



Strasbourg, 14 September 2011

Opinion no. 633 / 2011

CDL(2011)060*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

**ON THE COMPATIBILITY
WITH UNIVERSAL HUMAN RIGHTS STANDARDS
OF ARTICLE 193-1 OF THE CRIMINAL CODE
VIS-À-VIS THE RIGHTS OF NON-REGISTERED ASSOCIATIONS**

OF THE REPUBLIC OF BELARUS

by

Mr Pieter VAN DIJK (Member, The Netherlands)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

This document will not be distributed at the meeting. Please bring this copy.

www.venice.coe.int

**DRAFT OPINION ON THE COMPATIBILITY
WITH UNIVERSAL HUMAN RIGHTS STANDARDS
OF ARTICLE 193-1 OF THE CRIMINAL CODE OF BELARUS
VIS-À VIS THE RIGHTS OF NON-REGISTERED ASSOCIATIONS**

Provisional Comments by Pieter van Dijk

I. Introduction

In many respects the issues raised by the request from the President of the Political Affairs Committee of the Parliamentary Assembly by letter of 8 June 2011, are related to the ones raised by the request concerning the warning addressed by the Ministry of Justice to the Belarusian Association of Journalists and the warning addressed to the Belarusian Helsinki Committee.

Consequently, in my opinion, the Venice Commission may extensively refer to its opinions concerning these two cases.

II. Article 193-1 of the Criminal Code of Belarus

The question submitted to the Venice Commission by the President of the Political Affairs Committee concerns the compatibility with universal human rights standards of Article 193-1 of the Criminal Code of Belarus.

Article 193-1 of the Criminal Code provides as follows:

The same actions connected with organization or management of a political party, other public association or a religious organization, specified in Part 1 of the present Article, which have not passed the state registration in the established order, shall be punished by arrest for the term of up to six months or imprisonment for the term of up to three years.

III. Relevant constitutional provisions and relevant domestic legislation in relation to the compatibility of Article 193-1 of the Criminal Code with universal human rights standards

A. Constitutional provisions

According to Articles 2 and 3 of the Constitution of the Republic of Belarus, the individual's rights and freedoms are the supreme goal and value of society and the State. The State shall assume responsibility before the citizen to create the conditions for free and dignified development of his personality. The people are the sole source of State power and the repository of sovereignty in the Republic of Belarus.

In its Article 7, the Constitution provides that the State and all bodies and officials shall operate within the confines of the Constitution and national law. This, of course, also apply to the legislator: the legislation of the Belarus Republic must be in conformity with its Constitution.

In addition, 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.

Section II of the Constitution deals with individual rights. It puts a positive obligation on the State to guarantee the rights and freedoms of the citizens of Belarus that are enshrined in the Constitution and laws, and specified by the State's international obligations.

Article 21 provides that safeguarding the rights and freedom of citizens of the Republic of Belarus shall be the supreme goal of the State.

Article 22 provides that everyone is equal before the law and shall have the right to equal protection of his/her rights and legitimate interests without any discrimination.

According to Article 23, restriction of personal rights and freedoms shall be permitted only in the instances specified by law, in the interests of national security, public order, protection of the morals and health of the population as well as rights and freedoms of other persons. No one may enjoy advantages and privileges that are contrary to law.

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

The State is under the obligation to take all measures at its disposal to establish the domestic and international order necessary for the full exercise of the rights and freedoms of the citizens of the Republic of Belarus that are specified by the Constitution, as stipulated in Article 59. Furthermore, State bodies, officials and other persons who have been entrusted to exercise State functions shall, within their competence, take the necessary measures to implement and protect personal rights and freedoms. These bodies and persons shall bear responsibility for the actions violating the rights and freedoms of the individual.

B. The Law on Public Associations

According to Article 5 of the Law on Public Associations No. 3252-XII of October 4, 1994, amended as of January 4, 2010 (hereinafter PAA), public associations shall carry out their activities in accordance with the Constitution of the Republic of Belarus, the Act and other legislative enactments and on the basis of their own constituent instruments.

Article 1 of the PAA defines a public association 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.”

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.

IV. International obligations of the Republic of Belarus to guarantee and respect fundamental human rights

The Belarus Republic is a party to the International Covenant on Civil and Political Rights and the First Optional Protocol thereto, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on All Forms of Discrimination against Women and the Optional Protocol thereto, and the Convention on the Rights of the Child.

These international instruments contain the obligation to either respect, protect and fulfil human rights. The obligation to respect means that the State must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

The Venice Commission points out that, although the Republic of Belarus is not (yet) a party to the European Convention for the Protection of Human Rights and Fundamental freedoms (ECHR), the latter's standards are also relevant for assessing the conformity of Article 193-1 of the Criminal Code with human rights standards, since Belarus wishes to become a member of the Council of Europe and, if admitted, will have to ratify the ECHR. For that reason, the relevant provisions of the ECHR are also taken into account in the present opinion.

For the present opinion, the human rights obligations laid down in the ECHR and the International Covenant on Civil and Political Rights (ICCPR) are the most pertinent.

The Republic of Belarus, which ratified the ICCPR on 12 November 1973, is under the obligation to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind including political and other opinion, as stated in Article 2 of the ICCPR. The same obligation follows for the States parties to the ECHR from Article 1 in conjunction with Article 14 of the ECHR.

Moreover, the Republic of Belarus is under the obligation to ensure that any person whose rights or freedoms are recognized under the ICCPR, have access to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (Article 2 (3)). The same obligation is laid down in Article 13 of the ECHR.

V. Article 193-1 in light of the freedom of association

Freedom of association is considered as essential to the effective functioning of a democracy. Consequently, any restriction of this right must meet strict tests of justification. It is protected under Article 22 of the ICCPR and Article 11 of the ECHR.

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."

The protection afforded by Article 22 of the ICCPR extends to all organisational and operational activities of an association. In the view of the Human Rights Committee, 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 view 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.¹

Article 11 of the 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 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.²

¹ Cf., CCPR communication no. 1296/2004, *Aleksander Belyatsky et al. V. Belarus*, views of 24 July 2007.

² See, e.g., with respect to trade unions, ECtHR, *National Union of Belgian Police v. Belgium*, No. 4464/70, Judgment of 27 October 1975, § 39.

Moreover, no restrictions may be placed on the exercise of the rights of associations to protect their rights "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, the protection of public health or morals or the protection of the rights and freedoms of others." Restrictions on the freedom of association are to be construed strictly; only convincing and compelling reasons can justify restrictions on the freedom of association.³

It lies at the heart of the freedom of association that an individual or group of individuals may freely establish an association, determine its organization and lawful purposes, and put these purposes into practice by performing those activities that are instrumental to its functions. Restrictions on these initiatives and activities must be provided by law and pursue a legitimate aim.

In the opinion of the Venice Commission, penalizing actions connected with the organization or management of an association on the sole ground that the association concerned has not passed the state registration, as Article 193-1 of the Penal Code does, does not meet these strict criteria.

The restriction of the freedom of association that follows from the penalization, is provided by law, *viz.* Article 193-1 of the Penal Code. The Venice Commission is of the opinion that domestic law may require some kind of registration of associations, and that failure to register may have certain consequences for the legal status and legal capacity of the association involved. However, such a legal requirement may not be an essential condition for the existence of an association, as that might enable the domestic authorities to control the essence of the exercise of the freedom of association. In *Gorzelik and Others v. Poland* the ECtHR held as follows: "The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no meaning".⁴ This means that the right to freedom of association implies the right to form one.

In general, associations are regulated in domestic law as is the case in the Law on Public Associations in Belarus. That regulation may, however, not be too restrictive in its conditions. The right to freedom of association implies the positive obligation on the part of the State to enable associations, in conditions not at variance with the international standard concerned, to strive for the protection of their members' interests.⁵ This also implies that national law must enable legal personality for associations, or at least sufficient legal status for them to be able to stand up effectively for the interests of their members. Consequently, the mere fact that an associations does not fulfil all the elements of the legal regulation concerned, does not mean that it is not protected by the internationally guaranteed freedom of association. In *Chassagnou and Others v. France* the ECtHR emphasized the autonomous meaning of "association": "The term "association" (...) possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point."⁶

³ ECtHR, *Gorzelik and Others v. Poland*, No. 44158/98, Judgment of 17 February 2004.

⁴ ECtHR, *Gorzelik and Others v. Poland*, No. 44158/98, Judgment of 17 February 2004, § 55.

⁵ ECtHR, *National Union of Belgian Police v. Belgium*, judgment of 27 October 1975, § 39.

⁶ ECtHR, *Chassagnou and Others v. France*, Nos 25088/94 ; 28331/95 and 28443/95, Judgment of 29 April 1999, § 100.

In conclusion, the recognition of the association as a legal entity is an inherent part of the freedom of association, and a refusal of registration is fully covered by the scope of Article 22 of the ICCPR and Article 11 of the ECHR. This means, in the opinion of the Venice Commission, that the mere fact that an association has not passed state registration, may not be a ground for penalizing actions connected with such an association. This would make the activities of a non-registered association in fact impossible and, consequently restrict the right to freedom of association in its essence.

Apart, perhaps, of very serious circumstances, a penal sanction in its broad formulation in Article 193-1 of the Penal Code, and especially a sanction of the gravity as laid down there, cannot be said to be necessary for the protection of any of the public interests or the rights of others mentioned in Article 22 of the ICCPR and Article 11 of the ECHR in the form of a "pressing social need", let alone that such a general penalization could be held to be proportionate with any of those interests or rights.⁷

⁷ ²¹ ECtHR, *Koretskyy and Others v. Ukraine*, no. 40269/02, No. 107, Judgment of 3 July 2008