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Belarus Criminal Code 193-1 Expert Opinion

(responsibility for illegal organization of the activities of a public association, religious organization or foundation (fund), or for participation in the activities thereof)

Expert Opinion on the Conformity of Article 193-1 of the Criminal Code of the Republic of Belarus to the Constitution of the Republic of Belarus and International Acts Ratified by Belarus

The present independent public legal examination has been held on the Decision of the Board of the Republic's Human Rights Public Organization "The Belarusian Helsinki Committee" (hereinafter – the BHC) of May 5, 2007, made on the basis of Paragraph 2, Point 2.4, of the Charter of the BHC.

The object of examination is the conformity of Article 193-1 of the Criminal Code (hereinafter – the CC) of Belarus to the Constitution of the Republic of Belarus and its international treaties in the sphere of human rights.

1. The Law of the of the Republic of Belarus of 15.12.2005, No. 71-3 "On Making Changes and Additions to Certain Legislative Acts of the Republic of Belarus on the Issue of Strengthening Responsibility for the Actions Directed Against the Person and Public Safety" changed in Chapter 23 of the CC the wording of Article 193 of the CC and introduced a new Article 193-1, which establishes responsibility for illegal organization of the activities of a public association, religious organization or foundation (fund), or for participation in the activities thereof.

Article 193 of the CC has been complemented with the following:
"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."

Part 1 of Article 193 of the CC took as its basis the definition of the crime, which had been given in the old wording of Article 193 of the CC, but with account of terminological changes connected with updating of the legislation on public associations and political parties. The notion of a political party was isolated from the notion of a public association, and instead of the term "religious association" the term "religious organization" was adopted.

Article 1 of the Law of the Republic of Belarus of 05.10.1994, No. 3266-XII "On Political Parties" (in the wording of 26.06.2003) sets up that "a political party is the independent association of citizens, formed on the basis of individual voluntary membership and operating within the bounds of the Constitution and Laws of the Republic of Belarus, promoting the revealing and expression of citizens' political will and participating in the elections."

Article 1 of the Law of the Republic of Belarus of 04.10.1994, No. 3254-XII "On Public Associations" (in the wording of 12.07.2007) defines a public association as "a voluntary association of citizens in the order established by the legislation, who have united on the basis of the generality of their interests for joint realization of civil, social, cultural and other rights." One should remember that the "Law on Public Associations" does not cover political parties, trade unions, religious organizations (unions or associations thereof), other public formations and civil initiatives, the order of establishment and activity thereof shall be established by the respective legislative acts.

Thus, although a political party is a variant of a public association, but by virtue of constitutional provisions and specificities of statutory tasks it acquires a special status (since it is related to the political will of citizens). The same refers to religious organizations also by virtue of their specificities.

Article 9 of the Law of the Republic of Belarus of 17.12.1992, No. 2054-XII "On Freedom of Religion and on Religious Organizations" (in the wording of 29.11.1999) defines that religious organizations in the Republic of Belarus are religious communities, monasteries, religious brotherhoods, missionary societies, missions, spiritual educational institutions, as well as religious associations with their managements and centres. Religious organizations shall act on the basis of their charters (regulations) and have the status of legal entities.
Thus, the above Laws are covering only public associations of various orientations, the operation of which assumes, as a rule, the fixed individual membership, the presence of the charter (regulations) and the status of legal entities.

2. The new wording of Part 1 of Article 193 of the CC has expanded the sphere describing the illegal activity of a political party, other association or religious organization by including the following alternative version of behaviour: "or connected with impeding citizens to enjoy their state, public or family duties."

For correct understanding of the sense of Part 1 of Article 193 of the CC, the provisions of Part 2 of the same Article are important. Part 2 of Article 193 of the CC contemplates increased responsibility for the same actions, but in the cases when the respective party, other public association or religious organization has not passed the state registration in the established order.

Hence, Part 1 of Article 193 of the CC is spreading its action on the cases when a respective association has been created, registered in the established order, but contrary to the aims or tasks proclaimed by the Charter is engaged in absolutely different activities. In this case, to establish the subjective (mental) element of the crime it is necessary to prove that the association (organization) was registered with the aim to conceal violent or other illegal actions in relation to citizens.

The subject of this crime is specified as follows:
- In Part 1 of Article 193 of the CC – the founder or the head of the respective association (organization);
- In Part 2 of Article 193 of the CC – the actual organizer or the head of the non-registered public association or religious organization.

The sanction was also changed. Within Part 1 of Article 193 of the CC, this crime still refers to the category of the crimes not representing any great public danger. But the sanction was toughened: the punishment in the form of a fine and deprivations of the right to take certain positions was excluded, and the punishment in the form of imprisonment for the term of up to two years was introduced. Within Part 2 of Article 193, the crime is referred to the category of less grave crimes.

3. Under Article 193-1 of the CC, citizens are prosecuted in the criminal order for organization of the activities, or participation in the activities of a political party, other public association, a religious organization or a foundation, in relation to which there is an inured decision of the authorized state body about their liquidation or suspension of activities, or which have failed to pass the state registration in the established order. The sanction of the Article assumes a fine, or arrest for the term of up to 6 months, or imprisonment for the term of up to 2 years.

The essential elements of the crime are formal by their structure. The direct object of the crime is in the public relations, which ensure the existing order of registration and operation of political parties, other public associations, religious organizations or foundations. (It appears that by its object this crime refers more likely to the group of offences against the order of ruling.)

The objective part of this crime is described in the Law in two variants of criminal behaviour:

1) Organization of the activity or participation in the activities of a political party, other public association, religious organization or foundation, in relation to which there is an inured decision of the authorized state body on their liquidation or suspension of activities;

2) Organization of the activity or participation in the activities of a political party, other public association, religious organization or a foundation, which have failed to pass the state registration in the established order.

Within the first variant of behaviour, the organization of the activities of the respective association, organization or foundation is understood as certain organizational actions directed towards continuation of functioning of the respective association, which is caused, first of all, by the statutory tasks and aims of this association. The legal interpretation has been given to the notion "participation in the activities."

According to Part 1 of the remarks to Article 193-1 of the CC, participation in the activities of a political party, other public association, religious organization or foundation should be understood as the actions directed towards achievement of the aims of the above associations, organizations or foundations, including those defined in their statutory and other documents.

By the sense of the law, at the first variant of behaviour, organization of the activities or participation in the activities should take place after inuring the decision of the authorized state body about liquidation or suspension of the activities of the respective association, organization or foundation.

The decision on liquidation is made by the court under the claim of the registering body (in relation to Republic's (national) organizations and political parties – by the Supreme Court of the Republic of Belarus). The decision on suspension of the activities is also made, as a rule, on the basis of a court ruling. At the same time, for example, the Republic's body for religious matters has the right, provided the respective grounds are available, to suspend the activities of religious associations, monasteries, monastic communities, religious brotherhoods and sisterhoods, religious missions and spiritual educational institutions. The decision of the registering body to suspend the activities can be appealed against in the judicial order.

However, not any decision of the authorized body on suspension of activities refers to Article 193-1 of the CC. Thus, according to Part 2 of the remarks to Article 193-1 of the CC, the action of this Article does not cover the cases, where in relation to the respective association there is an inured decision of the authorized state body to suspend its activities, which is directed towards elimination of the violation that has formed the basis for suspension of its activities.

At the second variant of behaviour, the crime is recognized to be in the organization or participation in the activities of the respective association, if it has not passed the state registration. According to the rules as stated in Part 2 of the remarks to Article 193-1 of the CC, this Article does not cover the organization of the activities or participation in the activities of the respective association, which are connected with their state registration in the established order.

The crime is considered over from the moment of committing the respective action. From the subjective viewpoint, the crime is characterized by a direct intention (express malice). The subjects are the organizers (heads) or active participants.

Part 3 of Appendices to Article 193-1 of the CC contains a special norm about active repentance. A person can be exempted from criminal responsibility provided the following conditions are in place:

1) A person has voluntarily stopped the actions contemplated by Article 193-1 of the CC;
2) An application of the person to the state bodies to this end is available;
3) There are no elements of some other crime in the actions of this person.

Part 3 of remarks to Article 193-1 of the CC is not extended to the persons who have committed similar actions within two years after voluntary termination of the activities contemplated by this Article.

This is the sense of the introduced restrictions of the right to freedom of association, which is nowadays prosecuted in the criminal order under Article 193-1 of the Criminal Code.

4. Still earlier, the Ministry of Justice of the Republic of Belarus had adopted Statement No. 49 of 13.09.2005 "On Certain Issues of Founding Public Associations and Their Unions (Associations)." This legal act stipulates that "when holding actions of political nature and possible creation of blocks of political parties and trade unions, same as creation of any "movements," "initiatives," "coalitions," which unite citizens or legal entities, one should be guided by the current legislation and the present Statement." The norms of the Statement prescribe the need of state registration of "blocks," "movements," "initiatives" and "coalitions" as specified in point 1 of the Statement, and reference is made to Article 7 of the Law of 4.07.1994 "On Public Associations" (with amendments and additions) that prohibits any activity of non-registered public associations.

It is necessary to note here that according to the current legislation only public associations, as a special form of citizens' association, enabling to acquire the rights of a legal entity, are subject to state registration. The very concept of "a legal entities" is introduced by Article 44 of the Civil Code of the Republic of Belarus. Other forms of realization by citizens of their constitutional right for the freedom of association, not demanding to create a separate independent subject of civil legal relations, register the membership, regulate the procedures of electing managing bodies and decision-making, purchase of isolated property, may carry out their activities without creating a public association and, accordingly, without any special registration. Their public activities are not regulated by the Law "On Public Associations," and they can bear responsibility for their actions only in the cases as stipulated by the current legislation. This can be civil-legal, disciplinary, administrative or criminal responsibility.

For example, the citizens who are pursuing their non-commercial objectives can agree and act on the basis of an agreement "about joint activities" or in the form of a simple comradeship (Article 911 of the Civil Code). Spreading the scope of the Law "On Public Associations" on such forms of citizens' associations would mean an actual introduction of a ban on any activities of public formations without formation of a legal entity and, accordingly, without legal registration, for example, fan-clubs, parent committees in kindergartens and schools, joint actions of tenants aimed to improve the pre-house territory, as well as of other forms of citizens' self-organization mentioned

above. The requirement of state registration of this sort of citizens' unions and groups is a breach of their right to freedom of association; it is contradictory to the current legislation and common sense.

In our opinion, by adopting Statement No. 49, the Ministry of Justice had surpassed the limits of its competence, both by the form and the essence, as defined by the Regulations "On the Ministry of Justice of the Republic of Belarus" (Decree of the Council of the Ministers of the Republic of Belarus No. 1605 of 31.10.2001). However, the Council of Ministers, where the BHC had appealed, evaded from considering the application and sent it to that very Ministry of Justice whose actions had been appealed against.

The BHC experts have interpreted the adoption of Statement No. 49 as an illegal introduction of restrictions into enjoying the right to freedom of association, guaranteed by the Constitution of the Republic of Belarus and its international treaties, in particular, the International Covenant on Civil and Political Rights. It is obvious that the normative instructions of the Statement are intended, first of all, to justify administrative and criminal prosecutions against citizens.

5. The analysis of dispositions of Articles 193 and 193-1 of the CC shows that bringing to the criminal responsibility is possible not only for the activities, which prejudice the national safety and rights and freedoms of citizens, but also for organization of the activities or participation in the activities of any public formation that is not registered in the established order (a publicly organized civil initiative) irrespective of orientation of such activities and consequences thereof.

Thus, according to the valid norm of the CC, any organized initiative of citizens who are pursuing good intentions and acting for the benefit of the society but without registration of their formation may entail criminal prosecution and punishment only for violation of the order of ruling (the established registration procedure of public associations). Meanwhile, the objective assessment of such behaviour has obviously nothing to do with the acts pursued in the criminal order.

However, it is exactly this approach to imposing criminal responsibility that has been perceived by judiciary practice. Thus, in February 2006, the Court of the Tsentralny District of the city of Minsk sentenced citizens T. Dranchuk, M. Astreika, A. Shalaika, E. Branitskaya to different terms of deprivation of freedom after finding them guilty of organization of the activities and participation in the activities of the "Partnership" non-registered public association. These young people had set an aim to supervise the then held elections to the Chamber of Representatives of the National Assembly of the Republic of Belarus. When considering their case, the Court disagreed with qualification of their actions under Article 193 of the CC, which had been given by the bodies of the Prosecutor's Office, and re-qualified them under Article 193-1 of the CC. The verdict noted that "the state accusation has failed to present evidences to the court, and the judicial session did not reveal any of such evidences, which could testify that the above activities had entailed any encroachment on the rights, freedoms and legitimate interests of citizens." That is, the court has established that the activities of the said public formation and its participants were not directed towards causing damage to the values defended by the Constitution.

In July 2006, under similar circumstances, with justification of the action under Article 193-1 of the CC, the same Court convicted Dzmitry Dashkevich, one of the activists of the "Malady Front" (Young Front).

The Department of the State Security Committee (KGB) of the Republic of Belarus for Minsk and Minsk Region has initiated a criminal case under Article 193-1 of the CC against D. Fedaruk and A. Korban, activists of the same "Malady Front." The statement on opening the criminal case runs that young men were brought to criminal responsibility "for the actions pursuing the following aims and methods: uniting and training young people on the basis of the Belarus national idea, erection of the civil society on the basis of democracy, free market and other aims, as well as the methods of attaining the aims, including through holding mass actions, conducting enlightenment work and

sociological studies, publishing newspapers and other information materials, during the time period from September 2006 to the present time."

Our attention is attracted here by the fact that the aims, as revealed by the investigator, which were pursued by Fedaruk and Korban, were compliant (at least, nobody has challenged it) with the interests of the Belarusian state and inflicted no harm to the society. They are completely based on the rights and freedoms stipulated by the Constitution and Belarus' international obligations in the sphere of human rights. It is necessary to especially note here that even in the "execution" year of 1937 in the epoch of mass repressions, the bodies of the People's Commissariat of Internal Affairs (NKVD), while disclosing multiple "anti-soviet organizations," used to bring their members to responsibility for their hostile activities against the Soviet State, though usually the "activities" were invented by inspectors.

Initiation of a criminal case with the formulation as specified by the investigation can be justly regarded as a factual departure of the Belarusian state away from the democratic way of development, which is an obvious contradiction to the Constitution of Belarus and its international treaties, in particular, to the International Covenant on Civil and Political Rights. This Covenant has become, after its ratification, an integral part of the national legislation of the Republic of Belarus (see the Laws "On Normative Legal Acts of the Republic of Belarus" and "On International Treaty of the Republic of Belarus") and should be applied as a direct-action law.

It is known that the organizers of the "Malady Front" for at least three times had tried to register the public association in the established order at the Ministry of Justice. However, every time they were rejected for various bureaucratic cavils; and the young people continued their activities outside the bounds of a registered association.

It has been established by the investigation that their activities have not entail any violations of the constitutional rights and freedoms of citizens. In view of these circumstances, the BHC had addressed P. Miklashevich, General Public Prosecutor, and S. Sukharenka, Chairman of the KGB, with a demand to stop the criminal case illegally initiated against Dzmitry Fedaruk and Aleh Korban. However, this well-motivated application of the BHC has no legal response.

6. It should be mentioned here that as of the enactment of Article 193-1 of the CC, in Chapter 14 of the Administrative Code (hereinafter – the AC) (administrative offences encroaching on justice and the established the order of ruling) the then valid Article 167-10 contemplated administrative responsibility for the activities of political parties, trade unions or other public associations, which have failed to undergo state registration (re-registration) in the established order, including increased responsibility for recurrence of this sort of offence, within a year after application of administrative punishment – fine of up to 100 basic values or arrest for up to 15 days.

The new AC that came into force since March 1, 2007, has Article 9.9, establishing the administrative responsibility for founding a religious organization or for managing such without state registration in the established order, or for off-the-charter activities of religious organizations. Part 5 of this Article contemplates enhanced responsibility for the actions accomplished repeatedly within one year after imposing an administrative penalty for the same offences – a fine from 14 to 20 basic values.

Close by the legal sense to the above administrative offences are the actions contemplated by Article 23.39 of the AC (arrogation). This norm establishes illegal behaviour as follows: "A self-willed execution of one's valid or supposed right, accomplished through breaching the order, established by the legislation of the Republic of Belarus." In this case, while Article 9.9 is placed in Chapter 9 (administrative offences against one's health, honour and dignity, human and citizen's rights and freedoms), Article 23.39 is placed in Chapter 23 (administrative offences against the order of ruling). The acts contemplated both in Article 167-10 of the AC (in the wording before

1.03.2007) and in Articles 9.9 and 23.39 of the AC (in the new wording) coincide by their object and subject. The study of the dispositions of the administratively punishable offence under Article 167-10 of the AC (previous version), Articles 9.9 and 23.39 (of the current AC) and the criminally punishable act under Article 193-1 of the CC indicates that they deal with practically same arbitrary actions connected with organization or participation of citizens in the activities of parties, public associations, including religious organizations, which have been liquidated (suspended) by the court or failed to pass the state registration in the established order.

Our attention is called by the fact that in violation of the requirements of Article 11 of the CC (concept of a crime); the disposition (hypothesis) of Article 193-1 of the CC fails to include the circumstances that indicate the onset of any harmful consequences or a possible onset thereof. Meanwhile, Article 193-1 of the CC is placed in Chapter 23 "Crimes against Human and Citizen's Constitutional Rights," the title and interpretation of which assumes the onset of harmful consequences (a possibility of such consequences), relating to violations of citizens' constitutional rights.

Thus, when making comparison of the norms under study, we see that the same acts forbidden under a threat of punishment are prosecuted both in the criminal and in the administrative order. And the criteria of differentiation among these essential elements of offence according to the rules, established by part 4 of Article 11 of the CC, are defined nowhere.

7. When studying the disputable norm, we outgo from the following.

Article 2 of the Constitution of the Republic of Belarus proclaims as follows: "The individual, his rights, freedoms and guarantees for their attainment manifest the supreme goal and value of society and the State." While part 1 of Article 21 of the Constitution secures that "safeguarding the rights and liberties of the citizens of the Republic of Belarus shall be the supreme goal of the State."

The Constitution of Belarus secures one's right for the freedom of association (Article 36).

The analysis of constitutional provisions (Articles 5, 16, 34, 23, 44, etc.) shows that a mandatory precondition for admission of any restrictions of the freedom of associations, other rights and freedom guaranteed by the Constitution, shall be the necessity of such restrictions to ensure the defence of national security, public order, protection of morals, and rights and freedom of other persons. The above list is exhaustive and not subject to any lateral interpretation.

The above constitutional provisions correlate rather adequately with the rules of Article 22 of the International Covenant on Civil and Political Rights, as well as with other documents establishing universal principles of international law. It is necessary to note here that the practice of competent international bodies (European Court for Human Rights, Committee for Human Rights of the United Nations, etc.) is oriented towards admissibility of minimal restrictions only, which are certainly necessary in the democratic society.

The BHC has lodged an application to the Constitutional Court of Belarus asking to examine the constitutionality of the introduced norm (Article 193-1 of the CC). However, the Court has refused to initiate the proceedings and consider the issue on the merits, having referred to Article 116 of the Constitution that specifies the subjects, having the right to initiate this sort of cases. Thus, the Court has ignored the norms of the Law on the Constitutional Court, the Regulations on its operation and has evaded from following the requirements of Articles 40 and 50 of the Constitution on mandatory consideration of citizens' applications for protection of their constitutional rights and freedoms.

In connection with the aforesaid, I have arrived to the conclusion that Article 193-1 of the CC does not comply with the Constitution of the Republic of Belarus and the adopted international obligations in the sphere of human rights, in particular, the right for freedom of associations.

According to Article 112 of the Constitution, "the courts shall administer justice on the basis of the Constitution, the laws and other enforceable enactments adopted in accordance therewith. If, during the hearing of a specific case, a court concludes that an enforceable enactment is contrary to the Constitution, it shall make a ruling in accordance with the Constitution and raise, under the established procedure, the issue of whether the enforceable enactment in question should be deemed unconstitutional."

To eliminate the legal collision in a specific case the court shall apply this constitutional provision in the established order in order not to expose an innocent to criminal punishment.

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