

Memorandum
by
ARTICLE 19
of
Extracts of the Belarusian Criminal Code

Introduction

The current Criminal Code of the Republic of Belarus (Belarus), which contains severe provisions regarding defamation and insult at Articles 188, 189, 367, 368 and 369, came into force in January 2001. A large number of journalists in Belarus are being charged under these provisions, whose legitimacy in comparison with the right to freedom of expression is assessed in this Memorandum. The analysis draws, among other things, on the ARTICLE 19 publication *Defining Defamation. Principles on Freedom of Expression and Protection of Reputation*.¹

ARTICLE 19 is of the view that the Belarusian defamation and insult provisions allow the imposition of disproportionate penalties, grant special protection to the President and government officials, fail to establish adequate defences and are excessively vague, and hence potentially open to abuse.

Concerns With These Provisions

1. The Criminalisation of Defamation and Insult

A serious problem with the Belarusian defamation and insult laws under consideration is the fact that they are of a criminal, rather than civil nature. ARTICLE 19 believes that all criminal provisions on defamation and insult should be abolished and replaced with appropriate civil defamation laws. The criminalisation of a particular activity implies a clear State interest in controlling it and imparts a social stigma to it, neither of which we believe to be justified in relation to the protection of individuals' reputations. International courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights. In many countries, the protection of reputations is adequately dealt with primarily or exclusively through the civil law, proving that a criminal approach is unnecessary.

This problem is particularly acute in the case of Belarus, given the very harsh potential sanctions which include long periods of detention, limitation of freedom and

¹ (London: ARTICLE 19, July 2000).

imprisonment. Belarus should take steps to replace these criminal provisions with appropriate civil defamation laws. In the meantime, the following conditions, set out in the ARTICLE 19 Principle 4(b) should be fulfilled immediately:

- i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
- ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
- iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
- iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

Recommendations

- The criminal provisions on defamation and insult should be repealed and replaced by appropriate civil defamation laws; and
- In the meantime, the conditions listed above should be applied to any use of criminal defamation or insult laws.

2. Protection of High-Ranking Officials

Articles 367 and 368 of the Criminal Code provide special protection to the honour and dignity of the President, while Article 369 provides similar protection to other high-ranking officials. In particular, these articles provide for greater penalties for defamation and/or insult of such figures.²

These provisions are clearly contrary to the right to freedom of expression, pursuant to which public figures should tolerate a *higher* degree of criticism than ordinary citizens. For example, the European Court of Human Rights³ in its landmark 1986 judgement in *Lingens v. Austria* stated that:

[Politicians] knowingly and inevitably lay [themselves] open to close scrutiny of [their] every word and deed by both journalists and the public at large ... and [they] must consequently display a greater degree of tolerance [than ordinary members of the public]... [while politicians are entitled to protection of their

² The Belarusian Constitution, the Law on the Press and Presidential Decree No. 5 of 1997 also contain provisions making it a crime to defame or insult the honour and dignity of the president or other high-ranking officials. The Electoral Code, at Article 47, also contains a prohibition on “insulting or defaming the honour and dignity of official persons, Presidential and Parliamentary candidates.”

³ Although Belarus is not a party to the European Convention of Human Rights, interpretation by the Court of Article 10, on freedom of expression, is generally considered to be persuasive as an indication of the scope of Article 19 of the International Covenant on Civil and Political Rights, which Belarus has ratified [CHECK].

reputation,] the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.⁴

The European Court of Human Rights has also made it clear that information and ideas relating to matters of political interest deserve the highest protection:

Although it (the press) must not overstep various bounds set, *inter alia*, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest.⁵

ARTICLE 19's Principle 7 states that in relation to statements of fact on matters of public concern, the onus should be on the person bringing the case to prove that the matter is false, rather than on the defendant to prove that it is true. This reflects the need to ensure open public debate about such matters, and the relative importance of this compared to individual reputations. The Belarusian provisions fail to reverse the onus in this way, instead providing special protection for public officials.

Article 369 is of particular concern since it specifically applies to statements about the manner in which government representatives execute their official duties. Defamation laws should never be used to obstruct legitimate criticism of the authorities or the exposure of official wrongdoing and corruption. People's elected representatives should be held accountable for their actions and the general public has a right to criticise them.

ARTICLE 19 believes that public bodies of all kinds – including all bodies which form part of the legislative, executive or judicial branches of government or which otherwise perform public functions – should be prohibited altogether from bringing defamation actions.⁶ This is in recognition of the vital importance in a democracy of open criticism of government and public authorities, the limited and public nature of any reputation these bodies have, and the ample means available to public authorities to defend themselves from criticism.

Recommendations

- All provisions giving special protection to the President and other government officials against defamation and/or insult, including Articles 367,368 and 369 of the Criminal Code, should be repealed;
- In cases involving statements about matters of public concern, the onus should be on the person bringing the claim to prove any statement of fact is false; and
- Public bodies should not have a right to bring a suit in defamation or insult.

3. Article 188 – Defamation

Article 188 reads as follows:

1. The dissemination of false fabrications (slander) which discredit another person [and are] known to be unfounded, committed within one year of administrative prosecution for slander or insult, -

⁴ *Lingens v. Austria*, 8 July 1986, Series A no. 103. para. 42.

⁵ *The Sunday Times v. United Kingdom*, 26 April 1979, Series A no. 30, para. 65.

⁶ *Defining Defamation*, Principle 3.

is punishable by community service, or a fine, or corrective labour for a period of up to 1 year, or detention for a period of up to 3 months, or limitation of freedom for a period of up to 2 years.

2. Slander contained in a public speech, or in a printed or publicly performed work, or in the mass media, or [slander] accusing [someone] of committing a serious or very serious crime -
is punishable by a fine, or corrective labour for a period of up to 2 years, or detention for a period of up to 6 months, or limitation of freedom for a period of up to 3 years, or a prison sentence of up to 2 years.

The key problem with this provision, apart from the fact that it is criminal in nature, is the lack of defences. In particular, not every false statement should attract liability. It is widely recognised that even the best journalists make mistakes, especially when reporting in the public interest, and countries are increasingly recognising a defence of reasonable publication. This protects statements about matters of public concern where the author made a reasonable effort to ascertain whether or not the statement was true, even if it eventually proves to be false. As our Principle 9 states:

Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, the Court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.

Furthermore, it is important that sanctions be proportionate to the harm to reputation. Disproportionate penalties have a chilling effect on the work of the media and cannot be justified. The key problem with the sanctions in Article 188 is that they are criminal in nature; any reworking of this provision in a civil form should ensure that only proportionate sanctions may be imposed.

A further problem is that Article 188 provides for harsher penalties for “accusing [someone] of committing a serious or very serious crime”. There is no need for a separate paragraph to address this sort of defamation, which is already included in the first paragraph of Article 188, and it is counterproductive to distinguish between different types of defamation. As noted above, the penalty should correspond to the damage done to reputation, not the type of statement.

Article 188 applies only in the context of a second case of defamation within one year; the first case should instead be prosecuted under the Administrative Code. However, ARTICLE 19 was informed that first-time accused are often prosecuted directly under the Criminal Code. The use of criminal defamation even in cases where Belarusian domestic law envisages the use of civil proceedings reveals an intent on the part of the authorities to control and limit the free flow of information.

Recommendations

- Defamation defendants should be able to claim a defence of reasonable publication even if their statements are ultimately proved to be false;
- The law should require any sanctions for defamation to be proportionate to the harm caused to the plaintiff’s reputation, rather than creating separate categories of penalties depending on the type of statement; and

- Article 188 should never be applied to first-time allegations of defamation.

4. Article 189 – Insult

Article 189 reads as follows:

1. Deliberate degradation of the honour and dignity of an individual, expressed in an indecent manner (insult), committed within one year of administrative prosecution for slander or insult –
Is punishable by community service, or a fine, or corrective labour for a period of up to 1 years, or limitation of freedom for a period of up to 2 years.
2. An insult made in a public speech, or in a printed or publicly performed work or in the mass media –
is punishable by a fine, or corrective labour for a period of up to 2 years, or detention for a period of up to 3 months, or limitation of freedom for a period of up to 3 years, or a prison sentence for a period of up to 2 years.

It is important to note that the right to freedom of expression also covers statements deemed to be insulting. The European Court of Human Rights, for example, has stated:

[The right to freedom of expression] is applicable not only to “information” or “ideas” that are favourably received... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.⁷

ARTICLE 19 is of the view that no one should be held liable for the expression of an opinion (see our Principle 10). This finds some support in international jurisprudence, including that of the European Court of Human Rights, which has noted:

[A] careful distinction must be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ...As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself...⁸

In any case, the definition of insult in this article is excessively vague and overbroad covering, as it does, any “deliberate degradation of honour” deemed to have been expressed in an indecent manner.

As with defamation, there are no defences to this charge and no provision for special tolerance on the part of public officials.

Recommendation

- No-one should be liable under insult provisions for the expression of an opinion but if a provision of this sort is retained, it should be limited to a narrowly defined category of grossly abusive statements and should include an exception for statements on matters of public interest.

⁷ *Handyside v United Kingdom*, 7 December 1976, Series A no. 24, para. 49.

⁸ *Oberschlink v. Austria*, 23 May 1991, Series A no. 204, para.13.