



Strasbourg, 6 june 2011

Opinion No. 616 / 2011

CDL(2011)050*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE WARNING ADDRESSED TO
THE BELARUSIAN HELSINKI COMMITTEE
BY THE MINISTRY OF JUSTICE**

OF BELARUS

by

Mr Pieter VAN DIJK (Member, The Netherlands)

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PROVISIONAL COMMENTS
As of 21.04.2011

Preliminary note:

It is my understanding that, meanwhile, the Supreme Court has dismissed the appeal and that no other domestic legal remedy is pending or available. Therefore, there is no sub judice issue any longer.

I. Introduction

In many respects the issues raised by the request from the Chair of the Political Affairs Committee are identical or similar, *mutatis mutandis*, to the ones raised by the request concerning the warning addressed by the Ministry of Justice to the Belarusian Association of Journalists.

Consequently, in my opinion, the Venice Commission may extensively refer to, or quote from, its opinion concerning the latter case, if that is deemed appropriate.

II. The Belarus Helsinki Committee

(Description of its composition, function, activities and other relevant information, based upon its statutes).

III. Activities of the BHC that gave cause to the warning

(short description of the Communication by the BHC to Ms. Kraus, UN Special Rapporteur on the independence of judges and lawyers).

IV. Contents and scope of the warning

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V. Relevant constitutional provisions and other domestic legislation

(see previous opinion on BAJ) The Non-Governmental Organisations Act has to be added, as well as the Information, Information Technology and Protection of Information Act.

A. The Constitution

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.

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.

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.

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).

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.

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.

Article 36 of the Constitution states that “everyone is entitled to freedom of association”.

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.

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.

B. The Public Associations Act

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.

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 and Chapter 4 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 Non-Governmental Organisations Act

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D. The Information, Information Technology and Protection of Information Act

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VI. The warning against the BHC in the light of freedom of association

Freedom of association is considered as essential to the effective functioning of a democracy. Therefore, any restriction of this right must meet strict tests of justification. The right to freedom of association is protected under Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹

Article 22 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.”

The protection afforded by Article 22 ICCPR, to which Belarus is a party, extends Not only to the organisational but also to the 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.²

Article 11 ECHR reads as follows:

“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. “

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

¹ 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.

² Cf., CCPR communication no. 1296/2004, *Aleksander Belyatsky et al. V. Belarus*, views of 24 July 2007.

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 rights and interests of its members; the freedom of association presupposes a certain autonomy.³

It lies at the heart of the freedom of association that an association may issue statements and disseminate information that relates to its purposes and functions. Restrictions on these activities may pursue a legitimate aim, *in casu* the prevention of disorder and/or the protection of the rights and freedoms of others. However, in order for such restrictions to be justified under Article 11, paragraph 2, they must have a legal basis and meet the strict criteria of necessity and proportionality.

The warning refers to the fact that the BHC has not acted in conformity with the law and its statutes, while the Ministry of Justice orders the BHC to hold a meeting of the governing body at which steps are to be taken to ensure that there are no further breaches of the law or its statutes, and to hold to account those individuals who are guilty of these breaches.

Taking into account the severe intrusion upon the right of the BHC to organise its own activities as well as the character of the allegations and the activities to which they relate (expression of opinion and dissemination of information), in the opinion of the Venice Commission this interference with the BHC's freedom of association, even if provided by law and motivated by a concern to prevent disorder, does not meet the requirements of a "pressing social need" and of proportionality in the sense of Article 22 of the CCPR⁴ and of Article 11 of the ECHR. The Venice Commission points in that respect to the fact that the BHC as an association has as its primary goal the promotion of the Rule of Law, and the promotion and protection of human rights in the Republic of Belarus.

VII. The warning against the BHC in the light of freedom of expression

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.

Article 19 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."

³ 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.

⁴ Cf., CCPR communication no. 1296/2004, *Aleksander Belyatsky et al. V. Belarus*, views of 24 July 2007.

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.⁵ Protecting opinion separately emphasises the significance to form an opinion without any kind of interference.

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”.

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 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.”

“60. 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”. CDL-AD(2010)053 rev.

The scope of Article 10 of the ECHR includes multiple activities relating to disseminating information. The BHC has as one of its main purposes to collect and disseminate information about the human rights situation in the Republic of Belarus. That purpose in itself is fully legitimate.

The BHC Communication to the UN Rapporteur concerns alleged infringements of the freedom of assembly and freedom of expression of hundreds of persons who protested against the way the presidential elections had taken place and against their outcome. It also concerns restrictions of their access to court and to legal aid. That the demonstrations and protests were not welcome to the Belarus authorities, in particular the incumbent president, in itself did not constitute a justification of dispersing the rally concerned, arresting participants and restricting their free access to their lawyers.

But even if, in the end, the conclusion would be that the interferences were justified under the international human rights standards, that would not mean that the BHC did not have the right to challenge them and bring them to the attention of the UN Rapporteur.

In the first place, it may differ of opinion with the Belarus authorities and/or the Supreme Court of the Republic of Belarus, and indeed with any international authority including the UN Human Rights Committee or the European Court of Human Rights, and deem it appropriate to report it to the UN Rapporteur.

⁵ General Comment No. 10: Freedom of Expression (Art. 19) 29/6/83.

Secondly, even if the measures reported on by the BHC restricting the freedom of assembly and expression, and the right of access to court and to legal assistance of demonstrators, would be justified according to international human rights standards, such measures may still be considered inappropriate and even illegal according to other international or domestic standards.

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”.⁶ 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.”⁷

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. 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”.

VIII. Conclusions

⁶ *Handyside v. the United Kingdom*, No. 5493/72, Judgment of 7 December 1976.

⁷ *Sunday Times v. the United Kingdom*, No. 6538/74, Judgment of 26 April 1979, para. 65.