



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

COMMENTARY ON THE DECREE OF THE PRESIDENT OF THE REPUBLIC OF BELARUS

On Measures to Improve the Use of the National Segment of the Internet

This commentary has been prepared by Andrei Richter, Director of the Media Law and Policy Institute (Moscow), Doctor of Philology (Moscow State University Department of Journalism), commissioned by the Office of the OSCE Representative on Freedom of the Media

Having analyzed the Decree of the President of the Republic of Belarus No. 60 “On Measures to Improve the Use of the National Segment of the Internet” of 1 February 2010 in the context of the Constitution and current legislation of the Republic of Belarus, as well as of international regulations on freedom of information and the Internet, the expert commissioned by the Office of the OSCE Representative on Freedom of the Media has come to the following conclusions.

BRIEF SUMMARY OF THE COMMENTARY AND RECOMMENDATIONS

The Decree of the President of the Republic of Belarus No. 60 “On Measures to Improve the Use of the National Segment of the Internet” is aimed at protecting the interests of citizens, society, and the state in the information sphere and ensuring further development of the national segment of the Internet. It contains 16 paragraphs and was signed by President Alexander Lukashenko on 1 February 2010. The Decree will come into force on 1 July 2010.

The Decree contains several requirements that call for making information about state bodies and other government organizations more accessible on the Internet. The Decree contains several provisions aimed at protecting authorship rights on the Internet. It envisages state licensing of information networks and resources of the national segment of the Internet on the territory of Belarus which providers of Internet services must undergo by applying to the Ministry of Communications and Informatization of the Republic of Belarus or its authorized organization.

Providers of Internet services shall identify the subscriber units of Internet service users, as well as keep an account of and save information on such units and the Internet services rendered. They shall also submit this information to law enforcement agencies.

The Decree regulates the mechanism for restricting access to information at the request of an Internet service user regarding information that is aimed at spreading pornography, promulgating violence and brutality, or any other acts prohibited by the law.

The Decree addresses issues that relate to obtaining and disseminating information on the Internet, which cannot help but have an effect on the activity of journalists in Belarus and on the freedom of the media.

The Decree of the President of the Republic of Belarus contains several provisions aimed at enhancing freedom of information on the Internet. In particular, it envisages again (following the Law of the Republic of Belarus On Information, Informatization and Protection of Information, 2008) the obligation of state bodies and government organization to post information about their activities on Internet sites. The providers of Internet services are not held responsible for the contents of the information placed on the Internet.

However the merits of the Decree are ambiguous and are outweighed by shortcomings that restrict freedom of expression and freedom of the media on the Internet.

The following provisions of the Decree “On Measures to Improve the Use of the National Segment of the Internet” arouse particular concern:

- The demand for mandatory identification of users of subscriber units and users of Internet services.
- The vaguely defined restrictions and prohibitions on spreading illegal information and the procedure for implementing them.

- The unclear responsibility of the provider of information on the Internet in the event the instructions of a corresponding body to remove identified violations or its demands to halt Internet services are not carried out.
- The absence of any obligation on the part of state bodies to place not only information about their own activities on the Internet, but also share information that has been acquired or created as a result of such activities.
- The obligation that information reports and/or media articles disseminated via the Internet must include hyperlinks to the original source of the information or to the media agency that previously placed it.

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INTRODUCTION

At the request of the OSCE Office of the Representative on Freedom of the Media, this commentary was prepared by Andrei Richter, Doctor of Philology. Dr. Richter is the director of the Media Law and Policy Institute and the head of the Department of History and Legal Regulation of Domestic Media at the Department of Journalism of Lomonosov Moscow State University. He is a member of the International Commission of Jurists (ICJ, Geneva) and of the International Council of the International Association of Mass Communication Researchers (IAMCR).

This commentary contains an analysis of the Decree of the President of the Republic of Belarus No. 60 “On Measures to Improve the Use of the National Segment of the Internet” of 1 February, 2010 in the context of its correspondence to international standards relating to the right to freedom of expression and to freedom of the mass media.

Section 1 of this commentary examines the international obligations of the Republic of Belarus with respect to human rights and sets forth the international standards relating to the right to freedom of expression, including on the Internet. These standards are envisaged in international law, e.g., in the International Covenant on Civil and Political Rights and in various OSCE commitments, to which the Republic of Belarus is a party; in the decisions of international courts and tribunals on human rights; in declarations by representatives of international agencies, e.g., the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media; and are also commensurable with constitutional law on issues of freedom of expression.

Section 2 contains an analysis of the Decree of the President of the Republic of Belarus “On Measures to Improve the Use of the National Segment of the Internet”, with due account of the abovementioned standards.

This commentary is also based on the instructions of the OSCE Parliamentary Assembly set forth in 2009 in the Resolution on Freedom of Expression on the Internet. In Paragraph 12, the Parliamentary Assembly:

*“Requests that the OSCE Representative on Freedom of the Media monitor the policies and practices of participating States regarding the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet, including Internet censorship, blocking and surveillance”.*¹

¹ Resolution of the Eighteenth Annual Session. Vilnius, 29 June-3 July 2009. See the full English text at http://www.eerstekamer.nl/id/vibsmzeghdnh/document_extern/090629_vilnius_declaration/f=/vibsmzzpmwnr.pdf.

I. INTERNATIONAL STANDARDS RELATING TO FREEDOM OF EXPRESSION, INCLUDING ON THE INTERNET

1.1. Recognition of the Importance of Freedom of Expression

Freedom of expression has long been recognized as a fundamental human right. It is of paramount importance to the functioning of democracy, is a necessary condition for the exercise of other rights, and is in and of itself an indispensable component of human dignity.

The Republic of Belarus is a full-fledged member of the international community and a participant in the United Nations and the Organization for Security and Co-operation in Europe (OSCE). It has therefore assumed the same obligations as all the other participating States.

The Universal Declaration of Human Rights (UDHR), the basic instrument on human rights adopted by the General Assembly of the United Nations in 1948, protects the right to the free expression of one's convictions 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.²

The International Covenant on Civil and Political Rights (ICCPR),³ a UN treaty of binding judicial force and ratified by the Republic of Belarus, also guarantees the right to freedom of expression, as can be seen from 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 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.*

With respect to documents adopted by the United Nations, mention should be made of Resolution 59 (I), adopted by the UN General Assembly at its very first session in 1946. In reference to the freedom of information in the broadest sense of the concept, the resolution states:

Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.⁴

Freedom of expression is of fundamental importance in and of itself, and as the foundation for exercising all other human rights. Full-fledged democracy is only possible in societies that permit and guarantee the free flow of information and ideas. Freedom of expression is also of

² Resolution 217A(III) of the General Assembly of the United Nations, adopted 10 December 1948. A/64, pp. 39-42. See the full English text at <http://www.un.org/en/documents/udhr/>.

³ International Covenant on Civil and Political Rights. Adopted by Resolution 2200 A (XXI) of the General Assembly 16 December 1966. Entered into force 23 March 1976. See the full official English text on the UN website at <http://www2.ohchr.org/english/law/ccpr.htm>.

⁴ United Nations 65th Plenary Session. 14 December 1946. The official English text can be found at the UN website: [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59\(I\)&Lang=R&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(I)&Lang=R&Area=RESOLUTION).

paramount importance in identifying and exposing violations of this and other human rights and in dealing with such violations.

The European Court of Human Rights created to monitor the Convention for the Protection of Human Rights and Fundamental Freedoms has consistently emphasized the “pre-eminent role of the press in a State governed by the rule of law”.⁵ It has noted in particular that

*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.*⁶

In turn, the Inter-American Court of Human Rights believes: “It is the media that make the exercise of freedom of expression a reality”.⁷

In the same context, Part 1, Article 8 of the Constitution of the Republic of Belarus reads:

The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.

In turn, Part 3, Article 21 of the Constitution envisages that:

The State shall guarantee the rights and liberties of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state's international obligations.

Finally, Articles 33 and 34 of the Constitution of the Republic of Belarus protect the right to freedom of expression and information as follows:

Article 33. Everyone shall be guaranteed freedom of thoughts and beliefs and their free expression.

No one shall be forced to express their beliefs or to deny them.

No monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.

Article 34. Citizens of the Republic of Belarus shall be guaranteed the right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations, on political, economic, cultural and international affairs, and on the state of the environment.

⁵ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63. See the official text of this judgement at the ECHR website:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thorgeirson%20%7C%20v.%20%7C%20Iceland&sessionid=47499501&skin=hudoc-en>.

⁶ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43. See the official text of this judgement at the ECHR website:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Castells%20%7C%20v.%20%7C%20Spain%2C&sessionid=47499840&skin=hudoc-en>.

⁷ *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.

State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests.

*The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of the citizens and the full implementation of their rights.*⁸

1.2. Obligations of the OSCE Participating States with Respect to Freedom of the Media and the Internet

The right to freely express one's opinions is inseparably bound to the right of freedom of the media. Freedom of the media is guaranteed by various documents of the Organization for Security and Co-operation in Europe (OSCE), to which the Republic of Belarus has given its assent.

The Organization for Security and Co-operation in Europe is the world's largest regional security organization and comprises 56 nations of Europe, Asia, and North America. Founded on the basis of the Final Act of the Conference on Security and Co-operation in Europe (1975), the Organization has assumed the tasks of identifying the potential for the outbreak of conflicts, and of preventing, settling, and dealing with the aftermaths of conflicts. The protection of human rights, the development of democratic institutions, and the monitoring of elections are among the Organization's main methods for guaranteeing security and performing its basic tasks.

The Final Act of the Conference on Security and Co-operation in Europe (CSCE) in Helsinki⁹ states "[T]he participating States will act in conformity with the purposes and principles of the... Universal Declaration of Human Rights." The provisions coordinated by the participating States in the Helsinki Final Act of 1975 recognize "the importance of the dissemination of information from the other participating States" and "make it their aim to facilitate the freer and wider dissemination of information of all kinds" and "encourage co-operation in the field of information and the exchange of information with other countries."

The Final Act of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE states that the OSCE participating States will respect human rights and fundamental freedoms, including freedom of thought, conscience and religion for all and will not discriminate solely on the grounds of race, colour, sex, language and religion. They will encourage and promote civil, political, economic, social, cultural and other rights and freedoms, recognizing them to be of paramount importance for human dignity and for the free and full development of every individual.

In Paragraph 9.1 of the same document, the OSCE participating States reaffirm that:

"everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right

⁸ Constitution of the Republic of Belarus of 1994. See full English text at <http://law.by/work/EnglPortal.nsf/FINDPage/D93BC51590CF7F49C2256DC0004601DB?OpenDocument>.

⁹ Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975. See the complete official text at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf and in extracts concerning freedom of expression at http://www.medialaw.ru/laws/other_laws/european/zakl_akt.htm.

*may be subject only to such restrictions as are prescribed by law and are consistent with international standards”.*¹⁰

The OSCE Charter for European Security states:

*“We reaffirm the importance of independent media and the 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”.*¹¹

Finally, at the Moscow Meeting of the Conference on the Human Dimension of the CSCE held in October 1991, the participating States unanimously agreed that they:

“... reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize 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”.

The document of the Moscow Meeting also states that the CSCE participating States

*“... consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards”.*¹²

For the purposes of regulating the Decree of the President of the Republic of Belarus, it is important to be particularly mindful of the fact that in Paragraph 35 of the Concluding Document on Co-operation in Humanitarian and Other Fields of the Vienna Meeting 1986 of the CSCE, the participating States will also

*“take every opportunity offered by modern means of communication, including cable and satellites, to increase the freer and wider dissemination of information of all kinds”.*¹³

Decision No. 633 of the OSCE Permanent Council on Promoting Tolerance and Media Freedom on the Internet approved by the Ministerial Council of the OSCE participating States at the meeting in Sofia (2004) is also important in this respect, in which the Permanent Council

¹⁰ Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular Paragraph 9.1 and 10.1 at http://www.osce.org/publications/rfm/2008/03/30426_1084_en.pdf. The full official text is available at http://www.osce.org/documents/odhr/2006/06/19392_en.pdf.

¹¹ See Paragraph 26 of the Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999. The full official text is available at http://www.osce.org/documents/mcs/1999/11/4050_en.pdf.

¹² Paragraphs 26 and 26.1, Final Document of the Moscow Meeting of the Conference on the Human dimension of the CSCE. See the official text at the OSCE website: http://www.osce.org/fom/item_11_30426.html. The obligation to impose restrictions on the freedom of mass communications within the law and in accordance with international standards was also reaffirmed by all the OSCE participating states in Paragraph 6.1 of the Final Document of the Symposium on the Cultural Legacy of CSCE Participating States (July 1991). See *ibid*.

¹³ See full English text at <http://www.fas.org/nuke/control/osce/text/VIENN89E.htm>.

Reaffirming the importance of fully respecting the right to the freedoms of opinion and expression, which include the freedom to seek, receive and impart information, which are vital to democracy and in fact are strengthened by the Internet,

Decides that:

*1. Participating States should take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the Universal Declaration of Human Rights;*¹⁴

The OSCE has been concerned for several years now about the situation regarding freedom of information and ideas on the Internet in some of its participating states. In Paragraph 11 of its Resolution on Freedom of Expression on the Internet, the OSCE Parliamentary Assembly

*Calls on participating States to communicate to repressive States, including participating States, their concerns about government actions aimed at censoring, blocking or surveilling the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet.*¹⁵

1.3. Permissible Restrictions on Freedom of Expression

The right to freedom of expression, including on the Internet, is inarguably not absolute: in a few specific instances, it may be subject to restrictions. Due to the fundamental nature of this right, however, any restrictions must be precise and clearly defined according to the principles of a state governed by rule of law. In addition, restrictions must serve legitimate purposes and be necessary for the well-being of a democratic society.¹⁶

The limits to which legal restrictions on freedom of expression are permissible are set forth in Paragraph 3 of Article 19 of the ICCPR cited 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.*

It is worth noting that the matter does not concern the *need* or *duty* of states to establish appropriate restrictions on this freedom but only of the *admissibility* or *possibility* of doing so while continuing to observe certain conditions. This regulation is interpreted as establishing a threefold criterion demanding that any restrictions (1) be prescribed by law, (2) serve a legitimate purpose, and (3) are necessary for the well-being of a democratic society.¹⁷ This

¹⁴ Appendix to Decision No. 12/04. See full English text on the OSCE website at http://www.osce.org/documents/mcs/2004/12/3915_en.pdf.

¹⁵ Resolution of the Eighteenth Annual Session. Vilnius, 29 June-3 July 2009. See the full English text at http://www.eerstekamer.nl/id/vibsmzeghdnh/document_extern/090629_vilnius_declaration/f=/vibsmzppmwnr.pdf.

¹⁶ See Section II.26 of the Report from the Seminar of Experts on Democratic Institutions to the CSCE Council (Oslo, November 1991). The official text can be found at <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁷ See, e.g., Paragraph 6.8 of the UN Committee on Human Rights judgment in the case *Rafael Marques de Morais v. Angola*, № 1128/2002, 18 April 2005: <http://humanrights.law.monash.edu.au/undocs/1128-2002.html>.

international standard also implies that vague and unclearly formulated restrictions, or restrictions that may be interpreted as enabling the state to exercise sweeping powers, are incompatible with the right to freedom of expression.

If the state interferes with the right to freedom of the media, such interference must serve one of the purposes enumerated in Article 19 (Paragraph 3). The list is succinct, and interference not associated with one or another of the specified aims is consequently a violation of the covenant's Article 19. In addition, the interference must be "necessary" to achieve one of the aims. The word "necessary" has special meaning in this context. It signifies that there must be a "pressing social need" for such interference;¹⁸ that the reasons for it adduced by the state must be "relevant and sufficient", and that the state must show that the interference was proportionate to the aims pursued. As the UN Committee on Human Rights has 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".¹⁹ The European Court of Human Rights also makes similar demands of the concept "necessary".

With respect to the Internet, the European Convention on Cybercrime adopted in Budapest on 23 November 2001 emphasizes the need to be

*Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy.*²⁰

In this respect, it is worth noting that Part 1 of Article 23 of the Constitution of the Republic of Belarus reads:

Restriction of personal rights and liberties shall be permitted only in the instances specified in law, in the interest of national security, public order, the protection of the morals and health of the population as well as rights and liberties of other persons.

The Republic of Belarus Constitution, in the same way as international acts, points to the *admissibility* and possibility of restricting personal rights and freedoms in certain conditions. This regulation essentially demands that any restrictions are: 1) prescribed by the law, and 2) pursue legal aims set forth in the Republic of Belarus Constitution.

¹⁸ See, e.g., *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40 at the ECHR website: <http://www.echr.coe.int/eng/Press/2004/July/ChamberJudgmentHricovSlovakia200704.htm>.

¹⁹ See the Judgment in the case *Rafael Marques de Morais v. Angola*, note 31, para. 6.8.

²⁰ Participating States of the Council of Europe as well as the U.S., Japan, RSA, and Canada participated in drawing up the Convention. The Convention came into force on 1 July 2004, as of today it has been signed by 46 states and ratified by 26 of them (Belarus is not one of them). See full English text at <http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm>.

1.4. Regulating Media and Internet Operations

To protect their constitutional rights to freedom of expression, it is vital that the media have the opportunity to carry out their operations independently of government control. This ensures their functioning as a public watchdog and the people's access to a broad range of opinions, especially on issues of public interest. The primary aim of regulating media operations in a democratic society ought therefore to be the facilitation of the development of independent and pluralistic media, thus guaranteeing the public's right to receive information from a wide variety of sources.

Article 2 of the ICCPR assigns participating States the duty of adopting "such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means that participating States are required not only to refrain from violating these rights but also to take positive measures to guarantee that such rights are respected, including the right to freedom of expression. The states are *de facto* obliged to create conditions in which a variety of media can develop, thus ensuring the public's right to information.

Thus it is generally accepted today that any state authorities which exercise formal regulatory powers in the field of the media or telecommunications (including the Internet) should be fully independent of the government and protected from interference by political and business circles. Otherwise regulation of the media could easily become a target of abuse for political or commercial purposes. The Joint Declaration presented in December 2003 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 notes:

*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 which is transparent, allows for public input and is not controlled by any particular political party.*²¹

The licensing requirement for media was especially condemned in a resolution on Persecution of the Press in the Republic of Belarus, adopted by the Parliamentary Assembly of the Council of Europe (PACE) in 2004. Moreover, this was the first mention in such a high-ranking document of the fact that Article 10 of the European Convention on Human Rights *in principle* does not permit such licensing of media. The Council of Europe saw this as a violation of "the fundamental principle of the separation of powers between the executive and the judiciary and ... contrary to Article 10 of the European Convention on Human Rights", and called for the corresponding articles of the Law on the Media to be revised.²²

The Parliamentary Assembly recognizes the need for a number of principles relating to freedom of the media to be observed in every democratic society. A list of these principles can be found in PACE Resolution No. 1636 (2008), "Indicators for Media in a Democracy".²³ This list helps to objectively analyze the state of the environment for the media in a particular country with respect to the observation of media freedom, and to identify problem issues and potential weaknesses. This allows the authorities to discuss matters at the European level with respect to possible actions for resolving such issues. The Parliamentary Assembly proposed in its

²¹ See: <http://www.unhchr.ch/hurricane/hurricane.nsf/0/93442AABD81C5C84C1256E000056B89C?opendocument>.

²² See: Parliamentary Assembly of the Council of Europe. Resolution 1372 (2004). Persecution of the press in the Republic of Belarus. Full English text available on the official Council of Europe website at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1372.htm>.

²³ The full English text of the Resolution is available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm>.

resolution that national parliaments regularly conduct objective and comparative analyses in order to reveal shortcomings in legislation and media policy, and to take the measures needed to correct them. In the context of the amendments being analyzed, the following principle from this list is worth noting:

8.17. the state must not restrict access to foreign print media or electronic media including the Internet...

Based on the above provisions, commentary and recommendations on the key provisions of the Decree of the President of the Republic of Belarus “On Measures to Improve the Use of the National Segment of the Internet” will follow.

II. ANALYSIS OF THE DECREE OF THE PRESIDENT OF THE REPUBLIC OF BELARUS “ON MEASURES TO IMPROVE THE USE OF THE NATIONAL SEGMENT OF THE INTERNET”

2.1. Basic Concepts and Area Covered by the Decree

The President shall issue decrees and orders on the basis of and in accordance with the Constitution which are mandatory on the territory of the Republic of Belarus (Art. 85). The government is responsible for their implementation (Art. 107). Whereby Article 137 envisages: “The Constitution shall have the supreme legal force. Laws, decrees, edicts and other instruments of state bodies shall be promulgated on the basis of, and in accordance with the Constitution of the Republic of Belarus. Where there is a discrepancy between a law, decree or edict and the Constitution, the Constitution shall apply”.

The Decree of the President of the Republic of Belarus “On Measures to Improve the Use of the National Segment of the Internet” is aimed at protecting the interests of citizens, society, and the state in the information sphere, raising the quality and reducing the cost of Internet services, and ensuring further development of the national segment of the Internet.

The Decree contains 16 paragraphs and was signed by President of the Republic of Belarus Alexander Lukashenko on 1 February 2010.

The legislative act contains several demands that call on state bodies and other government organizations to provide more information about themselves. For this purpose, the Decree makes it incumbent upon state bodies and other government organizations, as well as the business entities that have a prevalent share in their authorized funds, to place information about their activities on the official sites of these bodies and organizations and ensure their efficient functioning and systematic updating.

The Decree contains several provisions aimed at protecting copyright from piracy on the Internet. For example, literary, scientific, music, photographic, audiovisual works, works of art, and other subject matters of copyright and associated rights that enjoy legal protection on the territory of the Republic of Belarus should only be placed on the Internet providing the requirements of the legislation on copyright and associated rights, including with the consent of the copyright holders, are observed. Information reports and/or other media materials disseminated via the Internet should include a hyperlink to the original source of the information or to the media organization that previously placed such information reports and/or materials.

The Decree envisages that Internet service providers undergo state licensing of information networks, systems, and resources of the national segment of the Internet located on the territory of the Republic of Belarus by applying to the Ministry of Communications and Informatization of the Republic of Belarus or its authorized organization. The Government of the Republic of Belarus shall determine the state licensing procedure, as well as the list and types of documents to be submitted, by 1 May 2010.

“In order to ensure the security of citizens and the state”, after 1 July 2010 Internet service providers must identify the subscriber units of Internet service users, keep an account of, and store information on such units and the Internet services rendered.

The Decree introduces regulation of the mechanism for limiting access to information at the request of the Internet service user. For example, at the request of an Internet service user, the

provider is obligated to limit access of the subscriber unit belonging to this user to information aimed at disseminating pornography and/or at promulgating violence, brutality, or other acts prohibited by law.

The Decree comes into force six months after its adoption – on 1 July 2010.

As can be seen, the Decree applies to questions relating to the procurement and dissemination of information on the Internet, which will inevitably have an impact on the activity of journalists in Belarus and on freedom of the media.

2.2. Questions Arousing Concern

2.2.1. Licensing of Internet Resources

The Decree (paragraph 14.1) entrusts the Council of Ministers of the Republic of Belarus with determining before 1 May 2010, in coordination with the Operative-Analytical Centre under the President of the Republic of Belarus, the state licensing procedure for information networks, systems, and resources of the national segment of the Internet located on the territory of the Republic of Belarus.

It is assumed that resources physically located on the territory of the Republic of Belarus or in the national domain of the Republic of Belarus belong to the national segment of the Internet. So it is obvious that the phrase in the text of Decree No.60 “located on the territory of the Republic of Belarus” refers not only to the domain name in the .by zone, but also to the hosting on the server that is physically located on the territory of the Republic of Belarus. This provision could create problems for those who use the services of the hosting on servers located outside the Republic of Belarus.

Resources evidently also imply Internet media. The danger arises that this Decree will awaken the regulation of Article 11 of the Republic of Belarus Law “On the Media”, which has been “dormant” since February 2009, in compliance with which all Internet media must undergo mandatory licensing, while “the state licensing procedure for media disseminated via the global Internet shall be determined by the Council of Ministers of the Republic of Belarus”. This regulation has already been criticized in a memorandum issued by the Office of the OSCE Representative on Freedom of the Media in 2008.²⁴

However, it should be presumed that this refers to a different type of licensing – not to licensing of an Internet resource as a form of media (according to the regulations of the Law “On the Media”), but rather to licensing as an information resource (according to the regulations of Article 24 of the Law of the Republic of Belarus of 10 November 2008 “On Information, Informatization and the Protection of Information”).

2.2.2. Identification of Internet Users

The Decree obligates the owners and administrators of Internet clubs and Internet cafes to identify their users, as well as keep an account of and store the personal data of such Internet service users. The same identification regulation also applies to the technical units of an Internet service user required for connecting to the telecommunication line in order to access the Internet (paragraph 6).

²⁴ See full English text of the Comments on the Draft Law of the Republic of Belarus “On the Mass Media” on the website of the OSCE Representative on Freedom of the Media at http://www.osce.org/documents/rfm/2008/06/31899_en.pdf.

Whereas at present, a distance or public contract on rendering hosting services or access to the Internet can be entered, when the law comes into force, the client will have to come to the provider's office in person in order to enter a contract and "go through the identification procedure". This may be easy to do in Minsk or in other large regional centres, but it will be much more difficult in a small village. The Decree essentially prohibits access to the Internet without a password, use of prepaid cards, and acquiring a hosting through the Internet.

It is worth noting that even today when using Internet services at an Internet cafe or club, a client must give his/her name and address, although showing one's passport is not yet required.²⁵

It is very likely that the Council of Ministers, which is to determine the new procedure, will introduce tough requirements regarding "identification". Moreover, according to the Decree, this information must be stored for a year and presented at the request of investigation agencies, public prosecutor and preliminary inquiry bodies, State Regulation Committee structures, tax agencies, and courts as set forth by the law.

These regulations are based in particular on the provisions of Article 20 of the Law of the Republic of Belarus "On Information, Informatization and Protection of Information" with respect to the fact that the information disseminated should contain reliable facts about its owner, as well as about the person disseminating the information, in a form and amount sufficient for identifying such persons. The Comments on the draft of this law issued in 2008 by the Office of the OSCE Representative on Freedom of the Media already mentioned that such a condition makes anonymous dissemination of information illegal.²⁶

Hence, the regulations introduced concerning mandatory identification of subscriber units and Internet service users will lead to unjustified restrictions on the rights of citizens to obtain and spread information guaranteed by the Constitution of the Republic of Belarus and international agreements.

Recommendation:

- Mandatory identification of the users of subscriber units and the users of Internet services should be abandoned.

2.2.3. Restrictions on Disseminating Harmful Information

Paragraph 8 of the Decree sets forth a regulation in compliance with which Internet service providers, at the request of Internet service users, shall restrict access of these users to information aimed at:

- carrying out extremist activity;

²⁵ See: M. Zolotova, The President's Decree Will Improve Binet? Report of the TUT.BY portal of 15 December 2009, available at <http://news.tut.by/155251.html> (in Russian).

²⁶ See English text of the Comments on the website of the Office of the OSCE Representative on Freedom of the Media at http://www.osce.org/documents/rfm/2007/06/25078_en.pdf.

- illicit circulation of weapons, ammunition, detonators, explosives, radioactive, contaminating, aggressive, poisonous, and toxic substances, drugs, psychotropic substances, and their precursors;
- assisting illegal migration and human trafficking;
- spreading pornography;
- promulgating violence, brutality, and other acts prohibited by law.

Accordingly, at the request of individual Internet users, providers must close access to such resources for such users (and not for all other Internet users). The Decree also envisages that access shall be automatically closed to illegal information from government authorities and organizations (for example, universities and schools). However, it is not clear who will evaluate the nature of the information with respect to which a “request to restrict access” has arrived and in what way. Internet providers themselves do not have the necessary qualifications or opportunities for this.

Another problem with this regulation is that the definitions of types of harmful and illegal information set forth in the Belarus legislation are very ambiguous. They are not formulated with sufficient precision and do not permit a citizen to regulate his/her behaviour and to foresee the possible consequences of a particular situation. For example, there is a restriction on “promulgating [any] acts prohibited by the law”. Such definitions give the authorities extremely broad powers to act at their own discretion. In this respect, the Belarusian authorities are recommended to turn their attention to the European Convention on Cybercrime and the Supplementary Protocol to the Convention on Cybercrime with respect to criminalization of racist and xenophobic acts committed via computer systems, as well as to important international instruments to combat crimes on the Internet.²⁷

Recommendation:

- The meaning and procedure for introducing restrictions and prohibitions on the spread of illegal information should be clarified.

2.2.4. Responsibility

Paragraph 12 of the Decree removes responsibility for the content of information placed on the Internet from providers (shifting it to those persons who place this information). This makes it impossible to accuse the administration of a site that runs forums, blogs, chat rooms, and so on of spreading illegal information, which is definitely a positive step. But if the instructions of a corresponding body to rectify identified violations or its demands to halt Internet services are not carried out, responsibility for the content (!) of the information is shifted to the Internet service providers and the owners and administrators of Internet clubs and cafes.

²⁷ See texts of these acts at http://medialaw.ru/laws/other_laws/european/index.htm.

Recommendation:

- The nature of the responsibility of the provider of information on the Internet in the event the instructions of a corresponding body to rectify identified violations or its demands to halt Internet services are not carried out should be clarified.

2.2.5. Disclosure of Information

Following the regulations of Article 22 of the Law of the Republic of Belarus “On Information, Informatization and Protection of Information”, the Decree (paragraph 1) contains several demands that republican state regulation bodies, local executive and regulation bodies, and other government organizations, as well as business entities in the authorized funds of which the Republic of Belarus or an administrative-territorial entity owns shares and to the decisions of which is therefore a party, shall provide information about themselves on the Internet, thus making it more accessible to citizens (including journalists). The Decree makes it incumbent upon such organizations to place information about their activities on the official sites of such bodies and organizations and to ensure their efficient functioning and regular updating.

Following the regulations of the same Article of the Law “On Information, Informatization and Protection of Information”, access to information is free of charge. Admittedly, the matter here (paragraph 1.6) only concerns access to certain home pages (?) of Internet sites, from which it follows that access to other pages might require payment.

The list of information on state sites on the Internet coincides with the list presented in Article 22 of the Law “On Information, Informatization and Protection of Information”, additional information to it on the sites shall be determined either by the President of the Republic of Belarus, or by the Council of Ministers of the Republic of Belarus, or by a decision of the head of the state body or organization.

With respect to the latter regulation, it is worth remembering that the Constitution of the Republic of Belarus (Article 34) guarantees citizens of the Republic of Belarus not only the “right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations”, but also “on political, economic, cultural and international life, and on the state of the environment”. The decrees of the President, as follows from Article 137 of the Constitution, are issued not only in accordance with, but also on the basis of the Constitution of the Republic of Belarus. Consequently, the Decree should envisage that state bodies are obligated not only to provide information about their own activities, but also to share information that has been obtained or created as a result of such activities.

Recommendation:

- The responsibility of state bodies to provide information on the Internet not only about their own activities, but also to share information that has been acquired or created as a result of such activities should be envisaged.

2.2.6. Obligatory Hyperlinks

The Decree prescribes that information reports and/or other media matter disseminated via the Internet must include a hyperlink to the original source of information or to the media organization that previously placed such information reports and/or matter. This additional demand on editorial boards does not apply in those cases when the original source is not an Internet source. It develops the regulation of Paragraph 1.2 of Article 52 of the Law “On the Media”. This paragraph of the said Law says that a journalist, founder (founders) of a medium, editor-in-chief (editor), editorial board, disseminator of media products, an information agency, or a correspondent bureau shall not be responsible for disseminating unreliable information, if this information was obtained from information agencies, providing there are references to such information agencies. That is, now the demand for a *reference* to an agency is supplemented by the demand for a *hyperlink* to the information. This means that stricter state control is being established over whether particular information was indeed initially disseminated by an information agency. The need for this regulation does not seem justified from the viewpoint of guaranteeing freedom of information as a citizen and human right.

Recommendation:

- The obligation that information reports and/or media matter disseminated via the Internet must have a hyperlink to the original source of information or to the media organization that previously placed them should be eliminated.