

Mandates of the Working Group on Arbitrary Detention and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
AL IND 32/2018

3 January 2019

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention and Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolutions 33/30 and 34/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the arrest and pre-trial detention under the National Security Act of Mr. **Kishorechandra Wangkhem**, a journalist, for criticizing the Government in a video posted on his private Facebook account.

Mr. Kishorechandra Wangkhem is a journalist and worked with the Information Service Television Network (ISTV) in Manipur. He served as the desk editor of ISTV until 19 November 2018.

According to the information received:

On 19 November 2018, Mr. Wangkhem posted a live video on his personal Facebook account expressing anger and frustration with the Bharatiya Janata Party (BJP) Government celebrating Rani Laxmi Bai (Jhanshi ki Rani) at the BJP Office in Canchipur. He expressed indignation toward the Hindutva ideology and what he saw as its effort to create a pan-Hindu identity for India.

On 21 November 2018, 11 plainclothes policemen arrived at Mr. Wangkhem's home and arrested him under order FIR no. 236 (11) 2018 filed at the Imphal Police Station under Section 124-A/294 (sedition) and section 500 of the Indian Penal Code. The policemen reportedly told Mr. Wangkhem that the city's police chief wanted to speak to him. Mr. Wangkhem asked if he could call his lawyer, but the policemen refused. By the evening, Mr. Wangkhem was taken to a high security prison on the outskirts of Imphal.

On 26 November 2018, the Chief Judicial Magistrate issued an order granting Mr. Wangkhem bail. The order stated that the "said words, terms and gestures used by the accused and the context in which they are used and the comment made by the accused person cannot be termed seditious to attract offence u/s 124-A IPC. It appears to be a mere expression of opinion against public conduct of a public figure in a street language. It does not appear to me to such which is intended to create enmity between different groups of people community, sections etc. nor does it appear to be one which attempts to bring hatred, contempt, dissatisfaction

against the government of India or the State. It is mere expression of opinion against the Prime Minister of India and Chief Minister of Manipur, which cannot be equated with an attack to invite people to violence against the Govt. of India or Manipur to topple it”.

On 27 November 2018, Mr. Wangkhem was arrested under the National Security Act (NSA) by an order of the District Magistrate of West Imphal. The National Security Act allows the State or Union Government to detained a person on being “satisfied” that they might act in any manner prejudicial to the defense of India, the relations of India with foreign powers, the security of India or maintenance of public order. Detention under the NSA can last up to 12 months, without the detainee being presented before a court of law. An advisory board has been established under the NSA to review detentions. The Advisory Board and the proceedings and the report of the board are confidential and the person detained is not allowed a lawyer to represent them before the Board. On 11 December 2018, the Advisory Board reviewed the case and on 13 December recommended that there were “sufficient grounds” for the detention of Mr. Wangkhem.

We express serious concern at the arrest and detention of Mr. Wangkhem. We are concerned at the criminalization of the peaceful exercise of freedom of expression through the use of the National Security Act, which is a broad and unspecific state security legislation, may have a chilling effect on public debate in India, including on the work of journalists. We are concerned that such legislation may be used particularly to target critical and dissenting voices in India. The facts alleged, if proved correct, would be in contravention, among other norms, with articles 9, 14, and 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded by India on the 10 April 1979. They guarantee the right not to be deprived arbitrarily of ones liberty and to fair proceedings before an independent and impartial tribunal, the right to be treated with humanity and respect for the inherent dignity of the human person, and the right to freedom of opinion and expression.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide additional information or comments you may have about the above-mentioned allegations.
2. Please provide detailed information about the factual and legal basis for the arrests and the detention of Mr. Wangkhem under the NSA for the videos he posted on Facebook. Please explain how this is compatible with articles 9 and 19 of the ICCPR.

3. Please provide information about the conditions of detention of Mr. Wangkhem, including his access to lawyer, access to information about the case against him, and access to visits by his family.
4. Please provide information about the assessment made by the Advisory Board under the NSA to confirm the detention of Mr. Wangkhem.
5. Please provide information about measures to be taken to ensure that the NSA is brought into compliance with international human rights standards.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We would like to inform your Excellency's Government that after having transmitted an allegation letter to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such letters in no way prejudice any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above. In particular, the facts alleged, if proved correct, appear to be in contravention, among other norms, with articles 9, 14, and 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded by India on the 10 April 1979. They guarantee the right not to be deprived arbitrarily of one's liberty and to fair proceedings before an independent and impartial tribunal, the right to be treated with humanity and respect for the inherent dignity of the human person, and the right to freedom of opinion and expression.

Article 19 of the ICCPR provides 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". Restrictions on freedom of expression must be strictly limited and meet the high threshold set out in article 19(3) of the ICCPR. They must be provided by law, and be necessary to achieve a legitimate purpose, namely the protection of national security, public order, public health or morals. The restrictions must be proportional in the sense that they must be appropriate to achieve their protective function; and the restriction must be provided by law.

We are particularly concerned at the criminalization of freedom of expression through the application of provisions in the National Security Act. The application of such law on cases involving the legitimate and peaceful exercise of freedom of expression may create an atmosphere of fear and intimidation that could negatively affect the right to freedom of expression of others, leading to self-censorship and the stymieing of creative and responsible public debate on issues of public interest.

In its General Comment No. 34 on Freedoms of opinion and expression (CCPR/C/GC/34), the Human Rights Committee stated that States parties to the ICCPR are required to guarantee the right to freedom of expression, including inter alia 'political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism', subject only to admissible restrictions referred to above as well as the prohibition of propaganda for hatred and incitement to hatred, violence and discrimination.

The charging of individuals and journalists with national security crimes under the NSA also raises concerns as the provision is vague and constitutes unnecessary and disproportionate restriction on freedom of expression. The Human Rights Committee has highlighted that '[e]xtreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that confirms to the strict requirements of paragraph 3'. The Committee notes that 'to invoke such laws to

suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others for having disseminated such information' is not compatible with article 19.

Moreover, the detention of individuals under the NSA are in contravention of the right to due process and a fair trial. We would like to appeal to your Excellency's Government to take all necessary measures to guarantee the right of individuals in detention not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 14 of the ICCPR. Moreover, we would like to remind that article 9, paragraph 3, requires that "any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. That requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it. [...] While the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances" (CCPR/C/GC/35, paras. 32 and 33). Moreover, we wish to remind that the right to challenge the legality of detention before a court is a rule of customary international law and has in fact acquired a status of *jus cogens*, which does not permit derogations. Moreover, in accordance with the international law applicable to situations of emergency, the domestic legislative framework should not allow for any restriction on the safeguards of persons deprived of their liberty concerning the right to bring proceedings before a court, including the right to be informed of the reasons for arrest, the right to be informed of the legal basis and of the judicial order for detention and the right to legal counsel. In addition, persons deprived of their liberty must have sufficient time to prepare their defence (A/HRC/WGAD/2017/41, para. 76).