

18 August 2020

STATEMENT

BHRC deeply concerned by Indian Supreme Court interference with legitimate criticism

On Friday 14th August senior human rights lawyer Prashant Bhushan was convicted of criminal contempt of court by the Supreme Court of India. In publishing two tweets relating to the Chief Justice of India and the role of the Supreme Court in the last six years, on his Twitter feed, he was found to have committed “contempt which scandalises or lowers the authority of the Supreme Court”, pursuant to section 2(c)(i) of the Contempt of Courts Act 1971. He faces a maximum sentence of six months imprisonment and a fine, to be determined on Thursday 20th August.

As a regular commentator on political and legal matters, Mr Bhushan published a tweet on 29th June in which he criticized the Chief Justice of India for riding a motorcycle, belonging to a leader of a political party, in the absence of a mask or helmet while the Supreme Court was in virtual lockdown due to the Covid-19 pandemic, thereby denying citizens access to justice.

On 27th June he published a tweet criticising the Supreme Court and the last four Chief Justices for what he described as their role in the destruction of democracy in India. It is for these two tweets that he was convicted of scandalising the Court.

The law of contempt by scandal

Scandalising the court, judiciary or judges is an old English common law offence, consisting of the publication of statements attacking the judiciary itself and likely to impair the administration of justice, as opposed to obstructing court proceedings or the administration of justice.

In England the offence had not been prosecuted for over 80 years and as such, the Law Commission recommended its abolition in 2012, which subsequently took place through the Crime and Courts Act 2013. The Law Commission concluded the offence is in principle an infringement of freedom of expression that should not be retained

without strong principled or practical justification, is no longer in keeping with current social attitudes, and is unlikely to influence the behaviour of publishers.

The Commission also found that the conditions for committing the offence are uncertain, which is in itself a potential violation of human rights principles. The Commission also considered that in prosecuting the offence, judges might look as if there is an attempt to stymie free speech or legitimate criticism. The Commission observed that in practice, the prosecution of such an offence could have undesirable effects. These include re-publicising the allegations, giving a platform to the contemnor and leading to a trial of the conduct of the judge concerned.

The offence of scandalising the court arose in an era where deferential respect to authority figures was the norm and before a human rights framework protected the civil liberties of individuals and enabled the institutions of power to be held properly to account.

Nevertheless, the English jurisprudence shows that the offence relates to abuse of the judiciary of a fairly extreme and irresponsible kind. Criticism in good faith, as part of a discussion of a question of public interest, does not fall within the offence.

The right to freedom of expression

India respects the right to freedom of expression, both through Article 19 of the Indian Constitution and as a signatory to the International Covenant on Civil and Political Rights, which in its Article 19 preserves the right to freedom of expression, including to impart information and ideas. The right is qualified, in this context, only by restriction provided by law that is necessary and proportionate for the respect of the rights or reputations of others. There must therefore be a pressing social need to interfere with the comments made and an appropriate measure taken in response.

The UN Basic Principles on the Role of Lawyers 1990 expressly recognises in Article 23 that:

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they 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 and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

The Court's judgment

The Supreme Court of India determined that in suggesting the Court was not administering justice effectively during lockdown, or has failed to appropriately conduct its constitutional role over the past six years, Mr Bhushan had committed criminal contempt.

The Court rightly asked itself whether the comments were made in good faith, but concluded at [70]-[71] that:

The scurrilous allegations, which are malicious in nature and have the tendency to scandalize the Court are not expected from a person, who is a lawyer of 30 years standing. In our considered view, it cannot be said that the above tweets can be said to be a fair criticism of the functioning of the judiciary, made bona fide in the public interest....An attempt to shake the very foundation of constitutional democracy has to be dealt with an iron hand.

BHRC's position

We are extremely concerned that the Court in reaching its decision did not hold in contemplation that lawyers are entitled to, and should have, the freedom to voice publicly legitimate criticism of how justice is administered.

Mr Bhushan's tweets, as his affidavit in reply to the contempt attests, were part of a widespread debate and critical discussion in the legal community of how the Supreme Court of India - as the protector of the constitution and check on State power - administers justice. To stymie such criticism risks a chilling effect on appropriate and necessary debate to advance law reform in a democratic society.

The right to freedom of expression in the context of legal process importantly preserves the principle of open justice - to allow scrutiny of proceedings to ensure proper judicial conduct and a fair trial, to enhance public confidence, to deter future offences, and to inform the public about matters in the public interest. An independent and impartial judiciary is stronger when enabling open and public debate on its operations.

We call upon the Supreme Court of India to:

- Enable an effective review process of the decisions of the Court to instigate contempt proceedings of its own motion and to convict Mr Bhushan of criminal contempt;
- Stay sentencing of Mr Bhushan until such review has been conducted;
- In any event, discharge Mr Bhushan from serving any punishment for the offence, commensurate with the broader context of public debate and the right to freedom of expression and legitimate criticism that the legal profession is entitled to exercise.

We also call upon the Government of India and the Parliament of India to abolish with all due expediency the continued statutory offence of criminal contempt by scandal, preserved in section 2(c)(i) of the Contempt of Courts Act 1971, as a violation of the fundamental right to freedom of expression, speech and legitimate criticism.

ENDS.

NOTES FOR EDITORS

1. For an interview with our spokesperson, please contact Josie Fathers, Project Coordinator on coordination@barhumanrights.org.uk or +44 (0)7854 197862
2. For more information on the Bar Human Rights Committee (BHRC), visit our website at <http://www.barhumanrights.org.uk>
3. The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales, working to protect the rights of advocates, judges and human rights defenders around the world. BHRC is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. It is independent of the Bar Council.
4. The report of the Law Commission of England and Wales, Contempt of Court: Scandalising the Court, Law Comm. No 335; HC 839 (2012) is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc335_scandalising_the_court.pdf
5. The judgment of the Supreme Court of India is available at https://www.livelaw.in/pdf_upload/pdf_upload-379895.pdf
6. Prashant Bhushan's affidavit is available at https://www.livelaw.in/pdf_upload/pdf_upload-379389.pdf