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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON THE WARNING ADDRESSED  
TO THE BELARUSIAN ASSOCIATION OF JOURNALISTS  
ON 13 JANUARY 2010**

**OF BELARUS**

**on the basis of comments by:**

**Mr Pieter van DIJK (Member, The Netherlands)**  
**Mr Christoph GRABENWARTER (Member, Austria)**  
**Mr Peter PACZOLAY (Member, Hungary)**  
**Ms Herdis THORGEIRSDOTTIR (Member, Iceland)**

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## I. Introduction

1. In its Recommendation 1897 (2010)<sup>1</sup>, the Parliamentary Assembly of the Council of Europe (hereafter the Parliamentary Assembly) requested the Venice Commission to assess the compatibility with “universal human rights standards”<sup>2</sup> of an official warning addressed by the Ministry of Justice of Belarus to the Belarusian Association of Journalists (hereafter BAJ), on 13 January 2010.

2. The Venice Commission appointed Ms Thorgeirsdottir, Mr van Dijk, Mr Grabenwarter and Mr Paczolay as rapporteurs. They worked on an English translation of the warning (CDL(2010)055) and presented their individual comments (CDL(2010)053, CDL(2010)055, CDL(2010)054).

3. In order to obtain a better understanding of the situation, Mr Paczolay and Ms Martin, from the Secretariat, on 14 May 2010, had an exchange of views with Mr Simonov, Deputy Minister of Justice and signatory of the warning, as well as Ms Zhanna Litvina and Mr Andrei Aliaksandrau, respectively Chairperson and Vice-Chairperson of the BAJ.

4. The exchange of views provided an insight into the national context.

5. The delegation is grateful to the Constitutional Court of Belarus for arranging the meeting, and also to Mr Ferenc Kontra, Ambassador Extraordinary and Plenipotentiary of Hungary to Belarus, for his assistance and offer to host the exchange of views with the BAJ representatives in the premises of the Hungarian Embassy.

6. *The present opinion was drawn up on the basis of the rapporteurs’ comments and of the information gathered during the exchange of views; it was adopted at the ... plenary session of the Commission (Venice, ...).*

## II. Preliminary observations

7. The following opinion intends to assess the compatibility of the official warning addressed by the Ministry of Justice to the BAJ in light of “universal human rights standards”.

8. Although the assessment of the warning requested by the Parliamentary Assembly may have relevance not only for BAJ and its members but more generally for the freedom of expression of the press in the country, the present opinion does not constitute an assessment of the national legislation and its compliance with international standards. Neither does this opinion constitute an analysis of the freedom of the press or of association in the country in general, as this would entirely exceed the scope of the Parliamentary Assembly's request.

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<sup>1</sup> Assembly debate on 27 January 2010 (6th Sitting). Text adopted by the Assembly on 27 January 2010.

<sup>2</sup> The exact terms of the request of the Parliamentary Assembly are as following :“14. The Assembly notes with concern the official warning addressed by the justice ministry of Belarus on 13 January 2010 to the Belarusian Association of Journalists, challenging its internationally recognised work in the interests of journalists, media and media freedom. Recalling its Resolution 1372 (2004) on the persecution of the press in the Republic of Belarus, the Assembly reaffirms that media freedom is an essential condition for democracy and a requirement for membership with the Council of Europe. The Assembly calls on the authorities in Belarus not to abuse arbitral administrative regulations to restrict unduly the rights to freedom of expression and freedom of association under Articles 19 and 22 of the International Covenant on Civil and Political Rights and Articles 10 and 11 of the European Convention on Human Rights. As Belarus is an associate member of the Venice Commission, the Assembly furthermore asks the Venice Commission to analyse the compatibility of such warning by the justice ministry of Belarus with universal human rights standards“.

### III. Background information and facts

#### A. The official warning

5. On January 13, 2010 the Ministry of Justice issued an official warning (hereinafter “the Order”) addressed to the Belarusian Association of Journalists.<sup>3</sup> The official warning declared that the administrative body of the BAJ be placed under the obligation to ensure that all membership documents previously issued to members of the BAJ are withdrawn and see to it that they cannot be used in the future. The Ministry of Justice maintained that the press cards issued by the BAJ were unlawful as they “led to an unjustified assumption by the members of BAJ of the powers attributed to a mass media journalist” who has the right according to Article 34 paragraph 2 of the Media Act to exercise professional duties.

6. The Ministry of Justice maintains in the Order that the official BAJ press cards illegally contain the words “Press” and “Press Republic of Belarus”, as the journalist association is not a “mass media” platform and may not issue “official documents” of the type in question to its members, since this is in breach of the requirements of paragraph 7 of Article 1 and paragraph 4.9 of Article 34 of the Republic of Belarus Mass Media Act, No. 427-Z of 17 July 2009.<sup>4</sup>

7. Moreover, the Ministry of Justice claimed that the Legal Centre for Media Protection attached to the BAJ is “not envisaged in the statutes of the BAJ and acted beyond the statutes of the organisation.” Pro bono legal work done in support of independent journalists would not comply with BAJ’s mandate.

8. Besides, the Ministry also complains about information concerning BAJ objectives on the web site of the Association ([www.baj.by](http://www.baj.by)) not corresponding to the statutes.

9. The BAJ was ordered to take steps to prevent any future infringements of the requirements of the law and the organisation’s statutes as mentioned in the Order and to submit evidence to the Ministry of Justice that the requirements listed in the Order<sup>5</sup> had been acted upon. It must rewrite its goals on the web site and withdraw all the press cards within a month of issuing the Order.

10. The warning was issued shortly after a member of the BAJ, who was filming a documentary on a glass factory, had been prevented by a policeman from doing so; despite a former agreement by the factory’s top management and despite the fact that he had introduced himself as a journalist and presented his BAJ membership card mentioning the word “Press”.

11. The Ministry of Justice registers associations and controls that their activities are carried out in conformity with their status and with the legislation. A warning constitutes the lowest sanction, out of the three types of sanctions that the Minister of Justice can issue with regard to associations. Further sanctions could be passed down by the Ministry of Justice to stop the activity of the association for six months, and eventually it may order the cessation of the activity of the association if the latter failed to comply with the previous warning. All three sanctions can be challenged directly before the Supreme Court.

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<sup>3</sup> Signed by the Deputy Minister of Justice, Mr Simonov.

<sup>4</sup> Legal Acts on Mass Media; Law of the Republic of Belarus, No. 427-Z of July 17, 2009

<sup>5</sup> The Order can be found on the BAJ’s web-site <http://baj.by/m-media-browse-aid-52-mid-4664.html>; English translation of the order (CDL(2010)055,

12. The warning issued by the Ministry of Justice on 13 January 2010 is valid until March 2011. Belarusian presidential elections are due to take place on 19 December 2010<sup>6</sup>.

## **B. The BAJ**

13. The BAJ is a non-governmental, non-partisan and non-profit professional union of media workers, united in the framework of free expression and independent journalism. According to its statutes, it works to defend the legitimate rights of journalists and campaigns for promoting the freedom of expression in the country.<sup>7</sup> Founded in 1995, the BAJ has currently some 1100 members, representing a wide range of media outlets from across Belarus. Around 16 per cent of its members work with the State-sponsored media organisations. This means that the BAJ is principally an association of independent journalists. Many foreign journalists are also members of the BAJ.

14. The BAJ has been issuing its press cards for ten years.<sup>8</sup> The BAJ Legal Centre has been active since 1999 and according to the dialogue with the BAJ representatives was “approved by the Ministry of Justice”; the web site has been operating since 2003.

15. The BAJ is an affiliate of “Article 19”, a global campaign for free expression in London.<sup>9</sup> It has been an affiliate of the International Federation of Journalists since 1997<sup>10</sup> and signed an affiliation agreement with Reporters without Borders in 2003. That same year, the World Association of Newspapers (WAN) awarded the BAJ with the Golden Pen of Freedom Prize.<sup>11</sup> In 2004, the European Parliament awarded the BAJ the Sakharov Prize for Freedom of Thought.<sup>12</sup>

16. The BAJ operates from headquarters in the capital Minsk and through a network of 24 regional affiliates in all regional and important urban centres across Belarus. Only six of these premises have official status, as the others have had severe problems with getting legal residences.

## **C. Subsequent events**

17. The international community reacted with conviction to the Ministry of justice’s legal action and made several public announcements.<sup>13,14,15, 16</sup>

18. The BAJ challenged the warning before the Supreme Court.

19. On March 22, 2010, the Supreme Court upheld the Order of the Ministry of Justice obliging the BAJ to revoke its membership cards and halt issuance of similar cards, and to halt the operation of the associations internal Legal Centre for Media Protection, which provides legal defence<sup>17</sup> to BAJ’s members, holding that it was not constitutionally established. The Supreme Court also confirmed the Order to revise the text on the BAJ web

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<sup>6</sup> Decided by the House of Representatives in Minsk on 14 September 2010.

<sup>7</sup> <http://www.belarus.non-gov.org/organizers.htm>

<sup>8</sup> According to Zhanna Litvina, chairperson of the Belarusian Association of Journalists. <http://baj.by/m-p-viewpub-tid-1-pid-8189.html>

<sup>9</sup> <http://www.article19.org/work/regions/europe/partners.html>

<sup>10</sup> <http://www.ifj.org/en/articles/ifj-protests-against-legal-harassment-of-belarus-association-of-journalists>

<sup>11</sup> <http://www.wan-press.org/article10805.html>

<sup>12</sup> [http://www.europarl.europa.eu/comparl/afet/droi/sakharov/prizewinners\\_en.htm](http://www.europarl.europa.eu/comparl/afet/droi/sakharov/prizewinners_en.htm)

<sup>13</sup> <http://www.ifj.org/en/articles/ifj-protests-against-legal-harassment-of-belarus-association-of-journalists> See also: <http://www.exiledjournalists.net/page.php?id=595&category=news> (accessed on 4 May 2010).

<sup>14</sup> <http://baj.by/m-p-viewpub-tid-1-pid-8189.html> (accessed 4 May 2010).

<sup>15</sup> <http://charter97.org/en/news/2010/2/12/26313/> accessed on 4 May 2010.

<sup>16</sup> Adopted by the BAJ Board on March 22, 2010. <http://baj.by/m-p-viewpub-tid-1-pid-8208.html> (accessed on 4 May 2010). See also: <http://charter97.org/en/news/2010/4/29/28556/> Accessed on 4 May 2010.

<sup>17</sup> Article 2.4.3, Statute of the Association of Public Organisation “Belarusian Association of Journalists” (BAJ).

site.<sup>18</sup> The verdict came into effect with its pronouncement. An appeal to the President of the Supreme Court or his deputies would have been possible. The BAJ did not appeal against the decision.

20. On May 14, 2010 the representatives of the BAJ informed the delegation of the Venice Commission that they had already complied with the warning and with the decision of the Supreme Court in order that the association would not expose itself to closure and dissolution.

21. Since then, the BAJ web site has regularly reported that other actions by the police or by the Ministry of Justice have been taken against members of the BAJ.

#### **IV. Relevant legal environment in Belarus**

##### **A. Relevant constitutional provisions**

22. According to Articles 2 and 3 of the Constitution of Belarus the individual's rights and freedoms are the supreme goal and value of society and the State. The people are the sole source of state power and the repository of sovereignty in the Republic of Belarus.

23. In Article 7, the Constitution provides that the State and all bodies and officials shall operate within the confines of the Constitution and national law

24. The Constitution states in Article 22 that all shall be equal before the law and entitled without discrimination to equal protection of their rights and legitimate interests.

25. Restriction of personal rights and liberties shall be permitted only in instances specified by law, in the interest of national security, public order, the protection of morals and health of the population as well as rights and liberties of other persons (Article 23).

26. Article 33 of the Constitution guarantees everyone freedom of thought and belief, and free expression. No-one shall be forced to express his/her beliefs or to deny them. No monopolisation of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.

27. Article 34 guarantees citizens of Belarus the right to receive, store and disseminate complete, reliable and timely information on the activities of State bodies and public associations, on political, economic, cultural and international life, and on the state of the environment. State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarise themselves with information that affects their rights and legitimate interests. The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of citizens and the full implementation of their rights.

28. Article 36 of the Constitution states that "everyone is entitled to freedom of association".

29. According to Article 8 of the Constitution, the Republic of Belarus shall recognise the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with it.

30. Finally, Article 59 of the Constitution provides that the State shall take all measures at its disposal to create the domestic and international order necessary for the exercise in full of the rights and liberties of the citizens of the Republic of Belarus that are specified in the Constitution.

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<sup>18</sup> [http://www.ifex.org/belarus/2010/03/25/baj\\_harassed/](http://www.ifex.org/belarus/2010/03/25/baj_harassed/)

**B. The Public Associations Act**

31. The Public Associations Act No. 3252-XII of October 4, 1994 (amended as of January 4, 2010) defines public association in Article 1 as “a voluntary association of citizens associated, in the order established by the legislation, on the basis of common interests for joint exercise of civil, social, cultural and other rights.” The Public Associations Act (PAA hereinafter) does not cover trade unions.

32. According to Article 2 of the PAA, citizens of the Republic of Belarus have the right to establish, on their own initiative, public associations and to join and operate within public associations. According to Article 5 public associations, are to be established and operated in accordance with the Constitution of the Republic of Belarus, the present law, and other acts of legislation on the basis of their constituent documents. According to Article 11, legal persons cannot be members of public associations. The rights of public associations are listed in Chapter 2 of the PAA. According to Article 20, public associations have the right to create their own mass media and carry out publishing activity in the order established by law. According to Article 30, public associations may join international public associations.

**C. The Law on Mass Media**

33. The Mass Media Act no. 427-Z of July 17, 2009 (the MMA hereinafter) defines a “journalist” in Article 1, paragraph 7 as a “natural person engaged in collection, editing, creation (preparation) and storage of informational reports and/or materials for the legal person which is entrusted with functions of the editorial board of the mass medium, who is connected with that legal person through labour or other contractual relations. Mass Media Information as defined in paragraph 11 of Article 1 applies to print and broadcasting media as well as other informational reports and, according to paragraph 15, to information on the internet as well.

34. According to Article 11 of the MMA, mass media are subject to State registration. Grounds for refusal of State registration are set forth in Article 15 and the permissibility to invalidate such a registration is set forth in Article 16.

35. The status of journalists and their rights and obligations are set forth in Article 34, which states that the journalist in his/her activities is governed by the Constitution, the MMA, other law and norms of journalists’ associations. According to this article a journalist is obliged to show his/her service certificate upon request when carrying out his/her professional activity.

36. The status of the service certificate of a journalist, within the mass media platform, is registered in the territory of the Republic of Belarus and shall be established by the administrative body component in the sphere of mass information.

37. In practice, according to the information the Venice Commission’s delegation gathered during the fact finding mission, this implies that the service certificate (press cards) will be issued by the Ministry of Information which will then verify that the journalist is contractually linked with a mass media outlet which is already registered within the Ministry of information.

**V. Issues addressed by the warning**

38. The restrictions placed by the warning on the BAJ and the consequences which arise from it for the association and for the journalists that are its members, address several aspects of international fundamental rights standards.

**A. The warning against the BAJ in the light of the right of freedom of association**

39. Freedom of association is considered as essential to the effective functioning of a democracy. Any restriction of this right must meet strict tests of justification. It is protected under Article 22 of the ICCPR<sup>19</sup> and Article 11 of the ECHR<sup>20</sup>.

40. Article 22 of the ICCPR reads as follows:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

41. The protection afforded by Article 22 of the ICCPR, to which Belarus is a party, extends to all organisational and operational activities of an association. In the Human Rights Committee views, for the interference with freedom of association to be justified, any restriction on this right must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be “necessary in a democratic society” for achieving one of these purposes. The reference to the notion of “democratic society” indicates, in the opinion of the Human Rights Committee, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.<sup>21</sup>

42. Article 11 ECHR reads as follows<sup>22</sup>:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

43. According to Article 11 of the ECHR and the case law of the European Court of Human Rights (hereafter ECtHR), the right to freedom of association not only guarantees the right to form and register an association, but also includes those rights and freedoms that are of vital importance for an effective functioning of the association to fulfil its aims and protect the

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<sup>21</sup> Aleksander Belyatsky et al. v. Belarus, [date???

<sup>22</sup> Although Belarus is not yet a party to the ECHR, its standards are relevant for assessing the warrant, since Belarus wishes to become a member of the Council of Europe and, if admitted, will have to ratify the ECHR.



rights and interests of its members; the freedom of association presupposes a certain autonomy<sup>23</sup>.

44. It lies at the heart of the freedom of association that an association may issue documents that show that particular persons are its members. Restrictions on issuing “official” documents may pursue a legitimate aim, i.e. the interest of public order, more precisely the aim of avoiding that a variety of “quasi-official” documents exist, while the authorities are not able to discern “official documents” from others. However, in order for such a restriction to be justified under Article 11, paragraph 2 it must have a legal basis and meet the strict criteria of necessity and proportionality.

45. The warning refers to the fact that the issue and use of membership documents constitutes a breach of Articles 1 and 34 of the Mass Media Act. Whether these articles of the mass media act would be compatible with Belarusian international obligations is not to be assessed here. The warning fails to show any reason why this infraction is a “necessity in a democratic society” of such an interdiction, and the Belarusian authorities have not advanced in any other way any arguments as to why it would be necessary to restrict the right of the journalists association (BAJ) to issue identification cards to its members.<sup>24</sup>

46. The danger facing journalists in Europe is taking various forms.<sup>25</sup> Preventing the BAJ from affording its members legal protection does not seem proportionate with any of the purposes justifying restriction under Article 22, paragraph 2 of the ICCPR and Article 11, paragraph 2 of the ECHR. The prohibition of such legal protection of the BAJ members has a chilling effect on journalism as the members of the association fear penalisation of their activities. It prompts self-censorship and therefore hampers serious and responsible journalism to the detriment of other rights and freedoms underlying democracy.<sup>26</sup>

47. Taking into account the severe consequences of ordering the BAJ to withdraw all membership documents issued previously to members and to see to it that they cannot be used in the future, as well as preventing the BAJ from affording its members legal protection is disproportionate and does not meet the requirements of permissible restrictions, in light of Article 22 of the CCPR<sup>27</sup> and of Article 11 of the ECHR.

48. The Venice Commission concludes that the warning fails to meet the strict criteria of justification under international and European standards.

## **B. The warning against the BAJ in the light of freedom of expression and freedom to receive and impart information**

49. Freedom of expression is a cornerstone of democratic rights and freedoms. Freedom of expression is essential in enabling democracy to work and for public participation in decision-making.

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<sup>23</sup> See, e.g., with respect to trade unions, ECtHR, *National Union of Belgian Police v. Belgium*, No. no. 4464/70, judgment of 27 October 1975, § 39.

<sup>24</sup> Cf., 1039/2001, *Boris Zvolzozkov et al. v. Belarus*, views of 17. Oct. 2006.

<sup>25</sup> CDL (2008)039; Report on the self-regulation within the media in the handling of complaints. By Herdís Thorgeirsdóttir (Study no. 415/2008, 7 April 2008)

<sup>26</sup> Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR*, Kluwer Law International (2005).

<sup>27</sup> Cf., CCPR communication no. 1296/2004, *Aleksander Belyatsky et al. V. Belarus*, views of 24 July 2007.

50. Article 19 of the ICCPR reads as follows:

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

51. Paragraph 1 requires protection of the “right to hold opinions without interference”. This is a right to which the Covenant permits no exception or restriction.<sup>28</sup> The right to opinion has been taken to mean more than simply the right to hold an opinion, equivalent to having a thought, as “holding an opinion could not be interfered with if no one knew about it”.<sup>29</sup> Protecting opinion separately emphasises the significance to form an opinion without any kind of interference, entailing a corollary duty for those traditionally associated with opinion formation in society (as the media).<sup>30</sup> The States parties, as stated in the Preamble of the ICCPR, recognise that “political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights”.

52. Paragraph 2 requires protection of the right of freedom of expression, which includes not only freedom to “impart information and ideas of all kinds”, but also freedom to “seek” and “receive” them “regardless of frontiers” and in whatever medium, “either orally, in writing or in print, in the form of art, or through any other media of his choice”.

53. The exercise of any political right requires the full enjoyment of other civil and political rights protected under the ICCPR. For journalists to be able to exercise their fundamental rights they need to be able to enjoy the protection of their association.

54. Political speech enjoys special protection due to its social dimension.<sup>31</sup> Journalists that do investigative reporting and seek to reveal the truth about political and controversial matters need the protection of their associations.<sup>32</sup> Journalist associations provide the paradigm for self-regulation of journalists and set the framework of ethical rules that journalists must respect when they seek to reveal the truth.

55. Article 10 of the ECHR reads as follows :

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or

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<sup>28</sup> General Comment No. 10: Freedom of Expression (Art. 19) 29/6/83.

<sup>29</sup> Quoting the chairman of the UN Human Rights Committee, cf. Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights* (Martinus Nijhoff Publishers) 2005 (Chapter 3 Opinion, journalism and dignity).

<sup>30</sup> Ibid.

<sup>31</sup> Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR*, Kluwer Law International 2005.

<sup>32</sup> Ibid., Journalists for example avail themselves of the protection Article 10 of the European Convention affords if they do not adhere to their professions codes of ethics. See also: [http://www.aej.org/page.asp?p\\_id=176](http://www.aej.org/page.asp?p_id=176)

crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and im-partiality of the judiciary.

56. As the European Court of Human Rights has emphasised repeatedly, freedom of expression is one of the most important issues and one of the key pillars of a functioning democracy.

57. Although freedom of the press is not explicitly mentioned in Article 10 of the ECHR, it is clearly recognised under its scope. The role of the press in a democratic society is a vital one. The European Court of Human Rights has pointed out the role of the press as purveyor of information and public watchdog several times<sup>33</sup>.

58. The scope of Article 10 of the ECHR includes multiple activities relating to disseminating information by the means of print media. Not only the publication of information in print media by journalists or by publishers, but also the relationship between journalists and publisher, the general conditions of the journalist's activity and the activity of the journalist him/herself are protected. In principle, Article 10 of the ECHR covers all fields of professional activities of a journalist, in particular the way how a journalist receives the information and how he/she arranges or modifies the information.

59. The case law on Article 10 of the ECHR reveals a clear understanding of the role of a free press as a basic condition for the "progress and development of every man". As the European Court of human Rights has held, "freedom of expression . . . is also applicable to information or ideas which offend shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society".<sup>34</sup> In a landmark judgment on press freedom of 1979 the European Court of Human Rights set forth the following general principle: "not only do the media have the task of imparting [such] information and ideas: the public also has a right to receive them."<sup>35</sup>

60. According to Article 2 of the BAJ's Statutes, the main purpose of the BAJ is to ensure and facilitate the professional activities of its members, including their right to unimpeded acquisition, storage and distribution of information. According to the web site of the BAJ, the association deals with gathering, systematisation and dissemination of information on violation of the freedom of expression and the journalists' professional rights in Belarus. It works to defend the legitimate rights of journalists and campaigns for promoting the freedom of expression in the country.

61. The purpose of the BAJ can clearly be said to directly relate to the protection of freedom of expression and of information. Consequently, the freedom to receive and impart information needs also to be examined.

62. Article 34 of the Constitution of the Republic of Belarus provides, *inter alia*, that State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarise themselves with information that affects their rights and legitimate interests, thus expressly recognising the role of public associations in the dissemination of information.

63. Article 5, paragraph 2, of the Constitution provides that public associations shall have the right to use state mass media. However, this may not be interpreted to imply that they shall not be engaged in their own mass media activities. Such kind of State monopoly in the area of mass media would be contrary to Article 10 of the ECHR in conjunction with Article 11. And,

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<sup>33</sup> See among others *Barthold v. Germany*, No. 8734/79, Judgment of 25 March 1985; *Lingens v. Austria*, No. 9815/82, judgment of 8 July 1986; *Monnat v. Switzerland*, No. 73604/01, judgment of 21 September 2006.

<sup>34</sup> *Handyside v. the United Kingdom*, No. 5493/72, judgment of 7 December 1976

<sup>35</sup> *Sunday Times v. the United Kingdom*, No. 6538/74, judgment of 26 April 1979, para. 65.

indeed, Article 33 of the Constitution states that no monopolisation of the mass media by the State, public associations or individual citizens, and no censorship shall be permitted. In this respect it is also worth mentioning that Article 4 of the Constitution states that democracy in the Republic of Belarus “shall be exercised on the basis of diversity of [...] views”.

64. The European Court of Human Rights permits States parties to the Convention “to control the way in which broadcasting is organised”, especially with regard to “technical aspects”, but otherwise the licensing measures have to comply with the requirements of paragraph 2 of Article 10 of the ECHR.<sup>36</sup> Consequently, even to the extent that the warning issued and the regulations on which it is based concern broadcasting, their justification has to be reviewed on the basis of the second paragraph of Article 10.

65. BAJ membership is open to every person who is a journalist or in profession related to development of journalism in the Republic of Belarus (Article 3.1 Statute of the BAJ). Although the BAJ is not a legal person operating in mass media according to the Mass Media Act, since it is composed of journalists it can play a substantial role in public debate.

66. Journalists are normally not obliged to reveal their journalistic sources, as the protection of these sources is one of the basic conditions for press freedom<sup>37</sup>. Therefore, holding a press card is of particular importance to be able to receive information. Indeed, the journalist may not receive the same amount or quality of information from his/her sources if his/her identity as a journalist cannot be established.

67. Consequently, a restriction placed on the right of an association of journalists to issue press cards has very serious consequences for journalists and, subsequently, for the press in whole to act as the public watchdog. Whether this can be considered as a violation of freedom of expression and information, and the corollary right of the public to receive information in order to be enabled to form an opinion on controversial political matters, has to be assessed in the light of Article 19 of the ICCPR, to which Belarus is party, and of Article 10 of the ECHR.

68. The right to freedom of expression is not an absolute right; its enjoyment may be subject to limitations. As a consequence, abusive exercise of the right to freedom of expression is subject to subsequent imposition of liability.

69. Pursuant to Article 19, paragraph 3 of the ICCPR, such limitations are permissible as are provided for by law and are necessary (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. However, such restrictions must not limit the full scope of freedom of expression or become direct or indirect methods of prior censorship. As the Human Rights Committee reiterated recently in a case against Belarus, the right to freedom of expression is of paramount importance in any democratic society, and any restrictions on its exercise must meet strict tests of justification.

70. Likewise, restrictions of the freedom of expression are possible under Article 10, paragraph 2 of the ECHR, provided there is a legal basis for the restrictions and provided that the restrictions are “necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

71. Under the notion of “legal basis”, the ECHR refers to the legal system of the State involved, which must provide an adequate basis for the restrictive measure that must be both accessible and transparent.

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<sup>36</sup> ECtHR, *Groppera Radio AG v. Italy*, judgment of 28 March 1990, §§ 59-61.

<sup>37</sup> See *Goodwin v. The United Kingdom*, No. 17488/90, Judgment of 27 March 1996.

72. Interferences with freedom of expression will be deemed to be 'necessary' only if they fulfil a 'pressing social need' ; interferences by legislation or executive measure that are simply 'reasonable' or 'desirable' will not be considered as a 'necessary' interference.

73. The legal provisions quoted by the warning (Article 5 PAA, and Articles 7, paragraph 7 and 26, 27 and 34 MMA) and their application do not seem to provide for a sufficient justification according to the conditions imposed under paragraph 3 of Article 19 of the ICCPR or paragraph 2 of Article 10 of the ECHR.

74. Indeed, although the freedom of expression is guaranteed in Section II of the Belarusian Constitution, its implementation in the applicable mass media law appears in practice not to recognise that the purpose of this freedom is to enable journalists as well as other citizens to enjoy "freedom from fear and want [which] can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights", as stated in the preamble to the ICCPR which Belarus signed and ratified in 1973 without any reservation. The mass media law in Belarus seems even in conflict with the constitutional commitment that the attainment of individual rights manifests the supreme goal and value of society, as stated in Article 2 of the Constitution of Belarus.

75. The applicable law imposes restrictions on the freedom of expression beyond what is permitted in international law.

76. Article 4 of the CCPR states that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the treaty may take measures derogating from their obligations under the CCPR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination on grounds prohibited under the said article. The Belarusian authorities have not advanced any argument in accordance with Article 4 of the ICCPR or any pressing social need to give priority to the application of its national law over its human rights obligations under international law.<sup>38</sup>

77. As to the proportionality of the interference, the warning of the Ministry of Justice criticised the display of the terms "PRESS" and "PRESS REPUBLIK OF BELARUS" on the official documents of BAJ members. This interference is equivalent to an interference with the process of receiving and collecting information as a journalist.

78. BAJ Members are engaged in journalism and should have the possibility to disclose themselves as journalists in order to carry out their activities. A threat of malpractice by using press cards has not been established. Restrictions on distributing press cards to certain types of associations operating in mass media according to the Mass Media Act might pursue certain legitimate public aims and might also be practical to achieve these aims, but it cannot be seen as proportional without any further justification.

79. It would be sufficient to distribute specific press cards under the Mass Media Act to make clear that these are under State control. Forbidding other associations such as the BAJ to use press cards using "PRESS" may, in the end, lead to a kind of censorship for BAJ journalists because they are not able to consequently receive and disseminate information in the same way as other journalistic actors. Actually, banning the use of press cards for associations such as the BAJ constitutes an intentional interference with Article 19 of the ICCPR and Article 10 of the ECHR in order to directly restrict the freedom of the press.

80. Additionally, the issuing of membership cards (press cards) is, according to European standards, usually done by journalists' associations and not by the State. The authorities do not issue press cards, except in the case of foreign correspondents wishing to have access

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<sup>38</sup> See f.ex. 628/1995, Tae Hoon Park v. Republic of Korea, views of 20 October 1998.

to specific events in the host country and therefore present their national press cards and prove that they are working as correspondents in their respective country.<sup>39</sup>

81. In regards to the accreditation system under the mass media law in Belarus, the Human Rights Committee is of the view that "an accreditation system, however justified and prescribed by law, operates as a restriction on the right to impart information".<sup>40</sup> The issue is not only about membership cards but also about who is allowed to be journalist at all.

82. The accreditation scheme on the basis of the mass media law in Belarus does not ensure that there will be no arbitrary exclusion from access to journalism. Even if it did, the issue of licensing journalists remains a very controversial one.

83. The Venice Commission concludes that, by placing the BAJ under the obligation to ensure that all membership documents issued to BAJ members which display the word „PRESS“ and „PRESS REPUBLIK OF BELARUS“ are withdrawn, and see to it that they cannot be used in the future, the warning has infringed upon the right of the BAJ and its members to freedom to receive and impart information and ideas as guaranteed in Article 19 of the ICCPR and Article 10 of the ECHR.

84. Article 10 of the ECHR may also be of direct relevance for the question whether the freedom of association reflected in Article 11 has been infringed upon. This holds well for political parties<sup>41</sup> and for religious associations,<sup>42</sup> but in particular also for associations of journalists. As the ECtHR held with respect to the link between Articles 10 and 11: "Such a link is particularly relevant where – as here - the authorities' intervention against an assembly or an association was, at least in part, in reaction to views held or statements made by participants or members".<sup>43</sup>

### **C. The warning in the light of the principle of non discrimination**

85. Article 26 of the ICCPR<sup>44</sup> stipulates that all persons are equal before the law.

86. Similarly, Article 14 of the ECHR<sup>45</sup> stipulates that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination, while Article 1 of Protocol No. 12 to the ECHR provides as follows:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

87. Equality before the law implies that the application of laws and regulations as well as administrative decisions by authorities should not be arbitrary but should be based on clear

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<sup>39</sup> There is a foreign press association in Sweden <http://www.fpa-sweden.org/membership.htm>

<sup>40</sup> CCPR communication No. 633/1995, Gauthier v. Canada.

<sup>41</sup> ECtHR, Refah Partise (Prosperity Party) and Others v. Turkey, judgment of 31 July 2001.

<sup>42</sup> See European Commission for Democracy through Law (Venice Commission), Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use the Adjective "Eucumenical", CDL-AD(2010)005, 15 March 2010, § 53.

<sup>43</sup> ECtHR, Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, judgment of 2 October 2001, §85.

<sup>44</sup> Article 26 ICCPR reads: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>45</sup> Article 14 ECHR reads : The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

coherent grounds, ensuring equality of treatment. To deny, without adequate reasoning, journalists and their associations the means necessary to practise their basic freedom of expression, a right to which everyone is entitled, seems arbitrary.<sup>46</sup>

88. The BAJ is subjected to a difference in treatment from others in a comparable situation in the enjoyment of the freedom of expression guaranteed under the Convention. This measure, in the Venice Commission's opinion, is not objectively and reasonably justified.

89. Both journalists who are members of BAJ, and journalists who are connected with legal persons operating in mass media according to the Mass Media Act, pursue journalistic activities. Both need to collect and receive information. The exercise of their activities can be carried out only or at least more easily by using a press card.

90. There might be a legitimate aim which the Republic wishes to pursue by restricting the distribution and use of press cards to only those who are established under the Mass Media Act, such as the need to establish State controlled Republic-level agencies in the sphere of mass media (see written warning p. 1).

91. Nevertheless, there is no objective and reasonable justification for the discrimination between journalists set out in the warning. It would, for instance, be sufficient to distribute specified press cards to those journalists who are directly connected with legal persons operating in mass media under the Mass Media Act. Banning any reference to the word "PRESS" in press cards of other associations engaged in journalism cannot be regarded as proportionate.

92. Therefore, the written warning of the Ministry of Justice can also be regarded as being in violation of Article 26 of the ICCPR and Article 14 taken together with Article 10 ECHR.

## **VI. Conclusions**

93. As a party to the ICCPR, Belarus has binding legal obligations to protect fundamental civil and political rights such as the freedom of expression (Article 19), the freedom of association (Article 22), the right to participation in public life (Article 25) and the right to equality before the law and non-discrimination (Article 26). Belarus has a positive obligation to respect these rights.

94. As a candidate country for membership of the Council of Europe and an associate member of the Venice Commission, the "acquis" of the Council of Europe, including the case law of the European Court of Human Rights, constitutes also a relevant frame of reference for the Venice Commission and the Parliamentary Assembly to assess if certain measures by the public authorities of Belarus are in conformity with international standards.

95. The rights to freedom of expression and of association are of paramount importance in any democratic society and any restriction of these must meet a strict test of justification.

96. The Ministry of Justice's Order has restricted the rights of a group of journalists to freedom of expression and the right to seek and impart information. To be able to enjoy freedom of expression of the press requires that journalists must have effective protection by their trade union or association. By denying the BAJ the right to issue press cards for their journalists the Belarusian authorities are denying these journalists the rights to have their interests protected by their association. At the same time the domestic legal situation is stripping the journalists' association, the BAJ, of effective power to protect members' interests.

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<sup>46</sup> CCPR communication No. 633/1995, Gauthier v. Canada.

97. The Ministry of Justice's Order constitutes in the opinion of the Venice Commission a violation of Articles 19 and 22 of the ICCPR and Articles 11 and 10 of the ECHR.

98. Additionally, since the Ministry of Justice's Order creates a discriminatory situation it also constitutes a violation of Article 26 of the ICCPR, and Article 14 ECHR taken together with Article 10 of the ECHR, and Protocol No 12 to the ECHR.