

Third Study Commission Questionnaire
2022 Israel
-Taiwan-

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 Taiwan freedom of speech is a repeatedly constitutionally guaranteed right. In particular, freedom of expression is preserved in section 11 of the Constitution of Taiwan which states that: "The people shall have freedom of speech, teaching, writing and publication."

Freedom of speech is one of the people's core fundamental rights, which is expressly enshrined in Article 11 of the Constitution. The State should protect it as much as possible to realize its functions, such as self-fulfillment, communication, pursuing truth, and monitoring all kinds of governmental and societal activities.

The Constitutional Court is the highest judiciary in Taiwan. The Judicial Review is the exclusive power for the Constitutional Court. The judiciary interpreted freedom of speech rights and adapted American First Amendment theory to the Taiwanese legal system.

For examples, Taiwan's Constitutional Court has several leading cases below:

1. Judicial Yuan Interpretation No. 407 held that obscenity is unprotected speech. (Jul. 5, 1996) (Taiwan);
2. Judicial Yuan Interpretation No. 617 narrowed the crime to only include content such as "violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value, or an average person will either find it not publicly presentable or find it so intolerable as to be repulsive. (Oct. 26, 2006) (Taiwan);

3. Judicial Yuan Interpretation No. 414 imputed the “the two-level theory” from the United States to divide high-level speech and low-level speech for different scrutinizes. (Nov. 18, 1996) (Taiwan); the low-level speech could be naturally limited by the government, like unprotected speech in the US. Judicial Yuan Interpretation No. 577, which holds that commercial speech is low-level speech and could also be banned by the government. (May 7, 2004) (Taiwan);
4. Judicial Yuan Interpretation No. 445 held that the government has the right to prohibit speech advocating communism or secession as being unconstitutional. Also, it applied the “two-track theory” from the US legal system to divide “the restriction to speech” and “the restriction to time, place and manner.” Furthermore, it imported “clear and present danger” doctrine speech. (Jan. 23, 1998) (Taiwan);
5. Judicial Yuan Interpretation No. 509 is vital to explain Criminal Act Article 310—the defamation clause. The court attributed the “actual malice clause” in *New York Times Co. vs. Sullivan*. (Jul. 7, 2000) (Taiwan); Judicial Yuan Interpretation No. 656, Justice Tzu-Yi Lin’s dissent in part explained that the “public figures” should have a higher burden of proof in their defamation complain. The opinion has been broadly used in all levels of courts in Taiwan. (Apr. 3, 2009) (Taiwan)¹.

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

In Taiwan 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.

The probably most fitting provision is incitement as per Article 309 of the Criminal Code. Article 309 states that: 1. A person who publicly insults another shall be sentenced to short-term imprisonment or a fine of not more than NT. 9,000 dollars.

2. A person who by violence commits an offense specified in the preceding paragraph shall be sentenced to imprisonment for not more

¹ Chang, Yen-Hsiang, "Hate Speech and Democracy: Deciding What Sort of Legal Doctrine is Best Suited to Hate Speech Regulation in Taiwan" (2020).

than one year, short-term imprisonment, or a fine of not more than NT. 15,000 dollars.

And hate speech may also fall into Article 310 of the Criminal Code which states that “1. A person who points out or disseminates a fact which will injure the reputation of another for purpose that it be communicated to the public commits the offense of slander and shall be sentenced to imprisonment for not more than one year, short-term imprisonment, or a fine of not more than NT. 15,000 dollars.

2. A person who by circulating a writing or drawing commits an offense specified in the preceding paragraph shall be sentenced to imprisonment for not more than two years, short-term imprisonment, or a fine of not more than NT. 30,000 dollars.

3. A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation unless the fact concerns private life and is of no public concern.”

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 and the State only guarantees the right “within the legal limits”.

Art 311 of the Criminal states that” A person who makes a statement with bona-fide intent under one of the following circumstances shall **not** be punished:

1. Self-defense, self-justification, or the protection of legal interest
2. A report made by a public official in his official capacity
3. Fair comment on a fact subject to public criticism

4. Fair report on the proceedings of a national or local assembly, court, or a public meeting.”

Moreover, the court also gives enormous space for “the Fair Comment doctrine” in Article 311 of the Criminal Code. If the defendants could prove that their insult or defamation speech was based on a comment for public events, the statement is still a fair comment, although the language can still be considered harsh, ironic, or extremely offensive.

A group of people who enjoy special protection of their freedom of speech are Congressmen. According to Article 73 of the Constitution states: “No member of the Legislative Yuan shall be held responsible outside the Yuan for opinions expressed or votes cast in the Yuan.” The purpose of the article is to preserve the power derived from the membership status in the Legislative Yuan that is granted by the people and to prevent intervention and influence by other government agencies that could obstruct the exercise of legislative functions.

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 –

- o Are there then guidelines on how the balancing should be done ?
- o 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?
- o 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 Article 311 mentioned above. Article 311 provides the exceptions clauses for both Article 309 and 310 of the

Criminal Code. It includes “the Fair Comment doctrine.” But the above statutes all target the crimes against individuals, not against groups.

The purpose and means of a restriction are weighed against the importance of freedom of speech.

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?

The legislation itself is clear, but it may be tough to find the right provisions as they are found in multiple laws and codes. 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. Citizens in Taiwan do not be deterred from suing as they often look justice in our juridical system.

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 Taiwan 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.