



SECOND EXPERT MEETING *Central Asia Judicial Dialogue*

5-6 March 2020 - Samarkand, Uzbekistan

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

Conclusions

The second Judicial Dialogue follows up on a successful event, which established this platform in Bishkek in December 2018. National judiciaries have a critical responsibility in protecting freedom of expression and in determining the circumstances under which states can restrict freedom of expression in conformity with international standards.

The topics of the event include the latest trends in the case law addressing violent extremism and radicalisation that lead to terrorism in the OSCE area, judicial measures against incitement to ethnic and religious enmity in the region, as well as defamation and insult case law. These topics derive from the most frequently addressed cases of offensive and sometimes illegal content encountered, both in online news resources and on social networks.

The Judicial Dialogue platform allowed comparing and evaluating national approaches to these issues in all of the Central Asian states but also in other OSCE participating States, and present case studies in the course of reforms that have been undertaken. It aims at strengthening the capacity of the judiciary to protect freedom of expression and media freedom while taking into account the security context and encouraging the exchange of best practices in the OSCE region.

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. National judges should in particular critically assess whether the measures taken are proportionate and whether no alternatives are available.

Justice should be delivered timely by competent, ethical, and independent neutral representatives, who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

Recommendations

The OSCE Representative on Freedom of the Media provides the following recommendations to safeguard the critical role of independent national judiciaries in protecting freedom of expression and freedom of the media in the cases of violent extremism and radicalisation that lead to terrorism, incitement to ethnic and religious enmity, as well as in defamation and insult case law.

1. In accordance with the UN-endorsed *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.
2. National judges should adjudicate cases concerning the relationship between public interests related to violent extremism and radicalisation, ethnic and religious enmity, 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 and OSCE commitments. In this regard, they are to take into account in their relevant decisions the need to protect freedom of expression and freedom of the media.
3. In adjudicating cases concerning violent extremism and radicalisation that lead to terrorism, incitement to ethnic and religious enmity, 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 public interests or other human rights.
 - i. Such limitations should be clearly and narrowly defined.

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

- ii. National judges should not uphold any restrictions which are imposed merely on the pretext of public interests and/or which rely on an overbroad application of the law. Thus, they should not uphold restrictions that are designed and/or used to suppress or withhold information of legitimate public interest or to 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 or public 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 or public 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. Judges need is a critical attitude *vis-à-vis* submissions of governmental organizations. Critical views mean not to believe blindly in the truthfulness and accuracy of claims submitted by prosecution, police and other agencies dealing with public security and accept an attitude to request transparent, undisclosed and supporting evidence from such submitting parties.
 - iv. 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 and other public figures or concerning the exercise of political or economic power.
- 4. In addition, judges should have due regard for the following principles.
 - a. All those accused of disseminating content of violent extremism and radicalisation that lead to terrorism, incitement to ethnic and religious enmity, as well as in defamation and insult case law, particularly journalists, should be afforded their rights to due process at all stages of criminal or civil procedure;
 - b. Provisions on the possession or dissemination of extremist content and “hate speech” should be interpreted in accordance with international standards, so that they encompass clearly defined and objective definitions 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 or “hate speech”.
 - d. Convictions in cases involving possession of material that does not actually involve the use or intent to use such material to incite or commit violence or discrimination should be quashed.
 - e. Individuals accused of violent extremism and radicalisation that lead to terrorism, incitement to ethnic and religious enmity, as well as insult, should have meaningful rights to appeal their convictions.
5. Following the OSCE commitments of the participating States, including those of the region, defamation law should not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public, in compliance with participating States’ obligations under international human rights law