

Third Study Commission Questionnaire

2022 Israel

-AUSTRIA-

For 2022, the Third Study Commission, which focuses on Criminal Law, decided to study “Restrictions by the criminal law of the freedom of speech.”

In order to facilitate discussion and to assist us in learning from colleagues, we ask that each country answers the following questions:

- 1. Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.**

In Austria freedom of speech is a repeatedly constitutionally guaranteed right. Austria’s fundamental rights are not codified in one bill of rights, but instead are found in multiple places. Given that the freedom of speech is considered a very important fundamental right, it can be found in several constitutional provisions. The Basic Law of 1867 (BL) stipulates in Article 13 that everyone has the right to express their opinion through word, writing, print or pictorial representation. A similar provision is located in Article 10 of the European Convention on Human Rights (ECHR), which proclaims everybody’s entitlement to free expression of opinion. Unlike the Basic Law, the ECHR does not limit its scope of application to specific forms or techniques of communication. The ECHR is effective in many European countries, in most of which it has the status of an ordinary law. Austria, however, chose to grant the ECHR constitutional status and therefore it is a binding directive for the legislation.

The range of protection includes personal judgemental opinions as well as factual statements, regardless of their importance or value. Even expressions that are offending, shocking or disturbing are protected by freedom of speech.¹ However, according to settled case-law untrue factual statements and opinions based on untrue factual statements are not within the extent of protection.²

1 RIS-Justiz RS0075696.

2 RIS-Justiz RS0107915; RIS-Justiz RS0032201; RIS-Justiz RS0075601.

Freedom of speech does not only protect the freedom of expression, but also the freedom of receiving information. Article 10 ECHR specifically protects the freedom of receipt of messages and ideas, free from any governmental encroachment. An important embodiment thereof is the freedom of the press and broadcasting. In its second sentence Article 13 BL states that the press must not be subject to censorship. After the First World War this principle got reinforced by the provisional national assembly, which dictates that every form of censorship is abolished and the freedom of the press is fully established.³ Later on a specific constitutional act regarding the independence of broadcasting was adopted. It stipulates that the legislator has to enact laws ensuring the objectivity and impartiality of reporting, the plurality of opinion as well as the balance of programmes.⁴

All those rights possess constitutional status, therefore they are detracted from simple majority decision and can only be changed by a majority of two thirds⁵. This provides persistency and makes them binding for every form of state action.

2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture

In Austria there is no separate criminal provision regarding hate speech. However, depending on its elaboration hate speech can fall within the scope of different delicts of the Criminal Code (CC).

The probably most fitting provision is incitement as per § 283 CC. It penalizes to publicly and in a manner that reaches many people (1) ask others to use violence against specific groups because of their race, skin colour, religion, gender, disability, sexual preference et al. or goad others to hatred, (2) berate people because of their belonging to one of those groups with intent of violating their human dignity in a way that it is eligible to decry or degrade that person in the public opinion, or (3) approve of, deny or justify genocide, crimes against humanity or war crimes.

In §§ 111 and following the penal code criminalizes delicts against honour, which can possibly be applicable to hate speech. According to § 111 CC it is forbidden to accuse somebody of contemptuous characteristics, dishonourable behaviour or immoral comportment in a way that is perceivable for others, if it is eligible to decry or degrade that person in the public opinion. When defamation is perpetrated via print

3 StGBI. Nr. 3/1918.

4 BGBl. Nr. 396/1974.

5 Art 44 Federal Constitutional Law.

work or broadcasting the extent of punishment is even larger. The penalization is omitted if the accusation is true or the offender had good reason to believe it was true. § 115 CC penalizes berating, flouting, physically maltreating someone or threatening someone with physical maltreatment if done publicly or in front of multiple people.

§ 107 of the Criminal Code is violated, if somebody dangerously threatens someone else in order to shift them into a state of dread or unease.

Another eligible provision is § 107c CC (in force since 2016), which prohibits enduring harassment through telecommunication or computer systems – also referred to as cyber-mobbing. Who commits an offence against the honour or spreads facts or pictures of someone's personal area of life without their consent via telecommunication or computer system is punishable under this provision, if the content is perceivable for many people for a long time and the victims conduct of life gets unacceptably affected.

When a person falsely accuses somebody of having committed a crime, that person fulfils libel according to § 297 CC, if the accused person is exposed to the risk of criminal prosecution.

Hate speech is a very present topic, especially concerning the internet. On these grounds 2021 there was enacted a package of laws regarding hatred on the internet.⁶ This legislative package serves as the implementation of the EU-directives regarding counterterrorism⁷ and combating sexual abuse and sexual exploitation of children as well as child pornography⁸. Pertaining to the criminal law the package has brought three changes: Firstly, § 107c CC was changed to that effect, that criminal liability exists as of the first posting. Secondly, § 120a CC was newly inserted, which penalizes unauthorized manufacture or distribution of pictures displaying people in private situations. Thirdly, § 283 CC got some changes and now incitement is also given if addressed to individuals. Also, in the code of criminal procedure § 66b was newly added, which grants victims psycho-social and legal process support.

Other changes brought by this package are for example prompt erasure of hate postings via dunning procedure, unburdened tracking of the offender, omission of the victim's cost risk or higher compensations in media law. Furthermore, there has been established a national "No-Hate-Speech"-committee to raise awareness and fight hate crime.

6 BGBl. I Nr. 148/2020.

7 RL (EU) 2017/541.

8 RL 2011/93/EU.

The European Court of Human Rights has developed case law to the topic hate speech and defines it as “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)”.⁹ According to the court hate speech is not protected by freedom of speech. This derives from Art 17 ECHR, which forbids misuse of the guaranteed rights.

3. **Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like? Including**
- **Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions**
 - **Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics**

Freedom of speech is not guaranteed limitless. Art 13 BL only guarantees the right “within the legal limits”. Such legal limits are the above-mentioned criminal offences, furthermore damage of credit according to § 152 of the Criminal Code, vilification of religious doctrines § 188 CC, public announcements with the aim of inducing obscene intercourse § 219 CC, vilification of Austria or its symbols as per § 248 CC, which penalizes berating or decrying Austria, or National Socialist activity of any kind as per the Prohibition Law¹⁰. More restrictions can for example be found in media law or administrative law or result from fundamental rights of others (those are not restrictions by *criminal law*, which is why no details will be discussed here).

Art 10 para. 2 ECHR allows restrictions, conditions or formal requirements, if they are stipulated by law and indispensable for a democratic society on behalf of national or public safety, public order or protection of health, morality, good reputation or the rights of others. This provision makes higher demands on restrictions: Besides the necessity of a law allowing the restriction, the law must also be proportionate, which means it must pursue a legitimate purpose, the used means has to be eligible, and the means must be necessary for achieving the purpose.

A group of people who enjoy special protection of their freedom of speech are journalists. According to § 29 Media Law journalists are not to be punished for their reports if there is a predominant interest of the public in publishing the information, they exercised due journalistic care and had reason to believe their reports were true. Another group of people whose freedom of speech is particularly protected are

⁹ EGMR 14.06.2004, 35071/97.

¹⁰ StGBI. Nr. 13/1945.

politicians. According to Art 57 and 96 Federal Constitutional Law members of the parliament cannot be prosecuted for oral or written statements that they make while practising their profession, unless the institution they belong to holds them responsible.

Other than that, there are no groups who enjoy special protection of their freedom of speech due to gender, sexual preference et al. Instead, there are only groups of people who have more restrictions to their freedom of speech, namely professionals concerning colleagues or practitioners¹¹, officials when talking about their authority¹² or journalists, who have to respect the presumption of innocence when reporting on a criminal case¹³. Regarding the workplace there are some restrictions concerning non-discrimination of gender, ethnic, religion, age or sexual preference: Job advertisements must always be non-discriminating to any of those groups, which is penalized by a rather small financial penalty.¹⁴

Particular topics that enjoy special protection are religion, which is protected against vilifications according to § 188 CC as mentioned above. It is prohibited to publicly decry or lampoon people or things that are honoured by a religion if the behaviour is eligible to give valid offence. Another topic is politics, where – as already discussed – the statements of members of the parliament during practice of their profession are not subject to prosecution.

4. **If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?**
- **Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category**
 - **In cases where the freedom of speech and the restrictions are to be weighed against each other –**
 - **Are there then *guidelines* on how the *balancing* should be done?**
 - **If Yes, which of the two parameters weighs heaviest, a) the protection of free speech or b) the category that is protected by the legislation? And does this *differ* from category to category?**

11 Kopetzki, Wieviel Unfug verträgt die Meinungsfreiheit?, RdM 2022/1; Berka, Verfassungsrecht⁸ Rz 1470.

12 VfSlg 13.978/1994.

13 § 7b Media Law.

14 BGBl. I Nr. 66/2004.

- **And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?**

Criminal laws that restrict the freedom of speech may only be issued if they hold up to an examination of proportionality. Art 10 para. 2 ECHR stipulates that restrictions, conditions or formal requirements regarding the freedom of speech are only allowed if they are provided by law and are necessary in a democratic society for the interests of national or public security, public order or protection of health, morality, good reputation or the rights of others. The purpose and means of a restriction are weighed against the importance of freedom of speech.

Therefore, the consideration primarily happens beforehand. Only after occurred interest-consideration a restricting law may be enacted.

The restricting provisions themselves sometimes require that the expression is eligible to trigger an unwanted reaction. § 283 para. 2, § 111 CC are only committed if suitability to decry or degrade in the public opinion is given. Only if a certain intensity of the action is reached, the protection of the victim is prioritized over the freedom of speech. Guidelines for when this is the case do not exist, this mostly depends on the individual case.

§ 29 Media Law only relieves journalists of their criminal responsibility if the public interest in information weighs heavier than the protection of privacy of the person the article is about. In this context the status of the person the report is about plays an important role: public figures have to endure much more publication of their protected areas of life and fiercer criticism than other people.¹⁵

Other than that, the restrictions are absolute. Of course, the judges have to decide case by case whether a criminal offence is met or not. Judges are bound by the constitution and have to interpret the law consistent with the constitution, therefore in a way they have to weigh the restrictions against the freedom of speech. But – besides the above-mentioned provisions – it is not specifically demanded to perform a weighing of interests.

5. **Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?**
 - **If it gives cause for doubt, how is it expressed? Does it *deter* the citizen from making statements? Or does it *deter* citizens from suing?**

15 EGMR 8.7.1986, Nr 9815/82.

In my opinion the legislation itself is clear, but it may be tough to find the right provisions as they are found in multiple laws and codes. I think the fundamental right to freedom of speech is very well known, people rather tend to say everything they want and justify it by freedom of speech, especially on the internet where they can hide behind anonymity. Other citizens might be deterred from suing as they often do not know when a criminal law is violated.

6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?

It is part of a judge's everyday business to decide whether a criminal offence is committed. This means judges have to examine in every case if an action is to subsume under a legal provision, which often is not completely clear. In Austria there is no "case law", therefore judges are not enabled to create new law by ruling precedent cases. Apart from the usual difficulties in a judge's day-to-day business, the interpretation of laws regarding freedom of speech is not more difficult than of any other provision. So generally, the relevant legislation is clear and comprehensible and does not give too much room for different outcomes.

Eisenstadt, 29. Juni 2022

Mag. Gabriele Nemeskeri, Judge

Member of the Austrian Association of Judges