is reflected in relevant provisions on equality and non-discrimination in the Russian Labour Code and the Russian Code of Administrative Offences.²¹⁹ Article 136 of the Criminal Code prohibits “Violation of the Equality of Human and Civil Rights and Freedoms” based on gender, race, nationality, language, origin, property or official status, place or residence, attitude to religion, convictions, or affiliation with public associations or any social groups.

The Constitutional Court has, to a certain extent, endorsed an expansive interpretation of the non-discrimination provisions of the Constitution to recognise sexual orientation and gender identity as protected characteristics.

Though the Constitutional Court found the Federal “homosexual propaganda” ban to be constitutional, the Court also stated that “the state is called upon to take measures aimed at exclusion of possible encroachment upon rights and lawful interests of persons because of their sexual orientation and ensure effective possibilities for protection and restoration of their violated rights on the basis of the principle of equality of all before the law and the court, fixed in Article 19 (Section 1) of the Constitution of the Russian Federation.”²²⁰ At the same time, the reasoning that the ban did not encroach on the rights of LGBT people, as it was justified to protect “public morals” (under Article 55 of the Constitution), is inconsistent with international human rights law.

The Constitutional Court has also given some recognition to equality for LGBT people in the field of labour rights. In the same case, the Constitutional Court recognised that “social group” in Article 3 of the Russian Labour Code includes groups as defined by their common sexual orientation: “This constitutional principle, contemplating, among other things, inadmissibility of limitation in rights and freedoms or establishment of any advantages depending on belonging to some or other social groups, which may be understood also as groups of persons with certain sexual orientation, is rendered concrete in the norms of branches of legislation.”²²¹ The Constitutional Court has not yet considered whether gender identity may also be afforded equivalent protections.

Criminal law framework to address bias-motivated crimes

Article 63(1)(e) of the Russian Criminal Code provides aggravated sentences for a limited range of mostly violent criminal offences there they are motivated by ‘political, ideological, racial, national or religious hatred or enmity or by reason of hatred or enmity with respect to some social group.’

The Constitutional Court has confirmed in its ruling regarding constitutionality of the ban on “homosexual propaganda” that LGBT people constitute a “social group” for the purposes of Article 63(1)(e) of the Criminal Code.²²² However, in reality, Russian police seldom adequately investigate bias-motivated crimes against LGBT people, and if they are brought to court, anti-LGBT bias is rarely found to be a motivating factor. The Equal Rights Trust has documented multiple cases where Russian courts failed to recognise that crimes had been motivated by anti-LGBT bias, despite the defendant openly stating this motive in court.²²³

Legal framework for freedom of expression, association and assembly

Although freedom of expression is guaranteed within Article 29 of Russia’s Constitution, in practice this right is regularly violated, with the government actively working to censor its critics. The government increasingly dominates the public information sphere, controlling most large media outlets, and clamping down on freedom of expression online. In practice, this means there is very little space for accurate and fair public discussion on LGBT issues, a fact exacerbated by the “homosexual propaganda” ban.

Since 2000, media freedom has been eroded to the point that the mainstream media is either directly owned, or influenced, by the Kremlin. There are no national independent TV or radio channels. Independent print media is largely confined to cities with relatively small circulations, therefore independent media outlets largely rely on the Internet to reach their audiences.

The Russian government is increasingly curtailing freedom of expression online, seeking to control what is published on the Internet through surveillance, restrictive legislation and criminal prosecutions

of online dissent.²²⁴ The government has significantly increased its right to block and filter online content, with Roskomnadzor (the country's communications regulator) and the General Prosecutor's office able to directly order blocking of online content without a court order and with limited scope for appeal.²²⁵ These powers are regularly invoked in order to restrict online content about LGBT issues.

Russia has legislation directly restricting expression on matters related to sexual orientation and gender identity.

On 29 June 2013, Russia adopted Federal Law no. 135-FZ, the so-called "homosexual propaganda ban", which amended Article 6.21 of the Code of Administrative Offences of the Russian Federation (2001)²²⁶ on protecting minors. The law bans the 'promotion of non-traditional sexual relationships among minors', providing sanctions of 4,000 to 5,000 roubles (EUR 100 to 120) for individuals; 40,000 to 50,000 roubles (EUR 1,000 to 1,200) for government officials; and up to 1 million roubles (EUR 25,000) or up to 90 days suspension of activity for organisations. The law also provides the basis upon which a number of LGBT assemblies have been prevented from taking place.

Prior to the adoption of the federal law, numerous regional laws targeting "homosexual propaganda" had served to enable and encourage widespread discrimination against LGBT groups, with thirteen regions of the Russian Federation adopting laws banning "propaganda of homosexuality" or "propaganda of non-traditional sexual relationships".²²⁷

This legislation attempts to censor and stigmatise LGBT people and prevents the free flow of information in Russia, including in areas of critical importance such as healthcare and education. Despite this, on 23 September 2014, Russia's Constitutional Court upheld the "gay propaganda" ban as protecting constitutional values such as "family and childhood", arguing that it could be justified in order to protect public morals. The Court also found no interference with the right to privacy and did not view the ban as censoring debates about LGBT relations.²²⁸

The legislation has been heavily criticised by international human rights bodies. For example, a legal opinion issued in June 2013 by the Venice Commission, the Council of Europe's advisory panel on legal matters, concluded that the draft of the adopted federal anti-LGBT law was "incompatible with [the European Convention on Human Rights] and international human rights standards" and should be repealed. The opinion found that the purpose of the law "is not so much to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail non-traditional ones by punishing their expression and promotion."²²⁹

On 20 June 2017, the European Court of Human Rights in the case of *Bayev & Others v Russia*²³⁰ held that the law "[does] not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others. Given the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions are open to abuse in

individual cases, as evidenced in the three applications at hand. Above all, by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.”²³¹ The UN Human Rights Committee has also found region “homosexual propaganda” bans in Russia to violate Article 19(3) of the ICCPR.²³²

Since its introduction the law has been actively implemented to convict persons of “propaganda of non-traditional sexual relationships” both through the dissemination of information at public assemblies (Article 6.21(1)) and through the media and internet (Article 6.21(2)). The list of people who have been found guilty under these provisions include:

- **Sergey Alekseenko**, a Murmansk-based LGBT activist was fined 100,000 roubles (1,450 EUR) for content published on the social media page of a group providing legal and psychological support for LGBTI people on 18 January 2016.²³³
- **Evdokiya Romanova**, a member of the Youth Coalition for Sexual and Reproductive Rights, was charged with “propaganda of non-traditional sexual relationships among minors using the Internet” in September 2017. The charges stem from links to articles on LGBT rights, which she reposted on various social networks. Romanova was found guilty on 18 October 2017 and fined 50,000 rubles (750 EUR).²³⁴

Prior to the introduction of the “Homosexual Propaganda” law in 2013, Russia’s Parliament passed Federal Law 139-FZ “On Introducing Amendments to the Law on Protection of Children from Information Harmful to Their Health and Development.” This allows Roskomnadzor, the federal agency empowered to oversee online and media content, to block content deemed to be “harmful” to children’s health. This has been actively applied to block LGBT content and websites online. In April 2016, a court in the Siberian town of Barnaul ruled to block the website of a project Deti-404 supporting young LGBT people²³⁵. In September 2016, Parabelsky district court ruled to block BlueSystem.ru, a highly popular LGBT news site²³⁶.

NGOs in Russia face significant barriers to operation, including the 2012 ‘foreign agents’ law. This requires all Russian NGOs that receive foreign funding and are engaged in loosely defined ‘political activities’ to register as ‘foreign agents’, a term popularly understood in Russia to mean ‘traitor’ or ‘spy’.²³⁷ NGOs must indicate their ‘foreign agent’ status in publications, which diminishes their credibility in the eyes of the public, subjects them to onerous reporting requirements, special inspection orders, and restrictions on the activities they may undertake. Criminal and administrative sanctions for non-compliance with ‘foreign agent’ obligations include, *inter alia*, fines of up to 500,000 roubles (7,000 EUR), or imprisonment of up to two years.²³⁸

The laws are disproportionately applied against organisations that are critical of the government, and several LGBT organisations have been targeted by the ‘Foreign Agents’ law. For example, in 2013

LGBT organisation ‘Coming out’ was fined twice, with 500,000 and 300,000 roubles²³⁹ (12,000 and 7,500 EUR). Other LGBT organisations: Rakurs, Maksimum, Sphere and even LGBT film festival “Side by Side” were also included in the register of ‘foreign agents’. While they continue to operate, this undermines their effectiveness and ability to stand up to “hate speech” and promote equality. This problem is further compounded by violence and targeted physical attacks against LGBT groups by nationalist groups, to which the police have largely failed to respond²⁴⁰.

Authorities frequently refuse permission to public assemblies organised by LGBT groups: Moscow Pride has been banned every year since 2006;²⁴¹ in St Petersburg, an assembly application for International Day Against Homophobia was dismissed in May 2016; and in the Arctic Circle, a planned ‘Polar Pride’ was banned in January 2017.²⁴² Refusals to hold such events are discriminatory and violate the rights to freedom of expression and assembly and the right of non-discrimination. In 2016, there were at least 70 court cases challenging refusals to organise LGBT related events across Russia: in at least 10, the courts ruled that the ban to hold an assembly was unlawful.²⁴³ Activists continue to demonstrate, and are regularly detained. Most recently, on 1 May 2017 several activists were detained in St. Petersburg for raising a rainbow flag during a May Day procession.²⁴⁴

Restrictions on “hate speech”

Russian legislation includes various provisions prohibiting “hate speech”, including that which amounts to incitement to violence. However, these fall short of the requirements under international law, they are both ambiguous and allow for abusive application against the very minorities they should be protecting, including LGBT activists.

Article 29(2) of the Russian Constitution prohibits “propaganda or agitation, which arouses social, racial, national or religious hatred and hostility” as well as “propaganda of social, racial, national, religious or linguistic supremacy.” This prohibition is much broader than the requirements of Article 20(2) of the ICCPR, and raises concern under Article 19(3) of the ICCPR. Its focus on the advocacy of hatred rather than only that expression which constitutes incitement to discrimination, hostility, or violence, casts a wide net allowing the criminalisation of “hate speech” that is not necessary to sanction.

This is seen in the national legislative provisions implementing Article 29(2) of the Russian Constitution. Article 282 of the Criminal Code proscribes “actions aimed at the incitement of hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group, if these acts have been committed in public or with the use of mass media.”

The provisions in the Criminal Code are similarly broad to the Constitutional prohibition, being focused on proscribing expression that spreads discriminatory “hatred”, “enmity”, or “abasement of a person”, rather than focusing on such expression that is intended and likely to incite actions of hostility, discrimination or violence.

The absence of explicit protection for LGBT people in these provisions of the Criminal Code has limited the possibility of targets of such expression relying on the authorities to prosecute even the worst incidences of “hate speech” amounting to incitement of hostility, discrimination or violence.

Nevertheless, in one Article 282 case, a Moscow Court ruled in 2013 that leaflets disseminated during a public assembly about homosexuals being inferior to others “abased the human dignity of Jews and homosexuals”, in violation of the Criminal Code.²⁴⁵ However, the case was later terminated, as the court ruled defendant to be insane. In other cases where Article 282 has been relied on, prosecution refused to initiate criminal proceedings and refused to interpret the language of “social group” to include persons identified according to their sexual orientation or gender identity, notwithstanding a number of cases concerning express calls for discriminatory violence.²⁴⁶ Exposing the level of ignorance regarding international human rights law in this field, one judgment concerning a prosecution brought under Article 282 refused to recognise “sexual orientation” as a protected characteristic by equating the notion with “satisfying one’s sexual needs”. The interpretation given by the Constitutional Court of “social group” does not appear to have influenced lower courts’ broader approach to non-discrimination cases.

Federal Law No. 114-FZ On Countering Extremist Activity includes “incitement to social, racial, national or religious discord”, among a range of activities defined as “extremist” and that are therefore prohibited. The Ministry of Justice creates and maintains, based on court rulings, a list of “extremist materials”, including a variety of publications and audiovisual materials. At the time of writing, that list contained 4,200 items. In case of dissemination of “extremist materials” to incite hatred, the case falls under Article 282 of the Criminal Code.

The law on “Countering Extremism” raises profound freedom of expression concerns, including for the expansive censorship powers it gives to the Ministry of Justice. They are more often used to target criticism and dissent, including from LGBT activists:

- In 2015, Konstantin Golava, an LGBT activist, was charged with dissemination of extremist materials for 2014 social media posts when he published a popular meme criticising supporters of Russia’s policy and a poem ridiculing supporters of annexation of Crimea, and supporters of Stalin. The charges included “incitement to hatred towards a social group”: “Russian citizens”, under Article 282 of the Criminal Code. He sought refuge to Sweden to avoid prosecution.²⁴⁷
- Among the listing of “extremist” images maintained by the Ministry of Justice, one entry is a famous protest image of Putin, photo-shopped to paint his eyes and lips with makeup. To imply “the non-standard sexual orientation of the President of the Russian Federation” was determined by the Ministry of Justice as “extremist.”²⁴⁸

ARTICLE 19 considers that concepts of “extremism” or “violent extremism” are inherently vague and should not in principle be used as a basis for restrictions on freedom of expression.

Positive policy measures by States

Given the extent of state-sponsored homophobia in Russia, it is unsurprising that there are no stated initiatives to address discrimination and “hate speech” against LGBT people.

National human rights institutions:

The national human rights institution in Russia is the High Commissioner on Human Rights in the Russian Federation, established under articles 45 and 103 of the Russian Constitution of 1993. Their functions are listed within the 1997 Federal Law On the High Commissioner for Human Rights in the Russian Federation which also provides for the establishment of regional human rights commissioners in the territorial entities of Russia.²⁴⁹

Despite having a mandate to “facilitate implementation of civil and human rights and freedoms in Russia”, successive High Commissioners have largely failed to address increasing discrimination against LGBT people, or related human rights violations and abuses. Tatiana Moskalkova, who was appointed to the post in April 2016 said in an interview with Novaya Gazeta in August 2016, “from 2012 and onwards, sexual minorities haven’t experienced any violations of their rights. They didn’t cease to exist, they don’t face any obstacles.”²⁵⁰

Following the violence against gay men in Chechnya, the Secretary General of the Council of Europe urged Russia’s High Commissioner for Human Rights to investigate the attacks²⁵¹. Due to international pressure, in November 2017, Moskalkova openly criticised the Investigative Committee of Russia for “insufficient activity” and called for opening a criminal investigation into the alleged murders and torture of gay men in Chechnya²⁵².

Media regulation:

There are no positive measures related to media regulation in Russia that would address cases of “hate speech”. The Federal Service for the Supervision of Communications, Information Technology and Mass Communications (Roskomnadzor) supervises compliance with Russian legislation related to mass media and mass communications, television and radio broadcasting. It regulates the registration of mass media and issues broadcasting licenses. In recent years Roskomnadzor has been especially active in overseeing online content. In some cases it has powers to block entire websites without a court ruling. The content that Roskomnadzor can block includes materials related to LGBT issues if they constitute “propaganda of non-traditional sexual relations”, based on the Federal Law 135-FZ.

Other online materials that can be blocked include: websites with “unlawful” content (Law 149-FZ), information calling for “mass riots, extremist activities and unauthorised mass public events” (Federal

Law 398-FZ), content “promoting suicide” (Law 139-FZ). Roskomnadzor also blocks content included in the list of “extremist materials” which is part of the Law, On Combatting Extremist Activities²⁵³.

Notices from Roskomnadzor to remove content do not need to specify what content was problematic. Failure to respond to a warning to take down the content within 24 hours can lead to blocking the website or the imposition of serious administrative penalties with the potential to cause significant financial issues for media outlets. If more than two warnings are issued to a mass media outlet within a year, the regulator has the right to request its closure.

The new law that came into force in January 2018 strengthens state control over activities of the media, both on-and-offline, by requiring mass media outlets, as well as broadcasters or publishers to report if they are receiving foreign funding. This will likely place greater pressure on independent media outlets, since, as with other legislation outlined above, a failure to comply will incur significant fines²⁵⁴.

Voluntary initiatives by other stakeholders

Independent media:

The Panel for Complaints about the Media²⁵⁵ is an independent ethics body for journalists, established as a voluntary, self-regulatory body to improve journalistic ethics. It aims to provide an initial mechanism for arbitration of disputes, avoiding the need for litigation in the courts. However, relatively few media outlets have joined the panel as members.

The Panel operates according to the Code of Professional Ethics of the Russian Journalist,²⁵⁶ Article 5 of which obliges the journalist to respect the honour and dignity of people who become the objects of his or her professional attention, and to avoid “derogatory allusions or comments in relation to race, nationality, colour of the skin, religion, social origin, or sex as well as in relation to the physical handicap or disease of the person”. Individuals may appeal to the Panel about content that breaches this code. The Panel has no competencies to invoke sanctions, however, it can make recommendations and pronounce media content that fails to uphold ethical standards.

The panel previously found media coverage to incite hatred on the grounds of sexual orientation and gender identity.

In 2011 the Panel issued a decision concerned a TV broadcast about same-sex couple and their children which was considered by the complainants as biased and disseminating false information. The broadcast was assessed as contributing to the formation and strengthening negative stereotypes against homosexual and bisexual women, discrediting their relationships and families²⁵⁷. However, it was followed by no reaction by the TV channel concerned.

Another case concerned a TV broadcast in September 2014 about QueerFest, an annual festival in St. Petersburg that promotes LGBT human rights, in which festival participants were described as “perverts”. The organisers of the festival complained to the Panel, which upheld the complaint, stating that the TV programme “incited hatred”²⁵⁸. While this is welcome, the effectiveness of this as a mechanism is undermined by the small circle of media outlets that have joined the Panel and agreed to comply by its standards; as well as the lack of remedial actions that it offers. There has been no later decisions published regarding incitement to hatred on the grounds of sexual orientation and gender identity.

Civil society initiatives:

The very hostile environment in which civil society in general, and LGBT communities in particular, operate, makes it extremely difficult for civil society to explore initiatives and actions to address “hate speech” towards LGBT people.

Despite this repressive environment, there are initiatives being made by civil society to address this. In 2017 an interactive documentary “Slovo” was created by a group of artists and activists from St. Petersburg, Russia²⁵⁹. The main theme of the project was “hate speech”, including towards LGBT people. The project focused on individual stories of people affected by “hate speech”, including LGBT people.

Moreover, SOVA Center for Information and Analysis based in Moscow conducts research on racism, xenophobia, and misuse of anti-extremism legislation. Their publications often contain information about violation of LGBT rights, including cases of incitement to violence²⁶⁰.

Conclusions

The Russian state has created an environment in which discrimination on the grounds of sexual orientation and gender identity is not only tolerated, but enshrined in law and encouraged by public officials through “hate speech”. Impunity for widespread violence against LGBT people perpetuates homophobia and transphobia. It is therefore unsurprising that such prejudice is reflected in public discourse on LGBT people and issues: monitoring conducted as part of this project confirmed public officials’ use of “hate speech”, which is met with a failure of States to respond appropriately, including impunity for the most serious cases where prosecutions would be warranted. State-controlled media largely reflected homophobic viewpoints of the government and society, and similarly goes unchecked.

Such pervasive homophobia and transphobia requires a response addressing the root causes of prejudice: robust non-discrimination legislation; and balanced and accurate media coverage and public campaigns about LGBT people. Unfortunately, the Russian legislative, policy and social environment is entirely hostile to such initiatives.

People wishing to speak positively about LGBT issues face significant barriers. The “homosexual propaganda” ban exacerbates a generally dire situation for freedom of expression: most media outlets are co-opted by the State, and those expressing viewpoints online run the risk of criminal prosecution. LGBT organisations are limited in the work they can do, facing legislative barriers to operating, compounded by the risk of physical attacks, to which the police have failed to respond.

Worryingly, monitoring identified some incidences of “hate speech” representing incitement to hostility and violence against LGBT people, most notably by Chechen officials in the aftermath of the large scale and systematic human rights violations and abuses against gay men there. Provisions of the Criminal Code that should protect from incitement of hostility, discrimination or violence, are woefully inadequate. Rather than being used to protect minorities, their ambiguity allows their abusive application to silence critical voices. This is in clear violation of international standards on freedom of expression and equality, and underscores the importance of wholesale reform.

Given this difficult context, it is remarkable that a number of NGOs and journalists continue to work to push back against the state narrative against LGBT people. There is a need for support and solidarity with domestic initiatives focused on positive measures such as counter-speech, campaigning and cooperation with independent media outlets. This will help to start a broader discussion on the problem of “hate speech” and its consequences, and build solidarity between various civil society groups, human rights lawyers, independent media and journalists to jointly address discrimination on the grounds of sexual orientation and gender identity.

Recommendations

To the government of the Russian Federation:

- Refrain from engaging in homophobic and transphobic “hate speech”, and speak out against such incidences when they occur. Instruct politicians and other influential people in society on the importance of avoiding statements that might promote discrimination or undermine equality.
- Repeal Federal Law no. 135-FZ, the so-called “homosexual propaganda ban”, and ensure that LGBT people can exercise their rights to freedom of expression, association and assembly without discrimination.
- Amend Article 282 of the Criminal Code on discriminatory incitement to conform with Articles 19(3) and 20(2) of the ICCPR, ensuring that it cannot be used against dissenting or minority expression, as outlined in the Rabat Plan of Action, and that it protects both freedom of expression and equality, including by:
 - Requiring proof that a proponent of “hate speech” intended to advocate hatred in such a way that it constituted incitement to hostility, discrimination or violence, and that such outcomes were a likely consequence of their conduct;
 - Adding sexual orientation and gender identity as protected characteristics.
- Amend legislation “On Countering Extremist Activity” to ensure that it complies with international standards on freedom of expression, ensuring they only prohibit expression constituting intentional incitement to violent acts where the expression is likely to lead to such acts being incited.
- Ensure that people can access information on any matter that would not meet a restriction under Article 19(3) of the ICCPR, including by revoking the authority of Roskomnadzor to block websites without judicial oversight and ensuring that the process of blocking websites meets international standards.
- Repeal or amend legislation that prevents participation in peaceful assemblies, and end discriminatory practices targeting assemblies organised by LGBT people.
- Repeal Federal Law No. 121-FZ on “foreign agents” and Federal Law No. 129-FZ on “undesirable organisations” to enable the operation of civil society organisations, including those focused on the promotion of rights for LGBT people.
- Adopt a comprehensive anti-discrimination law to provide protections from discrimination on the grounds of sexual orientation and gender identity, in all sectors, and not just limited to the field of employment.

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- Sexual orientation and gender identity should be specifically included in all the aggravated forms of offences and the general provisions on aggravating circumstances under Article 63(1)(e) of the Criminal Code.
 - Ensure that public officials at all levels vigorously condemn physical attacks against LGBT people when they occur, and ensure a prompt, effective and impartial investigation into attacks; and that perpetrators are brought to justice, and that effective remedies are provided to victim-survivors.
 - Provide trainings for public officials on non-discrimination and equality, including on the grounds of sexual orientation and gender identity. Develop and adopt ethical codes and “non discrimination” policies for elected officials.
 - Introduce training for personnel working within the criminal justice system (including police, prosecutors and the judiciary) on international standards on equality and non-discrimination, including with regard to sexual orientation and gender identity.
 - Organise public information and education campaigns, in collaboration with civil society, to combat negative stereotypes of, and discrimination against, LGBT people. In particular, public information and education campaigns should be integrated into primary, secondary and tertiary education, and complemented with concrete anti-bullying policies, including the provision of support services for victims of bullying, including peer-led initiatives.

To the High Commissioner for Human Rights:

- Mainstream protection of LGBT rights into all areas of competence, specifically:
 - Collect and publish statistics on cases concerning hate crime and incitement to hatred, violence or discrimination, motivated by homophobia and transphobia;
 - Draft thematic studies and reports on hate speech, including on the grounds of sexual orientation and gender identity;
 - Introduce relevant policies and conduct training to ensure incidents and reports of bias-motivated crime and incitement to violence and discrimination are properly and promptly responded to by the police and prosecutors.

To media actors:

- Amend the Code of Professional Ethics of the Russian Journalist, in order to:
 - Include prohibition of discrimination on the grounds of sexual orientation and gender identity;

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- Encourage avoidance of unnecessary references to race, religion, gender, sexual orientation, gender identity and other group characteristics that may promote intolerance.
 - Strengthen the ability of The Panel for Complaints about the Media to ensure compliance with its decisions by strengthening its ability to impose sanctions for non compliance with its decisions.
 - Individual media outlets should:
 - Consider adopting or amending internal ethics codes to reflect strongly the principles of free expression and equality, ensuring that the incitement of hatred against marginalised groups is unacceptable;
 - Educate journalists on “hate speech”, equality and non-discrimination to ensure objective coverage on LGBT-related issues;
 - Ensure that acts of discrimination and the harm caused by discrimination and negative stereotyping are brought to the attention of the public;
 - Give members of different communities an opportunity to speak and to be heard in a way that promotes a better understanding of them and reflects their perspectives.

To civil society

- Support marginalised groups to develop counter-speech and public condemn cases of “hate speech” on all protected grounds, including sexual orientation and gender identity;
- Express solidarity with LGBT people following “hate speech” from representatives of the authorities or religious leaders;
- Develop alliances with media outlets, media organisations and journalists to address and react on the problem of “hate speech” in media and political discourse.

Ukraine: Unfulfilled promises

Rights of LGBT people in Ukraine

Despite significant social upheaval in Ukraine following the Maidan protests in 2014 and a clear political reorientation towards integration with the EU, the rights of LGBT people in Ukraine are still not fully protected, leaving them vulnerable to violence and discrimination. Civil society is strong and well organised, and there has been a shift towards some politicians speaking in favour of LGBT rights, creating an environment where positive change could be fostered. Nevertheless, the government is failing to fulfil its obligations to ensure equality of LGBT people, including those in the National Human Rights Strategy.²⁶¹ Signed by President Poroshenko in 2015, this outlines necessary reforms to improve the human rights situation, including for LGBT people, by 2020.

Negative societal attitudes towards LGBT persons are widespread in Ukraine, and are encouraged in public discourse by religious actors and some politicians. Prior to the Maidan protests, Ukrainian deputies, following the example of the Russian Duma, attempted to pass a number of draft laws prohibiting 'homosexual propaganda' which would expressly viewpoints on the basis of support for LGBT equality. The most recent of these was rejected by parliament following international pressure in 2013. However, a number of those deputies who favoured of this legislation remain in parliament after the Maidan protests and continue to both shape public discourse and influence the legislative agenda.

Religious institutions take a publicly homophobic position, adding to an environment in which violence and discrimination against LGBT people is legitimised. In 2013, the Ukrainian Orthodox Church was in favour of the adoption of the bill banning "homosexual propaganda"²⁶². Religious leaders later successfully opposed attempts to include sexual orientation and gender identity as protected characteristics in the anti-discrimination law, adopted in 2012 and amended in 2014.

The All-Ukrainian Council of Churches and Religious Organisations blocks legislation aimed at protecting the rights of LGBT people.²⁶³ The Council of Churches has a consultative status with the government, and is the only public association represented at every ministry and in most parliamentary committees.²⁶⁴ In practice this affords it unique access to influence policy-making. Even though the Council of Churches was not able to substantially influence legislation within the Visa Liberalisation Action Plan, focused on closer integration with the EU,²⁶⁵ it successfully blocked several international agreements and national policy decisions that would have advanced protections for the rights of LGBT people: in particular, ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which uses such terms as "sexual orientation", "gender", and "gender identity", and a resolution of the Public Health Ministry cancelling the legislative ban on HIV-positive and transgender people adopting children.²⁶⁶

There are at least 20 far-right informal groups currently active in Ukraine that commit homophobic and transphobic crimes, in particular Okupai-pedofilai (Occupy paedophilia) and Modniy Prigovor (Fashionable Sentence), who stalk homosexual men, beat them up, humiliate them, film the event, and upload footage to the Internet.

The Main Investigation Department of the National Police collects statistics on hate crimes. Statistics cover crimes based on the grounds of racial, national or religious intolerance, as well as bias-motivated crimes against LGBT people and people with disabilities, although the law does not include these latter two groups as protected characteristics. For the first time, in 2016, the police published hate crime data recorded throughout 2015: out of a total of 157 incidents, nine were recorded as motivated by bias against LGBT people.²⁶⁷ While such monitoring is a start, there are questions around its comprehensiveness. In contrast, annual monitoring by the Human Rights Centre Nash Mir (Our World) documented 346 hate crimes and incidents of “hate speech” against LGBT people between 2014 and 2016, indicating underreporting of hate crimes in general, including homophobic violence, in the official statistics.²⁶⁸

The police are extremely reluctant to investigate cases of homophobic and transphobic crime. Most of the victims do not report attacks to the police as they do not trust the system, fear harassment and violence from the police or having to divulge information about their sexual orientation.²⁶⁹ The absence of an effective investigation and relevant legal categorisation of these offences as hate crimes sends a clear message about impunity for such crimes.

Public discourse about LGBT issues

Monitoring of public discourse on LGBT issues in online media was undertaken between December 2016 and April 2017, in two stages outlined below. Monitoring identified 480 articles or posts in total. The majority of articles or posts, approximately two thirds, were neutral in their coverage; with the rest including some form of transphobic or homophobic language. This included examples of incitement to violence, noticeably prior to significant LGBT events, such as Pride marches.

During the first stage, four online media outlets were monitored, all of which are considered to be independent of the government: *Liviy Bereg*, *Radio Liberty*, *Zerkalo Nedeli* and *Ukrayinska Pravda*. The first two have smaller audiences and are focused on human rights, while the latter are more widely read and may pursue more populist viewpoints. A keyword search using specific terms (e.g. LGBT, homosexuality, homosexual, same-sex relationships, transgender) identified 405 relevant articles. 129 of these articles were published by *Radio Liberty*, 111 by *Liviy Bereg*, 90 by *Ukrayinska Pravda*, and 75 *Zerkalo Nedeli*.

The second stage involved additional online media monitoring, specifically related to events promoting the rights of LGBT people in Ukraine, in order to obtain a more comprehensive understanding of homophobia and transphobia in Ukrainian media coverage. These included street events (March of Equality; *KyivPride-2016*; *Odessa Pride 2016*; feminist marches linked to International Women's Day on 8 March); thematic events (the Equality Festival organised by the human rights organisation *Insight*, in several Ukrainian cities); film screenings of *This is Gay Propaganda*; and legislative amendments promoting LGBT rights, including an anti-discrimination amendment to the Labour Code of Ukraine. As a result, 75 additional publications were collected from various types of media: national and regional news websites, including religious and far-right organisations.

Generally, the more neutral or positive articles contained references to LGBT issues in the international context, such as translated news items or information about anti-discrimination policies in the USA and the EU, the terrorist attack in Orlando, and homophobic initiatives in Russia.

Media coverage about domestic Ukrainian events was divided. Some journalists' articles were clearly homophobic and or transphobic, providing a platform only to radical, anti-LGBT voices, without any additional commentary or efforts to reflect the perspectives of LGBT people.²⁷⁰ However, such rhetoric was challenged in other publications. For example media published statements from international human rights organisations and European politicians and diplomats about the need for legislative protection for LGBT rights in Ukraine, or condemning discrimination and violence associated with public events in Ukraine.

“Hate speech” published in the media included a statement by a right-wing group leader that the LGBT community is “a group of perverts, [acting] with funding from foreign oligarchs with the purpose of destroying the foundations of the Christian society”²⁷¹, reported without critical commentary or presentation of contrary perspectives. Church leaders and journalists called the LGBT community a “herd of sinners”,²⁷² while homosexuality and transgenderism was described as “unnatural and immoral behaviour, condemned by god, and fights against god’s idea of family, man and woman”.²⁷³ The pathologisation and dehumanisation of LGBT people was also voiced from a more secular position: far-right publications and op-eds were full of statements that “a healthy cell of the society is a healthy family where children are growing up”,²⁷⁴ that the LGBT community is a “useless bunch of outcasts and deadbeats, [...] who mooch off of the body of Ukraine”,²⁷⁵ that “[gays] are not people, they are anthropoids”,²⁷⁶ “degenerates who desecrate Ukrainian land”,²⁷⁷ and the “cancerous tumour of humanity”.²⁷⁸

Such “hate speech” did not go unchallenged, however. An announcement by a Conservative politician that “gay culture leads to destruction of the world” was accompanied by a headline at Liviy Bereg: “Commissioner for Family Affairs turned out to be a homophobe”²⁷⁹. However, even these liberal publications considered to be more open, commonly use offensive euphemisms and politically incorrect or derogatory terminology: “person of non-traditional orientation”,²⁸⁰ “secret representatives of LGBT” (about closeted gay people),²⁸¹ “men of a specific type”,²⁸² and “some sort of orientation or some sort of propensities”²⁸³. ARTICLE 19’s Camden Principles for Freedom of expression and equality suggest that media should avoid unnecessary references to race, religion, gender and other group characteristics that may promote intolerance.

Several instances of homophobic and transphobic “hate speech” were registered prior to public events and marches organised to promote LGBT rights, which are almost always accompanied by incitement and threats of physical violence and actual attacks. Incitement of violence by far-right groups and politicians’ homophobic statements were often published in the media without a critical assessment. However, again, monitoring also uncovered positive examples of public discourse, where politicians openly supported public events dedicated to the rights of LGBT people. After violent attacks on the Equality Festival in Lviv in 2016, where local authorities were reluctant to protect the right to peaceful assembly of LGBT people, Pavlo Klimkin, Ministry of Foreign Affairs condemned the attack on Twitter, stating that “tolerance and non-discrimination make Ukraine stronger”.²⁸⁴ Serhiy Petukhov, Deputy Minister of Justice of Ukraine on the issues of the European Integration stated during a conference on EU integration and LGBT issues in March 2016: “The concept of human rights is universal, we cannot take only separate elements that we like. This is important, especially in the context of combating discrimination against LGBT people in Ukraine”²⁸⁵.

Two case studies are considered here in greater detail: KyivPride-2016 and the Zaporizhia Equality Festival.

Case study 7: KyivPride-2016

KyivPride is Ukraine's largest annual LGBT rights march, receiving the most media coverage. Since 2015 it has been supported by the President and the police, and presented on the international stage as evidence that Ukraine has opted for "European values" and for EU integration. However, neither the President nor the Mayor of Kyiv have participated in the event so far. The event is announced several months in advance, unlike all other street events promoting LGBT rights. Regardless of police ensuring safety during the march, media coverage of the event was full of homophobic statements, which often portrayed the march as 'anti-Ukrainian'.

In 2016, before the march, a number of media outlets (such as Lenta.ru, Antikor, Vesti) published information that police had refused to ensure the safety of a march for equality as it contradicted their beliefs, and forcing them to do so was a violation of their rights.²⁸⁶ The Ministry of Internal Affairs confirmed men who made a public statement were not police workers and that the March would be protected. Despite this statement, many media published articles stating that the entire police force were against Kyiv Pride.²⁸⁷

Several church leaders made statements against the 2016 event. Metropolitan Bishop of the Ukrainian Orthodox Church said that holding the Equality March is "extremely inappropriate and blasphemous, with the background of the continuing war in eastern Ukraine, where our fellow countrymen continue to die". The priest called on believers to "avoid violence", while accusing organisers of KyivPride of manipulation: 'the word "equality" in theory should calm down the society and convince people that in this way we move to the European values. But equality of what with what? Natural and unnatural? Family with sin? Good with evil?'²⁸⁸

This was followed by a far-right website, *Banderovets*, publishing a statement from a far-right group, 13th Kyiv Sotnya, with similar rhetoric. They called KyivPride "a slap in the face of all combat veterans who have returned home... dancing on the bones of all those who died defending our country from the Russian aggression", and called "all those who are not indifferent" from far-right groups (known for their attacks of LGBT events) "to make a stand together and prevent holding of the sodomite witches' sabbath in the streets of Kyiv".

The Right Sector, a nationalist political party published the following statement: “Today we are forced to agree with marches and festivals of LGBT, that is, to join the ranks of sinners and those who supports them. No, we will not watch quietly as the country for which we spilt our blood on multiple front, is destroyed on the home front, in the peaceful capital, by foul methods of hybrid war”.²⁸⁹ A threat from the Right Sector to “turn the march participants into a bloody porridge” was commented on by many media as a threat to “block the march”,²⁹⁰ to “disrupt the event”, to use “physical coercion”, “forceful resistance”,²⁹¹ or “to stand up ruthlessly”.²⁹²

The famous TV presenter Sergey Pritula commented on this threat on his Facebook page, referring to it as a form of entertainment: “Political minority will bash sexual minority! [...] I [am irritated], that they organise ‘parades’, knowing that they will be beaten up, and it will be shown on every TV channel in the EU, and the others are going there to beat them up, knowing that it will be shown on every TV channels in the EU! [...] Under these circumstances, I will simply get some popcorn.”²⁹³ Even though this statement was publicly condemned by some human rights activists and journalists, there were no noticeable consequences for his career after this discussion. In 2017, he was invited to host the Eurovision Song Contest, notwithstanding that its official slogan was ‘Celebrate Diversity’.

In contrast to this negative reporting, the March also sparked some thoughtful coverage of sexual orientation and gender identity, and provided space to LGBT people to express their viewpoints. Ukrainskaya Pravda published an article with 5 stories of LGBT activists²⁹⁴. Hromadske Radio published an interview with a mother of an LGBT person who shared her story.²⁹⁵

Case 8: Equality Festival in Zaporizhia

In September 2016, in Zaporizhia, the LGBT organisation Insight announced an Equality Festival: a series of films, lectures, and discussions devoted to the rights of LGBT people and other marginalised groups (people with disabilities, ethnic minority women, internally displaced people, and migrants). A regional online publication posted a short news item with a neutral description of the event, but chose to call the piece ‘Gay, Cossacks! Gay Pride will take place in Zaporizhia’, alongside a photograph from a European gay pride event showing a male couple in carnival costumes.²⁹⁶ The title referred to the fact that historically Zaporizhia was a Cossack republic capital, and sparked a number of articles and posts in the city.

A member of a militarised local self-defence group, Igor Grizaenko, said that he would throw a grenade at the premises if the event took place. Regional media published several interviews in order to find out more about his ‘civil position’: “I said that Zaporizhia is the Cossack capital, please do not offend us. [...] [LGBT] is not our subculture, probably, it is appropriate on some island where there is not enough of women’s attention, but not here.”²⁹⁷

Instead of condemning this “hate speech”, including a clear discriminatory threat of violence, in the media, representatives of local authorities publicly voiced a hypothesis that the festival could be a political provocation, and that its values were dubious.²⁹⁸ The Jewish Community Centre, which was supposed to host the festival, refused to provide its premises due to the threat of violence. The organisers found a different location, but during the festival the police received a false bomb alert. The local online news outlet Reporter UA described the alert as “nasty jokes”.²⁹⁹

Framework for responding to “hate speech”

In order to assess opportunities to counter “hate speech”, ten expert interviews were held with human rights defenders, journalists, LGBT activists, queer feminists, and experts who develop non-discrimination and gender equality policy in education. This section reflects the results of these interviews, as well as desk based research regarding the legislative and regulatory framework for responding to “hate speech”.

Legal framework against discrimination

As part of its growing orientation towards Europe, Ukraine has adopted a legal framework which largely prohibits discrimination. There is certainly momentum towards improving protections against discrimination on the grounds of sexual orientation and gender identity; however, guarantees for this are not represented in its legislation. In 2016, Ukraine ranked 44 out of 49 countries on the Rainbow Europe Map reflecting European countries’ legislation and policies guaranteeing LGBT human rights.³⁰⁰

The Action Plan for the National Human Rights Strategy 2020³⁰¹ sets out tasks for all actors to ensure protection from discrimination, including plans for adding SOGI as aggravated circumstances in bias-motivated crimes to the Criminal Code and prohibition of discrimination on the grounds of SOGI in the anti-discrimination legislation. However, the authorities have been criticised by civil society for reluctance in implementing the Action Plan,³⁰² as none of the above have been yet introduced.

The **Ukrainian constitution** includes guarantees for equality and non-discrimination, on paper at least.³⁰³ Article 24 of the Constitution lays out the explicit grounds for non-discrimination. There is no direct reference to sexual orientation and gender identity as protected characteristics, but an open-ended list gives an opportunity to use this provision for that end in the courts. At the time of writing, no case seeking to establish sexual orientation and gender identity as protected characteristics under Article 24 had been taken before the courts.

Moreover, guarantees for equality are undermined by Article 51 of the Constitution, which excludes same-sex couples from marriage creating consequential difficulties for these couples in various fields including citizenship, adoption, immigration and inheritance.

The Law on Preventing and Combating Discrimination. The law was passed in 2012 as part of the EU-Ukraine Visa Liberalisation Action Plan without reference to sexual orientation and gender identity, but with an open list of characteristics protected from discrimination. In 2014 the Parliament passed the Law on Amendments to Certain Legislative Acts of Ukraine on Prevention and Combating Discrimination in Ukraine,³⁰⁴ but again did not include sexual orientation and gender identity as protected characteristics. This is notwithstanding a concerted effort by civil society to include these grounds, as well as pressure from international partners.

Labour Code. Provisions prohibiting discrimination on the basis of sexual orientation and gender identity in the workplace were introduced into the existing Labour Code in November 2015.³⁰⁵ According to a report by the European Commission against Racism and Intolerance: “NGOs stated that this was the first significant step towards obtaining effective equality for LGBT people since decriminalisation of voluntary sex between men in 1991, and its importance cannot be overstated”.³⁰⁶ A new draft Labour Code however has been introduced, and in the version of March 2017, all protected characteristics had been removed. They were reintroduced in the July 2017 draft and at the time of writing the inclusion of SOGI is not secure, as the discussion is ongoing.³⁰⁷

Criminal framework to address bias-motivated crimes

Article 67(1)(3) of the Criminal Code provides that the commission a crime motivated by racial, national or religious enmity and hostility should be considered an aggravating circumstance.

One of the most widely publicised homophobic crimes in recent years was an arson attack on the Zhovten Cinema in Kyiv, during the screening of an LGBT-themed film, as part of an International Film Festival in October 2014. Two men threw bottles with incendiary fuel into the screening hall; the audience was evacuated and the building burnt down. The cinema was subject to a land dispute, prompting some media to suggest that the attack was motivated by business interests; however, both the police and an advisor to the Ministry of Internal Affairs publicly stated that the detainees had confessed that their target was specifically the LGBT film screening.³⁰⁸ The investigation into the case has been criticised for a failure to properly investigate the homophobic motivation: both men were sentenced to suspended sentences for hooliganism and illegal possession of ammunition.³⁰⁹

Legal framework for freedom of expression, association and assembly

The overall situation for freedom of expression in Ukraine has improved since the change of government following the Maidan Revolution in December 2014. There is a vibrant civil society presence, and numerous media outlets operating, resulting in robust debate in the public interest. However, this is undermined by the concentration of ownership of major media outlets by a small number of oligarchs, who use them as tools of economic and political power. In 2017, the Institute of Mass Information registered 274 cases of violations of journalists’ rights, including obstructions, threats, beating, political and legal pressure³¹⁰. Impunity for such attacks creates an atmosphere of fear and may result in self-censorship of journalists.

Moreover, national security concerns are frequently invoked to justify censorship, including the ongoing blocking of several Russian television channels and social media platforms. In 2017, President Petro Poroshenko approved an Information Security Doctrine³¹¹, allegedly aimed at preventing propaganda of or incitement to war, national and religious hatred. Lacking specifics, it is feared that this initiative

may lead to extra-judicial blocking of online content, on illegitimate and arbitrary grounds. This is likely to target ex-expression about the conflict in the East and relationships with Russia.

Ukraine has resisted pressures to pass legislation limiting the freedom of expression and association of LGBT persons. For example, Draft Law No. 1155, titled “On the Prohibition of Propaganda of Homosexuality Aimed at Children” was submitted to the Ukrainian Parliament in late 2012. The bill was removed from consideration in April 2014. The bill would have banned positive or neutral statements made in print, on air, or as part of any public demonstration or action about LGBT people. The legislation would have levied fines against first time offenders and mandated jail terms for repeat offenses. In this environment, there are few threats of legislative censorship of media or online coverage by or about LGBT people; however, it is clear that Ukraine critically needs a diversity of transparent media ownership independent of government, and significant improvements to ethical journalism practices, in particular in relation to minorities.

Civil society organisations generally operate freely in Ukraine, and there are a number of active NGOs working in Ukraine to promote the rights of LGBT people. Nevertheless, some human rights groups do face harassment by authorities and from right wing groups. During interviews with LGBT activists conducted as part of this project, interviewees also noted that their work was undermined by some representatives of government bodies and right wing groups. Advocating for LGBT rights is called by political and societal opponents as an anti-Ukrainian political provocation, while LGBT activists are demonised as internal enemies destabilising the situation in the country. In smaller cities, LGBT initiatives are persecuted by far-right groups; and human rights initiatives also face bullying and harassment in social media.³¹²

There are a number of issues around the organisation of peaceful assemblies, which require prior authorisation from the authorities³¹³. There is no specific law on peaceful assemblies which allows courts to impose limitations. In 2016, Lviv, Odessa, and Kherson city councils took legal action to ban public LGBT events in the respective cities. After the human rights Equality Festival in Zaporizhia, the Zaporizhia regional council sent a petition to parliament and the president urging the removal of SOGI from characteristics protected by the anti-discrimination provisions from the Ukrainian labour legislation. They also called for the freezing of implementation of LGBT related components in the Human Rights Strategy.³¹⁴ An attempt to hold an Equality Festival in Lviv faced a wave of physical violence and aggression by the far-right groups, while Lviv city council and the police refused to intervene to facilitate the assembly and ensure distance from counter-protesters, removing themselves from the situation and accusing the LGBT organisation Insight of provocation³¹⁵.

Restrictions on “hate speech”

The Criminal Code of Ukraine (2001)³¹⁶ Incitement is penalised under Article 161(1) of the Criminal Code, but only in relation to national, racial or religious enmity or hatred. Article 161(1) also punishes

‘humiliation of national honor and dignity, or the insult of citizens’ feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, color of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.’ Article 161(2) punishes more severely all the above actions when accompanied by violence, deception or threats, or committed by an official.

The wording of this provision is vague, allowing for arbitrary application and prosecution of expression beyond what is permissible under international law. It is prohibiting incitement to enmity or hatred, rather than incitement to “hostility, discrimination or violence”, which allows restrictions on expression without proof of them really causing an imminent risk of harm.

In particular, international standards do not allow for the protection of ‘feelings’ in respect of religious convictions (essentially a form of blasphemy prohibition) or ‘humiliation of national honour and dignity’, as neither serve a legitimate aim under Article 19(2) of the ICCPR. It is unclear whether or not the reference to direct or indirect restriction of rights’ raises concerns from a freedom of expression perspective, though it is not clear that it has ever been applied to criminalise expressive acts, such as “hate speech”.

In 2014, the UN Human Rights Committee expressed its concern “that Article 161 of the Criminal Code [...] which requires proving deliberate action on the part of the perpetrator, is rarely used and that such crimes are usually prosecuted under hooliganism charges”. The Committee urged the Ukrainian authorities to: ‘Strengthen its efforts to combat “hate speech” and racist attacks, by, inter alia, instituting awareness raising campaigns aimed at promoting respect for human rights and tolerance for diversity. The State party should also step up its efforts to ensure that alleged hate crimes are thoroughly investigated, that perpetrators are prosecuted under Article 161 of the Criminal Code.’³¹⁷

This provision has been used to stifle expression the government finds undesirable. Article 161 of the Criminal Code was used in December 2017, when incitement charges were brought against journalist Vasyl Muravytskyi, along with charges of ‘treason’, ‘threatening the territorial integrity of Ukraine’, and ‘participating in a terrorist organisation’. The charges related to expression about the conflict in the East. Amnesty International considers Vasyl Muravytskyi a prisoner of conscience.³¹⁸

There has been no prosecutions of “hate speech” against LGBT people in Ukraine so far.

Positive policy measures by States

Ukrainian authorities pursue some initiatives aimed at promoting equality, including with regard to sexual orientation and gender identity. However, these are not always implemented. Moreover,

protections against discrimination on the grounds of sexual orientation and gender identity are often absent from initiatives aimed at promoting equality more broadly. There are also some examples of officials undermining positive initiatives aimed at promoting equality.

The role of public officials, including politicians, in recognising and speaking out against intolerance and trans/homophobia cannot be underestimated. In this regard, the situation in Ukraine is mixed. Importantly, President Poroshenko has spoken on several occasions the importance of ensuring equality for LGBT people.³¹⁹ However, this is undermined by his insistence that same sex marriage should not be legalised.³²⁰ Similarly other politicians have publicly spoken in favour of LGBT rights or participated in Kyiv Pride.³²¹ On the other hand, other politicians continue to engage in deeply homophobic and transphobic language.³²²

National Human Rights Institutions:

The Office of the Ukrainian Parliament Commissioner for Human Rights was established in 1998. The work of the Commissioner is regulated by the 1997 Law “On the Ukrainian Parliament Commissioner for Human Rights”³²³. Article 10 of Law “On Prevention and Combating Discrimination in Ukraine” granted the status of a national equality body to the Commissioner, and there is no separate equality body. In 2014 it was awarded an A status by the Global Alliance of National Human Rights Institutions, for its compliance with the Paris Principles.³²⁴

The current Commissioner, Ms. Valeria Lutkovska, has been praised by LGBT activists for her commitment to gathering data on human rights violations of LGBT people.³²⁵ In her Annual Reports, there is a separate section on the situation of LGBT people in Ukraine. In her 2016 report, the Ombudsman stated that only five cases of “hate speech” against LGBT people and three cases of hate crimes had been reported to the Ombudsman Office that year. The report also outlines violations to freedom of assembly of LGBT people in different Ukrainian cities, where LGBT community faced obstacles in organising events. Generally, LGBT organisations can count on the support of the Commissioner, who also acted as a plaintiff in court cases regarding discriminatory violations of freedom of assembly affecting LGBT people.³²⁶

Public Service Media:

As noted above, Ukraine has a largely pluralistic media environment; however, despite some government initiatives, challenges persist in ensuring a diverse and transparent media landscape. Media outputs are often politicised, including with regard to coverage of LGBT issues. The registration of the Public Broadcasting Company (PBC) of Ukraine in January 2017 is an encouraging sign: if properly resourced, this could provide a source of independent, accurate and ethical journalism, which Ukraine critically needs, not least with regard to broadcasting on issues of equality and non-discrimination. While the 2014 Law on Public Television and Radio Broadcasting does not explicitly mention ensuring coverage on this topic, it does identify the aim of “meeting the informational, cultural, and educational needs of the Ukrainian people to the fullest extent” and “programming content aimed at children and youth, people with physical disabilities, ethnic minorities, and other social groups.”³²⁷

Despite legislative guarantees to ensure the PBC's effective operation and financial independence, the authorities have thus far failed to provide adequate funds to the service.³²⁸ This undermines the ability of the PBC to produce their own content; if this funding is secured, the PBC could provide an outlet for the production of diverse content that reflects the needs, interests and viewpoints of minority groups, including LGBT people, as a means of combating "hate speech".

Media Regulation:

Audiovisual media are regulated by the National Council for TV and Radio Broadcasting, an oversight agency responsible for supervising compliance with Ukrainian legislation in the sphere of television and radio-broadcasting, as well as exercising regulatory powers prescribed by respective laws.³²⁹ The National Council is legislatively designed to be independent; however, some concerns have been raised about pressure by the Executive on the Council's decisions.³³⁰

The National Council operates in accordance with Law no. 1715-VIII, passed in November 2016, which increased the agency's powers for countering "hate speech", empowering it to impose fines on television and radio organisations and programming providers for "hate speech". This is defined in the new law as "calls to starting an aggressive war or its propaganda and/or incitement of national, racial or religious hostility and hatred" (paragraph 1), excluding hatred on the grounds of sexual orientation or gender identity. Paragraph 4 contains a wider interpretation of "hate speech", which again fails to include homophobia and transphobia: "calls to violent dismantling of constitutional system of Ukraine, [...], racial or religious hostility and hatred, propaganda of exceptionalism, superiority or inferiority based on religious beliefs, ideology, national or racial background, physical or financial situation, social background."³³¹ In practice, state measures against "hate speech" are usually only implemented regarding content deemed to be Russian 'propaganda for war'; the National Council's legal actions during 2016–2017 contained demands to ban a number of Russian channels on this basis.³³²

The Council should be able to modify content moderation rules itself through a multistakeholder process which would allow to include sexual orientation and gender identity as protected characteristics. The Council should proactively inform the public regarding these rules and processes for making complaints, with particular outreach to civil society representing the interests of minority groups.

The Council is also charged with responding to complaints about broadcasting. A representative of the Council informed ARTICLE 19 that they had only received one complaint regarding content relating to sexual orientation and gender identity: in this incident, complaints were received about a show which some viewers believed depicted a positive depiction of homosexual relations, which they argued did not uphold 'Ukrainian values'. The Council rejected the complaints. The Council has not received complaints regarding negative depictions of LGBT people. The National Council does not conduct systematic monitoring of instances of "hate speech" of its own initiative; implementation of this could help identify problems and develop solutions.

Voluntary initiatives by other stakeholders

There are voluntary self-regulatory bodies working with the printed and online press (distinct from broadcasters) in order to promote media pluralism and ethical journalism. These can play an essential role in providing accurate coverage of LGBT issues as means of countering “hate speech”; however they have so far failed to adequately deal with issues relating to discrimination on the grounds of sexual orientation and gender identity.

The main media self-regulation body is the Journalism Ethics Commission (JEC), which gathers journalists from all regions of Ukraine, established in 2001 under the framework of the Journalists for Clean Elections initiative. This nationwide public organisation examines cases of conflict related to ethics, based on requests by journalists and other individuals and entities. It can issue decisions to publicly condemn cases where the actions of journalists or media are deemed to be in willful violation of journalism ethics, as set out in the Code of Ethics of Ukrainian Journalists, which has been signed by some 2000 journalists.³³³ JEC is part of the Council of Europe network of self-regulatory media councils of Eastern European countries and the network of post-Soviet countries.³³⁴ The Code of Ethics states that “no one can be discriminated against by reason of gender, language, race, religion or ethnic, social origin or because of political preferences” (Article 15), but fails to explicitly prohibit as an ethical matter journalistic discrimination on the grounds of SOGI: this shortcoming is reflected in the JEC’s non-responsiveness to issues of discrimination on these grounds.

Working with university journalism departments, the Commission on Journalism Ethics also published a study guide for preparation for the state exam on journalism ethics.³³⁵ The study guide mentions sexual orientation exclusively in the international context: first, as a protected characteristic under the US Code of Journalism Ethics, and then in three case studies focused on Poland (on family being the union of a man and a woman, on the need for gays to be treated as ill, and on church condemnation of homosexuality). The authors of the study guide do not comment on the homophobia of these examples, and do not provide any detailed explanation of the topic, leaving the decision to students for discussion.³³⁶

In December 2015, the Independent Media Council, a new media self-regulation body, was established with the following aims: argument and conflict resolution in the media industry; monitoring adherence to professional journalism standards; and developing recommendations for state agencies to improve media industry regulation.³³⁷ It was founded by representatives of the media community and the Institute of Media Law, Institute of Mass Information, Internews Ukraine, OO Telecritica, and Suspilnist Foundation. In its decisions, the Council is guided by the Constitution of Ukraine, Code of Ethics of Ukrainian Journalists, decisions of the European Court of Human Rights and relevant Ukrainian legislation. Since its establishment, the council has reviewed over 20 cases,

most of them related to Ukrainian–Russian relations; currently six more cases are under consideration and none of them involve “hate speech” related to sexual orientation and gender identity.³³⁸

Regardless of the existence of several independent media mediators, according to expert opinion published by analytical centre and media platform Telecritica, self-regulation of the media as an alternative to state regulation in Ukraine is inefficient due to a series of structural issues: media owners lack the motivation to resolve conflicts through self-regulation, instead opting for courts and unofficial agreements; the absence of strong trade unions and solidarity in the industry, and the erosion of the educational level and professional competence of journalists. Public hearings and discussions of ethical and professional norms are essentially not held, and the level of public involvement in media regulation procedures is low. Also, independent bodies of media self-regulation do not balance the interests of all stakeholders (media owners, journalists, and the public), while insufficient funding of these organisations limits their ability to monitor compliance with journalism ethics codes. The introduction of universal ethical principles is also complicated by media owners’ influence over editorial policy and the absence of editorial statutes and boards at the majority of media houses.³³⁹

Civil society initiatives:

Civil society research into “hate speech” in the national and regional media predominantly focuses on the groups involved in the conflict in Eastern Ukraine. For instance, research by the Content Analysis Centre during August 2015 found that the ‘level of “hate speech” used in the Ukrainian media is extremely low’, referring to an index of 1.7% of all reports related to the Donbass, Crimea, and Russia.³⁴⁰ However incidences of “hate speech” related to SOGI in such monitoring efforts is rarely recognised or documented.

Journalists often fail to comment on the problematic character of homophobic and transphobic statements, and tend to select the most xenophobic quotes as titles of news items to attract readers. As outlined above, even liberal media outlets tend to use inappropriate vocabulary related to LGBT people. As a result, LGBT organisations Tochka Opory and Gender Z in cooperation with the Institute of Mass Information published a brochure on correct LGBT terminology for journalists, *How to Write about LGBT*, in May 2017³⁴¹. This publication proposes to replace incorrect terms, such as ‘homosexuality’ with ‘homosexuality’, ‘gays’, ‘lesbians’, etc., highlighting that all demonstrations of human sexuality are natural.³⁴² Also the organisation Insight published an online training module for journalists on “hate speech” and media coverage of LGBT issues³⁴³.

Social campaign “Words hurt” was developed to raise awareness on the consequences of “hate speech” and to debunk myths and stereotypes around marginalised groups, including LGBT³⁴⁴. The website contains information regarding discrimination in Ukraine and also focuses on hate crimes.

Conclusions

Public discourse about LGBT people in Ukraine is reflective of divisions in society. Homophobia and transphobia are present in the media and online, articulated by influential figures within the church, politics and government. Incitement to violence prior to public events promoting the rights of LGBT people are of particular concern. At the same time, monitoring found examples of respectful and accurate media coverage and some political leaders and journalists have challenged the worst incidences of “hate speech”, speaking out in favour of equality.

Nevertheless, the state is failing to adequately respond to incidences of homophobic and transphobic “hate speech”. The government and civil society have prioritised responding to “hate speech” on the grounds of ethnic origin, failing to properly address “hate speech” on other grounds, including sexual orientation and gender identity. LGBT people are particularly vulnerable to “hate speech”, given the lack of comprehensive non-discrimination provisions and high level of prejudice, encouraged by some people in power.

The focus of “hate speech” provisions should be to promote equality and prevent violence and discrimination. However, the Ukrainian authorities seem to be using such legislation to restrict speech it finds undesirable. Article 161, ostensibly aimed at preventing incitement, is vaguely worded enabling arbitrary application. Censorship of contentious viewpoints will not address the root causes of “hate speech”, and may violate international standards if expression that does not incite to violence is proscribed.

It is welcomed that LGBT organisations operate freely in Ukraine, but authorities must do more to facilitate the free expression of LGBT people, including by guaranteeing the safety of participants in events and protests supporting LGBT equality, and ensuring attacks on LGBT people are properly investigated.

Ukraine has the foundations from which to build initiatives to respond to “hate speech”, including a relatively free and diverse media, a vibrant civil society, a functioning ombudsman, an independent public broadcaster, and various self-regulatory bodies that have shown a degree of willingness to engage in this issue. The focus must now be on ensuring these are properly resourced independent and have the mandate to effectively operate to promote equality on all grounds, including sexual orientation and gender identity. Moreover, this must be underpinned by a legislative framework that both protects freedom of expression and ensures equality. While Ukrainian authorities have repeatedly promised to uphold European standards in this regard, this must be followed through by actions.

This requires building public support for human rights of all people, which in itself demands political will. Changing societal opinions will not happen overnight; however, strong political leadership is required to forge a path that promotes equality, while upholding freedom of expression. Ukrainian politicians have been ambiguous in this regard: they must demonstrate whether they are truly committed to this. Otherwise promises and advances will merely be window dressing in the name of further European integration.

Recommendations

To the Government of Ukraine:

- Refrain from engaging in homophobic and transphobic “hate speech”, and speak out against such incidences when they occur. Instruct politicians and other influential people in society on the importance of avoiding statements that might promote discrimination or undermine equality.
- Amend Article 161 of the Criminal Code on incitement to conform with Articles 19(3) and 20(2) of the ICCPR, ensuring that it cannot be used against dissenting or minority expression, as outlined in the Rabat Plan of Action, and that it protects both freedom of expression and equality, including by:
 - Replacing references to ‘feelings’ or ‘humiliation of national honour and dignity’ with a clear definition of ‘incitement to violence’;
 - Ensuring that references to ‘direct or indirect restriction of rights’ are not used in cases of “hate speech”, which should only be tried under incitement provisions, according to the threshold established in the Rabat Plan of Action.;
 - Adding sexual orientation and gender identity as protected characteristics.
- Guarantee that legislation aimed at ensuring national security is not used to unjustifiably restrict the right to freedom of expression, and only proscribes expression aimed at actual incitement to violence.
- Ensure that any future mechanism aimed at blocking Internet content corresponds to the requirements of necessity and proportionality and that any such limitation shall only be enforced through court decisions.
- Ensure that LGBT people enjoy the right to freedom of peaceful assembly, including by ending discriminatory practices targeting assemblies organised by LGBT people and ensuring that adequate policing measures are in place to protect them from violent attacks by far-right groups when doing so.
- Ensure sufficient funding for the Public Broadcasting Company, including for the production of programmes about diversity and promoting tolerance, including with regards to sexual orientation and gender identity.
- Ensure the implementation of the Action Plan for the National Strategy on Human Rights, including provisions aimed at ensuring equality on the grounds of sexual orientation and gender identity.

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- Explicitly include the grounds of sexual orientation and gender identity as protected characteristics in the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”; and in the Draft Labour Code.
 - Include sexual orientation and gender identity as grounds for aggravated forms of offences and the general provisions on aggravating circumstances under Article 67(1)(3) of the Criminal Code.
 - Vigorously condemn all attacks against LGBT people when they occur, and ensure a prompt, effective and impartial investigation into attacks; and that perpetrators are brought to justice.
 - Ensure that the Ombudsman office and National Police have sufficient resources to collect comprehensive statistics on the degree and consequences of discrimination, hate crimes, and “hate speech”, including on the grounds of sexual orientation and gender identity.
 - Provide trainings for public officials on non-discrimination and equality, including on the grounds of sexual orientation and gender identity. Develop and adopt ethical codes and ‘non discrimination’ policies for elected officials.
 - Introduce training for personnel working within the criminal justice system (including police, prosecutors and the judiciary) on international standards on equality and non-discrimination, including with regard to sexual orientation and gender identity.
 - Organise public information and education campaigns, in collaboration with civil society, to combat negative stereotypes of, and discrimination against, LGBT people. In particular, public information and education campaigns should be integrated into primary, secondary and tertiary education, and complemented with concrete anti-bullying policies, including the provision of support services for victims of bullying, including peer-led initiatives.

To media actors:

- Amend the Code of Ethics of Ukrainian Journalists, in order to:
 - Include prohibition of discrimination on the grounds of sexual orientation and gender identity;
 - Encourage avoidance of unnecessary references to race, religion, gender, sexual orientation, gender identity and other group characteristics that may promote intolerance.
- Strengthen the Journalism Ethics Commission and Independent Media Council by introducing remedial actions in cases of violation of the Code of Ethics.

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- Individual media outlets should:
 - Consider adopting or amending internal ethics codes to reflect strongly the principles of free expression and equality, ensuring that the incitement of hatred against marginalised groups is unacceptable;
 - Educate journalists on “hate speech”, equality and non-discrimination to ensure objective coverage on LGBT-related issues;
 - Ensure that acts of discrimination and the harm caused by discrimination and negative stereotyping are brought to the attention of the public;
 - Give members of different communities an opportunity to speak and to be heard in a way that promotes a better understanding of them and reflects their perspectives.

To the National Council for TV and Radio Broadcasting:

- Promote diversity, including in terms of media targeting different communities such as sexual and gender minorities, one of the criteria for assessing broadcasting license application.
- Conduct systematic monitoring of instances of “hate speech”, including “hate speech” targeting LGBT people.

To civil society:

- Support marginalised groups to develop counter-speech and public condemn cases of “hate speech” on all protected grounds, including sexual orientation and gender identity.
- Express solidarity with LGBT people following “hate speech” from representatives of the authorities or religious leaders.
- Develop alliances with media outlets, media organisations and journalists to address and react on the problem of “hate speech” in media and political discourse.

References

1. Regrettably, the research methodology did not examine the treatment of intersex persons, due to a lack of capacity and resources, and the mandate of project partners which focus primarily on the experiences of LGBT people. While transgender persons were included in the scope of the project, fewer cases on this were identified. Further detailed research is needed into experiences of both intersex and transgender persons.
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