



EXPERT MEETING

Central Asia Judicial Dialogue

Wednesday, 19 December 2018 - Bishkek, Kyrgyzstan

The role of the judiciary in protecting free expression and media freedom

Conclusions

This conference has focussed on the importance of national judges in adjudicating cases concerning restrictions on freedom of expression and freedom of the media, particularly limitations imposed on the grounds of national security. Counter-terrorism and counter-‘extremism’ approaches – whether laws, policies and practices – have been shown to have far reaching effects upon media freedom across the region of Central Asia. Anti-‘extremism’ laws in particular, especially prohibitions on the mere possession of ‘extremist’ material, have been used to crackdown upon journalists and others raising their voices in states across the region, in various ways: journalists have been prosecuted or investigated for reporting on or speaking out against matters in the public interest, including the impact of such anti-‘extremism’ measures; journalists and others have been prosecuted for “liking” social media posts of allegedly ‘extremist’ content; and websites have been blocked on the grounds that they host ‘extremist’ content, limiting the public’s right to know, as well as journalists’ rights to disseminate information in the public interest. The effect of this crackdown has been the silencing of journalistic and other critical voices and, relatedly, the suppression of democratic debate, across Central Asia.

Against this worrying backdrop, national judiciaries have an important role to play in exercising their appropriate role as checks on executive and legislative power. National judiciaries have a critical function in protecting human rights, including freedom of expression and freedom of the media. National judges should uphold such rights and ensure that, when they are violated by state authorities on the pretext of national security, that there is due accountability. In doing so, national judges should ensure that the crucial role of the media in informing the public about matters of public interest, including national security threats and states’ policies in response, is not unduly restricted. They should also not penalise or uphold convictions against journalists for carrying their legitimate activities. To exercise their legitimate function of interpreting and enforcing the law, the independence of judges ought to be protected in law and in practice.

Recommendations

The OSCE Representative on Freedom of the Media makes the following recommendations to safeguard the critical role of national judiciaries in protecting freedom of expression and freedom of the media while addressing cases concerning counter-terrorism and counter-terrorism approaches.

1. In accordance with the *Basic Principles on the Independence of the Judiciary*,¹ the independence of the judiciary should be protected. In particular:
 - a. judicial independence should be guaranteed and enshrined in the Constitution or the law;
 - b. all state authorities and institutions should respect and observe the independence of the judiciary; and
 - c. the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

National judges should decide cases concerning the relationship between the state's national security, on the one hand, and freedom of expression and freedom of the media, on the other, in accordance with the rule of law, including the obligations of the state under international human rights law, in particular with Article 19 ICCPR and Article 19 of the UN Human Rights Convention.

2. In adjudicating cases concerning national security, particularly those concerning the application of counter-terrorism and counter-'extremism' provisions, national judges should apply the following general principles.
 - a. Any restrictions on freedom of expression and freedom of the media should be provided by law.
 - i. Any such law should be precise enough for an individual to be able to regulate her/his conduct and publicly accessible.
 - ii. The burden should be on the State to demonstrate the legal basis for any restrictions imposed on freedom of expression and freedom of the media.
 - b. Any restrictions on freedom of expression and freedom of the media should meet a legitimate aim, such as the protection of national security.
 - i. Such limitations should be clearly and narrowly defined.
 - ii. National judges should not uphold restrictions which rely on an overbroad application of the law. Thus, they should not uphold restrictions that are used to suppress or withhold from the public information of legitimate

¹<https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>

public interest that poses no harm to national security. Nor should they prosecute journalists for having disseminated such information.

- c. Any restrictions on freedom of expression and freedom of the media should not lead to unnecessary or disproportionate interferences with these rights.
 - i. In determining whether restrictions on these rights, including those imposed in the name of national security, infringe upon the principle of proportionality, national judges should consider whether such measures are appropriate and the least intrusive means to achieve their purported protective function.
 - ii. When a State party invokes national security as a ground for the restriction on freedom of expression or freedom of the media, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.
 - iii. National judges should take account of the form of expression at issue as well as the means of its dissemination. Thus, they should place high value on information which is critical to public debate, such as concerning political figures or concerning the exercise of political power.

3. In addition, national judges should have due regard for the following principles.

- a. All those accused of terrorism or ‘extremism’ charges, particularly journalists, should be afforded their rights to due process at all stages of criminal investigation, prosecution, and, if applicable, sentencing and detention;
- b. Provisions on the possession or dissemination of ‘extremist’ content should be interpreted in accordance with international standards, so that they encompass clearly defined and objective definitions of ‘extremism’ including the element of a deliberate intent to incite violence.
- c. Those accused of offences involving prohibited material should have a right to effectively challenge expert categorization of materials as ‘extremist’.
- d. Convictions in cases involving possession of material deemed to be ‘extremist’ that do not actually involve the use or intent to use such material to incite or commit violence should be quashed.
- e. Those responsible for the torture and other acts of ill-treatment as well as other serious abuses and violations of the rights of individuals accused of ‘extremism’ for the legitimate exercise of their freedom of expression should be held accountable.
- f. Individuals accused of national security offences, notably ‘extremism’ and terrorism, should have meaningful rights to appeal their convictions.

- g. Judicial verdicts on cases involving ‘extremism’ and terrorism being pronounced in public.

Final remarks

The Conference in Bishkek has shown the judiciary throughout the Central Asia region has a sustained interest in application and interpretation of the national laws pertaining to the national security, while upholding freedom of the media. By the same token, members of judiciary expressed their genuine interest in practical application of international media freedom standards in adjudicating cases involving journalists and active social media users.

The Conference has proven that the judiciary in Central Asia are keenly interested in and aware of the recent cases involving media and social media throughout the region. They are equally interested in relevant experience from outside the region.

Many topics remained outside the scope of the December 2018 Dialogue, in particular, defamation, libel and insult, the right to privacy and the public interest, classified information and corporate secrets, *etc.*

This situation calls upon establishing a series of similar events in the future and establishing a forum for information exchange among the judiciary in the region.