Organization for Security and Co-operation in Europe

Office of the Representative on Freedom of the Media

COMMENTS ON THE DRAFT LAW OF THE REPUBLIC OF BELARUS ON THE MASS MEDIA

The comments have been prepared by Andrei Richter, Doctor of Philology, Director of the Media Law & Policy Institute (Moscow), senior lecturer at the faculty of journalism of the Lomonosov Moscow State University, member of the International Commission of Journalists (ICJ, Geneva) and the International Association for Media and Communication Research (IAMCR).

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Having analysed the draft Law of the Republic of Belarus on the Mass Media (hereinafter referred to as the Draft Law) in the context of the Constitution and existing legislation of the Republic of Belarus, as well as international norms on freedom of information, the expert commissioned by the Office of the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE) has come to the following conclusion.

BRIEF SUMMARY OF COMMENTS AND RECOMMENDATIONS

The Office of the OSCE Representative on Freedom of the Media has consistently come out in support of preparing a more liberal Law on the Press and Other Mass Media, which would envisage participation by non-governmental organizations in its drafting and would facilitate promotion of freedom of expression and freedom of the media in Belarus.

The proposed version of the Draft Law, however, renders the existing law less dangerous for freedom of expression in the country. The view held here is that the serious nature of the shortcomings in the Draft Law considerably outweighs any advantages it might have. Moreover, it is doubtful whether a law on the Press and Other Mass Media is needed at all in its present form: the majority of its provisions, as the provisions of the Draft Law, are unnecessary for or detrimental to freedom of expression and freedom of the media in Belarus, while others are already reflected in the Civil and other codes of the Republic of Belarus.

The expert notes with satisfaction that the Draft Law makes unambiguous reference to **international treaties** concluded by the Republic of Belarus as the legal basis for the activities of the media. In this connection, it is confirmed that the comments and proposals below are intended to bring this norm closer to actual implementation, to prevent collisions between the future Law on the Mass Media and international treaties concluded by the Republic of Belarus, as well as generally accepted norms of international law.

It is welcome that, according to the Draft Law, it is to apply only to *analogues* of existing printed and television and radio broadcasting media distributed via the **Internet**. Moreover, even these analogues do not fall under the requirement for state registration of the media. Dissemination of information on the Internet is thus not subject to registration or, apart from the above-mentioned analogues, to regulation by the future Law on the Mass Media.

Another positive aspect is the fact that the concept of impermissible **censorship** has been expanded to include *any* legal entities among those prohibited to demand coordination of information communications (materials) and that this prohibition applies not only to making such demands to the editorial board, but also to all other persons operating in the sphere of the media.

At the same time, it is held here that the **registration** system envisaged by the Draft Law should be abolished. It is objectionable in connection with the fact that it creates grounds for abuse and, in practical terms, leads to unlawful restriction of the right to issue printed periodicals. The situation is in no way changed by the fact that, under the Draft Law, the procedure for media registration is somewhat simplified in that it makes no mention of the currently existing need for coordination of placement of media with the local authorities.

The expert is concerned about the norms of the Draft Law introducing a ban on professional activities of journalists of **foreign** media without a special accreditation from the Ministry of Foreign Affairs of the Republic of Belarus. This will create considerable difficulties for urgent work by foreign journalists.

Of concern is the absence from the Draft Law of the norms of the current Law of the Republic of Belarus on the Press and Other Mass Media (hereinafter referred to as the Law on the Press) that guarantee citizens of Belarus unhindered **access** to communications and materials of foreign media.

The Draft Law also completely changes the legal nature of **accreditation** of journalists with various authorities and organizations. The focus is diverted from the right to accreditation to the right to accredit. The Draft Law relegates the fundamental issues of accreditation to the discretion of the accrediting authorities themselves, which emasculates the meaning of accreditation, consisting in unhampered access to information on the activities of state authorities and public organizations.

Of further concern is the fact that the Draft Law annuls reference in the legislation to the **charter** of a media editorial board as regulator of relations between the founder and the editors, replacing it with the words "decision on the media editorial board."

A comparison of Article 34.2 of the Draft Law and Article 39 of the Law on the Press testifies to a substantial reduction in the list of **journalists' rights**. The article "Guarantees of social protection of journalists" in the current Law on the Press is also deleted. As a result, journalists are deprived of many legal opportunities and social guarantees of their activities to the benefit of society. The provision on the rights of journalists to confidentiality of information sources should be brought into closer alignment with international standards.

A cause for objection is the demand for absolute **compliance with reality** of media materials, which is absurd in that it virtually excludes the possibility of publishing forecasts or various potential scenarios, feuilletons, cartoons and other satirical and comic works, collages and the like.

The Draft Law repeats the provision of the Constitution envisaging a ban on **monopolization** of the media. The aspiration to introduce such a provision into the legislation might be welcomed if it were more detailed and not merely declarative in nature.

Considering the consequences of issued **warnings** and the practice of issuing them, one cannot agree with the system of limitations on freedom of the press proposed in the Draft Law. From the point of view of observance of the norms of international law in relation to freedom of speech, such forms of liability for violation of the legislation as suspension and termination of media activities should be abolished. The existing cases of full **release** of journalists and editorial boards from liability should be reinstated.

The main aspects of the Draft Law constituting cause for concern are discussed in more detail below, following a brief overview of the international and constitutional obligations of Belarus in relation to freedom of expression.

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INTRODUCTION

The current memorandum was prepared by Andrei Richter at the request of the Office of the OSCE Representative on Freedom of the Media. A.G. Richter, Doctor of Philology, is Director of the Media Law & Policy Institute (Moscow), senior lecturer at the faculty of journalism of the Lomonosov Moscow State University, and a member of the International Commission of Journalists (ICJ, Geneva) and the International Association for Media and Communication Research (IAMCR).

The memorandum analyzes the Draft Law of the Republic of Belarus on the Mass Media with respect to its compliance with international standards relating to freedom of expression. The Draft Law was submitted by the Council of Ministers of the Republic of Belarus to the Chamber of Representatives of the National Assembly of the Republic of Belarus on 10 June 2008. It is intended to replace the Law of the Republic of Belarus on the Press and Other Mass Media (of 13 January 1995, as amended).

I. INTERNATIONAL AND CONSTITUTIONAL STANDARDS IN THE SPHERE OF FREEDOM OF EXPRESSION

1.1. The significance of freedom of expression

Freedom of expression has long been recognised as one of the most essential human rights. It is of fundamental significance for the functioning of democracy, is a necessary condition for exercising other rights and itself constitutes an integral component of human dignity.

Belarus is one of the founding states of the United Nations. The Universal Declaration of Human Rights (UDHR), the basic document on human rights, adopted by the General Assembly of the United Nations Organization in 1948, protects freedom of expression in the following wording of Article 19:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[1]

The International Covenant on Civil and Political Rights (ICCPR)[2] – a United Nations treaty legally binding on and ratified by the Republic of Belarus in 1973 – guarantees and clarifies the right to freedom of expression in the text of its Article 19:

> 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 the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

At its first session, in 1946, the General Assembly of the United Nations adopted resolution 59 (I), which, relating to freedom of information in the broadest sense, states:

> Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.[3]

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[1] Resolution 217A (III) of the General Assembly of the United Nations, adopted on 10 December 1948. A/64, page 39-42. See the full official text in English at: http://www.un.org/Overview/rights.html.

[2] The International Covenant on Civil and Political Rights. Adopted by resolution 2200 A (XXI) of the General Assembly dated 16 December 1966. Came into effect on 23 March 1976. See the full official text in English on the website of the UN Office of the High Commissioner for Human Rights at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[3] United Nations. Sixty-fifth plenary session, 14 December 1946. Official text in English published on the UN website at: http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(I)&Lang=R&Area=RESOLUTION.

Freedom of information in the given and all subsequent resolutions of the UN supreme body is understood as the "right to gather, transmit and publish news anywhere and everywhere without fetters" in the name of peace and world progress. The main principle of freedom of information from the point of view of this UN resolution is "the moral obligation to seek the facts without prejudice and spread knowledge without malicious intent." As can be seen from resolution 59 (I), freedom of information is of fundamental significance per se and also serves as the basis for the exercise of all other rights.

The Human Rights Committee, meeting in New York and Geneva, exercises control over due observance of the International Covenant on Civil and Political Rights. It consists of experts and is empowered to consider applications from individuals claiming to have suffered violations of the rights set forth in the Covenant, including the rights envisaged by Article 19. This Committee has determined that:

> The right to freedom of expression is of paramount importance in any democratic society.[4]

Declarations of this type abound in precedent-setting court rulings on human rights throughout the world. The European Court of Human Rights, for instance, has stressed that "freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man."[5] As noted in this provision, freedom of expression is of fundamental significance both in itself and as the basis for all other human rights. True democracy is possible only in societies where a free flow of information and ideas is permitted and guaranteed. In addition, freedom of expression is crucial for identifying and disclosing human rights violations and for combating them.

The right to freedom of expression is connected with the right to freedom of the media. Freedom of the media is guaranteed by a variety of documents of the Organization for Security and Co-operation in Europe (OSCE), with which Belarus has expressed its agreement, such as the Helsinki Final Act of the Conference on Security and Co-operation in Europe,[6] the Final Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe,[7] the Charter of Paris agreed in 1990,[8] the closing document "Towards a Genuine Partnership in

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[4] Case of Tae-Hoon Park v. Republic of Korea, 20 October 1998, Communication No. 628/1995, para. 10.3.

[5] Case of Handyside v. the United Kingdom, 7 December 1976, Application No. 5493/72, para. 49. The text of the judgement in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=4647705&skin=hudoc-en.

[6] The Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August, 1975. See in English parts concerning freedom of expression, free flow of information, freedom of the media on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[7] Copenhagen session of the CSCE Conference on the Human Dimension, June 1990. See, in particular, clauses 9.1 and 10.1 in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[8] Charter of Paris for a New Europe, CSCE Summit, November 1990. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

a New Era" of the CSCE Summit in Budapest in 1994,[9] and the Declaration of the OSCE Summit in Istanbul.[10]

The Helsinki Final Act declares that "participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development." The Final Act also states that "participating States will act in conformity with the purposes and principles … of the Universal Declaration of Human Rights."[11]

These standards have been developed in detail in subsequent documents of the CSCE/OSCE. The Istanbul Charter for European Security of the OSCE states, in particular:

> We reaffirm the importance of independent media and free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.[12]

The Moscow meeting of the CSCE Conference on the Human Dimension unambiguously agreed that "independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms" and that any restrictions on the right to freedom of expression should be established "in accordance with international standards."[13]

A guarantee of freedom of expression is particularly important with respect to the media. This postulate has also been expressed in rulings of human rights courts. In this connection, it should be noted that the three regional human rights protection systems – the American Convention on Human Rights,[14] the European Convention on Human Rights (ECHR)[15] and the African Charter on Human and People's

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[9] Towards a Genuine Partnership in a New Era. OSCE Summit, Budapest, 1994, clauses 36–38. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[10] Declaration of the Istanbul OSCE Summit, 1999, clause 27. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[11] Clause VII of the Helsinki Final Act.

[12] Clause 26 of the Istanbul Summit Declaration.

[13] The Moscow Meeting of the CSCE Conference on the Human Dimension (October 1991), clause 26. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

[14] Adopted on 22 November 1969, came into effect on 18 July 1978.

[15] Adopted on 4 November 1950, came into effect on 3 September 1953.

Rights[16] – have reflected global recognition of the significance of freedom of the media and of freedom of expression as the vital human rights. Although neither these documents nor decisions of courts and tribunals acting in accordance with them are directly binding on Belarus, they do contain generally recognized principles of international law. By virtue of this, they serve as important comparable examples of the content and application of the right to freedom of the media and of expression and can be used in interpreting, in particular, Article 19 of the ICCPR, which is binding on the Republic of Belarus. In addition, according to Article 8 of the Constitution, "The Republic of Belarus recognizes the priority of the generally accepted principles of international law and ensures the legislation's compliance with them."

The European Court of Human Rights always stresses the "pre-eminent role of the press in a State governed by the rule of law."[17] In particular, it has noted:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[18]

Moreover, free media, as the United Nations Human Rights Committee has stressed, play a substantial role in the political process:

> Free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[19]

In turn, the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[20] The European Court of Human Rights has also stated that it is incumbent on the media to disseminate information and ideas concerning all spheres of public interest:

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[16] Adopted on 26 June 1981, came into effect on 21 October 1986.

[17] Case of Thorgeirson v. Iceland, 25 June 1992, Application No. 13778/88, para. 63. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=thorgeirson&sessionid=4691853&skin=hudoc-en.

[18] Case of Castells v. Spain, 24 April 1992, Application No. 11798/85, para. 43. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=castells&sessionid=4648759&skin=hudoc-en.

[19] General comment No. 25 of the United Nations Organization Human Rights Committee, 12 July 1996.

[20] Recommendation "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism", Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

Although the press should not cross the boundaries set for [protection of the interests defined in Article 10(2)[21]]… it is, nevertheless , assigned the mission of disseminating information and ideas of public interest; if the press is set the task of disseminating such information and ideas, the public, for its part, has the right to receive them. Otherwise, the press would be unable to fulfil its function as society's watchdog."[22]

1.2. Restrictions on freedom of expression

It cannot be disputed that the right to freedom of expression is not absolute: in a few specific circumstances it may be restricted. By virtue of the fundamental nature of this right, however, the restrictions must be precise and specifically determined in accordance with the principles of a rule-of-law state. In addition, the restrictions must pursue legitimate goals; the right may not be restricted merely because a statement or expression is seen as insulting or because it challenges accepted dogmas. The European Court of Human Rights has emphasized that such declarations deserve protection:

> [Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[23]

Besides, the bounds within which legitimate restrictions on freedom of expression may be permitted are established in Article 19.3 of the ICCPR quoted above:

> The exercise 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 respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

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[21] Article 10 (part 2) reads: "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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[22] See the case of Castells v. Spain, note 25, para. 43; The Observer and Guardian v. UK, 26 November 1991, Application No. 13585/88, para. 59; and The Sunday Times v. UK (II), 26 November 1991, Application No. 13166/87, para. 65. The texts of these judgments can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=castells&sessionid=4648759&skin=hudoc-en, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=observer&sessionid=4648759&skin=hudoc-en and http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=sunday%20%7C%20times&sessionid=4648759&skin=hudoc-en, respectively.

[23] Ibid.

This is interpreted as the establishment of a three-tier criterion requiring that any restrictions: (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.[24] This presupposes not only that the restrictions shall be based only on a law passed by the parliament of the country (and not just any legislative acts!), but also that vague and imprecisely formulated restrictions, or restrictions allowing too much freedom of action, are incompatible with the right to freedom of expression. Interference by the law with the freedom of the media shall pursue one of the goals listed in Article 19(3); this list is exhaustive, so interference not connected with any of the listed goals constitutes a violation of Article 19 of this Covenant. Interference shall also be "necessary" for achieving one of these goals. The word "necessary" in this context has a special meaning. It means that there should exist a "pressing social need"[25] for interference; that the reasons given by the state to justify the interference should "be relevant and sufficient" and that the state should demonstrate that the interference is proportionate to the aim pursued. As the UN Human Rights Committee declared, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."[26] Restrictions introduced in observance of the said conditions should be proportional to the legitimate aim pursued.

In this connection, it is worth recalling that Article 23 of the Constitution of the Republic of Belarus reads:

> Restriction of human rights and freedoms shall be permitted only in cases provided for by law, in the interests of national security, public order, protection of morality, public health, and the rights and freedoms of others.

Article 33 of the Constitution of Belarus protects the right of freedom of expression and freedom of the media as follows:

> Everyone shall be guaranteed freedom of opinion, conviction and their free expression.
>
> No one may be compelled to express their convictions or deny them.
>
> Monopolization of the mass media by the state, public associations or individual citizens, as well as censorship, shall be prohibited.

1.3. Regulation of media activities

For the purpose of protecting the right to freedom of expression, it is of vital importance for the media to be able to carry out their activities independently of state control. This enables them to function as "society's watchdog" and provides the public with access to a broad range of views, especially on

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[24] See, for example, the decision of the UN Human Rights Committee on the case Rafael Marques de Morais v. Angola, Communication No. 1128/2002, 18 April 2005, para. 6.8.

[25] See, for example, the case Hrico v. Slovakia, 27 July 2004, Application No. 41498/99, para. 40.

[26] Rafael Marques de Morais v. Angola, note 31, para. 6.8.

matters affecting public interests. The primary goal of regulating the activities of the media must, therefore, be to promote the development of independent and pluralistic media, thereby ensuring the population's right to receive information from diverse sources.

Article 2 of the ICCPR makes the state responsible for "adopting such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means that it is required of states not only to refrain from violating rights but also to undertake positive measures to ensure respect for the rights, including the right to freedom of expression. In fact, states are obliged to create conditions in which diverse and independent media can develop, thereby satisfying the population's right to information.

An important aspect of states' positive obligation to promote freedom of expression and freedom of the media consists in the need to develop pluralism within the media and ensure equal access for all to them. The European Court of Human Rights has noted: "[Dissemination] of information and ideas of general interest… cannot be successfully accomplished unless it is grounded in the principle of pluralism."[27] The Inter-American Court of Human Rights has stated that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[28]

The United Nations Human Rights Committee has stressed the role of pluralistic media in the process of national construction, noting that attempts to force the media to engage in propaganda of "national unity" infringe on the right to freedom of expression:

> The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.[29]

The obligation to promote the development of pluralism also implies that there should be no legislative restrictions for those who engage in journalism,[30] and that licensing or registration systems for independent journalists are incompatible with the right to freedom of expression. In their Joint Declaration of December 2003, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression noted:

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[27] The case of Informationsverein Lentia and Others v. Austria, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38.The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=&sessionid=4648759&skin=hudoc-en.

[28] Recommendation "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion" (note 27, para. 34).

[29] The case of Mukong v. Cameroon, 21 July 1994, Communication No. 458/1991, para. 9.7.

[30] See Recommendation "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion", note 27.

> Individual journalists should not be required to be licensed or to register.
>
> …
>
> Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance.[31]

Similarly, the three special representatives on the right to freedom of expression criticized the media registration scheme since it can easily be subject to abuse for the purpose of suppressing media freedom. The same Joint Declaration of 2003 states:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[32]

In this connection, it is generally accepted today that any state authorities empowered to regulate the media or telecommunications must be completely independent of the government and protected against interference on the part of political and business circles. Otherwise, regulation of the media might easily become subject to abuse for political or commercial purposes. The three special representatives noted that:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members that is transparent, allows for public input and is not controlled by any particular political party.[33]

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[31] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003. See in English on the website of the Office of the OSCE Representative on Freedom of the Media at: http://www.osce.org/documents/rfm/2003/12/27439_en.pdf.

[32] Ibid.

[33] Ibid.

II. ANALYSIS OF THE DRAFT LAW OF THE REPUBLIC OF BELARUS ON THE MASS MEDIA

The analyzed draft law consists of 10 chapters and 55 articles. Below, comments are given, with appropriate recommendations for aligning the text of the draft law with the international obligations of the Republic of Belarus and generally accepted international standards on the right to freedom of expression.

2.1. Scope of the law and its key concepts

The expert notes with satisfaction that the Draft Law unambiguously declares that the legal basis for the activities of the media also consists of the **international treaties of the Republic of Belarus** (Article 2). This norm is absent from the current Law of the Republic of Belarus on the Press and Other Mass Media.

Also welcome is the fact that, according to Article 3.2 of the Draft Law, it applies only to *analogues* of existing printed and television and radio media distributed via the **Internet**. Moreover, even these analogues do not fall under the requirement of state registration of the media. Dissemination of information on the Internet is thus not subject to registration or, apart from the above-mentioned analogues, to regulation by the future Law on the Mass Media. At the same time, the norm of the Draft Law that comes into collision with this by establishing the possibility and procedure for registration of media disseminated via the Internet by the Government of the Republic of Belarus (Article 11.1.2) is, indeed, cause for concern.

One cannot but note that the Draft Law mentions, among the key principles of the activities of the media, maintenance of a **diversity of opinions** (Article 4), which is missing from the current Law on the Press. At the same time, the provision of the Law on the Press that "the state considers the system of the mass media as the basis for implementation of the constitutional right of the citizens of the Republic of Belarus to freedom of speech and information" (Article 3.4) is unjustifiably excluded.

This deletion is evidently responsible for the fact that the Draft Law unjustifiably reduces the **opportunities of citizens** to exercise their right to freedom of opinion, of conviction and freedom of expression, as secured in the international obligations and the Constitution of the Republic of Belarus. The current Law on the Press envisages the possibility that "individual citizens producing and issuing mass information" may act as editors of media (Article 2.2), whereas the Draft Law defines the concept of "editor" only through its definition as a "legal entity entrusted with the functions of editing media," thus excluding the possibility of private individuals producing and issuing mass information. The Draft Law lacks any definition of the concept of "editor."

It is noted with satisfaction that the concept of impermissible **censorship** has been expanded to include any legal entities (Article 7.2) among the subjects not entitled to demand coordination of information communications (materials) and applying the prohibition on making such demands not only to editors but also to any other persons involved in the media sphere. At the same time, it is noteworthy that the norm of the Law on the Press prohibiting "creation and financing of organizations, institutions and

bodies or positions whose tasks or functions include censorship of mass information" (Article 4.2) has been unjustifiably deleted from the Draft Law.

The definition of "**accuracy"** as "compliance with reality" (Article 1.12) is unfortunate. Accuracy is, at the same time, identified as one of the basic principles of media activities (Article 4.2). By virtue of the nature of their profession, journalists are unable to check thoroughly the accuracy of facts, in contrast to officers of investigatory bodies, the public prosecutor's office and courts. They cannot conduct handwriting or other tests, organize identification parades or other investigation measures to determine the authenticity of documents and the veracity of what people say. This means that the results of checks performed by journalists cannot, in many cases, confirm 100% that what is, at the same time, reliable information they intend to disclose actually complies with reality. The requirement for absolute accuracy of media materials is absurd in that it virtually excludes the possibility of publishing forecasts or various potential scenarios, feuilletons, cartoons and other satirical and comic works, collages and the like.

Nor should it be forgotten that the media system in Belorussian society today consists not only in quality media, but also tabloid, mass, "yellow" publications and programmes that are inclined towards exaggeration, sensationalism, provocation and shocking of the public. The inclusion in the Draft Law of the principle of information accuracy binding on all media imposes an unjustified restriction on a major media segment. Readers and viewers are already somewhat sceptical about scandalous materials and treat them as an entertaining component in the media.

At the same time, scandalous, exaggerated materials can promote and, in practice, do promote discussion in society of various important social problems. In its judgement on the famous case *New York Times Co. v. Sullivan* (1963), the US Supreme Court established that a lie cannot be protected by the Constitution, however important the content of the material might be for exercise of the right to freedom of speech. Even so, the court introduced and distinguished between two concepts – malicious libel and non-malicious libel, determining that the latter, being "libel per se," is, indeed, not protected by the Constitution. At the same time, free discussion of socially significant issues is very important for a country and should be protected.

In addition, the above innovation may run counter to the well-known requirement (from the resolution of the European Court of Human Rights) for protection of shocking information (see section 2.1.).

The Draft Law (Article 6) reiterates the provision of the Constitution (Article 33) envisaging a ban on **monopolization** of the media. The aspiration to include in the legislation provisions prohibiting monopolization of the media should be welcomed, but these provisions should not be merely declarative in nature.

In a democratic state, the media should not, indeed, serve, as their priority, promotion of anyone's political, economic and personal interests. Ultimately, such "promotion" restricts the people's access to information that is contrary to or does not comply with these interests, leads to the suppression of socially important information, to so-called "information wars" and, as a consequence, is detrimental to development of freedom of the media and democracy as a whole. It is generally accepted that, for the sake of strengthening the diversity of the media, in a democratic society there must be guarantees of both absolute transparency on matters of ownership and support for a climate of healthy economic

competition. The latter should include not only legal measures to restrict concentration and unfair competition but also organizational measures to promote decentralization of the market.[34]

Recommendations:

- *Confirm, as the goal of the Law on the Mass Media, implementation of the right of citizens of the Republic of Belarus to freedom of speech and information.*
- *Define a media editor in view of the right of individual citizens to produce and issue mass information.*
- *Exclude the principle of accuracy, understood as compliance with reality, from among those binding on the media with respect to all their materials.*
- *The Draft Law needs revision so that it would, not only in word but also in practice, restrict monopolization of the media and ensure the requisite transparency of media organizations for this purpose.*

2.2. The need for registration of the media

Articles 11-16 of the Draft Law regulate questions of registration and re-registration of media, the need for which has repeatedly aroused serious doubts on the part of international organizations (see clause 1.3. of the first part of the Comments). In their remarks on media laws of Belarus and other countries of the region, OSCE experts have already proposed reviewing the registration scheme, since it creates room for abuse for political purposes. In addition, in his Special Report "Registration of Print Media in the OSCE area", published in 2006, the OSCE Representative on Freedom of the Media also warned of the danger posed by rules on media registration.[35]

In relation to Belarus, the UN Human Rights Committee established specifically that the requirement for registration of a media outlet with a print run of only 200 copies constituted a violation of freedom of expression.[36]

The registration scheme established in the existing Law on the Press (Article 1) and proposed once more in the Draft Law (Article 13.7.4) is applied to publications with a print run of only 300 copies.

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[34] See, for example, the corresponding resolution of the European Parliament: "Resolution on Media Takeovers and Mergers," OJ C68/137-138. 15 February 1990.

[35] See "Registration of print media in the OSCE area. Observations and recommendations." The English text is available on website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/documents/rfm/2007/03/23735_en.pdf.

[36] The case of *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

Therefore, the conviction that the registration system envisaged by the Draft Law should be abolished is confirmed here. It is objectionable in connection with the fact that it creates grounds for abuse and, in a practical sense, will entail unlawful restriction on the right to publish printed periodicals.

Besides this fundamental problem, the need to submit information about the subject, language, proposed print run and distribution territory is also dubious. It is not clear what is behind the requirement included in the Draft Law for repeat registration in the same way in the event of a change of address of the editorial board or a six-month (currently – a year-long) suspension of a publication (Article 14.2.1). The requirement for companies to submit a certain document – a certificate of state registration specifically as the "legal entity entrusted with the functions of the editorial board" – creates additional bureaucratic barriers and, apparently, the possibility of a special form and procedure for registration of legal entities seeking to engage in media publication.

If registration, as asserted, is a purely technical statistical procedure, then virtually all that is needed for registration purposes is the full name or company name and contact details. The demand that detailed information be submitted on the content, as well as on the subject of the publication, plus a multitude of bureaucratic barriers, all testify that the registration scheme will be used to exercise supervision over the media.

The situation is in no way changed by the fact that, in accordance with the Draft Law, the procedure for registering media is somewhat simplified in that it makes no mention of the notorious agreement on placing a media outlet with local authorities (Article 10 of the Law on the Press). Yet such a demand for agreement on the part of an executive authority could be introduced into subordinate legislation, as this is not prohibited by the Draft Law (Article 12).

Recommendation:

- *The media registration scheme is superfluous, restricting freedom of mass information, and should be abolished.*

2.3. Rights of foreign journalists and access to foreign media

The expert of the Office of the OSCE Representative on Freedom of the Media expresses concern over the norms of the Draft Law (Article 35.4, and Article 1.1) introducing a ban on the professional activities of journalists of foreign media without special accreditation with the Ministry of Foreign Affairs of the Republic of Belarus. This will create considerable difficulties for urgent work by foreign journalists coming to Belarus to cover short-term events, such as a state visit. At the same time, this norm is complicated by the need for Belorussian journalists fulfilling editorial tasks for foreign media also to obtain Ministry of Foreign Affairs accreditation.

The expert expresses concern about the absence from the Draft Law of the norms of the current Law on the Press (Article 44) guaranteeing citizens of the Republic of Belarus unhindered access to communications and materials of foreign media. The norm of the same article of the Law on the Press to the effect that "restriction on receipt of direct television broadcast programmes shall be permitted

only in cases envisaged by international treaties concluded by the Republic of Belarus" has also been deleted.

It should be recalled that, under the Final Act of the Conference on Security and Co-operation in Europe, the Republic of Belarus assumed the obligation "to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries, and to improve the conditions under which journalists from one participating State exercise their profession in another participating State."[37] It is doubtful that the given norms of the Draft Law further the goals secured in the international agreement of the Republic of Belarus. Section 2 of the Final Act – "Information" (clause c) envisages the rights of both accredited (temporarily and permanently) foreign journalists and journalists of other states irrespective of whether they have special accreditation. In particular, participating States, of which Belarus is one, undertook "to increase the opportunities for journalists of the participating States to communicate personally with their sources, including organizations and official institutions."[38]

Recommendations:

- *Abolish the requirement for accreditation with the Ministry of Foreign Affairs for foreign journalists visiting the country for short periods and for Belorussian journalists working for foreign media.*
- *Reinstate the right of citizens to unhindered access to communications of foreign media.*

2.4. Rights of media editorial boards

For the purpose of ensuring freedom of mass information, guarantees are required for the independence of the creative activities of editorial boards and journalists. Only editorial teams whose work is free from interference by owners can satisfy people's demands for unhindered receipt and distribution of information and ideas. Editorial independence does not mean that the editors should not be held judicially liable, above all for violating various legitimate rights in journalistic materials, especially the right of citizens to privacy and respect for their reputation.

The Draft Law annuls all reference in the legislation to the **charter** of media editorial boards as regulator of the relations between the founders and the editors, replacing it with "a decision on the media editorial board", without even disclosing the legal nature thereof. The editorial charter and the special procedure for adopting it constitute, however, virtually the ultimate mechanism for protecting the independence of journalists against pressure from founders (owners).

[37] Final Act of the Conference on Security and Co-operation in Europe. http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

[38] Ibid.

Substantial amendments are introduced by the Draft Law into the institution of **accreditation**. Already in Article 1 of the Draft Law, accreditation is regarded as "granting to a media journalist the right to cover events organized by state authorities, as well as other events occurring on the territory of the Republic of Belarus." Taking this norm literally, it is both absurd and inapplicable. No one can deprive a journalist of the right to cover events in the world if he or she has no accreditation from a state authority of the Republic of Belarus.

Accreditation of journalists is envisaged in cases when access by journalists needs to be organized (not prevented) to given events and to meetings of state authorities, particularly if the media interest exceeds the physical possibilities of satisfying it (that is, in the absence of proper conditions for a large number of members of the press to work simultaneously). Accreditation makes it possible to define those media and journalists which specialize in covering the activities of the state authorities, for the purpose of granting them the priority right to receive the relevant information.

Under the current Law on the Press (Article 42.2), issuance of accreditation imposes certain obligations on an accrediting body before an accredited journalist. These include the obligations to notify accredited journalists of its sessions, meetings and other events, to allow them access to these events (unless they are declared to be closed to the press), to provide relevant records and minutes (if kept) and the documents discussed at these sessions, to create favourable conditions for making audio and video recordings and photography. The Draft Law contains nothing of the sort. Nor does it contain a closed list of cases when a correspondent might be deprived of accreditation (Article 42.4). All this relegates fundamental questions of accreditation to the discretion of the accrediting bodies, which emasculates the very meaning of accreditation, consisting in unhindered receipt of information on the activities of state authorities and public organizations.

The analyzed Draft Law also completely changes the legal nature of accreditation of journalists with different state authorities and organizations. For instance, the current Law on the Press states: "Media editorial boards shall be entitled to accreditation of their correspondents with state authorities, organizations, institutions and public associations" (Article 42). The Draft Law reads: "State authorities, political parties, other public associations, and other legal entities may accredit journalists of the media for covering sessions, meetings and other events organized by these legal entities" (Article 35.1). The focus is thus transferred from the right to accreditation to the right to accredit, from the right of editorial boards to the right of state authorities, from the right of citizens to receive, via the media, information about the activities of state authorities to the right of administrative bodies to function in peace.

The Office of the OSCE Representative on Freedom of the Media published a special report on accreditation of journalists in the OSCE area.[39] It is advisable to take into consideration the recommendations made in this report for developing the rules for accreditation of journalists.

It is also recommended to align the provision relating to the right to **confidentiality of information sources** (Article 34.4.5 and Article 39) more closely with international standards. In accordance with the Draft Law, a criminal prosecuting body or a court may issue a directive to disclose a source on any

[39] See the text in English on the website of the Office of the OSCE Representative on Freedom of the Media at: http://www.osce.org/documents/rfm/2006/10/21826_en.pdf.

grounds in connection with preliminary investigations or judicial proceedings conducted by them. This violates the minimal standards established by human rights courts and regional human rights agencies, according to which a court may require journalists to disclose their source as an extreme measure, that is, only if necessary for investigation of a serious crime or for protection of a person in criminal proceedings.

For instance, Recommendation No. R (2000) 7 of the Committee of Ministers to the member states of the Council of Europe regarding the right of journalists not to reveal their sources of information establishes the need for national legislation to include clearly expressed protection of the right of journalists not to disclose information allowing its source to be identified, in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It recommends that competent authorities indicate the specific reasons for which the interest in revealing a source exceeds that in not revealing it. This concerns, in particular, cases when a source needs to be revealed in order to protect human life, prevent a serious crime or ensure protection, in a criminal case, of a person accused or found guilty of a serious crime, provided certain conditions are observed. The latter includes a source being disclosed only if and after other means and sources have been exhausted by the parties to the disclosure case. Such measures may, for instance, include internal investigation in the event that secret internal information about an enterprise or its administration has been disseminated; increased restrictions on access to a certain secret and a general investigation by investigation agencies or distribution of information refuting the original information.[40]

The importance of protection of journalists' sources for freedom of the press in a democratic society and the dangerous impact a court ruling to reveal a source might have on exercise of freedom of the press were already established in the resolution of the European Court of Human Rights in the case of *Goodwin v. the United Kingdom* of 27 March 1996. In another resolution (*Roemen and Schmit v. Luxembourg*), the European Court recognized searches conducted for the purpose of establishing a journalist's source of information as an even more dangerous act in relation to freedom of expression.

An important example of the national legal regulation of these issues was the Law passed in Belgium in 2005 on protection of journalistic sources. According to the Law, protection of sources is guaranteed for both journalists and editorial workers, by which are understood all persons that, in fulfilment of their official duties, might gain access to or discover information capable of leading to revelation of a source. The Law states that journalists and editorial workers shall have the right to refuse revealing to judicial authorities information that might disclose the source or the nature or the origin of the information itself, to disclose the author of a text or audiovisual work, and also if this will lead to revelation of the content of information and documents that, in turn, might help to establish who the informant is. At the same time, judges may require that information be disclosed about a confidential source on the following three conditions: (1) the information concerns crimes constituting a serious threat to the physical safety of one or several persons; (2) the information is of key significance for preventing such crimes; (3) it cannot be obtained in any other way. Operational and investigatory measures, such as searches and seizures of documents and information belonging to journalists and editorial staff, and telephone tapping, may not be carried out in relation to data on sources of information of journalists and editorial staff, except for cases when such methods are capable of

[40] See the text in English on the website of the Council of Europe at: http://www.coe.int/t/e/human_rights/media/4_documentary_resources/CM/Rec(2000)007&ExpMem_en.asp#TopOfPage.

preventing the crimes indicated above and the investigatory measures themselves satisfy the other conditions established there.

In another European country, Macedonia, the right to protect the secret of journalists' information sources is specifically envisaged in the state's Constitution.

A comparison of Article 34.2 of the Draft Law and Article 39 of the Law on the Press testifies to a considerable shortening of the list of **journalists' rights**. Also, Article 41, "Guarantees of social protection of the journalist," of the current Law on the Press is removed. As a result, the journalist is deprived of many legal and social guarantees of his or her activities to the benefit of society.

Recommendations:

- *Either by introducing norms on the charter into the Law on the Mass Media or by creating a system of transparent and honest relations between journalists and founders, envisage guarantees for the independence of editorial policy.*
- *Establish norms on accreditation of journalists allowing citizens to receive, via the media, full information about the activities of state authorities and organizations.*
- *Bring the provision on the right of journalists to maintain the secrecy of their information sources into line with international standards.*
- *Expand the rights and guarantees with respect to the activities of journalists as of those fulfilling an important public duty.*

2.5. Liability of editorial boards

Chapter 9 of the Draft Law envisages liability for violating the legislation on the media. In accordance with this, the initial form of liability is a written **warning** to media editors, which may be made on a variety of grounds, including for "disseminating inaccurate information that might cause harm to state and public interests", "distribution of information not complying with reality and defaming the honour or business reputation of individuals or the business reputation of legal entities or individual entrepreneurs" (Article 49). Progress may be seen here; after all, under the Law on the Press, a warning may be issued for any violation of any legislative act of the Republic of Belarus. A written warning is issued either by the Ministry of Information or a prosecutor's office at any level.

The OSCE Representative on Freedom of the Media has already noted at meetings with the Minister of Information of the government of the Republic of Belarus that, according to data received from both government and independent sources, the Ministry of Information has used its powers to issue warnings/suspend activities primarily in relation to non-governmental media. The Office of the OSCE

Representative was unable to identify any single case of a warning regarding the content of published materials being issued to a state media outlet.[41]

The next sanction is **suspension** of media activities for a period of up to three months by resolution of the Ministry of Information on a variety of grounds, including for failing to provide, in due time, information on remedying offences with the necessary evidence (Article 50). Suspension of media activities should not be imposed by decision of the controlling authority (especially considering that it is not independent, but is part of the system of executive power). In a case of acute public need for urgent suspension of the activities of some "dangerous" medium, immediate and final consideration of the conflict in a court of law should be envisaged. The court that hears the case should study the existence of guilt and malicious intent on the part of the media editorial board.

Finally, the harshest sanction consists in **termination** of the issue of a media outlet. A decision on this should be taken by a court at the demand of the Ministry of Information or prosecutor's office on the condition that, during a year, the media outlet or its founder (founders) have been issued two or more written warnings. Such termination of activities is accompanied by a prohibition on the founders of the given media outlet to establish new ones for a period of three years (currently, two years).

As for other violations, for instance, violation of the civil or administrative legislation, the proposed system for suspension or termination of media activities includes excessive liability that is both unjustified in terms of its purpose and inappropriate to the degree of the violation. To the extent to which restrictions on freedom of the media are both lawful and necessary, they should be stipulated in the general legislation, such as the civil or criminal codes. Some degree of liability for legal offences is and may be borne by journalists, the editor-in-chief, the owner or the media organization, but this liability should be both fair and proportional to the offence.

To close down a media outlet is an excessive form of liability. Forced termination (suspension) of media activities, even by court ruling, is an inadmissible procedure in a democratic society.

The article in the current Law on the Press envisaging **release of the media from liability** in the event of reprinting information and in other cases has been substantially revised. The current release of the editors from liability for information contained in copyright works aired without pre-recording (Article 47) is abolished. This limits the opportunities for live television and radio broadcasts. The Draft Law (Article 52) deprives the media and journalists of this "privilege" in cases when information is distributed that discredits the Republic of Belarus, as well as information that does not comply with reality and defames the honour, dignity or business reputation of private individuals or the business reputation of legal entities or individual entrepreneurs. The possibilities of criticism in the media are thus limited, for journalists are forced to recheck information received from competent sources, including in response to a request for information. This also restricts freedom of mass information, since it halts the media from using information provided by agencies and reprinting communications from other media.

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[41] See *Visit to Belarus: Observations and Recommendations* of the OSCE Representative on Freedom of the Media Miklós Haraszti, accompanied by Advisers Alexander Ivanko and Ana Karlsreiter, from 9 to 11 February 2005. http://www.osce.org/documents/rfm/2005/03/4390_en.pdf.

A major innovation of the Draft Law is institution of a **Public Coordination Council** which would make recommendations in the sphere of the media (Article 28). Its composition and activities are to be determined by the Ministry of Information. One might hope that the purpose of the Public Council will be to monitor observance of ethical standards in journalism, and not to exercise political control over the media. In setting it up, it is recommended that use be made of the existing experience in European countries of the functioning of such co-regulation bodies. Media co-regulation and self-regulation systems are described in detail in the Media Self-Regulation Guidebook published by the Office of the OSCE Representative on Freedom of the Media.[42]

Recommendations:

- *Reconsider all the restrictions contained in the Draft Law from the point of view of observance of the norms of international law in relation to freedom of speech.*
- *Abolish such forms of media liability for legal offences as suspension and termination of activities.*
- *Restore the current cases of release of journalists and editors from liability in full.*
- *Take into account the experience of European countries in setting up a media co-regulation body – the Public Coordination Council.*

[42] The Media Self-Regulation Guidebook, Office of the OSCE Representative on Freedom of the Media. http://www.osce.org/publications/rfm/2008/04/30697_1117_en.pdf.