

Third Study Commission Questionnaire 2022

Israel

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.

Answer: Yes. Freedom of speech is enshrined in the basic law of the country in the Constitution of the Republic of Kazakhstan – in Article 20, which states that freedom of speech and creativity are guaranteed. Censorship is prohibited. Everyone has the right to freely receive and disseminate information in any way not prohibited by law. The list of information constituting state secrets of the Republic of Kazakhstan is determined by law. Propaganda or agitation of violent change of the constitutional order, violation of the integrity of the Republic, undermining the security of the state, war, social, racial, national, religious, class and clan superiority, as well as the cult of cruelty and violence are not allowed.

Also, Article 29 of the Criminal Procedure Code of our country states that the proceedings of criminal cases in all courts and judicial instances are open. The restriction of the publicity of judicial proceedings is allowed only when it contradicts the interests of the protection of state secrets and other secrets protected by law. A closed trial is allowed by a reasoned court order in cases of juvenile criminal offenses, in cases of sexual crimes and other cases in order to prevent the disclosure of information about the intimate aspects of the life of the persons involved in the case, as well as in cases where this is required by the interests of the safety of the victim, witness or other persons involved in the case, as well as members of the their families or close relatives. Also in art. 23 of the CPC states that the parties involved in the criminal process are equal, that is, they are endowed with equal opportunities to defend their position in accordance with the Constitution of the Republic of Kazakhstan and this Code. The court bases the procedural decision only on those evidences, the participation in the study of which on an equal basis was provided by each of the parties. In the course of criminal proceedings, the parties choose their position, ways and means of defending it independently and independently of the court, other bodies and persons. The court, at the request of the party, assists him/her in obtaining the necessary materials in accordance with the procedure provided by the CPC.

The Republic of Kazakhstan has also ratified the International Covenant on Civil and Political Rights - 12/16/1966, which came into effect in Kazakhstan on 04/24/2006. These norms of the international treaty were taken into account and reflected in the legislation of our country.

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

Answer: Yes. According to art. 174 of the Criminal Code of the Republic of Kazakhstan deliberate actions aimed at inciting social, national, ancestral, racial, class or religious discord, insulting national honor and dignity or religious feelings of citizens, as well as propaganda of exclusivity, superiority or inferiority of citizens on the basis of their attitude to religion, class, national, ancestral or racial affiliation, if these acts were committed in public or with the use of mass media or telecommunications networks, as well as by producing or distributing literature or other media promoting social, national, ancestral, racial, class or religious discord – shall be punished by a fine in the amount of two thousand to seven thousand monthly calculation indices or by restriction of liberty for a term of two to seven years, or imprisonment for the same term. The same actions committed by a group of persons, a group of persons by prior agreement or repeatedly or connected with violence or the threat of its use, as well as committed by a person using his official position or the leader of a public association, including using funds obtained from foreign sources, are punishable by imprisonment for a term of five to ten years with or without deprivation of the right to hold certain positions or engage in certain activities for up to three years. The acts provided for in the first or second parts of this article, committed by a criminal group or entailing grave consequences, are punishable by imprisonment for a term of twelve to twenty years with or without deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years.

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?

Answer: No.

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

Answer: No. There are no restrictions, restrictions only on criminal cases considered in a closed court session (on publications, media coverage).

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?

Answer: The legislation is clear and understandable for citizens, moreover, if, due to the lack of any knowledge in the field of criminal procedure, a citizen has the right to seek legal assistance from a lawyer who, by virtue of his authority and experience, explains to the applicant the norms of the law and how they operate. In any case, a citizen has the right to apply for judicial protection of his violated rights, moreover, ambiguity or the presence of doubts cannot deter him from filing a lawsuit in court.

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?

Answer: The legislation in the field of freedom of speech, criminalization of hate speech is clear and understandable for a lawyer. In cases of ambiguity in the interpretation of a particular rule of the law or code, the Supreme Court of the country provides detailed explanations in the form of issuing Regulatory Resolutions of the Supreme Court of the Republic of Kazakhstan on a particular norm of substantive or procedural law.

Freedom of speech very closely borders on the abuse of the right to express one's subjective opinion, which is expressed in exerting pressure on the judge through the media and social networks when making a decision, as well as pressure on the appellate and cassation instances when they consider complaints and protests. Such pressure can take place in the filed appeals (petitions), in publications in the media before the judicial act enters into force, conducting various kinds of comments and speeches, "inflating" public resonance, insulting both the judge personally and the judiciary as a whole, etc. Judges, often fear problems at work, they make a decision pleasing to the "applicant". Many perceive freedom of speech in the form of "I am a citizen, I can say what I want, and no one will dare to restrict me in this," or "I know all judges are corrupt, they are corrupt,

etc." And no one is responsible for insulting the judiciary, no one even understands that permissiveness is not freedom of speech.

Yes, the law provides for criminal liability for contempt of court, expressed in insulting a judge and (or) a juror, for interference in any form in the activities of the court in order to obstruct the administration of justice. However, not all actions may have the elements of a crime. But they may have offensive overtones. To do this, through the Union of Judges (branches), it was proposed to initiate lawsuits to the court for the protection of the honor and dignity of a judge who had subjected an illegal and unjustified public (in appeals, publications in the media, etc.) insult. This also applies to lawyers who indulge in unjustified insults to judges, which are reflected in complaints (publications) written (published) on their behalf, and in some cases, on behalf of their clients. Prosecutors also do not stand aside, who, through the injured persons, initiate various kinds of complaints to higher courts, publications in the media and social networks, without hesitating in expressions. It seems to me that such a response from the judicial community will put the "victim" in a strict procedural framework, direct his energy into the legal field, and not to create hype and imaginary resonance in cases that are resolved legally and reasonably. Such proposals have been submitted to the Supreme Court of the Republic of Kazakhstan, and are under consideration.