

ARTICLE 19

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## Kyrgyzstan: Freedom of expression and 'extremism'

November 2020

Report

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## 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)

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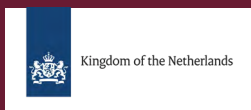
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# Executive summary

In this report, ARTICLE 19 and the Media Policy Institute examine the Kyrgyzstan law on 'extremist' content, specifically the part of restrictions that are typically referred to as 'hate speech', and the implementation of this law in practice.

Similar to many governments around the world, Kyrgyzstan developed and adopted legislation and regulation to combat 'extremism.' ARTICLE 19 and the Media Policy Institute note that there are several key problems in the national legislation as well as in its enforcement. Due to its overly vague and undefined terminology, there is a high risk of overbroad interpretation and application of law. This is particularly troubling where the law provides severe criminal penalties for individuals who break it. Under its current form, ARTICLE 19 and the Media Policy Institute believe that the applicable legislation does not meet the requirements laid out in Article 31 of the Kyrgyzstan Constitution nor the State's international human rights obligations.

In this report, ARTICLE 19 and the Media Policy Institute also provide a case study of the "September TV" case that demonstrates how this legislation is applied in practice. In August 2018, an interview broadcast by the channel was considered "an extremist material". On that basis a district court in Bishkek, satisfied the Prosecutor General's request to permanently terminate the operation of the channel and ban the distribution of any programmes produced by the channel through any other media. This case shows how 'extremist' content laws can lead to severe restrictions on freedom of expression. ARTICLE 19 and the Media Policy Institute highlight that decisions such as these are possible due to 'extremist' laws having an overbearing scope and not sufficiently protecting freedom of expression.

## Key recommendations

- The Government should urgently review its 'counter-extremism' and 'hate speech' legislation and bring it to full compliance with international freedom of expression standards. The 'counter-extremist' laws in their current form should be repealed. In particular, provisions on Articles 313 and 314 of the Criminal Code should be substantially revised and Article 315 of the Criminal Code should be repealed.
- In all relevant legislation, prohibited forms of 'hate speech' should be defined in a consistent manner, and terminological uniformity should be observed. This includes a consistent approach to protected characteristics;
- 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

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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.

- Redress under civil law should be made available in cases of 'hate speech' as a less restrictive alternative to criminal sanctions (and in the case of organisations and media, to quasi-criminal sanctions such as closures or suspensions). This involves 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 media) and/or a public apology;
- The courts should interpret and apply all legal provisions restricting 'hate speech' and 'extremism' in a manner consistent with the requirements of international human rights law. 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.

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# Introduction

In this report, ARTICLE 19 and the Media Policy Institute examine specific parts of legislative restrictions on freedom of expression that have been adopted in Kyrgyzstan purportedly to address 'extremist' content.

The restrictions in question, imposed under the chapeau of 'extremism' in Kyrgyzstan 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.

Given the confusion surrounding the concept of 'extremism' in Kyrgyzstan, ARTICLE 19 and the Media Policy Institute's report focuses on the part of restrictions that are typically referred to as 'hate speech.'<sup>1</sup> Kyrgyzstani law does not use the term 'hate speech' as such; instead, it refers to "igniting hostility," "igniting discord," and "propaganda of exceptionalness, superiority or inferiority" (on the basis of different protected characteristics). However, 'hate speech' is a convenient shorthand to designate those diverse categories of prohibited discriminatory expression. It would be misleading to take cue from the language of international human rights instruments and refer to those restrictions as "incitement to hatred," since in practice they have been understood to cover expression that does not reach the threshold of incitement.

Not all categories of speech prohibited under Kyrgyzstani counter-extremism legislation can be linked to 'hate speech.' ARTICLE 19 and the Media Policy Institute 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.

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<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 comas.

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- 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.

This report’s focus on ‘hate speech’ does not imply an endorsement of the other restrictions imposed on freedom of expression under the ‘counter-extremism’ laws.

The structure of the report is as follows. First, the report outlines international human rights standards that address restrictions on the right to freedom of expression on the basis of ‘extremism.’ Second, the report examines the Kyrgyzstan legislation on ‘extremism’ and ‘hate speech’ and reviews its compliance with the applicable international standards. Third, it outlines how this legislation is applied in practice; and finally, it offers recommendations for bringing both the legislation and practice in compliance with international human rights standards.

ARTICLE 19 and the Media Policy Institute hope that the recommendations in this report will be useful to the Kyrgyzstan Government, the media, civil society and other stakeholders in further reforms in this area.

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# 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, Kyrgyzstan 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.

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<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.



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## 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

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<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> [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.

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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 as in Kyrgyzstan, 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 internet 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>

## Limitations on 'hate speech'

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

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<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.

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levels.<sup>14</sup> While there is not 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 must create “an imminent risk of discrimination, hostility or violence against persons belonging to [the target group].”<sup>17</sup>

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<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 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.

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

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The **Rabat Plan of Action** provides additional authoritative guidance on the scope of restrictions required by Article 20(2).<sup>18</sup> This document set 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>

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<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> General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para 50.

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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 do 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>

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<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> *Op. cit.*

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

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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 in Kyrgyzstan:

- **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.

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<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.*; General Comment No. 34, *op.cit.*, para 48 (“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.

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# Kyrgyzstan 'hate speech' legislation and its enforcement

## Constitutional framework

Freedom of expression is guaranteed in Article 31 of the Kyrgyzstan Constitution. However, it may be restricted under a general limitation clause contained in Article 20(2) which is fully aligned with the proportionality test of Article 19(3) of the ICCPR.

Article 31 also prohibits any “propaganda of national, ethnic, racial [or] religious hatred [or] gender or other social superiority that incites discrimination, hostility or violence.”

This prohibition follows the language of Article 20(2) of the ICCPR insofar as it requires the existence of incitement to discrimination, hostility or hatred. However, it also differed in two important respects.

- First, its list of protected characteristics is broader. While the inclusion of gender as a protected characteristic is welcome, “other social superiority” is too vague a concept that lends itself to overly broad interpretation.
- Second, “superiority” is not synonymous with “hatred,” the most relevant difference being that it does not require a degree of intensity associated with the latter. “Propaganda of superiority” therefore covers a considerably broader range of expression than what is prohibited under Article 20(2) of the ICCPR.

Article 4 of the Constitution also prohibits political parties, civil society organisations and religious organisations “whose activities are directed towards igniting social, racial, national, inter-ethnic or religious hostility.” The most direct impact of this restriction is on freedom of association. However, it is also a restriction on the freedom of expression of political parties, civil society organisations, and religious associations.

“Igniting hostility” is open to a much broader interpretation compared to the language used in Article 20(2) of the ICCPR - or, indeed, Article 31 of the Constitution:

- First, it is unclear if “igniting hostility” must always be intentional, since “directed towards” can be understood as either “aimed at” or “having the effect of.”
- Second, insofar as “activities” include acts of expression, Article 4 does not limit them to those that constitute (intentional) advocacy of hatred. The ordinary

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reading of this provision would suggest that even well-reasoned views expressed in a calm and rational manner (e.g. views on autonomy for ethnic minorities, minority languages, etc.) will fall under this prohibition if they are deemed capable of “igniting hostility.”

- Yet another problematic aspect of this provision is the reference to “social hostility.” This is a concept that is almost impossible to define narrowly, and so it can be easily abused to restrict critical or controversial expression.

## Criminal law

The Criminal Code of Kyrgyzstan considers a number of problematic provisions that goes beyond restrictions permitted under international human rights standards and these provisions are frequently misused to target those critical of the public authorities or the government.<sup>30</sup>

This section focuses on provisions that criminalise ‘hate speech’ under the rubric of “crimes against the State” rather than crimes against the person. This means that ‘hate speech’ offences are put on par with criminal acts such as a violent overthrow of the government, armed civil unrest or violent separatism. In other words, protecting individuals against discrimination or hate-motivated violence is not understood as the primary goal of the criminalisation of ‘hate speech.’ This makes the notion of harm caused by criminal forms of ‘hate speech’ much more nebulous, removing the need to establish the existence or likelihood of specific harm to protected groups.

The Criminal Code contains a number of relevant provisions against ‘hate speech.’

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<sup>30</sup> These include, e.g. also Article 310 of the Criminal Code that provides for liability for public calls for the violent seizure of power and these provisions are also used to prosecute those critical of the state bodies. For instance, in May 2020, on the instructions of the State Committee for National Security of the Internal Affairs Directorate for the Talas region, Mr Shabdan was taken from Chynarbek (Ali Shabdan) to the building of the law enforcement agency and was taken from him an explanatory note due to the fact that he reposted several posts on his Facebook page criticizing the actions of the authorities. In July 2020, the State Committee for National Security summoned a stand-up show participant Nazgul Alymkulova for interrogation, for her humorous video in which the face of the President was superimposed on the face of one of the famous American rappers. In July 2020, Argen Baktybek uulu and his wife Erkin Asanbaeva were summoned for interrogation by the Investigative Service of the Ministry of Internal Affairs of the Kyrgyz Republic, for posting some memes on social media.



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## Direct criminalisation of 'hate speech'

**Article 313 of the Criminal Code** criminalises public statements that are “directed towards arousing of racial, ethnic, national religious or inter-regional hostility (discord) [or] belittling national dignity” as well as public statements that constitute “propaganda of the exceptionalness, superiority or inferiority of individuals on the basis of their attitude towards religion, [or their] nationality or race.”

This provision is not in conformity with the requirements of Articles 19(3) and 20(2) of the ICCPR for a number of reasons:

- It includes vague concepts that are not defined anywhere in the law but easily lend themselves to an overly broad interpretation, namely: arousing hostility (discord), national dignity (most likely in the meaning of the/a nation's dignity), and propaganda of exceptionalness, superiority or inferiority;
- The protection of the 'dignity' of abstract entities such as a nation or a people cannot be justified on the ground of protecting any of the legitimate aims listed in Article 19 of the ICCPR. Therefore, criminalising expression that “belittles national dignity” is, a priori, an illegitimate restriction, quite apart from the lack of legal certainty inherent in the use of such vague a concept;
- The inclusion of the notion of “inter-regional hostility” does not serve any discernible legitimate aim, considering that acts of violent separatism are criminalised as a separate offence while inter-ethnic/national minority relations are already covered in this provision by the notion of “ethnic hostility.” Moreover, its meaning is too vague to meet the legal certainty requirement and ensure foreseeability in its application.
- Article 313 fails to make it clear that intent on the part of the speaker to cause proscribed consequences is a necessary element of the crime. The wording eschews the established term “incitement” (подстрекательство), which does require the existence of intent, in favour of “igniting/arousing” which is not used in domestic law outside this context. It should be also noted that the wording does not follow the language of Article 31 of the Constitution which prohibits only expression that incites discrimination, hostility or violence. While theoretically “igniting hostility” could be interpreted by national courts in a manner compliant with the ICCPR (i.e. as requiring intent to cause discrimination, hostility or violence), this is emphatically not how it has been understood and applied in practice;
- The provision does not offer any guidance on the required degree of likelihood that the impugned expression may cause actual hostility, discrimination or violence. The “propaganda of exceptionalness, superiority or inferiority” is prohibited as such, without reference to any negative consequence it may or is likely to cause;

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- The only penalties envisaged are lengthy prison sentences ranging from 5 and 10 years. The harshness of the punishment is flagrantly disproportionate, especially insofar as it can be imposed on speech that has not resulted, nor was intended to result, in violence or other serious tangible harm.

### **Indirect criminalisation under the guise of targeting ‘extremist’ organisations**

**Article 314 of the Criminal Code** additionally criminalises the establishing or governing of “an extremist organisation.” Its first paragraph applies only to organisations “whose activity is connected to arousing national, ethnic, racial religious or inter-regional hostility (discord), belittlement of national dignity, [or] propaganda of the exceptionalness, superiority or inferiority of individuals on the basis of their attitude toward religion, [their] nationality of race, [or their] place of residence.” It appears that this paragraph is not meant to punish for the operation of an organisation that has been officially declared extremist under the counter-extremist legislation, since the latter situation (i.e. operating an officially banned organisation) is addressed separately in the second paragraph where it attracts a more severe punishment.

From a freedom of expression perspective, the criminal liability of founders and managers of non-governmental organisations under the first paragraph of Article 314 is highly problematic for a number of reasons:

- It serves no discernible legitimate purpose, considering that “arousing hostility” is already criminalised as such. Even though legal entities cannot be held criminally liable in Kyrgyzstan’s legal system (i.e. only individuals can commit a criminal offence), this provision is a de facto restriction on the freedom of expression of non-governmental organisations. However, it neither replaces nor precludes the criminal liability of individuals within the organisation who are directly responsible for acts of ‘hate speech’ criminalised in Article 313;
- It expands the already problematic concept of “arousing hostility” by adding a new protected characteristic, namely “place of residence.” None of the legitimate aims for restricting freedom of expression can provide a plausible justification for a restriction based on this ground. Furthermore, it can be easily misused as the fall-back category for punishing for legitimate expression when none of the other grounds can be plausibly established;
- “Connected to” is an overly loose way of defining the required link between the organisation and the act of “arousing hostility.” It clearly does not require that “arousing hostility” be the aim the organisation. In fact, the language is so unspecific that, if interpreted literally, the provision may be applied to, say, a human rights organisation providing legal assistance to individuals prosecuted for ‘hate speech;’

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- It establishes a form of strict liability for the founders and senior management of an organisation that is based solely on their position. Considering that this provision envisages a milder penalty in comparison to Article 313, it makes sense only if it is intended to apply to individuals who have not committed 'hate speech' themselves.

### **Criminalisation of production and distribution of material containing 'hate speech'**

**Article 315 of the Criminal Code** criminalises, among other things, the production, dissemination, transportation or shipment of extremist materials, as well as purchasing or storing such material for the purpose of its dissemination. Since 'hate speech', as prohibited by Article 313, is included in the definition of "extremism" under national law, Article 315 is an additional form of restricting 'hate speech' by targeting channels through which it can be publicly disseminated.

Article 315 is a highly problematic provision for several reasons:

- Similar to Article 314, it establishes strict liability for producers or distributors of "extremist material." In other words, it criminalises the production, dissemination or even shipment of proscribed content regardless of the person's intent or, on the face of it, even regardless of their prior knowledge of the content's unlawful character;
- It is entirely unclear what constitutes "extremist material" for purposes of this provision. The Criminal Code does not define the term, and while a broad definition of "extremist material" can be found in the law on counter-extremism (discussed below), the absence of a definition in the Criminal Code raises serious concerns in respect of the requirement of legal certainty;
- An additional layer of uncertainty comes from the fact that neither the Criminal Code nor the counter-extremism legislation (see below) make it clear if it is only a material already declared extremist by a prior court decision that can be considered as an "extremist material." That is, it is unclear if this provision applies only to the production or dissemination of material that is already banned as extremist by a pre-existing court decision, or if the material's extremist character can be established for the first time directly in the criminal proceedings under Article 314. The latter interpretation makes the provision most certainly non-compliant with the principles of legal certainty. However, even the former interpretation does not fully remove such concerns, given that full and up-to-date information about materials declared to be extremist is not usually available;
- The penalties envisaged are disproportionately harsh. The penalties are even harsher if certain aggravating circumstances are present, namely, if such acts are committed by a group of individuals or with the financial or other support of foreign organisations

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or foreign citizens. It is impossible to discern a legitimate justification for imposing harsher punishment in such circumstances.

Article 315 targets actors, who are not speakers themselves, but who are instrumental to others exercising their freedom of expression. It creates a strong incentive for such actors to err on the side of caution and refuse to handle any material they consider as potentially risky - even material that would not fall into the already overbroad categories of prohibited speech established in national law.

### **'Counter-extremism' legislation**

Kyrgyzstan's 'counter-extremism' legislation imposes additional restrictions on freedom of expression that run in parallel to criminal measures discussed above. Whereas the Criminal Code penalises individuals who are either the authors of prohibited forms of speech or considered as conduits for such speech, the Law on Countering Extremist Activity (LCEA) enables the State to target proscribed content directly.

### **'Hate speech' as a form of 'extremism'**

Article 1 of the LCEA defines "extremism" through listing prohibited "extremist" acts. It is a broad and eclectic list, ranging from serious violent crimes (e.g. terrorism or *coup d'état*) to unspecified threats to national security, to vaguely defined forms of expression that do not amount to incitement to violence or other criminal behaviour.

Within this "definition," the forms of "extremism" that can be loosely termed as 'hate speech' are largely overlapping with, but not fully identical to, the expression criminalised under Article 313 of the Criminal Code. They include: (i) "igniting racial, national (inter-ethnic) or religious discord, as well as social discord involving violence or calls for violence;" (ii) "belittlement of national dignity;" and (iii) "propaganda of exceptionalness, superiority or inferiority of individuals on the grounds of their attitude to religion [or their] social, racial, national (inter-ethnic), religious or linguistic affiliation."

The categories of prohibited 'hate speech' under the LCEA raise the same issues as Article 313 of the Criminal Code, which means they are equally non-compliant with the requirements of Articles 19 and 20 of the ICCPR:

- The counter-extremism legislation is equally reliant on the same overbroad and undefined concepts;
- With the exception of expression "igniting social discord" which requires "calls for violence," the intent of the speaker is seemingly irrelevant, and so is the likelihood of the expression's causing tangible harm;

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- With the above-mentioned exception related to “social discord,” proscribed speech does not need to rise to the level of incitement to discrimination, hostility or violence;
  - The prohibition of “belittlement of national dignity” is additionally problematic because it protects an abstract construct rather than the rights of individuals and has no discernible connection to any other legitimate aims for restricting freedom of expression.

The LCEA further widens the scope of proscribed expression by introducing two other overlaying concepts.

- First, it recognises a “public incitement” to any of the above-mentioned “extremist” acts as an act of “extremism” in its own right (Article 1 of the LCEA). In consequence, it directly prohibits ‘hate speech’ and similar expression as a primary form of “extremist activity,” and it also prohibits speech that can be *interpreted as an incitement to committing ‘hate speech.’*
- Second, Article 1 of the LCEA introduces the notion of “extremist material” which refers to any medium in which proscribed “extremist” content can be published or prepared for publication. In terms of its content, “extremist material” is defined as material “that calls for carrying out extremist activity or rationalises or justifies the necessity of such activity” or “publications rationalising or justifying national (ethnic) and/or racial superiority or justifying the practice of committing war crimes or other crimes that are aimed at full or partial elimination of a certain ethnic, social, racial, national or religious group.”

Therefore, “extremist material” is not only material that contains expression directly prohibited as a form of “extremist activity” in the first part of Article 1 of the LCEA. It is also material that may be free of that kind of expression per se but is seen as “calling for” or “rationalising or justifying” it. The inherently vague concepts of “rationalising” and “justifying” are highly problematic even when they are used in connection with unquestionably grave threats such as terrorism. They are even more problematic when applied in the sense of speech that “rationalises or justifies” other forms of speech.

This definition of “extremist material” expressly extends the scope of restricted expression beyond ‘hate speech’ to include legitimate expression that must not be restricted in any manner. For instance, it can be applied to a newspaper column expressing a disagreement with the conviction of a particular individual for an extremist offence and explaining that that person’s statements were not hate speech, even if the journalist does not reproduce any of their original, supposedly inflammatory language.

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## Measures against 'extremist' speech

The LCEA introduces measures that target prohibited content directly as well as measures that do so indirectly by penalising media outlets and civil society organisations for publishing prohibited content.

Content can be removed from any form of public dissemination by virtue of being officially labelled as extremist material, with its subsequent inclusion on an official list of extremist materials. Whether specific content is an "extremist material" is determined by court (Article 13 of the LCEA).

Alternatively, the state prosecutor's office and state regulators can issue cautions to order civil society organisations and media organisations to remove content they deem "extremist" (Articles 6-8). The LCEA expressly provides for a possibility to appeal against cautions issued in respect of non-governmental and religious organisations but not against those in respect of media organisations. If the organisation does not comply with the caution or receives a second caution within a year it faces mandatory permanent closure (the only form of penalty envisaged in this context). At the same time, these provisions have become unenforceable since the new version of the Kyrgyzstan Constitution in 2010, that introduced significant changes to the prosecutor's powers. The prosecutor's office no longer has the right to inspect the activities of legal entities with a private form of ownership. Hence, Articles 6-8 of LCEA contradict the constitutional provisions.

Cautions against media outlets can be issued for disseminating extremist material or when the relevant authority detects "signs of extremism" in their activities. This language implies that cautions can be used as a *preventive* measure where acts proscribed under Article 1 of the LCEA, broad as their definition already is, have not been committed yet - which gives the regulators and the law enforcement bodies authorised to issue cautions an exceptionally wide discretion in the use of this measure. Consequently, while they may initially appear as a relatively mild measure, cautions allow multiple non-judicial bodies to interfere with the content produced by media organisations on pain of permanent closure. This in turn robs the judicial safeguards envisaged under Article 13 of any practical value.

The LCEA also targets organisations and media responsible for the dissemination of 'extremist'/hate speech. The only measures envisaged in this regard are a permanent ban on civil society organisations and religious organisations (with the possibility of immediate suspension while the decision on the ban is pending - Articles 9 and 10, respectively) and, the case of media outlets, a permanent closure (Article 11).

Therefore, according to the LCEA, a media outlet must be closed if they do not comply with a caution, and it also *may* be closed for disseminating extremist material or "carrying out extremist activity" without/regardless of the existence of a prior caution. These two options are available in parallel, leaving it entirely at the discretion of the respective

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authorities to choose whether they want to proceed with a caution first or immediately initiate the termination proceedings.

Furthermore, the LCEA allows the authorities to seek the termination of a media outlet/ a non-government organisation for *any* violation of Article 1 of the LCEA, without having regard to the scale or repetitiveness of unlawful conduct, the organisation's intent, its broader objectives, or the existence of any mitigating circumstances. At the same time, it does not require the authorities to do so (except for non-compliance with a caution when termination is mandatory). Such virtually unchecked discretion allows for complete arbitrariness in the application of the measure. It cannot be reconciled with the legality requirement under Article 19(3) of the ICCPR.

The measures under Articles 9 to 11 also fail to meet the proportionality requirement. A permanent ban/closure is evidently the most restrictive measure that can be applied to a media outlet or other organisation. It should be allowed to be used 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. However, apart from the highly problematic caution mechanism discussed above, the LCEA does not envisage any less restrictive responses, such as self-regulatory complaint mechanisms, the right of reply, financial penalties, or temporary suspension.

According to the LCEA, organisations can be banned/closed only on the basis of a court decision. However, this safeguard is of little practical value, given the fundamental problems with the legal framework discussed above, namely, the vagueness and overreach of the key definitions (which, in consequence, lack foreseeability in their application) and the unlimited discretion afforded to authorities in deciding whether to apply these sanctions.

## **The enforcement of 'hate speech' laws**

It is clear that a serious overhaul of the current 'hate speech' legislation is necessary to bring it fully in line with Kyrgyzstan's international human rights obligations. The prohibited categories of 'hate speech' are defined in too broad and vague a manner to meet the legality criterion under Article 19(3) of the ICCPR, and the penalties envisaged for individuals, civil society organisations and media are disproportionately harsh.

Yet, there is also a limit to how specific a law can and should be. It is the job of the courts and executive bodies to resolve unavoidable ambiguities by interpreting and applying the laws in a manner consistent with international law. Some (but not all) of the shortcomings

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of the 'hate speech' laws discussed above could be overcome or minimised at the enforcement stage, if the courts, law enforcement agencies and state regulators were to interpret those laws narrowly, having regard to the right of freedom of expression as it is guaranteed in international law and the constitution. This has not been the practice in Kyrgyzstan.

It is not feasible to conduct a comprehensive review of the judicial practice on 'hate speech' in this report. Court decisions (including in criminal cases) are not generally published, occasional media reporting of the more significant cases does not typically provide enough detail about the content of the impugned statements or the court's arguments. However, the Media Policy Institute has collated enough data in the course of its monitoring and litigation work to identify certain established patterns in how the courts approach 'hate speech' cases.

- This data enables us to conclude that when determining if a specific statement is 'extremist' (i.e. falls into any of the prohibited categories of 'hate speech'), the courts focus **exclusively on the language of the statement**. No attempt is made to establish and assess other crucial factors, such as the speaker's intent, the context in which the statement was made (both in the narrow sense of the larger expressive act of which the statement formed a part and in the broader sense of the social, political and economic context) or the likelihood of any specific harm caused by the statement. It therefore appears that neither the courts nor the law enforcement authorities that initiate/investigate hate crime cases view those factors as relevant.
- The **speaker's intent** is a crucial and distinguishing element of the 'hate speech' prohibited by Article 20(2) of the ICCPR. In consequence, the application of the existing criminal-law provisions on 'hate speech' would be consistent with international law only if the national courts interpreted them as requiring: (i) the speaker's intent to engage in advocacy to hatred; (ii) the speaker's intent to target a protected group 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. In practice, however, the speaker's intent (e.g., to "arouse discord") is automatically implied, once the language of the impugned statement is found to have reached the requisite level of offensiveness.
- Similarly, the courts do not engage even in the most superficial assessment of how likely the impugned statement **was to cause harm**, i.e. how likely it was to result in any of the outcomes proscribed by the criminal law (such as inter-ethnic or inter-religious hostility/discord). Neither the speaker's actual ability to influence their audience, nor the audience's likely perception of the statement are regarded as relevant. Instead, the courts (and the prosecutors and regulators) adopt what can be described as a 'magic thinking' approach to 'hate speech:' only the language itself matters, and



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once the language is found to be transgressive, the harm is automatically implied, irrespective of any external factors. The authorities do not consider that the speech's audience has its own agency which will determine how the audience will interpret, be influenced by, and react to the speech, including the audience's capacity to respond with counter-speech.

- By the same token, the demonstrable absence of harm is not considered as a circumstance precluding - or, at the very least, drastically reducing - the speaker's responsibility. In some cases, serious criminal penalties were imposed for statements that had already been in the public domain for a considerable length of time (a year or longer), with no evidence of any harmful consequences caused.

Such complete disregard for context and intent makes the enforcement of the 'hate speech' restrictions not only excessive but also counterproductive to the very purpose of those restrictions. It creates a chilling effect on public debate and media reporting on the subject of hate speech, its underlying causes, prevalence and responses required. In one instance, a criminal case was opened against a news website reporter who had reported on bona fide incidents of 'hate speech' to criticise the authorities for their lack of response.

As an offshoot of the strictly textual approach, the courts are **excessively reliant on expert opinion in the form of linguistic expert assessments** which are de facto mandatory in all 'hate speech' proceedings. This is done at the expense of the court's independent 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 the expert report. At best, the court may order a new expert assessment when it finds that the quality of the original report is too poor from a methodological perspective. However, neither ARTICLE 19 nor the Media Policy Institute are aware of a single example where the court arrived at substantive conclusions different from what was accepted as the final expert report in the case.

Remarkably, it never seems to occur to the judges that it only matters how the impugned statements were or could be perceived by their target audience, not by experts in linguistics - and so that, in that sense, the judges themselves should be perfectly capable of understating and assessing their meaning without any "expert" input. In one of the most striking examples of such extreme deference to experts, it took four expert assessments to acquit a person for an inane, albeit rather rude, short comment he posted on Facebook. The comment in question was a single sentence about people's nostalgia for the Soviet era which did not contain any discriminatory or hateful language towards any specific protected group.

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The only factor that the courts and investigating authorities consider relevant besides the language of the statement is its **public character**. However, it only matters insofar as the statement has been made public in any form. There is no apparent difference in how instances of 'hate speech' are treated depending on their extent and magnitude, no distinction drawn between, for instance, a user comment on a social media platform which has been viewed by a handful of people and a material widely disseminated in mainstream media, or between one-off dissemination and repeated dissemination.

Finally, the courts do not take account of the **conflicting interests** of freedom of expression, making no attempt to balance the need for restricting 'hate speech' against the need to protect freedom of expression in individual cases. In fact, the dependent's right to freedom of expression is not discussed even in the most superficial manner.

### **September TV case study**

The closure of a private TV station called September Channel highlights many of the systemic problems with the practice of using the counter-extremist legislation to restrict hate speech.

In August 2018, the Office of the Prosecutor General successfully petitioned a district court in Bishkek to declare an interview broadcast by the channel "an extremist material" and, on that basis, terminate the operation of the channel permanently and ban the dissemination of any programmes produced by the channel through any other media. After a short hearing in which the channel's representatives were not heard out, the court satisfied the Prosecutor General's request in full.

The interview in question was broadcast live more than a year earlier, and its recoding was not made publicly available after the broadcast. The interview was with a well-known opposition figure and former senior law-enforcement official, Mr Kaparov. It was broadcast as part of a current affairs programme which discussed the historic events in the Osh region of Kyrgyzstan where violent clashes broke out between the Kyrgyz and Uzbek communities in June 2010. Mr Kaparov had long been critical of the central authorities' handling of those events. In the interview, Mr Kaparov gave his account of celebrations that had once taken place at a school for the Uzbeki minority which, in his opinion, were an unacceptable display of nationalism. He did not use language that could be seen as offensive or discriminatory. Yet, it is that part of the interview that was found to be "extremist." Prior to the hearing against September Channel, Mr Kaparov himself was convicted for the same statement in a separate criminal trial. He was found guilty of "arousing national (inter-ethnic), racial, religious or inter-regional animosity."

ARTICLE 19 and the Media Policy Institute find the decision against September Channel highly problematic for a number of reasons:

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- The impugned statements made in the interview do not reveal any signs of ‘hate speech’ that can be legitimately prohibited under international law;
  - The sole basis for the Court’s decision was the “extremist” nature of the impugned statements, even though the case concerned the TV programme in which those statements were made. The Court did not examine the contents or objectives of the programme as such. Crucially, the court did not examine the journalists’ intent behind the interview;
  - The Court did not examine if the interview had caused or was likely to cause any specific negative consequences. In this regard, the court paid no attention to the fact that the interview was a one-off broadcast that took place more than a year before the hearing, with no recording of it available to the public;<sup>31</sup>
  - The Court did not hear out the representatives of the channel, and it did not seek any evidence in addition to what had been submitted by the Prosecutor General. Nor did it examine the interview directly, relying instead on the representations made by the Office of the Prosecutor General. The Court fully and uncritically deferred to the conclusions of the expert report as summarised in the Prosecutor General’s submission;
  - At no point, did the Court consider the channel’s right to freedom of expression to be a relevant factor;
  - The closure of the entire channel was a manifestly disproportionate measure. The Court made that decision solely on the basis of the “extremist” character of a single programme. The Court did not examine the channel’s programming in general and made no attempt to explain why restricting the offending content would not be sufficient;
  - There was no justification for the removal of all other content produced by the channel. No evidence was presented to or sought by the court to demonstrate that any of that other content contained “extremist” material.

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<sup>31</sup> Cf. European Court of Human Rights, *Jersild v Denmark*, App. No. 15890/89, 23 September 1994. The Court paid attention to “the manner in which [the programme containing offending statements] was prepared, its contents, the context in which it was broadcast and the purpose of the programme” and “whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.” (para. 31). It stressed that “[n]ews reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of “public watchdog” [...] The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so” (para 35).

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# Key problems of the national legislation and its enforcement

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 make it clear if the speaker's intent to cause certain harm (discrimination, hostility or violence) is a required 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 excessively broad and formalistic application which focuses merely on the content of the contested expression but 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 particularly 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;
- In addition to criminalising 'hate speech' directly, the criminal law separately criminalises the dissemination of material containing 'hate speech,' apparently where it is done through negligence rather than intentionally (as the latter would be covered by the direct criminalisation). This extends the criminal restrictions even further beyond their legitimate scope, by additionally targeting individuals and organisations who are not speakers themselves but who are instrumental in the ability of others to exercise their freedom of expression;
- Possible sanctions against legal entities (media outlets, civil society organisations, and religious organisations) are largely confined to permanent bans and closures. These measures can be applied for any violation of the 'hate speech' restrictions imposed by the 'counter-extremism' legislation, regardless of their seriousness, scale

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or frequency. The discretion the authorities are afforded in imposing these sanctions is too broad to ensure the law's non-arbitrary and foreseeable application. As the most severe measures that can be adopted against organisations and media, closures and bans are justified only in the most exceptional circumstances where less restrictive measures are not sufficient. In most cases where their application is allowed by the current laws, they are manifestly disproportionate;

- Even though the banning of 'extremist material' and the termination of organisations/media outlets can only be done by court, this safeguard is stripped of its practical value because the relevant legislation is too vague and ambiguous to provide sufficient guidance to the judiciary.

Although some of these flaws in the 'hate speech' legislation could be rectified through restrained and human rights compliant interpretation, the actual practice of its application by courts, law-enforcement authorities and regulators reveals a very different picture:

- The definitions of 'hate speech' contained in the legislation are interpreted broadly 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 to 'hate speech, whereby harmful consequences such as ethnic or religious "discord" are automatically implied in the expression's transgressive language;
- The courts and law enforcement authorities are fully reliant on linguistic 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 linguistic expertise shifts de facto responsibility from the courts and law enforcement authorities to forensic 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 restriction is strictly necessary and proportionate as per the requirements of international human rights law.

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# Recommendations

ARTICLE 19 and the Media Policy Institute believe that a serious overhaul of the 'extremism' and 'hate speech laws' is required to bring them in line with Kyrgyzstan'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 reform is completed, providing that the courts and law-enforcement authorities implement the relevant legislation with reference to Kyrgyzstan's international human rights obligations - for instance, by carefully assessing the necessity and proportionality of restrictive measures in every individual case.

ARTICLE 19 and the Media Policy Institute make the following recommendations to the Kyrgyzstani government:

- The definitions contained in Article 313 of the Criminal Code should be substantially 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. The offence of "belittling national dignity" should be removed altogether;
- The lawmakers are strongly encouraged to consider categorising criminal forms of 'hate speech' as crimes against the individual (they are currently categorised as crimes against the State). However, irrespective of the categorisation, prison sentences should be envisaged only for the most serious forms of incitement to violent action, whereas less severe penalties, such as community work and fines, should be the default option;
- Article 314 of the Criminal Code which punishes individuals involved in the governance/management of "extremist" organisations should be limited only to organisations that

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have been formally banned - i.e. strictly as a sanction for violating a pre-existing ban on operation. For any other cases of criminal activity falling under the current rubric of “extremism,” including ‘hate speech’ prohibited under Article 313, only the perpetrators should be held criminally responsible under the provisions of the Criminal Code which directly criminalise the relevant acts. There should be no vicarious liability for senior managers or founders of organisations. Furthermore, the fact that acts of ‘hate speech’ are committed by an individual affiliated with a civil society organisation should not be automatically regarded as an aggravating circumstance or attract stricter penalties;

- Article 315 of the Criminal Code which punishes individuals involved in the preparation or distribution of ‘extremist’ material (i.e. including material containing criminal hate speech) should be repealed. When such acts are performed intentionally, the individual should be/is held liable directly under the provision of the Criminal Code that criminalises the relevant category of “extremist” acts (e.g. Article 313) - as direct perpetrators or as accomplices. There should not be additional liability for those who are involved in the distribution of restricted material unintentionally (i.e. through negligence or recklessness);
- Redress under civil law should be made available as a less restrictive alternative to criminal sanctions (and in the case of organisations and media, to quasi-criminal sanctions such as closures or suspensions). This involves 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 media) and/or a public apology;
- In all relevant legislation, prohibited forms of ‘hate speech’ should be defined in a consistent manner, and terminological uniformity should be observed. This includes a consistent approach to protected characteristics;
- 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 19 and the Media Policy Institute 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-extremist” laws and, accordingly, from

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the application of “counter-extremist” measures such as lists of prohibited extremist materials, cautions to civil society organisation and media, bans on “extremist” organisations, and closures of media outlets.

ARTICLE 19 and the Media Policy Institute further recommend the following steps to improve the implementation of the existing legislation as well as ensure 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’ and ‘extremism’ in a manner consistent with the requirements of international human rights law, in particular, Article 19(3) and Article 20(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.



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# About ARTICLE 19 and the Media Policy Institute

**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. The Law Programme 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.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal>

For more information about the ARTICLE 19's work in Kyrgyzstan and in Europe and Central Asia, you can contact us by e-mail at [eca@article19.org](mailto:eca@article19.org)

**Media Policy Institute** has been operating in Kyrgyzstan since 2005 as an independent non-profit organization in the field of freedom of speech, expression and information and contributing to the development of the rule of law. Media Policy Institute's expert lawyers analyse initiatives and proposals for national legislation regulating freedom of speech and the media, as well as access to information. On the basis of the materials developed, the Media Policy Institute conducts campaigns to promote the rights of journalists and the media, as well as the development of national media legislation to bring it into conformity with Kyrgyzstan's international obligations. Media Policy Institute lawyers defend the interests of journalists and the media court and advise citizens on various issues related to freedom of speech and access to information through its regularly-published articles, analyses and research pieces.

## DEFENDING FREEDOM OF EXPRESSION AND INFORMATION

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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)