



The independence of the legal profession.

The right to protection
(Article 14 of the International
Covenant on Civil and Political Rights)

Report prepared by Helsinki Foundation for Human Rights in partnership with World Organisation Against Torture.



The following organizations joined the report:

FIDH - International
Federation for Human Rights

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1. Legal framework

1.1. Law of the Republic of Belarus dated 30.12.2011 No. 334-3 “On the Bar and Advocacy in the Republic of Belarus” as revised on July 11, 2017, No. 42-3¹.

1.2. Presidential decree of the Republic of Belarus “On licensing certain activities” dated September 1, 2010 No. 450².

1.3. Decree of the Ministry of Justice “Regulation on the Qualifications Commission on the practice of law in the Republic of Belarus” dated November 30, 2010 No. 105

1.4. Decree of the Ministry of Justice “On the approval of the Procedure for lawyers’ qualification” dated February 2, 2012 as revised on May 16, 2017³.

2. Access to profession and termination

2.1. Citizens of the Republic of Belarus, who have completed higher legal education, who have worked in the legal profession for at least three years, completed the professional traineeship, have been granted a license and joined the Bar association, are allowed to practice law in Belarus. The licenses are issued by the Ministry of Justice. Since November 2015, licenses have no expiration date. To obtain a license, the applicant must pass the qualification exam conducted by the Qualifications Commission, established under the Ministry of Justice.

2.2. Lawyers are only a minority in the Qualifications Commission: 8 out of 17 members. The Qualifications Commission is comprised of: one representative from seven territorial bar associations and the chairman of the Republican Bar; one representative of the Supreme Court and the General Prosecutor’s Office, five representatives from the Ministry of Justice of the Republic of Belarus, including the deputy minister as the Commission’s chairman; two scientific organizations representatives. It is legally possible to add other state institutions representatives to the Commission.

2.3. As a licensing authority, the Ministry of Justice, following the resolution of the Qualifications Commission, may suspend and terminate the license on the grounds set in the Decree on Licensing.

3. Qualification

3.1. Although licenses have no expiration date, lawyers must undergo requalification at the Qualifications Commission of the Ministry of Justice or on its behalf, at the territorial bar association every five years. Irrespective of passing the next qualification, a special qualification can be carried out upon the recommendation of the Minister of Justice or his deputy “should facts indicating the lawyer insufficient qualification be revealed”. The legal uncertainty of concepts and situations that can lead to a special qualification should be noted.

3.2. In particular, additional requalification is carried out upon:

1. revealing the facts of improper performance by a lawyer of his professional duties;
2. the receipt during one calendar year of two or more complaints about the actions (inaction) of a lawyer, evidence of a violation by a lawyer of the law, which were examined and justified.

1 (<http://www.rka.by/content/zakon-respubliki-belarus>)

2 (<http://pravo.by/document/?guid=3871&p0=P31000450>)

3 (<http://pravo.by/document/?guid=3871&p0=P31000450>)

3.3. The qualification includes the Qualifications Commission's consideration of the submitted materials, including the materials on the lawyer fulfillment of the legal requirements and other materials concerning the lawyer professional activities. The lawyer addresses the Commission during an oral interview, during which the lawyer knowledge of the law may be checked. There is no questions list for this exam; the questions may concern any branch of the law, regardless of the lawyer specialization.

3.4. The following decisions can be made based on the qualification test:

- decision on the lawyer compliance with legal requirements;
- decision on the lawyer professional incompliance with the legal requirements with a six-month qualification adjournment, subject to the Qualifications Commission recommendations, including the need for the lawyer to undergo advanced training;
- decision on the impossibility for a lawyer to perform his/her professional duties due to insufficient qualifications. This qualifies as the basis for license termination.

3.5. In 2017, following the protests related to the enactment of Decree No. 3 (special tax on unemployed citizens) and the subsequent punitive measures against civil society representatives who were represented by lawyers, the Ministry of Justice conducted an audit and requested an extra qualification for many of these lawyers. The qualification was caused by the technical shortcomings revealed during the Ministry's consideration of the working documentation and reporting. As a result of the certification, the Qualifications Commission deemed it impossible for 2 lawyers to fulfill their professional duties due to insufficient qualifications; ruled incomplete compliance with the legal requirements with a qualifications adjournment for six months for 12 lawyers. Most of the lawyers are human rights defenders involved in high-profile and political cases. One of the two disbarred lawyers was Anna Bakhtina, who had 38-year legal experience and a wide range of clients, including political opposition and civic activists.

4. The Ministry of Justice authority over lawyers and bar associations

4.1. Apart from the authority mentioned above, in accordance with the Law On the Bar and Advocacy in the Republic of Belarus, the Ministry of Justice exercises a wide range of powers over advocacy, including statutory enactments governing the Bar's activities, including the Rules of Professional Ethics for Advocates; submitting information to the college of lawyers on disciplinary liability for the lawyers, initiation of disciplinary proceedings and license suspense for the duration of the disciplinary proceedings conducted by the Minister; controlling the lawyers' activities, including obtaining information from government bodies and bar associations concerning lawyers' activities.

4.2. The Ministry also approves candidates for the posts of chairmen of territorial colleges and heads of legal consultations, proposes candidates for chairmen of collegiums and submits their early recall to the board or terminates their authority. The Ministry may suspend the resolutions of the governing bodies of the collegiums of advocates and make a submission on the cancellation of such decisions.

4.3. All the above indicates that the Ministry of Justice, as an executive body, controls the professional association of lawyers, membership in which is mandatory, the aforesaid is contradictory to the principle of lawyers' and advocates' independence.

4.4. The composition of the Qualification Commission contradicts the UN Basic Principles on the Role of Lawyers, which stipulate that "[l]awyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the

*professional associations shall be elected by its members and shall exercise its functions without external interference.*⁴The UN Special Rapporteur on the Independence of Judges and Lawyers has highlighted that *“the legal profession is best placed to determine admission requirements and procedures and should thus be responsible for administering examinations and granting professional certificates. This would further help in preserving its independence and self-governance (...).”*⁵

5. Inability to qualify lawyers in human rights issues

5.1. The qualification exam curriculum for lawyer license applicants does not include international human rights standards. Further lawyers' training is carried out at the State Institute of refresher courses and advanced professional training for Judges, Prosecutors, Courts and Justice Institutions (<https://www.bsu.by/ru/main.aspx?guid=6361>), the curriculums also lack human rights issues. Therefore, unofficial courses for lawyers are the only source to obtain this knowledge.

5.2. At the same time, the Decree of the Ministry of Justice No. 96 dated April 15, 2011 “On the participation of lawyers in educational events outside the Republic of Belarus” (not published in open sources) is still in force, requiring bar associations to decide on the possibility[permission to leave the country] of lawyers to participate in such events, determining the advisability of participation bases on the lawyer report, taking into consideration the event's topics and their specialization. Considering that the lawyers' participation in educational programs on human rights abroad, since 2006, has been repeatedly suppressed by the bar associations' leaders, the risk of refusing such a decision is great.

6. Unlawful restrictions on freedom of expression of lawyers

6.1. Lawyers are limited in their ability to voice the issues of violations of their client's rights in public. Thus, following the 2010 protests, six lawyers who defended presidential candidates and demonstrators in the courts lost their lawyer licenses: Oleg Ageev, Tatyana Ageeva, Vladimir Tolstik, Tamara Garaeva, Pavel Sapelko and Tamara Sidorenko.⁶

6.2. The Ministry of Justice at the time argued that *“some lawyers, abusing their right to protect others, distorted information concerning the progress of the investigation and their clients' empowerment to receive legal aid, their health status and detention conditions, biased information about law enforcement agencies operations”*⁷.

6.3. The term “some lawyers” referred, in particular, to the lawyers mentioned above. One of the grounds for terminating Oleg Ageev's license was his interview to the media.

6.4. In January 2012, the chairman of the Republican Bar association in his letter N 0125/488 “On lawyer interviews to the media”, recommended the lawyers to coordinate their interviews in advance with the respective law offices, chairmen of respective bar associations or their deputies. Against the background of these events, lawyers are put in conditions of strict self-censorship.

4 Principle 24, available at < <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> >

5 UN Doc. A/64/181, para. 34, available at < http://www.un.org/ga/search/view_doc.asp?symbol=A/64/181 >

6 For more details, see the report by OMCT & FIDH, Stop Harassing Rights Lawyers, June 2018, pages 12 – 15, available at < https://www.omct.org/files/2018/06/24946/belarus_report_english.pdf >, and report by HRHN - <https://humanrightshouse.org/noop-media/documents/22729.pdf>

7 FIDH report “Belarus: Restriction of Political and Civil Rights of Citizens after the 2010 Presidential Elections “, June 2011 https://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

6.5. Recently, it has become a widespread practice to make lawyers sign a non-disclosure of preliminary investigation data affirmation, the violation of which may result in criminal liability. Moreover, the criminal law norm (part 1, art. 407 of the Criminal Code⁸) is too vague to understand what specific data of the preliminary investigation is prohibited to disclose. Such an affirmation may be required by the investigator's arbitrary decision without justifying its necessity. As a result, in such cases, lawyers are deprived of the opportunity to inform their client's relatives and the public even basic information about the case. In June 2019, a criminal case was started against lawyer Vera Oreshko under article on the disclosure of preliminary investigation data. This happened on the eve of her client's acquittal, who spent more than 4 years in pre-trial detention⁹. The case was dismissed subsequently, but this event increased the pressure on lawyers¹⁰.

6.6. On the other hand, the powers of the Ministry of Justice and other regulatory bodies provided for by the law concerning the activities of lawyers and advocate associations cripple the inviolability of attorney-client privilege. Thus, in the aforementioned case, searches were carried out in the lawyer office and apartment to institute criminal proceedings.

6.7. On September 26, 2018, the Constitutional Court of Belarus adopted a resolution which recognized the need to establish additional guarantees for securing attorney-client privilege and amend the Code of Criminal Procedure to determine the specifics of the inspections, search and arrest of the lawyer¹¹. This resolution was subjected to criticism by the President of Belarus, who in one of his official addresses in October 2018 stated: "The Constitutional Court has nothing more to do - they began to defend lawyers. What is so special about those lawyers of whom you are trying to make a separate caste of and defend, to make them untouchable even? How do they differ from you, from other public servants?"¹²

6.8. As a result, on June 5, 2019 the Constitutional Court changed its decision due to "new circumstances" and suggested that the government conducted a study on improving the legislation on the protection of secrets protected by law in the criminal proceedings and, if necessary, prepare draft amendments to the criminal procedure law¹³.

7. Conclusions and Recommendations:

7.1. The Bar of Belarus does not represent an independent self-governing organization, neither de jure nor de facto. The Bar and the lawyers are controlled by the Ministry of Justice. The UN Human Rights Committee at its 124th session emphasized in its concluding observations that in order to act in line with the Covenant and the 1990 Basic Principles on the Role of Lawyers, the State party should revise its regulations and practices regarding the licensing and monitoring of lawyers' work with a view to ensuring the full independence of bar

associations

8 Article 407. Disclosure of inquiry, preliminary investigation or closed court session data

1. Intentional disclosure of inquiry, preliminary investigation or closed court session data by a person who has been warned in the manner prescribed by law concerning disclosure prohibition, without the permission of the person conducting the inquiry, investigator, prosecutor or court - shall be punishable by a fine or arrest.

2. The same act committed by a person with access to the criminal case materials, - shall be punished by a fine, or arrest, or custodial restraint for a term of up to three years, with disqualification to hold certain positions or to practice certain professions, or without the aforesaid disqualification.

9 (<https://news.tut.by/society/643657.html>)

10 (<https://naviny.by/new/20190805/1565005265-zakryto-delo-v-otnoshenii-advokata-glavnogo-inzhenera-mzkt>).

11 (<http://www.kc.gov.by/main.aspx?guid=50973>)

12 (<https://www.belta.by/president/view/spravedlivost-ideologija-distiplina-i-kadry-lukashenko-aktualiziroval-zadachi-administratsii-322084-2018/>).

13 (<http://www.kc.gov.by/main.aspx?guid=53033>)

and lawyers and their effective protection against any form of undue interference or retaliation in connection with their professional activity”¹⁴.

8. Recommendations:

- Bring the Belarus legislation regulating the legal profession in line with international standards.
- Abolish provisions in the country legislation on the legal profession concerning the responsibilities of the Ministry of Justice to govern the legal profession, and transfer the duties of the Ministry of Justice to lawyers’ self-governing bodies.
- Abolish licensing of lawyers by the Ministry of Justice by transferring the duties to regulate lawyers’ admission to the profession to lawyers’ self-governing bodies.
- Exclude representatives of executive authorities from the Qualification Board, and transfer the responsibility for managing the Board to lawyers’ self-governing bodies.
- Ensure that lawyers can exercise their professional duties free from any obstruction, intimidation or pressure.
- Work in consultation with NGOs, both registered and unregistered, as well as other civil society actors, to identify areas in need of reform, and prepare and implement recommendations to improve the judicial system in accordance with international standards.

14 <https://digitallibrary.un.org/record/1653877>