ARTICLE 19

Kazakhstan: Comment selected provisions of the Draft Code of Civil Procedure

October 2014

Legal analysis

Executive summary

In October 2014, ARTICLE 19 examined the compliance with international human rights standards of a Draft Amendment to the Code of Civil Procedure of Kazakhstan which bans the criticism of court decisions.

The analysis was also carried out from a comparative perspective, in particular, ARTICLE 19 considered the case law of the European Court of Human Rights which has examined several cases concerning court reporting. The Court has recognised that issues concerning the functioning of the justice system constitute questions of public interest and criticism of the judiciary fulfils a vital function in a democratic society. The media should be able to cover trials and formulate and disseminate their views and opinions on important issues involved in the court cases. The criticism of court decision also gives the courts an opportunity to obtain feedback on how their judicial decisions are understood by the public. The ban on criticism of court decisions in the Draft Amendment to the Code of Civil Procedure of Kazakhstan runs against these principles. In addition, it fails to meet the test for the legality of restrictions on the right to freedom of expression set out in Article 19 (3) of the International Covenant on Civil and Political Rights as it is excessive and unnecessarily affects media freedom, public debate on the functioning of the judiciary and academic freedom. Finally, the ban on criticism of court decisions does not meet the proportionality test for interferences with the right to freedom of expression because, on balance, the harm caused to the overall public interest is greater than any interest it may seek to protect.

Therefore, ARTICLE 19 calls on the legislator to remove the proposed provisions from the draft Civil Code of Procedure.

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Introduction

In this analysis, ARTICLE 19 reviews selected provisions of the Draft Amendment to the Code of Civil Procedure of Kazakhstan (Draft Amendment), namely the proposal for the amendment to Article 19 that bans criticism of court decisions.

The Draft Amendment is part of a new bill reforming various provisions of the Civil Code of Procedure of Kazakhstan relating to access to courtrooms, audio and video coverage of trials, legal representation, court fees and others.[1]

ARTICLE 19 welcomes the opportunity to comment on the Draft Amendment; for the past 10 years, we have campaigned for this reform and for bringing the media legislation of Kazakhstan in line with international law. In the past, we reviewed different laws[2] and engaged with local stakeholders in discussions on reform and the state of freedom of expression in the country. Together with our partners and independently, we have also formulated a number of proposals for the Government on freedom of expression problems.

This analysis is intended to inform the legislator and the legal community of Kazakhstan of relevant international standards, identify the discrepancies with them and make recommendations for improvement.

[1] ARTICLE 19's comment is made on the basis of a Russian version of the Draft Civil Code of Procedure, published on 30 June 2014.

[2] Memorandum on Kazakhstan's Laws Regulating Mass Media, 2002; Summary of Concerns on Proposed Amendments to Kazakhstan's Media Law, 2006; or Memorandum on Civil Code restriction on freedom of expression, 2012.

International freedom of expression standards

The review of the Draft Amendment is made on the basis of international standards on freedom of expression and media freedom, in particular the International Covenant on Civil and Political Rights (ICCPR), General Comment No. 34[3] of the UN Human Rights Committee, comparative regional standards and the joint declarations on special mandate on freedom of expression.[4] Kazakhstan ratified the ICCPR in 2007 and is thus bound by its provisions.

Right to freedom of expression

Article 19 of the ICCPR guarantees the right to freedom of expression in the following terms:

> 1. Everyone shall have the right to freedom of opinion.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
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> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The right to freedom of expression is not absolute; however it may be restricted only under very narrow and limited circumstances, also known as a three-part test of restrictions. Namely, any restriction:

1. Must be **set out by law**: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[5]

2. Must pursue **one of the following interests**: respect of the rights or reputation of others, or a protection of national security, public order, public health or public morals. Restrictions on other grounds are not permissible under international law.[6]

3. Must be **necessary and proportionate** for the protected aim. Hence, legislators and law enforcement bodies should always balance the right to freedom of expression against

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[3] In the General Comment No. 34, the Human Rights Committee interprets the standards in greater detail; CCPR/C/GC/34, adopted on 12 September 2011.
[4] Since 1999, special mandates on freedom of expression of the UN, the Organisation of Security and Cooperation in Europe, the African Union and the Organisation of American States issue annual joint declarations on in which they address specific freedom of expression issues. All declarations area available at ARTICLE 19 website.
[5] General Comment No. 34, *op.cit.*
[6] The Human Rights Committee has expressed concerns regarding laws on such matters as disrespect for authority, protection of the reputation of monarch or heads of state, disrespect for flags and symbols as they do not pursue any of the legitimate interests set out in Article 19 (3); General Comment No. 34, *op.cit.* para. 38.

other rights and interests, and assess whether the circumstances in the given situation made a restriction of freedom of expression necessary. Restrictions must not be overbroad. The restrictions must also be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected.

Criticising court decisions

Court trials and decisions can be newsworthy events especially when they concern issues of public interest (e.g. defamation cases or corruption charges against public officials). Through their reports, the media enable the general public to observe the workings of the judicial system and the delivery of justice. By debating and criticising the work of judiciary, the media can help ensure the overall health of the justice system and contribute to the public's confidence in it.

The publication of information and comments about court proceedings is an important media function, especially in the field of criminal justice.[7] As the European Court of Human Rights (the European Court) observed:

> [T]he courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.[8]

From a comparative perspective, it is useful to consider the case law of the European Court that has examined several cases concerning court reporting.[9] When assessing whether restrictions on court reporting are in line with the right to freedom of expression, the European Court uses the following set of principles:

1. **The press plays pre-eminent role** in a State governed by the rule of law:[10] The European Court has repeatedly stated that the freedom of the press provides the public with one of the best means of discovering and forming an opinion of issues of public interests.[11] The media have a **duty to impart information and ideas** concerning matters that come before the courts just as in other areas of public interest[12] and the reporting about court proceedings also contributes to their publicity.[13]

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[7] See, e.g., *Worm* v *Austria*, Appl, No. 22714/93, 29 August 1997; *Obukhova* v *Russia*, Appl. No. 34736/03, 8 January 2009*; Ressiot and Others v France*, Appl. No. 15054/07, 28 June 2012, para. 102.
[8] *Sunday Times v UK* (No. 1), Series A No. 30, 26 March 1979, para. 65.
[9] *Prager and Oberschlick* , Application No. 15974/90, 22 March 1995, *Barfod v. Denmark*, Application No. 11508/85, 22 February 1989, *Semik-Orzech v Poland*, No. 39900/06, 15 November 2011,*Mustafa Erdoğan and Others v. Turkey*, Applications nos. 346/04 and 39779/04), 27 May 2014,
[10] *Prager and Oberschlick ,ob.cit.*, para. 34.
[11] See, for example, *Oberschlick* v *Austria*, No. 11662/85, Series A, No. 204, 23 April 1991, para. 58.
[12] *Sunday Times v UK*, *op.cit.*
[13] *Worm v Austria*, Appl. No 83/1996/702/894, 29 August 1997, para 50.

2. **Debates on issues of public interest, such as the functioning of the justice system require a stronger protection:** The European Court has held that "very strong reasons" are required to justify restrictions on debates on political and public issues.[14] It considers that issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection.[15] It recognised that criticism of the judiciary fulfils a vital function in a democracy and that journalistic freedom permits "a degree of exaggeration, or even provocation."[16]

3. **The exercise of the right to freedom of expression carries with it special duties and responsibilities:** The Court has held that journalists should act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.[17]

4. **Statements of fact and value judgement**: The European Court has held that in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments. For example, It stipulated that

> While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself... The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive.[18]

5. **Academic freedom requires a higher protection**: The European Court has recognised that academic freedom includes the freedom to criticise court decisions and the administration of trials and subjects the facts of court cases concerning academic speech to "careful scrutiny."[19]

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[14] See, for example, *Fatullayev* v *Azerbaijan*, No. 40984/07, 22 April 2010, para. 117.
[15] See for example, *Mustafa Erdoğan and Others v. Turkey*, *op.cit* para. 40
[16] *Prager and Oberschlick*, *ob.cit*, para. 38.
[17] *Standard Verlagsgesellschaft mbH (No. 2)* v *Austria*, No. 37464/02, 22.2.07, para. 38.
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[18] *Mustafa Erdoğan*, *op. cit.*, para. 36. In this case, concerning the conviction of a law professor for defamation in connection with his article criticising Constitutional Court judges, the European Court found that the Turkish courts failed to make a distinction between value judgements and statements of fact. The Court concluded that the expressions used by the law professor may be regarded as insulting, but they were not a personal attack on the judges and should be considered in the context in which they were made – during a public debate following up the release of a decision of the Constitutional Court. Therefore, it found that the conviction of the law professor for defamation was unnecessary and violated his right of freedom of expression.
[19] *Ibid.* para 40. The Court also underlined the importance of academic freedom, stating "in this connection, academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction … It is therefore consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings … This freedom, however, is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof."

Analysis of the provision

Article 19 of the Civil Code of Procedure of Kazakhstan proclaims the obligatory nature of court decisions. The Draft Amendment expands this provision by adding a new sentence to Article 19 para 4:

> **The direct public criticism of court's findings included in a court decision shall be prohibited, if the decision has entered into force and it is no longer possible to repeal or amend the act in the manner prescribed by this Code.**

General observations
As outlined above, the criticism of court decisions is allowed under international law. As stipulated by the European Court, the media should be able to not only cover trials, but also "to formulate and disseminate their views and opinions on important issues involved in or connected with the subject matter of cases under judicial consideration."[20] The criticism of court decision also gives the courts "an opportunity to obtain feedback on how their acts and judicial decisions are understood and regarded by the public."[21] The criticism of the judiciary helps the public understand better the complexity of the issues involved in the administration of justice.[22]

Therefore, ARTICLE 19 considers that the ban on criticism of court decision, *per se*, goes against international freedom of expression standards.

Specific problems
The ban of criticism of court decisions imposed by the Draft Amendment amounts to an interference with the right to freedom of expression.[23] Hence, it must meet the three-part test outlined above.

ARTICLE 19 finds the Draft Amendment fails to meet this standard for the following reasons:

- **The ban is overbroad** and fails to meet the requirement of legal certainty. The wording of the Draft Amendment, in particular the expression "direct public criticism," can be interpreted in various ways and journalists and ordinary individuals would be unable to decide how they must act. The lack of clarity may result in a fear of discussing court decisions and limit the public scrutiny over the judiciary.

- **The purpose of the ban is unclear**: ARTICLE 19 recalls that international law requires all restrictions on the right to freedom of expression pursue one of the legitimate aims, explicitly listed in Article 19(3) of the ICCPR: respect of the rights or reputations of others; the protection of national security or of public order (ordre public), or of public health or morals.

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[20] *C.f.,* European Court, *Semik-Orzech v Poland*, *op..cit*, para. 62.
[21] *Ibid.*
[22] *Ibid.*.
[23] *C.f.,* the European Court,*Barfod v. Denmark*, *op..cit*, para. 25; *Prager and Oberschlick*, o*p.* cit.

We note that it is difficult to discern the purpose of the ban of criticism of court decisions. Since the Draft Amendment expands Article 19 of the Civil Code of Procedure - which proclaims the obligatory nature of court decisions - it could be assumed that its purpose is to guarantee that court decisions are observed. However, we note that the observance of court decisions could not justify a restriction on the right to freedom of expression as it is not among the aims listed in Article 19 (3) of ICCPR.

- **The ban is not necessary**: ARTICLE 19 finds the ban on criticism of court decisions unnecessary in a democratic society. The ban is in conflict with all established international principles regarding court reporting, as outlined above:

    - The ban prevents the media from discovering and forming opinion on the functioning of the judiciary and the quality of court decisions, which are issues of public interests.

    - The ban affects not only the right and the duty of the media to seek and impart information but also the right of the public to be informed of issues of public interest.

    - The ban affects the freedom to hold public debates on the functioning of the justice system. In contrast to international law, which affords higher protection to debates on such issues, the ban would put a stop on them.

    - By adopting the ban, the legislator would restrict academic freedom rather than protect it. Academics and law practitioners would be prevented from expressing publicly critical opinions on court decisions. The academic silence on the administration of justice would affect the public understanding of the issues involved and the ability to scrutinise courts. At the same time it would prevent courts from obtaining feedback on how their acts are understood.

- **Proportionality of the restriction**: An absolute restriction on the right to freedom of expression, such as the ban on criticism of court decision, does not meet the proportionality test for interferences with this right because, on balance, the harm caused to the overall public interest is greater than any interest it may seek to protect.

In sum, considering the nature and severity of the restriction, ARTICLE 19 is of the opinion that the ban on criticism of court decision is unnecessary and would disproportionately affect the media freedom, public information, public debate on the functioning of the judiciary, criticism of judges in their professional capacity and academic freedom.

In conclusion, and in view of the above findings, ARTICLE 19 considers that the ban of criticism of court reporting is in breach of Article 19 of the ICCPR.

Recommendations:

- **ARTCLE 19 calls on the legislator to remove the ban on criticism of court decisions from the draft Civil Code of Procedure.**

About ARTICLE 19

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year and Memorandums on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/publications/law/legal-analyses.html.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about the ARTICLE 19's work in Kazakhstan, please contact Nathalie Losekoot, Head of Europe, at Nathalie@article19.org.