

ARTICLE 19

Kazakhstan: Civil Code Restrictions on Freedom of Expressions

July 2012

Legal analysis

Executive summary

In July 2012, ARTICLE 19 reviewed the civil law regime concerning defamation in Kazakhstan, contained in the Civil Code of Kazakhstan and the Tax Code of Kazakhstan.

The review concludes that despite some positive elements of the regime, such as the right of reply, and the explicit provision that legal entities cannot claim compensation for moral harm of defamation, the regulation fails to provide safeguards for free expression and meet international defamation standards. In particular, the Civil Code does not require from judges to balance between reputation and freedom of expression and examine how the protection of the first affects the second.

Moreover, the definition of defamation in the Civil Code is overbroad and allows for punishment even in cases when the defamatory statements are true. ARTICLE 19 submits that by failure to distinguish between opinions and statements of fact, the Civil Code does not protect opinions in line with international standards. Finally, defendants do not have a defence of truth, and a defence of 'reasonable publication', and thus, journalists can be held liable for defamation even though they have acted in accordance with journalistic ethics.

Additionally, the protection of personal images does not correspond to international standards. Setting an outright ban on the use, publication, reproduction, and distribution of images without the consent of the persons depicted, the provision unnecessary limits the right to freedom of expression and disproportionately restricts the media reporting on matters of public interest by the use of images.

ARTICLE 19 calls on:

- the Government of Kazakhstan to propose amendments to the Civil Code relating to civil law liability for defamation in line with the recommendations in this review;
- civil society organisations in Kazakhstan to launch public campaign to explain the need of reforming of the Civil Code in order to strengthen the safeguards for freedom of expression.



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Introduction

In this analysis, ARTICLE 19 reviews legal framework on defamation and the use of personal images provided by the Civil Code of Kazakhstan as well as related provisions of the Tax Code of Kazakhstan.¹

Our analysis draws upon the international standards and jurisprudence of international bodies, including the UN Human Rights Committee and the European Court of Human Rights, in the area of defamation. These standards, as well as comparative standards in this area, have been encapsulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (“Defining Defamation”),² to which we frequently refer. These principles have attained significant international endorsement, including by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.³

ARTICLE 19 notes that the provisions in Civil Code of Kazakhstan concerning defamation are often invoked by politicians and businessmen complaining against the damaging effect of publications on their reputation. Civil liability for defamation is an ordinary way for protection of reputation which exists worldwide. However the provisions in the Civil Code should be in compliance with international defamation standards.

¹ This analysis is carried out on the basis of an English translation of the respective provisions of the Civil Code and Tax Code, enclosed in Annex to this analysis. ARTICLE 19 is not responsible for any mistakes of the translation.

² *Defining Defamation, ARTICLE 19*, London 2000; available at <http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf>.

³ See Joint Declaration of 30 November 2000; available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?openDocument>.

Analysis

Protection against Defamation

Two provisions of the Civil Code of Kazakhstan define the liability for damaging one's reputation.

Article 141 establishes the general regime on protection of personal non-property rights. The provision gives a right to compensation for moral damages of victims of violations of personal non-property rights. Along with compensations the victim may request the elimination of the consequences of the violation or the undertaking, at the expense of the violator, of necessary actions for the elimination of the violation.

The special civil law regime for protection against defamation is provided by **Article 143**. The provision establishes two remedies for victims of defamation. First, victims can request refutation of the information. Courts are granted the power to establish the procedure for refutations and include time periods thereof. A refutation should be made within a month after the request for refutation has been made by the media outlet which has damaged the reputation. For failure to execute court decisions for refutations, media outlets can be fined. If the information is contained in a document by an organisation, the document may be replaced or annulled.

The second remedy for defamation which can be sought either simultaneously or alternatively with the right of refutation is the right to demand compensation. Individuals and legal entities can demand compensation for the material damage which the defamation caused. Individuals can also seek compensation for their suffering and pain as a result of the defamation.

Problematic issues concerning protection against defamation

Inadequate concept of defamation

The Civil Code does not contain a legal definition of defamation. Instead, Article 143 provides individuals and legal entities with remedies when "information damages their honour, dignity or business reputation." Hence, the elements of civil defamation are a) information and b) this information is damaging one's honour, dignity and business reputation.

According to Article 951, moral damages are to be compensated regardless of the culpability of the defendant in cases where the damage has been inflicted by the spread of information denigrating the honour, dignity and business standing.

ARTICLE 19 considers that concept of defamation in Kazakhstan, as stipulated by the above provisions of the Civil Code of Kazakhstan, is inappropriate because it allow for disproportionate restrictions on freedom of expression for the following reasons:

- Firstly, based on these provisions, one can seek compensation for true statements damaging his/her reputation – for example, a government official who is of accused of abuse of State funds, can claim compensation even if the statement damaging his/her reputation is true. This is not a proper use of defamation law. We note that Principle 2

of *Defining Defamation* states that “defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit ... In particular, defamation laws cannot be justified if their purpose or effect is to prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption.”⁴

- Second, defamation laws need to distinguish between statements of fact and statements of opinion. Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) recognises the right to hold an opinion and the right of freedom of expression and gives a higher protection for second. In contrast with the right of freedom of expression, the right to hold opinions permits no exception or restriction. International bodies have confirmed this differentiation. For example, in *Feldek v. Slovakia*, the European Court of Human Rights disagreed that the use by the applicant of the phrase “fascist past” should be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance. One of them could be that a person participated as a member in a fascist organisation; on this basis, the opinion that that person had a ‘fascist past’ could fairly be made.⁵

Both negative and positive opinions have unlimited protection as long as they are based on established or admitted facts and made in good faith.⁶ The European Court emphasised that no proofs were required for expression of value judgments.⁷

- Thirdly, the Civil Code does not contain definitions of “honour”, and “dignity” although these terms can be broadly interpreted. We are concerned that the “vague” legal concepts can be used to restrict legitimate expression. Noting that defamation laws are designed to protect reputation, i.e. the general estimation in which a person is held by the public; we note that it would be inappropriate to protect the self esteem in which people hold themselves. We also note that international law does not permit restrictions on freedom of expression aiming at protecting self-esteem. Finally, UN Human Rights Committee’s General Comment No. 34,⁸ containing authoritative interpretation of the right to freedom of expression, provides that vague legal concepts cannot be used to justify a restriction on this right.

Recommendations:

- The concept of defamation should include elements of intent, and specify that defamation is possible only when the defamatory statement is false;

⁴ *Supra note 1.*

⁵ *Feldek v Slovakia*, Judgement of 12 July 2001, Application No. 29032/95.

⁶ *Lingens v Austria*, Judgment of 8 July 1986, Application No. 9815/82, para. 46; and *De Haes & Gijssels v Belgium*, Judgment of 24 February 1997, Application No. 7/1996/626/809 at para. 47

⁷ *Ibid.*, *Lingens v Austira*, at para. 46.

⁸ Adopted on 12 September 2011; available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

- The Civil Code should distinguish between statements of fact and opinions and provide that the right to hold opinions cannot be restricted when the opinions are based on established or admitted facts and made in good faith

Defamation Defences

The Civil Code does not provide for defences of people sued for defamation. This is in contrast with UN Human Rights Committee's General Comment No. 34 which provides that defamation laws should include legal defences which can be invoked against defamation claims.⁹ The defence of truth and the defence of responsible publication on a matter of public interest are explicitly mentioned in the General Comment No. 34.

The defence of truth protects persons who have made truthful statements. In other words, a claim of defamation is defeated if the defendant proves that his/her statements were true.

The defence of responsible publication on a matter of public interest can be invoked in cases involving matters of public interest, such as comments about the way public officials perform their duties. In such cases the public interest of freedom of expression may prevail over reputation. For example, if the defamatory statement is a result of an unintentional error a journalist should not be held liable for defamation. These errors normally happen because sometimes journalists cannot postpone the publication of their stories until they are completely sure that every fact made available to them is correct. In order to use the defence journalists can demonstrate that they have acted without malice by proving that in the preparation of their statements they have observed the professional standards and code of ethics.

ARTICLE 19 points that other defences to allegations of defamation drawn from international and comparative jurisprudence include *statements of opinion* (see above); *absolute and qualified privileges* - no one should be liable for statements made during judicial proceedings, or before elected bodies unless it can be shown to have been made with malice; *words of others* - journalists should not be held liable for reporting or reproducing statements of others, so long as these statements have news value and the journalist refrain from endorsing them.

For example, the Law of Georgia on Freedom of Speech and Expression provides the following defamation defences:

Article 15. Qualified privilege for defamation

A person shall have a qualified privilege for a statement containing essentially false fact if: a) he has taken reasonable steps to verify the accuracy of the fact, but failed to avoid a mistake and took efficient measures for the restoration of the reputation damaged due to defamation; b) The purpose of his action was protection of the legitimate interests of the society, and the protected good exceed the caused damage; c) He made a statement with the claimant's consent; d) His statement was a corresponding reply to a statement made by the respondent against him; e) His statement was a fair and accurate reporting related to an event of public interest.

⁹ *Ibid.*, para. 47

Finally, ARTICLE 19 is concerned that under the current regime, it is not inconceivable that an Internet Service Provider (ISP) could attract liability by unwittingly providing access to insulting or defamatory information published through the Internet. This would not be appropriate because ISPs cannot be regarded as the ‘authors’ of such information. Additionally, there is an important risk of ‘censorship by proxy’: given their potential liability, many ISPs will simply remove statements from the Internet as soon as they have been challenged as defamatory, regardless of the legitimacy of the challenge.

In this respect we refer to *Defining Defamation*, which has given expression to the global understanding that special protection in defamation law is necessary in relationship to the Internet. Principle 12 (b) states, in relevant part:

Bodies whose sole function in relation to a particular statement is limited to providing technical access to the Internet, to transporting data across the Internet or to storing all or part of a website shall not be subject to any liability in relation to that statement unless, in the circumstances, they can be said to have adopted the relevant statement.

Recommendations:

- The Civil Code should recognise defamation defences: the defence of truth, the defence of reasonable publication on a matter of public interest; the defence of opinion, the defence of words of others and include absolute and qualified privileges in defamation cases.
- The Civil Code should exempt Internet Service Providers from liability for defamation with regard to providing access to insulting or defamatory information published through the Internet.

Lack of guarantees for free public debates

The Civil Code does not take into consideration the purpose of expression and whether it concerns matters of public interests. By doing so, it fails provide guarantees for free public debates on matters of public interest.

ARTICLE 19 points out that international law provides for special protection of public debates concerning public figures. In this regard paragraph 47 of General Comment No. 34 includes the following principles:¹⁰

- the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant;
- all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition;

¹⁰ *Supra note 8.*

- criticism of institutions, such as the army or the administration should not be prohibited.

Recommendations:

- The Civil Code should provide protection to expression relating to matters of public interest including criticism toward public officials

Awards for damages

It is commendable that the Civil Code provide for two remedies in defamation cases: the right to reply and pecuniary compensations. However, as no maximum amount has been specified in the law it is possible for plaintiffs to claim any amount of pecuniary compensations even excessively high.

ARTICLE 19 notes that General Comment No. 34 provides that excessive penalties lead to violation of the right to freedom of expression even if the statements for which they are imposed are defamatory. The Comment states that restrictions on freedom of expression:

- must not be overbroad;
- must conform to the principle of proportionality;
- must be appropriate to achieve their protective function;
- must be the least intrusive instrument amongst those which might achieve their protective function.¹¹

The last requirement regarding compensations means that laws and courts should prioritise the use of available non-monetary remedies to redress any harm to reputation caused by defamatory statements. The Civil Code is not in compliance with this requirement because it does not give priority to the right of reply over the right to compensation.

Recommendations:

- The Civil Code should give priority to the right of reply over the right to compensation. If the right of reply has been sought, defendants should not be able to seek pecuniary compensation.
- The Civil Code should include principles how to determine awards for defamations: it should specify that the awards are proportionate, appropriate to achieve their protective function and at least intrusive for freedom of expression.
- To avoid excessive compensations in civil defamation case it is advisable that the Civil Code specifies the maximum sum which can be awarded as compensation

Statutes of limitations

Article 178 of the Civil Code sets out a three year statute of limitations for submitting claims for moral compensation. The statute starts running on the day when the person learnt of the violation of the right.

¹¹ Supra note. 8, Para. 24

ARTICLE 19 is seriously concerned about the opportunities for instituting a defamation action even after a long time has passed since the publications of the defamatory statements. We recommend that consideration be given to providing for a limitation period of one year for filing a defamation action. This approach has been taken in numerous other jurisdictions where special time limits, shorter than for litigation generally, are set for the initiation of defamation cases in view of the impossibility for defendants to defend themselves against defamation actions relating to publications made long time ago.¹²

Recommendation

- The Civil Code should set out a limitation period of one year for filing a defamation action

Lack of safeguards against malicious defamation complaints

The Civil Code does not contain any safeguards for media and other defendants against malicious plaintiffs. ARTICLE 19 suggests that two issues must be considered in this respect.

First, the cost for filing a defamation lawsuit and claiming high compensations is extremely low. Article 534 of the Civil Code provides for levying of fixed percentage rates of state duty on lawsuit application which amount of 50 per cent of the monthly assessment index in Kazakhstan. At the moment this index is 1618 tenge (around 7 GBP). Malicious plaintiffs take advantage of the low cost defamation litigation to harass media and journalists. It is recommended that the state duty in defamation lawsuits be proportionate to the amount of compensation claimed. For example, in Ukraine the court tax is 10 percent of the compensation sought for defamation.

Second, media and other defendants should have access to remedies in cases on unsubstantiated claims. As often plaintiffs institute defamation lawsuits with no prospect of success in order to prevent media criticism of their actions, Principle 19 of *Defining Defamation* require that defendants have an effective remedy where plaintiffs bring clearly unsubstantiated cases. The particular remedy will vary between jurisdictions but possible options include the right to bring a case for abuse of civil process and/or the availability of a procedural mechanism to strike out the claim early on in the proceedings unless the plaintiff can show some probability of success.

Recommendations:

- The Civil Code should contain safeguards against malicious defamation complaints including:
 - the state duty in defamation cases should be proportionate to the compensation sought by the plaintiff;

¹² See, for example, the Report of the Legal Advisory Group on Defamation in Ireland, published in March 2003. Available at: <http://www.justice.ie/80256976002CB7A4/vWeb/fsWMAK4Q7JKY>. See also *Defining*

Defamation, note 3, Principle 5.

- judges should be able to strike out a defamation claim early on in the proceedings unless the plaintiff can show some probability of success

Limitations on Freedom of Expression aiming at Protection of Privacy

Article 145 of the Civil Code prohibits the use of images of persons without the consent of the latter. The same ban applies to the publication, reproduction and distribution of a graphic piece (picture, photograph, film, etc) in which another persons is depicted. If the person is dead the consent is to be given by his/her children and spouse.

ARTICLE 19 considers that Article 145 of the Civil Code is not in line with international law because it imposes a blanket ban on the use of individuals' images, regardless of whether the images contribute to a debate of general interest.

We recall that Article 17 of the ICCPR provides that everyone has a right to privacy. The state has an obligation to adopt laws protecting individuals from invasion of their privacy by fellow citizens. However this right is not absolute and can be restricted. The restrictions must be 'prescribed by law' and must be 'necessary in a democratic society.'

As legal provisions protecting privacy, by definition, limit the right to freedom of expression and media freedoms, it is important that both rights are being balanced. Normally when a journalistic material interfering with individual's privacy (including publishing his/her images) relates to a matter of legitimate public concern, such as corruption of public officials, a greater weight should be given to the freedom of expression than to privacy. Otherwise it would be impossible for the media to investigate corruption and the public would not be able to learn about this cases. Therefore a blanket ban on the use of images is not 'necessary in a democratic society' and is in violation with international law.

The European Court of Human Rights always refers to the public interest when examine applications about interference with privacy. Another source of authority on the proper delineation of the right to privacy and the right to freedom of expression is Resolution (74) 26 of the Committee of Ministers of the Council of Europe.¹³ The Resolution states that an individual should have an effective remedy against an interference in his or her privacy:

...except where this is justified by an overriding, legitimate public interest, where the individual has expressly or tacitly consented to the publication or where publication is in the circumstances a generally accepted practice and not inconsistent with law.

Recommendation:

- Article 145 of the Civil Code should be amended requiring that consideration should be taken whether the use of personal images contribute to a debate of general interest

¹³ Resolution (74)26 on the right of reply – position of the individual in relation to the press, 2 July 1974.

Annex: Reviewed Provisions

The Civil Code of the Republic of Kazakhstan

Article 141. Protection of Personal Non-Property Rights

1. A person whose personal non-property rights are violated, apart from the measures stipulated in Article 9 of this code, shall have the right to compensation of moral damage by the rules of this Code.
2. Protection of personal non-property rights shall be carried out by the court in accordance with the procedure stipulated in civil procedural legislation.
3. Personal non-property rights shall be subject to protection irrespective of the guilt of the person that violated the right, unless it is otherwise stipulated in the present Code. The person who presented a claim of defence must prove the fact of the violation of his personal non-property right.
4. The person whose non-property right is violated may at his discretion, claim from the violator the elimination of the consequences of the violation or at the expense of the violator to independently undertake the necessary actions, or to delegate their execution to a third party.

Article 143. Protection of Honour, Dignity and Business Reputation

1. Through the court a citizen shall have the right to refutation of information which damages his honour, dignity or business reputation.
2. Where the information that damages the honour, dignity or business reputation of a citizen or a legal entity is spread through the mass media, that information must be free of any charge refuted by the same mass media.

In the case where said information is contained in a document issued by an organisation, such a document shall be subject to replacement or annulment with the obligatory communication to the addressees of the inconsistency of the information contained in that document.

The procedure for refutation in other cases shall be established by the court.

3. A citizen or a legal entity with regard to which the mass media published information which restricts his rights or legitimate interests, shall have the right to publish their response in the same mass media free of any charge.
4. The claim by a citizen or a legal entity to publish a refutation or response in the mass media shall be considered by the court in a case where the mass media refused such publication, or did not carry out the publication within one month, and also in the case of its liquidation.
5. Where a court decision is not executed, the court shall have the right to impose a fine upon the violator, which shall be taken for the revenue of the budget. The fine shall be imposed in accordance with the procedure and in the amounts which are established by the civil procedural legislation. The payment of the fine shall not exempt the violator from the obligation to execute the action stipulated in the court decision.
6. A citizen or a legal entity with regard to whom information was spread that damages his honour, dignity or business reputation, shall have the right, apart from the refutation of such

information, to demand compensation for the damage and the moral harm inflicted by their promulgation.

The provisions of this Article on the protection of business reputation of a citizen shall be equally applied to the business reputation of a legal entity with the exception of an opportunity to demand compensation for the moral harm. The protection of business reputation includes claims to recover damages in accordance with the procedure established by the present Code.

7. Where it is impossible to identify the person that spreads the information which damages the honour, dignity or business reputation of a citizen or a legal entity, the person with regard to whom such information is spread, shall have the right to appeal to the court with an application to recognise that the promulgated information as not true.

Article 145. One's Right to the One's Own Picture

1. Nobody shall have the right to use the image of a person without his consent, and in the case of his demise, - without the consent of his inheritors.
2. The publication, reproduction and distribution of a graphic piece (picture, photograph, film etc.), in which another person is depicted, shall only be permissible with the consent of the depicted, and after his death, - with the consent of his children and surviving spouse. Such consent shall not be required where it is established by legislative acts or the person depicted was posing for a fee.

Article 177. The Definition of the Statute of Limitations

1. The statute of limitations is a period of time during which a claim may be satisfied, which arises from a violation of rights of a person or of an interest protected by law.
2. Statutes of limitation and the procedure for their calculation shall be stipulated in law and may not be changed by an agreement of parties.

Article 178. Terms of the Statute of Limitations

1. The general term of the statute of limitations shall be established at three years.
2. For certain types of claims legislative acts may establish special-purpose terms of the statute of limitations, which are shorter or longer as compared to the general term.
3. The rules of Articles 177, 179 - 186 of this Code shall apply also to the special-purpose terms of the statute of limitations, unless legislative acts stipulate otherwise.

Article 179. The Application of the Statute of Limitations

1. The requirements to protect a violated right shall be accepted by the court for consideration irrespective of expiry of the term of the statute of limitations.
2. The statute of limitations shall be applied by the court only upon the application by a party in the dispute, which is made prior to the adoption of a decision by the court.
3. The expiry of the term of the statute of limitations prior to the presentation of the claim shall be the basis for the court's passing the decision to deny the action.
4. With the expiry of the term of the statute of limitations on the principal claim, the term of the statute of limitations shall expire with regard to additional claims (concerning the imposition of damages, the responsibility of the trustor etc.).

Article 180. The Course of the Term of the Statute of Limitations

1. The course of the term of the statute of limitations shall begin on the day when the person learned or should have learned of the violation of the right. Exceptions from this rule shall be established by this Code and the other legislative acts.
2. With regard to the obligations which have a definite term for their implementation, the course of the statute of limitations shall begin upon the expiry of the date of the execution.

3. With regard to the obligations, the implementation term of which is not determined or is determined by the moment of the call, the course of the statute of limitations shall begin from the moment when the call for the implementation of the obligation is made, and where the debtor is granted a privilege term for the implementation of such call, the counting of the statute of limitations shall begin on the expiry of the indicated term (paragraph 2 of Article 277 of this Code).
4. With regard to the regress obligations the course of the statute of limitations shall begin from the moment of execution of the principal obligation.

Article 951. Compensation for the Moral Damage

3. Moral damages shall be compensated, regardless of the guilt of the defendant in cases where:
 1. injury has been inflicted on the life or health of an individual by a source of special danger;
 2. damage has been done to an individual as a result of his illegal conviction, the illegal institution of criminal proceedings against him, the illegal application of remand in custody as a measure of restraint, home arrest or a written pledge not to leave his place of residence, the illegal imposition of the administrative penalty in the form of arrest, the illegal placement to psychiatric medical facility or other medical facility;
 3. damage has been inflicted by the spread of information denigrating the honour, dignity and business standing;
 4. in other cases provided for by the law.
 5. In other cases, prescribed by the legislation;

The Tax Code of the Republic of Kazakhstan

Article 534. Taxable Items

- 2, The fixed percentage rates of state duty shall be computed on the basis of the monthly assessment index as established by the law concerning the Republic's Budget for the relevant fiscal year, unless otherwise specified by this Code.

Article 535. Rates of State Duty in Courts

1. State duty shall be collected in the following amounts, on lawsuit applications, applications for special claim processing, applications (complaints) in cases of special processing, applications for passing a court order, applications for issuing a duplicate executive writ, applications for issuing executive writs for enforced implementation of decisions of third-party (arbitration) tribunals and foreign courts, applications for a repeat issue of copy court acts, executive writs and other documents:
 7. on lawsuit applications for update or termination of an agreement on leasing housing, for extending periods of entry into inheritance, for alleviation of property restraint and on other lawsuit applications of non-property nature, or those which are not subject to valuation — 50 per cent;