

**ARTICLE 19**

# **Free speech vs reputation**

## **Guide for journalists and policymakers in Kazakhstan**

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Legal briefing

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## ARTICLE 19

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# Introduction

This guide explains how international human rights standards on freedom of expression address the rights of journalists to publish information and opinions about politicians and public officials. In a democratic society, freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations. It is intended to assist policymakers in Kazakhstan to ensure that any restrictions on freedom of expression on the basis of protection of reputation fully comply with relevant international law and standards.

International human rights law, in particular Article 19 of the International Covenant on Civil and Political Rights (ICCPR), obliges governments to protect the right to freedom of expression. Kazakhstan signed the ICCPR in 2005 and is obliged to give effect to it through national legislation and practice. Additionally, the Kazakhstan Constitution guarantees the right to freedom of expression in Article 20. The right to freedom of expression may be restricted for the respect of the reputations of others, however only when provided by law and necessary.

Defamation law protects an individual's reputation or feelings from unwarranted attacks. Defamation law can serve a legitimate purpose and it is recognised internationally as a valid ground for restricting freedom of expression. However, in many countries, defamation is a blunt weapon of law used by governments and powerful people to punish intrusive journalists and to stifle honest reporting. Many states fail to recognise the need to achieve an appropriate balance between the protection of reputation and freedom of expression for the media.

Despite international commitments, Kazakhstan has an array of laws which are highly restrictive of freedom of expression, most notably criminal defamation and insult under the Criminal Code 2014. Hence, this Guide provides international law-based arguments which should inform the legal reform of respective laws and inform the responses in legal actions. The brief also explains the rights of journalists to publish information and opinions about public figures, and discusses what happens if a public figure claims that a publication damages their reputation.

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# Key questions about defamation

## What is considered a publication?

Publication occurs when any statement is communicated to a person other than the plaintiff/claimant via print, video, electronic media or any other means. This can include headlines, drawings, outlines or photographs. The full context of a publication should be considered when determining liability.

## What is wrong with criminal defamation?

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate **civil** defamation laws. The UN Human Rights Committee and other international authorities on freedom of expression have expressed their concern over the misuse of criminal defamation laws on numerous occasions. Kazakhstan should abolish all criminal defamation provisions.

As an interim measure until the law is abolished:

- no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
- the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
- public authorities should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
- prison sentences, suspended sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

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## What should be the purpose of defamation law?

A good defamation law – one which lays the groundwork for striking a proper balance between the protection of individuals' reputation and freedom of expression – could be defined as follows: a defamation law is a law which aims to *protect people against false statements of fact which cause damage to their reputation*.

This definition contains four elements. In order to be defamatory, a statement must:

- be false;
- be of a factual nature;
- cause damage; and
- this damage must be to the reputation of the person concerned, which in turn means that the statement in question must have been read, heard or seen by others.

Provisions of defamation in Kazakhstan should conform to this definition.

## Why is it important to publish information about politicians and public officials?

Freedom of expression is one of the cornerstones of democracy. The media should be able to act as 'watchdogs': indeed, a healthy government will encourage the media to provide legitimate criticism.

The jurisprudence of international human rights bodies and comparative case law from regional and national courts recognise that politicians and public officials are required to tolerate a greater degree of criticism than ordinary citizens. This principle has been also stressed by courts in a number of national jurisdictions. This is for three key reasons.

- First, democracy depends on the possibility of open public debate about matters of public interest. Without this, democracy is a formality rather than a reality. Hence, those who hold office in government and who are responsible for public administration must always be open to criticism. This applies as much to ideas and information that offends, shocks or disturbs as it does to that which is perceived as inoffensive. A democratic society demands pluralism, tolerance, and broadmindedness.
- Second, politicians and public officials have willingly and knowingly exposed themselves to examination by assuming public functions. For example, the European Court of Human Rights has emphasised that any political actor "inevitably and

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knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance” than a private individual. An even greater degree of tolerance applies to criticism of governments than in relation to a politician.

- Third, politicians and public officials nearly always have greater access to means of public communication and can therefore respond to any allegations with a speed and ease that is unavailable to ordinary citizens.

## Should public bodies be allowed to sue for defamation?

Under international freedom of expression standards, public bodies of all kinds -- including the legislative, executive or judicial branches of government, as well as other bodies that perform public functions -- should not be allowed to bring a claim for defamation. Only a living individual, corporations and other legal entities should be allowed to bring a defamation claim.

This is because of the importance of open debate about the functioning of such bodies and because they are not seen as having a ‘reputation’ entitled to protection. As abstract entities without a profit motive, public bodies lack an emotional or financial interest in preventing damage to their good name. Moreover, the bringing of defamation suits by these bodies is seen as an improper use of public money, particularly given the ample non-legal means available to them to respond to criticism, for example through a public counter-statement.

Public bodies should therefore be **prohibited** from bringing defamation actions. The ban should extend to the heads of public bodies regarding legal actions that essentially aim to protect the reputation of the public bodies rather than the individual head.

## What defences should be available for defamation in civil cases?

Journalists have extremely wide latitude to publish information on any subject of public interest. Even then, it is essential that legislation provides for a number of defences which can be invoked against a defamation claim to prevent defamation laws from unreasonably restricting the free flow of information and ideas. In particular:

### Defence of substantial truth

Journalists should be allowed to publish statements that are true, even if the information is unpleasant, or the person at issue would prefer to keep it hidden. If a statement is

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true, then there should be no liability under defamation. The rationale for this defence is that the law of defamation should serve to protect individuals against unwarranted attacks on their reputation, rather than to protect them regardless of whether or not their good reputation is deserved. Individuals may not wish to see true but unflattering statements about them published, but they should not be able to sue for damages for this. At the same time, an individual confronted with truthful revelations about his or her private life may still have a separate claim for invasion of privacy

Furthermore, the journalist should be protected where they make a substantially true statement of fact. Requiring the proof of absolute truth would be an excessive burden. In most matters, facts are by their nature complex and intricate, and it is almost impossible to avoid slight inaccuracies in reporting. Showing that every single detail of a story is perfectly true would simply be impracticable. While a standard of absolute truth would have a chilling effect upon freedom of expression, the standard of substantial truth rightly encourages the accurate reporting of facts.

### **Defence of reasonable publication**

The main purpose of the defence of reasonable publication is to ensure that the media can do their work of informing the public effectively. Journalists should have the right to publish statements on matters that the public has a right to know about, provided that they take due diligence steps to ensure the accuracy of their reporting (as explained above). This applies even if the journalist cannot prove that the statement is true, and even if the statement is later proven to be false.

If a defamation claim is later brought against the journalist or media outlet, they should be able to argue that it was reasonable to publish it - on the basis that it was a matter of public concern - and made in good faith and with due diligence.

While the defence of reasonable publication is most likely to be invoked by the media, it should be available to anyone. Situations may arise in which non-journalists, such as academic researchers or civil society activists, unintentionally publish false facts under circumstances in which it was reasonable to do so

### **Defence of opinion**

Under international law, statements of opinion have been accorded very significant protection: no one should be found liable under defamation law for an opinion. This is because statements of opinion, which do not contain factual allegations, cannot be proven true or false.



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An opinion, in this context, is any statement that either:

- does not contain a statement of fact that could be proved false; or
- cannot be reasonably interpreted as stating fact.

Cartoons, satire or obviously humorous pieces, for example, would count as ‘opinions’.

### **Defence of consent**

Consent is a common defence against any tort claim. If someone has permitted the statement to be published, they cannot later sue for defamation. This applies whether the statement is true or false. The defence of consent would apply, for example, in cases in which an individual provides false information about him- or herself to a newspaper, which the newspaper subsequently publishes.

### **Defence of words of others**

Individuals should not be held liable for reporting or reproducing the defamatory statements of others where the following three conditions are met:

- The statements were part of a discussion on a matter of public interest;
- The individual refrained from endorsing the statements; and
- It is clear that the statements were originally made by someone else.

### **Absolute and qualified privileges**

There are certain occasions on which the ability to speak freely, without fear of legal consequences, is so vital that statements made there should never lead to liability for defamation.

- Absolute privilege should apply, for example, to statements made in the course of legal proceedings, statements made by or before elected bodies, such as Parliament or a local authority, and fair reports of such statements.
- Certain other types of statements should enjoy a qualified privilege; that is, they should be exempt from liability unless it is proven that they were made with ill will or spite. This should include statements which the speaker is under a legal, moral or social duty to make, such as reporting a suspected crime to the police. The deciding factor should be whether the public interest in statements of that sort being made outweighs the harm that they may cause to private reputations.

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## What should be the rules on remedies in defamation cases?

A 'remedy' is a form of reparation that can be awarded by a court to redress harm caused. These include orders to pay financial compensation, to cease the wrongful conduct, or to provide a correction or right of reply.

Traditionally, the most common remedy for defamation has been financial compensation or damages to be paid by the defendant to the plaintiff. However, alternative remedies are more freedom of expression speech-friendly and should be prioritised; monetary awards should only be imposed if the plaintiff cannot adequately be compensated for the defamatory statement through other means.

Where monetary awards are truly necessary, the law should specify clear criteria for determining the size of the award, which should take into account actual damages proven by the plaintiff, as well as any redress already provided through non-pecuniary remedies. A ceiling should be set for the level of compensation that may be awarded for nonfinancial harm to someone's reputation – that is, harm which cannot be quantified in monetary terms.

As an alternative to judicial processes, an independent body regulating the media could significantly reduce the need for court redress. Plaintiffs could take their complaints to this body, which would hold an inquiry and decide the case. In countries where this system has been adopted, it has proven less expensive than a civil trial and resolves the matter much more quickly.

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# Specific questions about publication

## **Can journalists be sued for defamation for a statement that they did not write?**

Journalist should not be liable for any statement of which he or she was not the author, editor or publisher or where he or she did not know, and had no reason to believe, that what he or she did contributed to the dissemination of a defamatory statement.

## **Can journalists be sued for defamation for reporting a suspected crime to the police?**

Statements that are made in the pursuit of a legal, moral or social duty or interest – should be exempt, unless it can be shown that they have been made with malice. Journalists should enjoy “qualified privilege” in defamation cases.

## **When should plaintiffs be allowed to bring defamation cases?**

A person suing a journalist (or anyone else) for defamation should file the case no more than one year from the date of publication. Courts should ensure that defamation proceedings are carried out in a timely manner, but not so rapidly as to deny defendants a proper opportunity to conduct their defence.

## **Can journalists be required to pay excessive damages, having lost a defamation case?**

From a freedom of expression perspective, the abolition of defamation as a criminal offence remains a priority. Yet the imposition of excessive damages in civil defamation cases can inhibit journalists’ exercise of their freedom of expression and the free flow of information. Damages should never be disproportionate to the harm done. Damages for actual financial loss, or material harm, caused by defamatory statements should be awarded only where that loss is specifically established. The level of damages for non-material harm to reputation (ie harm that cannot be quantified in material terms) should be subject to be highly exceptional and subject to a fixed ceiling. Damages which go

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beyond compensation for harm to reputation should be highly exceptional and applied only where the person suing the journalist has proven that the journalist acted with knowledge of the falsity of the statement and with the specific intention of causing the harm to him or her.

Further, there should be a mandatory capping of costs to limit the level of fees chargeable by lawyers. The court should also pay particular attention to the potential effect of the cost award on freedom of expression.

## **What is the role of independent self-regulation?**

In order to guard against censorship and undue political interference in the media, it is preferable for bodies aimed at promoting media accountability to be established by the media community voluntarily. Sector-wide self-regulatory bodies should be:

- Independent from government, commercial and special interests;
- Established via a fully consultative and inclusive process;
- Democratic and transparent in their selection of members and decision-making.

Voluntary self-regulatory bodies should also deal with complaints from individuals who believe that they have been negatively affected by unprofessional reporting. These bodies should then be able to recommend that the journalist or publication in question publishes a correction or other statement. Where an effective self-regulatory system of this kind exists, the defamation law should recognise it by requiring courts to take any satisfaction already provided in this way into account when assessing the appropriate legal remedy.

## **What steps should journalists take to ensure the accuracy of their reporting?**

Voluntary self-regulatory bodies (mentioned earlier) should adopt codes of conduct/ethics and set the standards to which members of the profession should then endeavour to adhere. Such codes should not be elaborated in national legislation but are the preserve of journalists and media organisations.

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The codes can include standards on accuracy of reporting. This typically includes recommendations for journalists to:

- Check sources thoroughly and get independent corroboration wherever possible;
- Be cautious when editing to make sure that the rewrite does not delete important context or convey misleading information;
- Watch for headlines and cutlines that may be defamatory (but there is more leeway because it is assumed to be explained in the story);
- Make sure news promos or teasers used to pique audience interest are not misleading or defamatory;
- Where possible, provide subjects with the statement to be published before publication to give them an opportunity to comment;
- Verify any letters or statements made by others. Double-check any factual allegations as carefully as statements in a news story. Where possible, seek clarification from the original author or comment from the person to whom the statement refers, because this can help show that it was reasonable to publish the statement;
- When covering court cases, make sure to understand the legal procedure and ensure that everything is recorded accurately, in particular the charges, what the witnesses says, the judgment, and the sentence.

## **DEFENDING FREEDOM OF EXPRESSION AND INFORMATION**

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