

ARTICLE 19

human  
constantia



# Belarus: Right to freedom of expression and 'extremism' restrictions

November 2020

Report

---

## **ARTICLE 19**

Free Word Centre  
60 Farringdon Road  
London,  
EC1R 3GA  
United Kingdom  
T: +44 20 7324 2500

F: +44 20 7490 0566  
E: [info@article19.org](mailto:info@article19.org)  
W: [www.article19.org](http://www.article19.org)  
Tw: [@article19org](https://twitter.com/article19org)  
Fb: [facebook.com/article19org](https://facebook.com/article19org)

A19/ECA/2021/001/

---

© **ARTICLE 19, 2020**

This work is provided under the Creative Commons Attribution-Non-Commercial-ShareAlike 2.5 licence. You are free to copy, distribute and display this work and to make derivative works, provided you:

- (1) give credit to ARTICLE 19;
- (2) do not use this work for commercial purposes;
- (3) distribute any works derived from this publication under a licence identical to this one.

To access the full legal text of this licence, please visit: <http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode>.

ARTICLE 19 would appreciate receiving a copy of any materials in which information from this report is used.

---

# Executive summary

In this report, ARTICLE 19 and Human Constanta examine the interpretation of various Belarusian legislation – in particular on ‘extremism’ and ‘hate speech’ – that is in contravention with the country’s obligations under international human rights law. The report finds that the legislation fails to comply with international freedom of expression standards going beyond the boundaries established by Articles 19 and 20 of the ICCPR.

The report finds that the Belarusian legislation uses vague and undefined terms to determine prohibited expression. The legislation includes:

- Legislation aimed at tackling ‘extremism’; and
- Prohibitions on ‘hate speech’ and incitement to hatred and violence;

This report, without endorsing the conflated understanding of the concepts of ‘extremism’ and ‘hate speech’ in Belarus, analyses the relevant legislation to assess its compliance with international human rights law. It also examines the problematic jurisprudential practices, such as the over-reliance on expert assessments and lack of balance between the restrictions and freedom of expression, to further show the negative impact of this legislation. These practices do not conform with the jurisprudence of the European Court of Human Rights (the European Court) and the practices of Council of Europe countries.

ARTICLE 19 also highlights in the report that the legislation is often applied in an overly broad manner that lends itself to misuse and abuse, thus becoming an instrument of state control and censorship.

ARTICLE 19 and Human Constanta urge the government to bring the relevant legislation and practices in compliance with international human rights standards, with an emphasis on the State’s international freedom of expression obligations. We believe that this compliance will achieve the intended aim of the legislation: to provide protection against national security threats and counter incitement to violence and hatred.

## Key recommendations

- All legal restrictions on ‘hate speech’ should be compliant with the requirements of legality (i.e. they must be sufficiently clear and precise), necessity (i.e. they must be necessary to achieve one of the legitimate aims of limiting freedom of expression under international law, such as protecting the rights of others), and proportionality (i.e. a particular restriction can be imposed only if a less restrictive alternative is not sufficient). All legal restrictions on ‘hate speech’ should be formulated with reference to the six-factor test set out in the Rabat Plan of Action;

- 
- The “counter-extremist” laws in their current form should be repealed. At the very least, however, all forms of expression that do not constitute direct incitement to violence should be removed from the scope of the “counter-extremist” laws and, accordingly, from the application of “counter-extremist” measures, such as lists of prohibited extremist materials, bans on “extremist” organisations, and any other sanctions against individuals and organisations for disseminating or facilitating “extremist” content (e.g. under the Code of Administrative Offences);
  - Article 130 of the Criminal Code should be revised to make it clear that this provision applies only to speech that amounts to incitement to discrimination, hostility or violence – which in turn requires the proof of intent to cause discrimination, hostility or violence. While the list of protected characters may be legitimately extended (e.g. to include gender, disability, and sexual orientation), “other social affiliation” should be removed on account of its being too broad and unpredictable in its application;
  - ‘Hate speech’ criminalised under Article 130 of the Criminal Code should be moved from the category of crimes against humanity to crimes against the individual. Irrespective of the formal categorisation, prison sentences should be envisaged only for the most serious forms of incitement to violent action;
  - The definitions of prohibited ‘hate speech’ in the criminal law should be also revised to ensure that they are limited to expression amounting to incitement of discrimination, hostility or violence. The definitions of prohibited ‘hate speech’ that are contained in other legislation should be also revised to ensure that they comply with international freedom of expression standards (e.g. in the context of banning so-called “extremist materials”;
  - Redress under civil law should be made available as a less restrictive alternative, involving the possibility for victims of ‘hate speech’ and for NGOs to seek redress in the form of pecuniary and non-pecuniary damages, the right of correction and reply (for incidents of ‘hate speech’ in the media) and/or a public apology.
  - The courts should interpret and apply all legal provisions restricting ‘hate speech’ in a manner consistent with the requirements of international human rights law, in particular, Articles 19 para 3 and Article 20 para 2 of the ICCPR (as interpreted in the Rabat Plan of Action). This involves interpreting the current definitions of prohibited ‘hate speech’ narrowly so that, wherever possible, they are narrowed down to advocacy of hatred amounting to incitement (подстрекательство) to discrimination, hostility or violence;
  - In determining if a particular statement falls under a prohibited category, analysis should never be limited to the language of that statement. The courts and law-

---

enforcement authorities in charge of investigating 'hate speech' cases should always establish the speaker's intent to cause prohibited consequences. Furthermore, they should always consider the likelihood of harm to be caused by the statement – and, to that end, the context in which it was made, its extent and magnitude, and the speaker's position and their authority or influence over their audience;

- The courts and law-enforcement authorities should minimise their reliance on expert assessments in 'hate speech' cases. They should only seek expert opinion when specialist knowledge is truly needed to interpret or assess particular evidence. The courts should never substitute their own assessment for the analysis performed by experts;
- Judges, law-enforcement officials and other relevant officials (e.g. those involved in media regulation) should be provided with comprehensive and regular training on international human rights standards and comparative good practices relating to 'hate speech';
- In collaboration with experts and civil society, law enforcement authorities should develop investigative guidelines on the prosecution of 'hate speech' cases in line with international human rights standards.

---

# Table of Contents

<b>Introduction</b>	<b>5</b>
<b>Applicable international human rights standards</b>	<b>7</b>
The general scope of the right to freedom of expression	7
Limitations on freedom of expression on the basis of 'extremism'	8
Limitations on 'hate speech'	10
Obligation to prohibit	10
Permissible limitations	12
Lawful expression	12
<b>Belarus 'extremism' legislation and its enforcement</b>	<b>14</b>
Constitutional framework	14
Criminalisation of hate speech	15
Criminal Code	15
Code of Administrative Offences	16
Measures against 'hate speech' under 'counter-extremism' legislation	17
The application of 'extremism' and 'hate speech' laws in practice	21
<b>Conclusion: key problems identified</b>	<b>26</b>
<b>Recommendations</b>	<b>28</b>
<b>About ARTICLE 19 and Human Constanta</b>	<b>31</b>

---

# Introduction

In this report, ARTICLE 19 and Human Constanta examine certain important elements of Belarus's legislative restrictions on freedom of expression that are ostensibly designed to address 'extremism.'

The specific focus of this report is on restrictions on expression that can be loosely defined as "hate speech."<sup>1</sup> Imposed under the chapeau of 'extremism,' such restrictions encompass a wide range of conduct and expression, often vaguely defined. They involve criminal penalties against individuals (speakers as well those who are involved in the dissemination of prohibited content), quasi-criminal measures against non-governmental organisations and media outlets (forcible closure), and measures aimed at restricting content directly (removing content labelled as 'extremist material' from circulation). However, ARTICLE 19 wishes to emphasise that the focus of this report on 'hate speech' does not imply our endorsement of the other restrictions imposed on freedom of expression under the 'counter-extremism' laws.

Not all categories of speech prohibited under Belarusian counter-extremism legislation can be linked to 'hate speech.' ARTICLE 19 and Human Constanta have chosen to focus only on those that are for a number of reasons:

- First, disparate categories of speech prohibited under the rubric of "extremism" do not have a discernible unifying characteristic other than being artificially united by the lawmakers under that label. ARTICLE 19 opposes the use of 'extremism' as a legal concept, especially as a basis for rights restriction. Hence, we are wary of reinforcing this fallacious concept by discussing all "counter-extremist" restrictions collectively.

---

<sup>1</sup> The term 'hate speech' is not defined in international human rights law. As described below international standards require different response to different types of 'hate speech' based on the level of severity. For these reasons, ARTICLE 19 uses the term in inverted commas. Belarusian law does not use the term 'hate speech', instead referring variously to "igniting hostility", "arousing hostility or strife", and "propaganda of exceptionalness, superiority or inferiority" on the basis of racial, national, religious, linguistic or "other social" affiliation. 'Hate speech' is just a convenient shorthand to designate those diverse categories of prohibited expression. The report deliberately avoids referring to them as "incitement to hatred," even though it is often done by commentators who take their cue from the language of international human rights instruments. Such a label would be misleading, considering that the actual restrictions, as they are defined in the law and applied in practice, fall well short of the strict threshold implied in the notion of incitement as it is understood in those instruments.

- 
- Second, experience shows that ‘hate speech’ related restrictions are frequently used to target legitimate speech, often for being critical of the authorities or not conforming to state-approved narratives. This bad practice is enabled by the vague language of the ‘hate speech’ laws that easily lends itself to overreach and abuse.
  - Third, restricting some instances of ‘hate speech’ is not only legitimate but may even be required. International law expressly obliges States to prohibit the most serious forms of ‘hate speech’ where they amount to incitement of discrimination, hostility or violence. This can be seen by national decision-makers as a strong justification – or an excuse – for sweeping restrictions. However, not all ‘hate speech’ can be legitimately restricted. Whereas appropriate (narrowly defined) restrictions serve the aim of advancing equality and non-discrimination, finding the right balance between this aim and the protection of freedom of expression is a challenging task.

After setting out applicable international standards, the report provides an analysis of the key elements of the national legislation that serve as a basis for restricting hate speech, starting with the broad framework established in the constitution and moving on to the criminal-law measures and measures envisaged in the so-called “counter-extremism” legislation. The report assesses the compatibility of all of those measures with international freedom of expression standards, highlighting the most problematic areas where violations of freedom of expression are most likely to occur. The report further includes a brief discussion of how these legal provisions are enforced in practice. Unfortunately, this area is marked by low levels of transparency, with only very limited and incomplete data available for review. While a comprehensive analysis of the relevant practice would be impossible for this reason, the available data is sufficient to conclude that the legislative restrictions on ‘hate speech’-like expression are interpreted and applied in a manner that is not compliant with international standards.

Drawing on this analysis, the report makes recommendations to the national law/policy-makers and law-enforcement authorities in order to assist them in bringing the relevant legislation and the practice of its implementation fully in line with Belarus’s international obligations in the field of freedom of expression.



---

# Applicable international human rights standards

## The general scope of the right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights<sup>2</sup> and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties.<sup>3</sup> As a State party to the ICCPR, Belarus must ensure that its legislation pertaining to freedom of expression complies with Article 19 ICCPR as interpreted by the Human Rights Committee (HR Committee) and that they are in line with the special mandates' recommendations.

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice.

The right to freedom of expression, however, is not absolute. Under Article 19(3) of the ICCPR, expression may be restricted in limited exceptional circumstances as long as any restrictions are:

- **Provided by law:** all relevant legislation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim:** the list of which is exhaustive, and it includes respect of the rights or reputations of others, the protection of national security or of public order (ordre public), and the protection of public health or morals;
- **Necessary and proportionate in a democratic society:** if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.

---

<sup>2</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>3</sup> Article 10 of the European Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights; and Article 13 of the American Convention on Human Rights.

---

## Limitations on freedom of expression on the basis of 'extremism'

There is no agreed definition of 'extremism' under international law and the term is often used interchangeably with 'terrorism,' that, equally, is not defined.<sup>4</sup> Both terms refer to limitations on freedom of expression on national security grounds.

The protection of freedom of expression in the context of national security has been a matter of significant debate for a number of years, both internationally and at domestic levels. Specifically, under international law, it is well recognised that human rights, including free expression, must be respected in the fight against terrorism/extremism, and must not be arbitrarily limited. For example, the UN Security Council Resolution 1456 (2003) states that:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.<sup>5</sup>

The UN Human Rights Commission has also issued resolutions reminding nations to "refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression in ways which are contrary to their obligations under international law."<sup>6</sup>

Furthermore, in the Johannesburg Principles on Freedom of Expression and National Security,<sup>7</sup> freedom of expression may be restricted on national security grounds only where it is intended to incite imminent violence, is likely to incite such violence, and there are a direct and immediate connection between the speech and the likelihood or occurrence of such violence.<sup>8</sup> The UN Secretary-General has supported this interpretation, stating that:

---

<sup>4</sup> See e.g. UNODC, [Frequently Asked Questions on International Law Aspects of Countering Terrorism](#), 2009, p. 4; or [The Use of the Internet for Terrorist Purposes](#), 2012, para 49.

<sup>5</sup> Resolution 1456 (2003), para 6. See also General Assembly resolution 60/288 of 20 September 2006 on Global Counter-Terrorism Strategy

<sup>6</sup> Commission on Human Rights resolution 2003/42; Commission on Human Rights Resolution, 2004/42; The right to freedom of opinion and expression; or Human Rights Resolution 2005/38.

<sup>7</sup> ARTICLE 19, [Johannesburg Principles on National Security, Freedom of Expression and Access to Information](#), October 1995. The Principles, developed by a group of experts from around the world and endorsed by the UN Special Rapporteur on Freedom of Expression.

<sup>8</sup> *Ibid.*, Principle 6.

---

Laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action.<sup>9</sup>

In a similar vein, the Special Rapporteur on human rights and counter-terrorism explained that for the criminalisation of incitement to terrorism to be compliant with international human rights law, it must, among other criteria, be limited to the incitement to conduct that is truly terrorist in nature, include an actual (objective) risk that the act incited will be committed, and expressly refer to intent to communicate a message and intent that this message incite the commission of a terrorist act.<sup>10</sup>

ARTICLE 19 is aware that same as Belarus, some States have also legislated against 'extremism' in addition to counter-terror laws. However, we note that speech restrictions aimed at countering 'extremism' are prima facie illegal under international law due to the inherent vagueness and overreach of this concept. The HR Committee has criticised its use in national legislation to restrict expression because it is "too vague to protect individuals and associations against arbitrariness in its application."<sup>11</sup> The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has described it as "critical and prima facie non-human rights compliant practice" and expressed "serious concerns that the term lends itself to illegitimate judgments about what extremism is."<sup>12</sup> She further described the category of extremist crimes as "particularly vague and problematic," "broad and overly vague," capable of "encroach[ing] on human rights in profound and far-reaching ways" and, ultimately, "per se incompatible with the exercise of certain fundamental human rights."<sup>13</sup>

---

<sup>9</sup> Report of the Secretary-General, The protection of human rights and fundamental freedoms while countering terrorism, A/63/337, 28 August 2008, para 62.

<sup>10</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 22 December 2010, A/HRC/16/51, paras 29-32.

<sup>11</sup> Concluding observations on the Russian Federation (CCPR/CO/79/RUS), para 20.

<sup>12</sup> Human rights impact of policies and practices aimed at preventing and countering violent extremism, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 21 February 2020, A/HRC/43/46, para 13

<sup>13</sup> *Ibid.*, para 14.

---

## Limitations on 'hate speech'

The term "hate speech" has no definition under international human rights law, although various broad definitions of 'hate speech' have been advanced by the UN and regional levels.<sup>14</sup> While there is no universally accepted definition, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States.<sup>15</sup>

- Severe forms of "hate speech" that international law requires States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law<sup>16</sup> and Article 20(2) of the ICCPR;
- Other forms of "hate speech" that States may prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment;
- "Hate speech" that is lawful but nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State but should be protected from restriction under Article 19(3) of the ICCPR.

### Obligation to prohibit

Article 20(2) of the ICCPR obliges the State to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." In this context, advocacy should be understood as an intention to promote hatred publicly towards the target group. Article 20(2) prohibits such advocacy only if it reaches the level of incitement, which in turn implies the speaker's intent to incite others to commit acts of discrimination, hostility or violence. While the proscribed outcome need not in fact occur, the term "incitement" strongly implies the advocacy of hatred

---

<sup>14</sup> For example, the Committee on Elimination of All Forms of Racial Discrimination (ICERD Committee) has defined 'hate speech' as "a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society; see General Recommendation No. 35, CERD/C/GC/35, para 7. For definitions adopted in the context of the Council of Europe, see the Committee of Ministers Recommendation No. R(97)20 on Hate Speech and Committee of Ministers Recommendation No. Rec (2010)5 on measures to combat discrimination on the grounds of sexual orientation or gender identity.

<sup>15</sup> C.f. 'Hate Speech' Explained: A Toolkit, *op.cit.*

<sup>16</sup> UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, Article 3(c). It specifically requires States to prohibit the direct and public incitement to genocide through criminal law rather than other less severe forms of censure that might be offered by administrative or civil law.

---

must create “an imminent risk of discrimination, hostility or violence against persons belonging to [the target group].”<sup>17</sup>

The **Rabat Plan of Action** provides additional authoritative guidance on the scope of restrictions required by Article 20(2).<sup>18</sup> This document sets out six key criteria that should be taken into account:

- *The context of the expression*: the expression should be considered within the political, economic, and social context in which it was communicated;
- *The speaker*: in particular, the position of the speaker, and their authority or influence over their audience. The speaker must address a public audience and their expression include advocacy of hatred targeting a protected group based on protected characteristics and constituting incitement to, inter alia, violence;
- *The intent of the speaker*: the speaker must specifically intend to engage in advocacy of violence and intend for or have knowledge of the likelihood of the audience being incited to violence;
- *The content of the expression*: what was said, including the form and the style of the expression, whether the expression contained direct or indirect calls for discrimination, hostility or violence, and the nature of the arguments deployed and the balance struck between arguments;
- *The extent and magnitude of the expression*: the analysis should examine the public nature of the expression, the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume;
- *The likelihood of harm occurring*, including its imminence.

The Human Rights Committee has explained that restrictions imposed under Article 20 must be compliant with the three-part test set out in Article 19(3).<sup>19</sup>

---

<sup>17</sup> See, e.g. ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence, December 2012.

<sup>18</sup> Office of the High Commissioner for Human Rights (OHCHR), [The Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, February 2013.

<sup>19</sup> Human Rights Committee, General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para 50.

---

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the ICERD on this test.<sup>20</sup>

### Permissible limitations

There are forms of “hate speech” that target an identifiable individual, but that does not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR and the three-part test set out above.

### Lawful expression

Irrespective of how ‘hate speech’ is generally defined, it is necessary to keep in mind that not all ‘hate speech’ can be legitimately restricted. International freedom of expression standards protect expression that is offensive, disturbing or shocking.<sup>21</sup> Consequently, restricting expression solely on the basis of “offence” caused to an individual or group is not permitted. Although originally intended to assist in the application of Article 20(2) of the ICCPR only, the six factors set out in the Rabat Plan of Action, with necessary adjustments, provide useful guidance for determining if other forms of ‘hate speech’ reach the level of severity that justifies their restriction under Article 19(3).<sup>22</sup>

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximising opportunities for all people. Many of these positive measures are set out in the Rabat Plan of Action,<sup>23</sup> which draws extensively upon ARTICLE 19’s Camden Principles on Freedom of Expression and Equality.<sup>24</sup>

---

<sup>20</sup> UN Committee on the Elimination of Racial Discrimination, General recommendation No. 35: Combating racist hate speech, 26 September 2013, paras. 15 – 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

<sup>21</sup> The Human Rights Committee describes the scope of the right to freedom of expression as including “deeply offensive” speech, General Comment No. 34, *op. cit.*, para 11. See also. e.g., European Court of Human Rights, *Handyside v. UK*, App. N. 5493/72, 7 December 1976.

<sup>22</sup> See 2019 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/47/486, para 24.

<sup>23</sup> Rabat Plan of Action, *op. cit.*

<sup>24</sup> ARTICLE 19, [The Camden Principles on Freedom of Expression and Equality](#), 2009.

---

Given the confusion surrounding the concept, it is beneficial to achieve clarity about categories of expression which should not automatically be considered 'hate speech.' This also includes expression related to denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive. This is, in particular, a problem of two areas of restrictions:

- **Defamation of religions/blasphemy:** The right to freedom of expression cannot be limited to protect religions or associated ideas or symbols from criticism, or to shield the feelings of believers from offence or criticism. Such illegitimate restrictions can take various forms in national laws, including direct blasphemy<sup>25</sup> and insult to religious feelings.<sup>26</sup> International human rights standards are clear that prohibitions of blasphemy without the added element of incitement to discrimination, hostility or violence are not legitimate.<sup>27</sup>
- **Protection of “the State” and public officials:** International standards do not permit restrictions on freedom of expression that are designed to protect “the State” or its symbols from insult or criticism.<sup>28</sup> These entities cannot be the target of 'hate speech,' because they are not people and are therefore not rights-holders.<sup>29</sup> For natural persons associated with the State, such as heads of state or other public officials, this status is not a “protected characteristic” on which discrimination claims, or the characterisation of 'hate speech,' can be based.

---

<sup>25</sup> Direct blasphemy seeks to protect a religion, its doctrines, symbols, or venerated personalities, from perceived criticism, contradiction, contempt, stigmatisation, stereotyping or 'defamation.'

<sup>26</sup> Insult to religious feelings seeks to protect the feelings or sensibilities of a group of persons 'insulted,' 'offended,' or 'outraged' by incidents of blasphemy against a religion they identify with.

<sup>27</sup> See Rabat Plan, *op.cit.*; and General Comment No. 34, *op.cit.*, para 48 (which states that “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged by article 20, paragraph 2, of the Covenant”). The Committee has also underlined that it would be “impermissible” to “prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”

<sup>28</sup> See, e.g. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, 20 April 2010; or Johannesburg Principles, *op.cit.*, para 38.

<sup>29</sup> *Ibid.*, Johannesburg Principles.

---

# Belarus ‘extremism’ legislation and its enforcement

## Constitutional framework

Freedom of expression, along with freedom of opinion, is guaranteed in Article 33 of the Belarusian Constitution. The same provision prohibits censorship and the “monopolisation” of the media by the State or any private party.

Restriction on freedom of expression is not expressly envisaged in Article 33. Instead, a general limitation clause for all rights guaranteed in the Constitution is found in Article 23, which allows restrictions only if they are “envisaged by law in the interests of national security, public order [or] protection of public morals, public health [or] the rights and freedoms of others.”

This provision is only partially aligned with the three-part test of Article 19 para 3 of the ICCPR. It incorporates the legality requirements and the closed-ended list of legitimate grounds (aims) for restriction. However, it does not expressly include the necessity/proportionality requirement, i.e. there is nothing in the express language of Article 23 to suggest that restrictions to constitutional rights, including freedom of expression, may be imposed only to the extent it is (strictly) necessary to achieving of the listed aims and only insofar it does not result in the destruction of the right in question.

In addition, Article 5 of the Constitution prohibits “political parties and other public associations that have violent change of the constitutional order as their aim or conduct propaganda of war [or] social, national, religious or racial hostility.” Insofar as it relates to ‘hate speech’, the language of this provision has important differences from that of Article 20 para 2 of the ICCPR. In particular, no element of *incitement* to hostility is expressly required, while, in the absence of an authoritative interpretation of the term, it is not clear if ‘propaganda’ is synonymous with incitement in the context of ‘hate speech’ and, specifically, if it involves intent to cause social, national, religious or racial hostility.

The reference to ‘social hostility’ is another important difference from Article 20 para 2 of the ICCPR. Adding to the latter’s list of protected characteristics (on the basis of which ‘hate speech’ may be restricted) is not problematic per se. In fact, it is good practice to adopt a broad list of protected characteristics that covers all recognised prohibited grounds for discrimination (e.g. sex, disability, sexual orientation etc.). However, the criterion of belonging to a ‘social group’ which is implied in “social hostility” is too broad and malleable for that purpose. It can be easily stretched to apply to almost



---

any polemical expression disfavoured by the authorities as long as it can be seen as 'hostile' to someone belonging to a 'social group' defined by the target's social status, occupation, social function or any number of other "social" aspects of their identity.

The practice of several other countries where similar restrictions exist shows that they can be abused when the authorities categorise public officials (members of parliament, law enforcement personnel etc) as a "social group" in order to prosecute and punish for views that are critical of those officials or even general policies or practices. ARTICLE 19 and Human Rights Watch have not seen the evidence that this bad practice is adopted in Belarus. However, we are concerned that, in the absence of an established interpretation of "social hostility", this particular restriction on expression remains open for abuse. We recommend that the courts and law-enforcement authorities adopt a narrow, yet progressive interpretation of "social hostility" in line with international standards on freedom of expression and anti-discrimination, so that it includes grounds such as disability, gender or sexual orientation but *excludes* professional or official status.

## Criminalisation of hate speech

### Criminal Code

**Article 130** of the Criminal Code criminalises "intentional acts aimed at arousing racial, national, religious or other social hostility or strife on the grounds of racial, national, religious, linguistic or other social affiliation as well as intentional acts of rehabilitating Nazism. The 'aggravating circumstances' automatically attracting more severe penalties include use of violence, abuse of one's public office, acting in a group, and negligently causing death or other grave consequences. The penalties range from a fine to up to 5 years of imprisonment where such acts committed without any of the aggravating circumstances. The maximum penalty under this provision is 12 years of imprisonment.

Article 130 is placed among so-called "crimes against peace and global security", which include international crimes, such as waging a war of aggression and genocide, along with terrorism. This peculiar categorisation may explain the severity of the penalties envisaged, but it is not justified. Only the most severe form of hate speech, which is incitement to genocide, belongs in this category. It is quite clear, however, that Article 130 does not cover incitement to genocide. Considering that the primary rationale behind restricting 'hate speech' is to protect individuals from discrimination and discriminatory violence, the 'hate speech' acts criminalised under Article 130 would be appropriately included among "crimes against the person."

One of the key problems with this provision is that it employs vague and potentially overbroad terminology that is not defined anywhere in the national legislation and lacks

---

a clear established meaning in practice (i.e. “strife,” “hostility” and “social affiliation”). Furthermore, it does not expressly require that the actual harm in the form of “strife” of “hostility” must be likely to occur.

## **Code of Administrative Offences**

Paragraph 1 of Article 17.11 of the Code of Administrative Offences penalises “the dissemination of information material containing calls for extremist activity or propagandising such activity as well as the production, storage or transportation of such material for the purpose of its dissemination, provided that these acts do not constitute a criminal offence [under the Criminal Code]”. The penalties include fines for individuals and legal entities.

Paragraph 2 of Article 17.11 penalises the dissemination of material included in the official list of “extremist materials” as well as the production, storage or transportation of such material for the purpose of its dissemination — provided that these acts do not constitute an offence under the Criminal Code. The penalties include larger fines as well as the confiscation of equipment and, for individuals, short-term incarceration (so-called “administrative arrest”).

These provisions refer to the notions of “extremist activity” and “extremist materials” that are defined in the Law on Countering Extremism. Both of them include ‘hate speech’-like expression, overlapping with, but also extending beyond, the categories of speech criminalised in Article 130 of the Criminal Code. While their scope is discussed in the next section of this report, it should be immediately noted that the ‘hate speech’ aspects of “extremism” are defined in an overly broad manner, employing inherently vague concepts that easily lend themselves to application well beyond the boundaries established by Articles 19 para 3 and 20 para 2 of the ICCPR.

One important difference between these provisions and Article 130 of the Criminal Code is that they do not expressly require for proscribed acts to be intentional. This increases their potential to be used to curtail legitimate expression that does not constitute unlawful ‘hate speech’ under international law.

The application of Article 17.11 is not limited to individuals or entities that are the authors of illegal content (i.e. speakers). It also penalises those who provide services essential for the publication of speech authored by others, such as production, storage, transportation and distribution. By making them liable regardless of their intent (and, thus regardless of their actual knowledge of the unlawful nature of the impugned content), paragraph 1 of Article 17.11 strongly incentivises such service-providers to exercise extreme caution and reject any potentially controversial or problematic material that may not be illegal even under domestic law.

---

Moreover, as has already been explained above, intent to cause discrimination, hostility or violence is an essential element of 'hate speech' that can be legitimately restricted under international law. Consequently, insofar as the Code of Administrative Offences prohibits "negligent" 'hate speech' it is in breach of Articles 19(3) and 20(2) of the ICCPR for this reason alone.

Where the respective provisions of the Criminal Code and the Code of Administrative Offences overlap, the law fails to provide criteria for determining which of the two should be the basis for prosecuting a specific case. This determination is seemingly left to the discretion of the law enforcement authorities, thus adding to the arbitrariness that already exists on account of those provisions' overly vague and imprecise language.

Article 9.22 of the Code of Administrative Offences is another provision restricting freedom of expression in part to address 'hate speech.' It penalises "publicly insulting [or] denigrating the official and other national languages and creating obstacles and restrictions with regard to their use [as well as] preaching hostility on linguistic grounds." Consequently, it targets three distinct types of conduct: (1) expression "insulting" national languages as such; (2) discriminatory action aimed at obstructing other people's ability to use any of those national languages; (3) expression constituting "preaching of hostility on linguistic grounds." Only the first and third categories are of relevance to this report.

ARTICLE 19 and Human Constanta note that these provisions are problematic in light of international freedom of expression standards. Expression in the first category is insulting/denigrating a language (i.e. an abstract entity) rather than individuals using a particular language. Protection of languages is not necessarily a legitimate aim; moreover, it is not clear what is meant by term "national languages". "Preaching hostility" is a term that is not used elsewhere in the law. We assume that in some cases, it would overlap with ethnicity/nationality as a protected characteristic (i.e. minority languages such as, say, Polish) but that clearly it would also be the case with Russian (spoken by an absolute majority) or Belarusian (spoken by a small minority while at the same Belarusians as an ethnicity form an overwhelming majority of the population).

## **Measures against 'hate speech' under 'counter-extremism' legislation**

The adoption of a 2007 Law on Countering Extremism created an additional tier of restrictions on expression, including expression that can referred to as 'hate speech.' This law expanded both the substantive scope of illegal 'hate speech' and the scope of sanctions imposed for 'hate speech,' enabling the banning of "extremist" content as well as organisations that are deemed in some way responsible for producing such content.

---

Although the criminal-law restrictions on 'hate-speech' (i.e. Article 130 of the Criminal Code) pre-dated the Law on Countering Extremism, the latter recast 'hate speech' as a form of 'extremism'/'extremist activity' while also expanding and loosening its definition. According to Article 1 of the LCE, the following forms of 'hate speech'-like expression constitute "extremism" and are thus prohibited:

- "Igniting racial, national, religious or other social hostility or strife;" and
- "Propaganda of exceptionalness, superiority or inferiority of individuals on the basis of their social, racial, national, religious or linguistic affiliation."

The first of the two categories is almost identical to the language of Article 130 of the Criminal Code. The important difference, however, is that the Law on Countering Extremism does not explicitly require for such incendiary expression to be intentional. The second category is unique to the Law on Countering Extremism. It relies on vague concepts that are not defined anywhere in the law, such as propaganda, exceptionalness, superiority, inferiority, and social affiliation. These concepts are clearly open to overbroad interpretation. Crucially, there is no implied intent to incite hostility, discrimination or violence, even though it is an essential element of any 'hate speech' that can be legitimately restricted under international law. In other words, it appears that the only determining factors for expression to fall into the prohibited 'propaganda' category are its content and public nature, while the elements of intent to incite hostility, discrimination or violence and the likelihood that these consequences may materialise are irrelevant. These considerations make the 'hate speech' restrictions under the Law on Countering Extremism incompatible with the requirements of Articles 19 and 20 para 2 of the ICCPR.

The scope of prohibited expression is also potentially expanded in a less direct manner, namely, through the concept of "extremist materials." The Law on Countering Extremism takes a somewhat circuitous approach to defining "extremist materials." Rather than being simply materials with extremist content (e.g. materials containing 'hate speech'-like expression prohibited by the Law on Countering Extremism), Article 1 of the LCE defines them as materials containing *calls for or propaganda* of extremist activity – which in the case of 'hate speech' effectively means incitement to, or propaganda of, acts that are themselves incitement or propaganda. Such tautology creates additional space for misuse by blurring and potentially extending the boundaries of illegal speech even further.

More precisely, Article 1 of the Law on Countering Extremism defines "extremist materials" as "printed, audio/audio-visual and other communications and/or materials, placards, banners and other means of visual advocacy [or] advertising materials" that must meet the following criteria concurrently:

- 
- They must be “designed for public use, public dissemination or other forms of dissemination,”
  - They must “contain calls for extremist activity [or] propaganda of such activity;” and
  - They must be declared to be extremist materials by court.

The procedure for officially determining materials to be “extremist materials” is set out in Article 14 of the Law on Countering Extremism. This provision expressly forbids the disclosure of the content of such materials, which precludes any external scrutiny of the application of this mechanism in practice. In effect, such pre-emptive content restriction can hardly be seen as anything other than censorship (which is not only unlawful under international law, but is also expressly prohibited by the Belarusian Constitution). The mandatory involvement of the judiciary in such determinations does not provide a meaningful safeguard against arbitrariness or abuse, since the legal framework is so fundamentally flawed.

The Law on Countering Extremism also establishes certain measures that can be taken with regard to “extremist” speech. They include, among others:

- Powers granted to public prosecutors to demand the removal of “extremist” content by means of “directives” (Article 9);
- The prohibition and physical destruction of “extremist materials” (Article 14);
- Powers granted to counter-extremism authorities to issue “official cautions” against organisations and individuals when there are “indications that they are preparing to commit acts [of extremism]” (Article 10). It should be noted that this is not a milder form of sanction imposed for acts already committed but, rather, a preventive measure in respect of acts that the authorities believe *could be potentially committed*. Why exactly the authorities are expected to possess such prophetic abilities is unclear, but it is certain that the law establishes no meaningful criteria to contain their discretion in issuing “cautions.” Indeed, there has been evidence that this mechanism is abused to harass and intimidate civil society activists.<sup>30</sup>
- Termination of public assemblies and other mass events (Article 15).

The Law on Countering Extremism also allows for the termination and prohibition of “extremist organisations” (Articles 11 and 12) and prohibition of “extremist”

---

<sup>30</sup> See, e.g., Spring, [And again “extremism”: Maxim Vinyarsky is summoned to the police](#), 6 August 2014.

---

organisations based abroad (Article 13). The substantive criterion for declaring an organisation to be an 'extremist organisation' is that of "conducting extremist activity or recognising the possibility of conducting [such activity] as part of its operation or financing extremist activity" (Article 1 of the Law on Countering Extremism).

This measure fails to comply with the freedom of expression and freedom of association standards contained in the ICCPR for two distinct reasons. One of them is the same definitional reason that taints all other measures against 'hate speech' under the Law on Countering Extremism. As has been repeatedly pointed out above, speech that can amount to "extremism" is defined in a manner so broad and vague as to cover lawful 'hate speech' that cannot be legitimately restricted under international law and even legitimate expression that does not constitute any form of 'hate speech' at all. Moreover, other elements of the definition of "extremism" potentially allow to target a very broad spectrum of organisations that are not directly responsible for "extremist" content but have provided some form of (very broadly defined) support to the authors of such content. Article 1 of the Law on Countering Extremism adds the following to the catalogue of "extremist activities": "financing of extremist activity [or] other assistance in conducting it, including by providing real estate, electronic means of communication, educational, publishing [or] other material resources or information services."

The other reason is that this measure would be disproportionate even if it were to apply only in the cases of organisations involved in disseminating genuine 'hate speech' of the kind that may be restricted under the ICCPR. Rather than allowing for a nuanced approach designed to afford maximum protection to freedom of expression and freedom of association, the law goes for the nuclear option of termination and permanent banning regardless of the gravity of a 'hate speech' incident and its actual impact, of whether it is a one-off incident or a repeated pattern or whether other less restrictive solutions would be sufficient. Such an extreme measure should be allowed only as a last resort in the most exceptional circumstances, such as where 'hate speech' is of a particularly grave character posing an exceptionally serious public threat or where serious patterns of 'hate speech' have been persistent and the previously applied less restrictive responses have proven insufficient. This requires that less restrictive measures are available in the first place, such as self-regulatory complaint mechanisms, the right of reply, financial penalties, official cautions, or temporary suspension.

According to the Law on Countering Extremism, an organisation can be terminated and banned only by the Supreme Court. However, this purported judicial safeguard is of little practical value, considering that the legal framework on the basis of which the court is required to make such determinations is inherently flawed.

---

Finally, it should be reminded that the scope of 'hate speech' prohibited under the rubric of "extremism/extremist activity" under the Law on Countering Extremism also determines the application of Article 17.11 of the Code of Administrative Offences discussed in the previous section. In other words, redefining 'hate speech' as a form of extremism entails further penalties under the Code of Administrative Offences which can be imposed on individuals and legal entities involved in producing or facilitating 'hate speech' content.

## The application of 'extremism' and 'hate speech' laws in practice

There is a marked lack of transparency in the practices related to the enforcement of the speech restrictions discussed above. Court decisions, including in criminal 'hate speech' cases, are not made available to the public, while the descriptions of materials included in the list of banned "extremist materials" are so pithy that it is often impossible to discern their content, let alone the logic behind the labelling them as "extremist."

In this section, the report draws primarily on the monitoring work conducted by Human Constanta as well as reports published by other Belarusian human rights NGOs and in the media. The available evidence makes it possible to establish certain patterns of how the 'hate speech' legislation is used and misused. In particular, it reveals several consistent trends:

- Key terminology employed in the 'hate speech' laws, such as "strife", "hostility" and "information services," remains undefined – which makes for its inconsistent, arbitrary and, potentially, abusive application;
- Courts and law-enforcement authorities focus only on the content of potentially unlawful expression, while disregarding other crucial factors reflected in the six-part test of the Rabat Action Plan, such as the speaker's intent, the context in which the statement was made or the likelihood of any specific harm caused by the statement.<sup>31</sup> In particular, they fail to establish all of these key aspects of intent required by international freedom of expression standards: (i) the speaker's intent to engage in advocacy to hatred; (ii) the speaker's intent to target a protected group

---

<sup>31</sup> *C.f.* for instance the case of Dmitry K. who was sentenced to three years of restriction on freedom and sent to an open type institution based on the decision of the Minsk City Court from 23 May 2019. He posted on Instagram three photos of a group of men in field military uniforms without insignia standing next to a weapon with hashtag and commentary. The Court said that the post "contained psychological and linguistic signs of inciting ethnic hostility or hatred towards Russians".

---

on the basis of a protected characteristic; and (iii) the speaker's knowledge that, in the given context at the time, the expression was likely to cause a proscribed outcome. Instead, the speaker's intent to cause harmful consequences (national, religious or other "strife") is automatically implied, once the language of the impugned statement is found to have reached the requisite level of perceived offensiveness. Furthermore, courts fail to carry out even the most superficial assessment of how likely it is that impugned statements would cause such harm. Neither the speaker's actual ability to influence their audience, nor the audience's likely perception of the statement are examined;

- Law enforcement authorities and courts are excessively reliant on, and deferential to, expert opinion (in the form of assessments conducted by specially designated expert committees), at the expense of performing their own analysis of all relevant circumstances, including the language used. Whether it is a criminal trial or a civil-law hearing on restricting "extremist material," a 'hate speech' case stands or falls by the conclusions of an expert report;
- No consideration is given, no matter how superficially, to the conflicting interests of freedom of expression. In other words, courts make no attempt to balance the need for restricting 'hate speech' against the need to protect freedom of expression in individual cases.

In consequence, the existing 'hate speech' restrictions are applied (and sometimes abused) in a manner that is not compliant Articles 19 para 3 and 20 para 2 of the ICCPR, routinely penalising protected forms of expression, such as:

- Controversial or critical statements that are disliked by the authorities but do not constitute 'hate speech' in any meaningful sense. For instance, blogger **Eduard Palchys** was convicted under Article 130 for publishing views that were highly critical of Russia's foreign policies.<sup>32</sup> While some of those cases can be put down to the authorities' excessive zeal and lack of understanding of the concept of 'hate speech', others appear to be politically motivated, where contrived 'hate speech' charges are used as a means of punishing political activists for other views they have expressed.

---

<sup>32</sup> See Spring, [Eduard Palchys is a political prisoner. Joint statement by human rights organizations](#), 5 October 2016. Another example of Article 130 prosecution for journalistic political opinion pieces is the case of Regnum journalists; see RSF, [Five-year suspended jail sentences for three Belarusian bloggers](#). For further details on both cases, see Analytical Document of Legal Organisation of Belarus, [Opposition of extremism and human rights, National anti-extremist legislation and corrective practice](#) (in Russian), Minsk, 2019.



- 
- Blasphemy, i.e. expression that can be perceived as ‘offensive’ by some religious followers. Thus, journalist **Aliaksandr Sdvizhkov** was convicted under Article 130 of the Criminal Code and given a lengthy prison sentence for re-printing the Danish cartoons of Muhammad as an act of solidarity with the Danish journalists.<sup>33</sup>
  - Offensive statements that may be deserving of moral condemnation. but that do not attain the level of severity justifying their restriction under international law.

It is also extremely problematic that in the run-up to the 2020 presidential election and in its aftermath, the Belarusian law enforcement authorities began to actively use the anti-extremist legislation for political persecution of dissent. It has been reported that more than 500 criminal cases were initiated under the extremism legislation. For example, in September 2020, blogger Pavel Spirin was detained and is currently in a pre-trial detention under Article 130 of the Criminal Code for his film “Edge 2019” which was included in the list of “extremist materials.”<sup>34</sup>

In the same period, the authorities also expanded the list of “extremist” materials. For instance, in October 2020, the Central District Court in Minsk issued a ruling to include the popular Telegram channel NEXTA and its logo in the list of “extremist” materials under Article 17(11) of the Code of Administrative Offences. The Court decided that materials published by the channel include calls for mass riots and ordered the Ministry of Information to restrict access to its content on the Belarusian internet.<sup>35</sup> The decision of the Minsk court imposes an administrative offence on anyone who reposts or shares NEXTA materials, or uses video and photo with NEXTA logo.<sup>36</sup>

Additionally, the authorities have been using the anti-extremism legislation to restrict the right to protest. For example, in October 2020, Julia Mitskevich, director of the Center for Development of Effective Communication ABF, was detained for participating in the protest.<sup>37</sup> While serving a 15-day arrest she was visited by employees of the Main Department for Fight Against Organized Crime and Corruption who spoke about “extremist activity of the organisation” and threatened with criminal liability towards organisation members for “extremism.”<sup>38</sup> She was subsequently sentenced to 15 days in prison.<sup>39</sup>

---

<sup>33</sup> See, e.g. Freedom for Political Prisoners, [Aliaksandr Sdvizhkov](#).

<sup>34</sup> See, e.g. Charter97, [Blogger Pavel Spiryn Was Detained in Belarus, 4 September 2020](#).

<sup>35</sup> See, e.g. .Coda, [Belarus declares opposition Telegram channel “extremist,” 21 October 2020](#).

<sup>36</sup> *Ibid.*

<sup>37</sup> See, e.g. Liberal international, [Belarus human rights leader gaoled after sham trial, 2020 No. 10](#).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

---

The routine misuse of the 'extremism' and 'hate speech' restrictions is exacerbated by the fact that illegal 'hate speech' is considered as a form of "extremism" under Belarusian law, thus bringing into play additional repressive mechanisms ostensibly created for "countering extremism." This has a number of negative consequences for how 'hate speech' cases are handled in practice.

- First, "counter-extremist" entities and powers established by the Law on Countering Extremism create their own bureaucratic momentum that leads to prosecutions for prosecutions' sake. While genuine instances of violent extremism or other domestic national security threats are thin on the ground, 'hate speech' cases are an easy way for 'counter-extremist' bodies and officials to imitate activity and boost their performance indicators.
- Second, casting 'hate speech' cases as a national security risk enables investigative authorities and courts to cloak their proceedings in secrecy, which impedes the possibility of independent monitoring. For instance, closed court hearings in Article 130 trials is a common practice.
- Third, the security-based approach also allows and encourages to impose disproportionately harsh sentences.
- Finally, applying the 'counter-extremism' framework to 'hate speech' fosters a highly formulaic approach to deciding on individual cases, where a mere display of signs, images or abbreviations from the official list of banned 'extremist materials' is a sufficient basis to restrict content or prosecute and convict content-providers, irrespective of the content and context of the expressive act in which those were included. Thus, in one case a person was fined under Article 17.11 of the Code of Administrative Offences for sharing a news article on his Facebook account, because that article was illustrated with a poster containing a banned "extremist" abbreviation. In another example, demonstrating the absurd levels of formalism this approach can lead to, local political activist Y. was prosecuted under the same provision of the Code of Administrative Offences for reacting with an emoji to a political cartoon on social media. The case was opened on the ground that the image featured Nazi insignia. It was eventually dismissed, but only because the court found that at the time of posting the insignia in question was included in the "extremist material" list only in the format of a banner/standard.<sup>40</sup>

---

<sup>40</sup> The proceedings in both cases were monitored by Human Constanta. For further details (in Russian) see [here](#).

---

The process of including certain materials on the list of banned “extremist materials” in itself is opaque, giving an impression of arbitrariness and even randomness. The current list is a mishmash of books, online videos, compact discs, photographs, chants, terms of clothing, personal ornaments etc.<sup>41</sup> None of the included items are accompanied with enough information to understand the reason for their inclusion (or, in some cases, even their content). However, even a cursory look at the list yields some clearly random choices, such as the classic Adolf Hitler biography by renowned British historian Alan Bullock (“Hitler: A Study in Tyranny”).<sup>42</sup>

---

<sup>41</sup> Ministry of Information of Belarus, [Republican list of extremist materials](#).

<sup>42</sup> *Ibid.*

---

# Conclusion: key problems identified

The analysis of the 'hate speech' legislation included in this report reveals a number of serious flaws that make this legislation incompatible with international standards on freedom of expression. In particular:

- The legislation relies on excessively vague and undefined terminology to determine forms of prohibited expression. This opens it to overbroad interpretation and misuse, allowing the authorities to restrict legitimate expression simply because it is critical or offensive or because it does not conform to a narrative favoured by the State;
- The legislation does not expressly require the speaker's intent to cause certain harm (discrimination, hostility or violence) as an essential element of prohibited forms of hate speech;
- The legislation does not require that prohibited 'hate speech' must be likely to cause certain harmful consequences (discrimination, hostility or violence). This opens it to an excessively broad and formalistic application which focuses merely on the content of the expression and does not take account of the context or the likely perception by the audience;
- Sanctions against individuals who have committed acts of 'hate speech' are limited to severe criminal penalties. Those penalties can only be justified in the most exceptional narrowly defined cases which involve incitement to violent acts, but they are disproportionate for most instances of criminal 'hate speech' as it is defined in the Criminal Code;
- The 'counter-extremism' legislation expands the substantive scope of prohibited expression further beyond the kind of 'hate speech' that can be legitimately restricted under international law. It also establishes various measures to restrict "extremist" content and sanction organisations and individuals deemed responsible for disseminating or facilitating "extremist" speech;
- Sanctions against organisations envisaged under the 'counter-extremism' legislation are limited to liquidation and permanent banning which can be imposed under the counter-extremism legislation. The authorities are granted the discretion to impose these extreme measures regardless of the seriousness of a 'hate speech' incident (defined as "extremism"), its scale or frequency. However, under

---

international law, such measures can only be justified in the most exceptional circumstances where less restrictive measures are not sufficient;

- This and other measures, including the removal of content labelled as “extremist material” are fatally tainted by the excessively broad underlying legal definitions of “hate speech-like expression. In consequence, they all can be employed in an arbitrary and/or disproportionate manner and misused to penalise legitimate expression such as criticism of public officials or governmental policies;
- The mandatory judicial involvement in the implementation of some of these measures cannot provide an adequate safeguard against their arbitrary or disproportionate application, because the underlying legislation is too vague and ambiguous to provide sufficient guidance to the judiciary and fails to ensure that decisions are balanced against the need to protect freedom of expression.

Some of the above flaws in the legislative framework could be partially rectified through a restrained and human rights compliant interpretation of the law in practice. However, this has not been the case in Belarus. Available evidence shows that:

- The legislative definitions of proscribed speech are interpreted expansively rather than narrowly;
- In determining if a given statement is a proscribed form of “extremist” expression/hate speech, no consideration is given to the speaker’s intent, the expression’s context, its audience, or the likelihood of harm to occur. The authorities adopt a ‘magic thinking’ approach, by which a supposedly transgressive statement is automatically assumed to produce harmful consequences in the real world such as some form of “strife”;
- The courts and investigating authorities are fully reliant on expert reports in their assessments of alleged ‘hate speech’, at the expense of their own independent analysis of the content of the expression and other relevant circumstances. Such total and totally misplaced reliance on expert assessment shifts de facto responsibility from the courts and law enforcement authorities to forensic/“counter-extremism” experts who by definition are unqualified and unauthorised to make determinations on points of law;
- Considerations related to protection of freedom of expression do not enter judicial analysis in ‘hate speech’ cases. The impact that criminal sanctions or other restrictions may have on freedom of expression is not viewed by courts as a relevant factor. In consequence, courts make no attempt to assess whether the restrictive measure at hand is strictly necessary and proportionate as per the requirements of international human rights law.

---

# Recommendations

ARTICLE 19 and Human Constanta believe that a serious overhaul of the 'hate speech' laws is required to bring them in line with Belarus's international obligations and achieve the right balance between protecting individuals against discrimination and hate-motivated violence on the one hand and protecting the right to freedom of expression on the other. As a starting point, these two objectives should not be viewed by policymakers, courts and other stakeholders as mutually exclusive. When freedom of expression is excessively restricted, it stifles public debate on the issues of discrimination, prejudice and hate, their underlying causes and possible solutions; it also silences the voices of minorities and the marginalised. So, in the end, the restrictions become counterproductive to the very purpose they are supposed to serve.

Reforming the legislation, however, is only part of the answer. It is equally important that the law is interpreted and applied in a manner consistent with human rights standards and, specifically, with the guarantees of the right to freedom of expression. In fact, considerable positive change can be achieved even before the much needed legislative reform is accomplished, providing that the courts and law-enforcement authorities implement the relevant legislation with reference to Belarus's international human rights obligations – for instance, by carefully assessing the necessity and proportionality of restrictive measures in every individual case.

ARTICLE 19 and Human Constanta make the following recommendations to the Belarusian government:

- All legal restrictions on 'hate speech' should be compliant with the requirements of legality (i.e. they must be sufficiently clear and precise), necessity (i.e. they must be necessary to achieve one of the legitimate aims of limiting freedom of expression under international law, such as protecting the rights of others), and proportionality (i.e. a particular restriction can be imposed only if a less restrictive alternative is not sufficient). All legal restrictions on 'hate speech' should be formulated with reference to the six-factor test set out in the Rabat Plan of Action;
- Article 130 of the Criminal Code should be revised to make it clear that this provision applies only to speech that amounts to incitement to discrimination, hostility or violence – which in turn requires the proof of intent to cause discrimination, hostility or violence. While the list of protected characteristics may be legitimately extended (e.g. to include gender, disability, and sexual orientation), "other social affiliation" should be removed on account of it being too broad and unpredictable in its application;

- 
- ‘Hate speech’ criminalised under Article 130 of the Criminal Code should be moved from the category of crimes against humanity to crimes against the individual. Irrespective of the formal categorisation, prison sentences should be envisaged only for the most serious forms of incitement to violent action;
  - The definitions of prohibited ‘hate speech’ in the criminal law should be also revised to ensure that they are limited to expression amounting to incitement of discrimination, hostility or violence. The definitions of prohibited ‘hate speech’ that are contained in other legislation should be also revised to ensure that they comply with international freedom of expression standards (e.g. in the context of banning so-called “extremist materials”;
  - Redress under civil law should be made available as a less restrictive alternative, involving the possibility for victims of ‘hate speech’ and for NGOs to seek redress in the form of pecuniary and non-pecuniary damages, the right of correction and reply (for incidents of ‘hate speech’ in the media) and/or a public apology.

ARTICLE 19 and Human Constanta oppose the use of the inherently vague notion of “extremism” as a basis for rights restrictions, and we strongly recommend the repeal of the “counter-extremist” laws in their current form. At the very least, however, all forms of expression that do not constitute direct incitement to violence should be removed from the scope of the “counter-extremism” laws and, accordingly, from the application of “counter-extremist” measures, such as lists of prohibited extremist materials, bans on “extremist” organisations, and any other sanctions against individuals and organisation for disseminating or facilitating “extremist” content (e.g. under the Code of Administrative Offences).

ARTICLE 19 and Human Constanta further recommend the following steps to improve the implementation of the existing legislation as well as ensuring that any future legislation will be enforced in a human rights compliant manner:

- The courts should interpret and apply all legal provisions restricting ‘hate speech’ in a manner consistent with the requirements of international human rights law, in particular, Articles 19 para 3 and Article 20 para 2 of the ICCPR (as interpreted in the Rabat Plan of Action). This involves interpreting the current definitions of prohibited ‘hate speech’ narrowly so that, wherever possible, they are narrowed down to advocacy of hatred amounting to incitement (*подстрекательство*) to discrimination, hostility or violence;
- In determining if a particular statement falls under a prohibited category, analysis should never be limited to the language of that statement. The courts and law-enforcement authorities in charge of investigating ‘hate speech’ cases should always

---

establish the speaker's intent to cause prohibited consequences. Furthermore, they should always consider the likelihood of harm to be caused by the statement – and, to that end, the context in which it was made, its extent and magnitude, and the speaker's position and their authority or influence over their audience;

- Judges, law-enforcement officials and other relevant officials (e.g. those involved in media regulation) should be provided with comprehensive and regular training on international human rights standards and comparative good practices relating to 'hate speech';
- In collaboration with experts and civil society, law enforcement authorities should develop investigative guidelines on the prosecution of 'hate speech' cases in line with international human rights standards.



---

# About ARTICLE 19 and Human Constanta

ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and information. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which guarantees the right to freedom of expression. ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. ARTICLE 19 has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, freedom of expression and equality, access to information and broadcast regulation. For more information about the ARTICLE 19's work in Belarus and in Europe and Central Asia, you can contact us by e-mail at [eca@article19.org](mailto:eca@article19.org)

Human Constanta is a Belarus-based human rights organisation founded in 2016. Human Constanta focuses on three main areas: protecting the rights of foreign citizens and stateless persons, promoting non-discrimination, protecting digital freedoms and rights. Human Constanta contributes to promoting human rights standards in the sphere of anti-extremism and counterterrorism policies.

## DEFENDING FREEDOM OF EXPRESSION AND INFORMATION

---

ARTICLE 19 Free Word Centre 60 Farringdon Road London EC1R 3GA

T +44 20 7324 2500 F +44 20 7490 0566

E [info@article19.org](mailto:info@article19.org) W [www.article19.org](http://www.article19.org) Tw [@article19org](https://twitter.com/article19org) [facebook.com/article19org](https://facebook.com/article19org)