



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media**

**LEGAL ANALYSIS OF THE DRAFT LAW OF THE REPUBLIC OF BELARUS “ON
AMENDING THE CODES RELATED TO CRIMINAL LIABILITY ISSUES”**

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

This analysis has examined the Draft Law of the Republic of Belarus “On Amending the Codes Related to Criminal Liability Issues” (hereinafter – “the Draft”) to the extent it affects the exercising of the right to freedom of expression and media freedom. All provisions selected for the study are to amend the 1999 Criminal Code of the Republic of Belarus (hereinafter – “CCRB”).

While the Draft was under review, it was adopted by the House of Representatives and approved by the Council of the Republic and became a Law, No. 112-3, on 26 May 2021.

The proposed amendments are substantial. They concern a broad range of existing and new crimes, including so-called “extremism,” defamation, and dissemination of “fake news.” The amendments also address issues concerning protection of public order, personal data, privacy, official secrets, and cybersecurity.

Due to the concerns expressed in June 2021 by the OSCE Representative on Freedom of the Media, Teresa Ribeiro, about numerous abuses by criminal legislation against journalists and media workers in Belarus¹, the intent to considerably reform Belarussian criminal law should have been welcomed.

However, the analysis has shown that the Draft **poses serious new challenges to exercising media freedom and freedom of expression in Belarus. It also contradicts international human rights standards on freedom of expression and media freedom considerably, including the OSCE commitments undertaken by Belarus authorities.**

The main reasons are summarised as follows:

- **General comments**

- The Draft substantially increases criminal penalties for existing crimes, although the current sanctions for these crimes are largely disproportionately severe as they are. It also provides excessively harsh punishment for the new offenses. Practically all of the amendments allow sentencing to imprisonment, mostly disregarding the seriousness of the crimes and whether they involve incitement to violence.
- Instead of making the current provisions clearer and more precise, as legally required, the Draft generally intensifies existing ambiguities of national law, which may complicate its enforcement. The Draft proposes several new bans that overlap with the current prohibitions, posing the risk of arbitrary application at the discretion of law enforcers. Furthermore, the new definition of “cumulative charges” (Amendments to CCRB’s Article 42 Part 1) seems to allow double punishment for a single offense, violating the fundamental international and constitutional legal principles outlawing this practice.

¹ OSCE Representative on Freedom of the Media urges immediate and unconditional release of all detained journalists in Belarus. 2 June 2021. <https://www.osce.org/representative-on-freedom-of-media/488371>

- **Specific comments**

- The Draft establishes several new “counter-extremist” crimes, thus expanding the overly broad ban on “extremism” and making this notion more indefinite and less connected to violent acts.
- Specifically, the Draft introduces vague notions of “social affiliation (or group)” and “political or ideological fight” to prohibit social, political, or ideological hatred. These bans are inadmissible from the international legal perspective and may be used to silence criticism towards any group of individuals, including public officials, in addition to political views or ideologies.
- The Draft also increases the excessive maximum sentence for the “public calls to actions intended to cause harm to national interests” (Article 361 of the CCRB’s), even though this ambiguous offense involves no incitement to violence. Therefore, this amendment significantly threatens Internet freedom and media freedom. What’s more, this Article partly overlaps with several other counter-extremist provisions, including the new Article 369-3 criminalizing calls for illegal associations or meetings.
- In contradiction to the requirements of proportionality, legality, and necessity, the Draft considerably increases maximum penalties for the “creation or management” and “funding” of “extremist” organisation, although the legal vision of “extremism” do not imply its connection to violence. In addition, it excessively and ambiguously criminalises participation in an “extremist organization,” “assisting” it, alongside the “failure to execute a decision to recognize an organisation as extremist.” That is to say, the amended Articles 361-1, 361-2, 361-4, 361-5, 423-1 of the CCRB are profuse and promote confusion. Several amendments may be interpreted to excessively punish the funding of media organisations.
- The amended CCRB’s Articles 364, 366 fail to differentiate sanctions for violence against police officers and public officials from those for a threat to cause violence to them or their “nearest,” which is a vague notion. The Draft allows disproportionate sentencing for such threats that may not necessarily be real.
- In addition, the Draft poses new challenges to the exercise of artistic freedom, which is also a part of freedom of expression. Apart from criminalizing several offenses that could be subject to administrative penalties as acts of hooliganism, the Draft imposes excessive limitations on group art performances and street art, especially graffiti (amendments to article 341). The Draft maintains vague bans on the “desecration” of national symbols, such as the flag and anthem, and increases disproportionate penalties for committing this offense (amendments to Article 370).
- The Draft also considerably expands the prohibition of the “discreditation of the Republic of Belarus,” contradicting the requirements of legality, legitimacy, proportionality, and necessity in a democratic society. In general, amended CCRB’s Article 369-1 seems to introduce a vague new ban on the so-called “fake news” if it is deemed “harmful” to “public or state interests” of Belarus, irrespective of whether such fake news has been disseminated publicly, via mass media, or on the

Internet, or even in private email correspondence. Furthermore, it is worrisome that this Article criminalizes expressions that challenge official information or statements of Belarussian authorities on the issues of public interest, including on Belarus' "political, economic, social, military or international" or human rights state.

- Several amendments significantly tighten criminal liability for defamation of public authorities and officials, including the president (Amendments to Articles 367-369), although international law condemns the criminalization of defamation, especially if it is to protect the reputation of public bodies or officials. The Draft additionally criminalizes such defamation in private correspondence online along with any insult of a public officials' "nearest." As with the amendment on "discreditation of the Republic of Belarus," the Draft's amendments on defamation overlook the notion of public interest.
- The Draft also increases disproportionately high maximum penalties for all crimes representing defamation (amendments to Articles 188, Articles 367-369). The maximum sentence for the libel and insult of the president of the Republic of Belarus is five and four years of imprisonment, respectively.
- In contradiction to the requirements of clarity, proportionality, and necessity, new Article 198-1 criminalises repeated dissemination of banned information on websites by their owners if they have been imposed administrative penalties for a similar act less than a year ago. The article negates the notion of public interest and establishes an excessive maximum sentence of two years of imprisonment. It may produce a considerable chilling effect on freedom of expression online and increase Internet self-censorship.
- Draft attempts to strengthen the protection of privacy and personal data, which may be in line with new online threats posed by the technological advances, would have been welcomed. However, the new CCRB's Articles 203-1 and 203-2 provide disproportionately high penalties allowing imprisonment for administrative offenses, such as the use of personal data or private information of individuals without their consent. Some of the crimes also overlap and allow charging interchangeably or cumulatively.
- Furthermore, new Article 203-1 in Part 3 directly threatens investigative journalists, bloggers, and "whistle-blowers," although international legal standards suggest providing them additional legal protection. The new provision negates the notion of public interest. It permits sentencing to up to five years of imprisonment for "intentional" collecting, providing, or disclosing private information or personal data of public officials and their "nearest" if these acts are committed "in relation to public officials' performance of their official duties." This vague and excessive provision may create new obstacles for public (and journalistic) scrutiny of how public officials perform their official duties, including public disclosure and debate of the facts of the violations by public officials.
- Additional threats to "whistle-blowers," investigative journalists, and bloggers are posed by several articles seeking to consolidate cybersecurity protection. Although such protection may represent a legitimate aim and may be necessary amidst

technological advances, the Draft insufficiently balances it with the protection of freedom of expression and media freedom. The Draft overlooks the notion of public interest. Therefore, the amendments may be interpreted too broadly and used to punish the use or development of computer programmes necessary to seek or access information of public interest, for instance, after it has been removed from the Internet in violation of international law. It is extremely worrisome that the proposed Article 354 fails to differentiate criminal sanctions for developers and users of “harmful” programmes, negating the requirements of proportionality. Amended Articles 349, 350, 352-355 are mostly disproportionate and vague. They may also be misused interchangeably or cumulatively.

- Although the amendments to articles 375-375¹ protecting state and official secrets aim to protect a legitimate aim, they are greatly imbalanced against the protection of freedom of expression, particularly the right to access information. They also overlook the importance of access to information of public interest. They may apply, with excessive punishment, to an indefinite number of individuals whose duties do not involve the commitment to keep such information confidential, including journalists.

Summary of main recommendations

- It is recommended to abstain from adopting the Draft and undertake a large-scale reform of existing laws in Belarus to bring national criminal law in full compliance with international human rights standards, including the OSCE commitments on freedom of expression and media freedom.
- It is strongly suggested to clarify vague notions and concepts in national law. Sanctions for any crimes should be proportionate to harm and the seriousness of these offences.
- It is advised to exclude overlapping provisions that may cause multiplying, arbitrary or disproportionate sanctions.
- All provisions in national law aimed at counteracting extremism should be clear and precise and limited to offenses involving violence. It is highly recommended to exclude vague bans on social, political, or ideological hatred as well as indefinite prohibitions of actions or expressions that may cause harm to “national interests.” It is also suggested to provide legal mechanisms to exclude punishment for threats to cause violence if they represent a figure of speech and do not mean to cause actual violence.
- It is recommended to avoid limiting artistic freedom, especially in criminal law. Street art should be protected. Vague bans on the “desecration” of national symbols are extremely undesirable.
- Prohibitions on “fake news” or other vague concepts, such as “discrediting Belarus or its interests, should be abolished. National law should include legal mechanisms to ensure free public debate on the issues of public interest.
- Defamation should be decriminalised. It is recommended to consider applying civil law to protect the reputation of individuals from defamation. National law should guarantee that public officials are open and tolerant to criticism. Any provisions that may be interpreted

as protecting the reputation of public officials should be avoided. No special protection should be provided to the reputations of public officials' family members.

- Any provisions in national law concerning freedom of expression, including provisions on defamation, should not negate the notion of public interest.
- It is strongly suggested not to impose excessive limitations on website owners or other media professionals. It is also suggested to avoid criminalizing dissemination of banned information only because individuals have already been imposed administrative penalties for such offences.
- Disproportionately severe measures for collecting or for any use of personal data or private information should be avoided. It is recommended to consider applying administrative law to punish such offences. Protection of personal data and private information should be balanced with the protection of freedom of expression and media freedom.
- It is necessary to exclude using excessive and vague provisions protecting personal data, private or other secret information, as well as cybersecurity against investigative journalists, bloggers, and whistle-blowers. Their activities should be protected under the right to freedom of expression. Any laws that may criminalise their activities should be avoided.
- Protection from cybercrimes and official secrets should be balanced with freedom of expression in line with the requirements of the international legal three-tier test. National law should unambiguously provide liability for disclosure of state secrets or other secret information only to those individuals whose duties involve the commitment to keep such information confidential.
- It is suggested not to restrict developing and using programmes that allow the use of VPNs or anonymization of users' identity.