India: ICJ urges review of criminal contempt laws after Supreme Court convicts human rights lawyer for social media posts critical of judiciary

The ICJ today expressed its concern regarding the 31 August 2020 and 14 August 2020 decisions of the Indian Supreme Court to convict prominent human rights lawyer Prashant Bhushan for criminal contempt of court, on the basis of two twitter posts in which the lawyer criticized the performance of the Indian judiciary.

While the Court only imposed a symbolic fine of one rupee, rather than imprisonment, the ICJ considers that the conviction appears to be inconsistent with international standards on freedom of expression and the role of lawyers. The ICJ stressed that the ruling risks having a chilling effect on the exercise of protected freedom of expression in India and urged a review of the laws and standards on criminal contempt as applied by the Indian courts.

The two tweets published by Prashant Bhushan referred to the Chief Justice of India riding an expensive motorbike belonging to a BJP leader "when he keeps the SC in Lockdown mode denying citizens their fundamental right to access justice" and asserted that the Supreme Court and the last four Chief Justices of India had contributed to how, in his view, "democracy has been destroyed in India even without a formal Emergency"

The Court in its 31 August judgment held that the tweets were a serious attempt to "denigrate the reputation of the institution of administration of justice" which, it said, is "capable of shaking the very edifice of the judicial administration and also shaking the faith of common man in the administration of justice."

The Court considered that its ruling was consistent with freedom of speech and expression under Article 19 of the Indian Constitution, saying that it will have to balance its exercise of power to punish for contempt for itself (Article 129) with freedom of speech and expression. The ICJ is concerned, however, that the conviction appears inconsistent with international law on freedom of expression as guaranteed by the International Covenant on Civil and Political Rights (Article 19, ICCPR) to which India is a party. While some restrictions of freedom of expression are permitted by international standards, a particularly wide scope must be preserved for debate and discussion about such matters as the role of the judiciary, access to justice, and democracy, by members of the public, including through public commentary on the courts. Any restrictions must be strictly necessary and proportionate to meet a legitimate purpose, such as protecting public order or the rights and reputations of others.

"There is a general concern that the protection of freedom of expression is rapidly eroding in India," said Ian Seiderman, ICJ Legal and Policy Director. "We have seen this recently around the COVID 19 crisis in relation to the imprisonment of human rights defenders, on draconian charges of sedition, rioting and unlawful assembly for protesting against the Citizenship (Amendment) Act."

"While the Indian Supreme Court has over the years generally been an institution that has served to advance human rights in India and globally, we fear it now may be perceived as silencing criticism and freedom of expression by invoking outdated criminal contempt laws." added Ian Seiderman.

The ICJ joins the 1800 Indian lawyers in calling for the Supreme Court "to review the standards of criminal contempt", emphasizing that the law is overbroad and should be aligned with international law and standards on the limited scope for restrictions on freedom of expression and criminal contempt.

"Prashant Bhushan is a lawyer and lawyers being part of the legal system have a ring-side view and understanding of the state of the court. Convicting a leading lawyer for contempt for expressing his views in this manner may have a chilling effect on lawyers, in particular considering his involvement in many public interest litigation cases," said Mandira Sharma, ICJ South Asia Senior Legal Advisor.

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Background

The Indian Supreme Court on 31 August 2020 and 14 August 2020 held lawyer Prashant Bhushan in criminal contempt of court. In what it described as its "magnanimity" it only imposed a nominal fine of one rupee, to be paid by September 15, 2020. The Supreme Court specified in the judgement that if the fine were not paid, he would face simple imprisonment for a period of three months and debarment from practicing in the Court for a period of three years. He has stated that he intends to pay the fine.

The Supreme Court on 14 August 2020 had determined that the tweets were not a "fair criticism of the functioning of the judiciary, made bona fide in the public interest." The Court stated that the tweets "scandalize[d]" the authority of the courts and interfered with the "administration of justice". It held that "it is not necessary to prove affirmatively that there has been an actual

interference with the administration of justice by reason of such defamatory statement and it is enough if it is likely, or tends in any way, to interfere with the proper administration of justice." As per Article 129 of the Constitution, the Supreme Court has the power to "punish for contempt of itself".

Another contempt of court proceeding remains pending against Prashant Bhushan, based on an interview he gave in 2009, wherein he opined about judicial corruption. Hearings on the case had not taken place since 2012, until hearings in July and August 2020. The matter has since been adjourned until 10 September, when a new judicial bench will be constituted to hear it. The bench is expected to examine whether public allegations about judicial corruption can be made and the process for making such allegations.

Among the applicable international standards on freedom of expression of lawyers and human rights defenders as well as judicial conduct, here are the following.

Article 19 of the ICCPR provides in part that, "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." However, it also specifies that, the exercise of those rights may be subject to certain restrictions, "but these shall only be such as are provided by law and are necessary: (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 UN Human Rights Committee, mandated by the ICCPR with monitoring its implementation by States, has affirmed (in its "General Comment no. 34") that, "The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party."

While contempt of court laws can constitute "provision by law" as required by Article 19, all such laws "must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not." The Committee says that, "Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings."

The Committee emphasizes that any restriction of freedom of expression, even "deeply offensive" expression, "must conform to the strict tests of necessity and proportionality", and this is "not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The

Committee has also said that "the principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination", and that, "For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain." Indeed, "all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism".

Even when State authorities can invoke a legitimate ground for restriction of freedom of expression, the Committee has held, the authorities "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." The Committee has particularly urged that States "should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty"; similar considerations should presumably apply to use of criminal contempt powers to punish "defamation" of a government institution such as the judiciary.

The UN Basic Principles on the Role of Lawyers affirm lawyers' right to freedom of expression, and in particular that lawyers "shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights", though they should "always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession" in so doing. The UN Declaration on Human Rights Defenders emphasizes that human rights defenders and others have a right to "publish, impart or disseminate to other views, information and knowledge on all human rights and fundamental freedoms".

The Commentary on Bangalore Principles on Judicial Conduct, adopted by the Judicial Integrity Group (of whom former Chief Justice of India the Hon. Prafullachandra N. Bhagwati, was a longstanding member), published by the UN Office on Drugs and Crime, urges that contempt powers should be "used as a last resort, only for legally valid reasons and in strict conformity with procedural requirements" and that, "It is a power that should be used with great prudence and caution." The Commentary elaborates that: "In striking an appropriate balance between, for example, the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press, a judge must accept that he or she is a public figure and that he or she must not have a disposition that is either too susceptible or too fragile. Criticism of public office holders is common in a democracy. Within limits fixed by law, judges should not expect immunity from criticism of their decisions, reasons, and conduct of a case."

The Commentary also states: "Members of the public, the legislature and the executive may comment publicly on what they may view to be the limitations, faults or errors of a judge and his or her judgments. Owing to the convention of political silence, the judge concerned does not ordinarily reply. While the right to criticize a judge is subject to the rules relating to contempt, these are invoked more rarely today than they were formerly to suppress or punish criticism of the judiciary or of a particular judge. The better and wiser course is to ignore any scandalous attack rather than to exacerbate the publicity by initiating contempt proceedings."

The Latimer House Guidelines for the Commonwealth also stresses that "criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions".