# People's Union for Democratic Rights

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This newsletter is part of an initiative by PUDR to keep those interested in the organisation's work and issues of civil liberties and democratic rights informed of some of the issues that we are working on. A more comprehensive account of the issues and organisation's work can be found on https://www.pudr.org/.

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## Incarceration and Remission

The August 15 release of 11 men sentenced to life for murder and rape in the Bilkis Bano case has raised critical questions about the purpose of incarceration and remission. Does the current system meet the goals for which it was designed? Does it ensure equality before the law and the criminal justice system's goals of reform and rehabilitation? These questions are also brought to the fore by cases where remission has been denied – such as the continuing incarceration of the accused in the Bara massacre case, or where remission is granted only after labyrinthine legal struggles as in the release of Perarivalan earlier this year followed by the other accused in the Rajiv Gandhi assassination case.

On what grounds are some accorded remission and release and others denied the same? Is there an equitable process at arriving at these decisions? A brief look at these three cases is a useful way of examining the systems, procedures and guidelines for remission that are in place and its actual implementation.

While the death penalty continues to be used in what the judiciary constructs the rarest of rare cases (most recently in the case of Mohammmed Arif where the charge of terror has been used a justification for upholding death sentence – see box), the courts of late have reasoned in favour of longer life terms as an alternative to the death penalty. The IPC does not clarify what is meant by a life term, and only qualifies the minimum number of years a person is required to spend in jail once imprisoned for life. CrPC grants power to both the Central and state governments to suspend or remit sentences. The power to remit is predicated on the convict having served a minimum sentence of 14 years in cases where the conviction is for an offence for which the maximum punishment is death. This had given rise to a practice of treating a standard period

of 14 years as 'life term', on completion of which remission could be sought from the executive.

Over the years however, the judiciary has increasingly interpreted life term as the end of a convict's natural life. The courts have held that a term of 14 years is incommensurate to a penalty of death and hence should be replaced by life imprisonment for the remainder of the convict's natural life with no scope for remittance. The position was stated emphatically by a Supreme Court ruling in 2015 in *Union of India v. V Sriharan @Murugun*. The Court ascertained that the appellate courts have the authority to restrict remission powers of governments under the CrPC, while imposing life imprisonment and that no prisoner has a fundamental right to claim remission. How is this to be viewed in connection with the goal of reform and rehabilitation of the criminal justice system? If the judiciary claims to uphold the right to life by commuting death penalty to life term, but given the state of prisons in India, is endless imprisonment a humane outcome? Can endless imprisonment ensure reform?

In the Perarivalan case, where the state government had sought to release him, its decision was opposed by the central government. The Supreme Court settled the issue of federal powers in favour of the state government. The release gives hope to prisoners (see PUDR statement) who are serving life sentences without the expectation of remission, especially in terror-related cases where the standard of evidence is low, the normal safeguards of due process are greatly diluted and the burden of proof favours the prosecution as was evident from subsequent developments in the Perarivalan case.

IPS officer V. Thiagarajan, who had recorded Perarivalan's 'confession', revealed in subsequent years that he had omitted parts of the testimony that would have made it clear it was not a

confession. Justice K.T. Thomas who presided over the Supreme Court bench has stated that the confessions of the accused were used as substantive evidence rather than corroborative evidence because the cases were being tried under anti-terror laws.

In its order upholding the decision to release Perarivalan the court cited the length of incarceration, the good behaviour of the convict including while out on bail and his efforts to redeem himself. However is this reasoning applied to all cases? In 2021 in three cases of commutation, the SC ordered life term for a fixed term of 30 years to three persons, one case involved the charge of murder with rape (Irappa Siddappa Murgannavar v. State of Karnataka Criminal Appeal Nos. 1473-1474 of 2017) and two others involved the murder of multiple members of their own family (Mofil Khan and Anr. v. State of Jharkhand Review Petition (Criminal) No. 641 of 2015 and Bhagchandra v. State of Madhya Pradesh Criminal Appeal Nos. 255-256 of 2018). In all three cases, the Court observed that there was possibility for reform in the convicts yet owing to the 'gruesome' nature of the offences, they were sentenced for 30 years without remission. In a similar vein, the trial into the Bara massacre of 1992 spanned over two decades involving two different TADA courts and two different Supreme Court benches. In all, the apex court, in 2002, confirmed death penalty for four (Krishna Mochi, Vir Kuer Paswan, Nanhe Lal Mochi and Dharmendra Singh) and, in 2013, commuted two to life imprisonments (Bugul Mochi and Vyas Kahar). PUDR's report analyses the questionable 'fair' trial which was premised upon a series of omissions and procedural lapses and leniency of evidence gathered in defence of the prosecution's account. In 2017, the President commuted the four death penalties to life imprisonment. Importantly, though two of the convicts had served 25 years and the remaining two had also served 19 and 18 years respectively, the commutation has not clarified what 'life

imprisonment' means in this case. Arguing that imprisonment till the end of natural life is brutal and purposeless, PUDR has filed several appeals to authorities asking for remission which have not been paid heed to.

The circumstances for the prisoners in the Bilkis Bano case are substantively different. While the 11 had completed the minimum of 14 years of incarceration, there were complaints against four of them for threatening witnesses while out on parole and one of the convicts was also charged under IPC sections 354, 504, 506. Given the nature of the crimes they were convicted for, the prisoners would not have qualified for parole under the state government's current remission policy which was formulated in 2014 (and excludes those convicted of rape and murder) but were remitted on the basis of the 1992 policy which was in effect at the time of conviction. The reasoning behind the decision to release the convicts, which was approved by the Central government as well is not in the public domain and remains opaque. However public comments made by a committee member about the high caste status of the accused as a factor for release points to a problematic process of decision-making. The subsequent valorisation of the released convicts by a member of the RSS points to politicisation of their release (see PUDR statement).

Why does the system of remission remain opaque even while the justice system is premised on the principle of transparency ensuring equity? What condemns one convict to endless imprisonment and another to the minimum? Is it not time for a review of these systems to ensure that they are not opaque and arbitrary and to prevent them from being politicized?

**Box: Mohammad Arif**

On November 3 the Supreme Court upheld the sentence of death for Mohammad Arif, a convict in the Red Fort attack case of December 2000, marking an end to the convoluted judicial process from the initial award of death penalty by the sessions court in 2005 to successive levels of judicial appeals and review. Rejecting the review petition a three-member bench of the Supreme Court reasoned that terror attack by a foreigner is the most aggravating crime. The confirmation of death penalty comes at a time when the judicial tenor has been in favour of longer life imprisonments as a replacement to death penalty, and the courts have also ordered the release of Perarivalan and Nalini, the convicts in Rajiv Gandhi's assassination case, in May and November this year respectively. But in Arif's case, the court has decided to award death penalty as a punishment for the heinousness of "terror crime" drawing upon the identity of the accused. These developments bring to fore the fissures in judicial reasoning, an observation made in PUDR's statement demanding commutation.

## AFSPA

AFSPA has been extended in several districts of Assam, Manipur, Nagaland and Arunachal Pradesh. Following the withdrawal of some areas from the disturbed areas list in April, no state is fully covered by AFSPA.

A large part of Assam has been removed from the disturbed areas list and the Assam Chief Minister recently stated that the state was considering withdrawing it from Lakhipur of Cachar district and the entire Karbi Anglong district. Officials in Assam and Manipur have been quoted as saying that AFSPA has continued in areas of

the state contiguous to Nagaland. The Special Director General of Police, Assam has also revealed that the number of troops in the state had dwindled due to their redeployment in Ladakh.

Union Home Minister Amit Shah has said it was the government's aim to resolve inter boundary disputes in the northeast and strike a conciliation with all armed insurgent groups in the region before 2024. He however also said (AFSPA) would be removed only after the government had installed peace in the northeast.

Naga groups including the Naga People's Front have protested against the extension of AFSPA in Nagaland (see PUDR's March 2022 newsletter for more background on AFSPA).

### Bhima Koregaon, NIA and UAPA

In a significant judgement the Bombay High Court has granted bail to Anand Teltumbde, one of the accused in the Elgar Parishad/ Bhima Koregaon case citing a lack of evidence. The bail order was upheld by the Supreme Court which dismissed the challenge by the National Investigation Agency (NIA) on November 25.

In its bail order on November 18, the Bombay High Court had observed, "In the present case, seizure of the incriminating material as alluded to hereinabove does not in any manner prima facie leads to draw an inference that, Appellant has committed or indulged in a 'terrorist act' as contemplated under Section 15 of the UAP Act." The NIA had submitted that prima facie reading of these documents reveal that Appellant is an active member of CPI(M) and has been involved in activities to further its ideology to overthrow the state. In response, the Court said the five letters allegedly recovered from co-accused Rona Wilson's laptop and cited as evidence against Anand Teltumbde, was in the "realm of presumption" requiring

"further corroboration." It may be recalled that the contents of Rona Wilson's laptop are also a matter of dispute with a report from a Massachusetts-based digital forensics firm, Arsenal Consulting concluding that the letters were planted in the laptop by a hacker. The NIA's case against the accused is on the basis of these letters.

Rejecting the NIA's challenge to the High Court order, the SC bench noted that Teltumbde's participation in an event in Madras IIT was for dalit mobilization. The bench asked, "Is Dalit mobilization preparatory act to proscribed activity?" The Court, however, added that the High Court's observations will not be treated as final findings at the time of the trial.

The court also noted that the Bhima Koregaon incident resulted in one person's death. However, based on the draft charges and chargesheet the court said "we prima facie find that NIA has not investigated or made any investigation in respect of this aspect".

The court order points to issues that activists and human and democratic rights organisations have been raising about the UAPA. The law allows the presumption of guilt to outweigh the requirement of evidence, and the stringent restrictions on bail result in long incarceration regardless of the outcome of the case. The process itself becomes the punishment whether or not the accused is finally found guilty. The low rate of conviction in UAPA cases also gives credence to this argument.

A recent report released by People's Union for Civil Liberties (PUCL) as part of its #repealuapa campaign "UAPA: Criminalising Dissent and State Terror," is a revealing glimpse into how the draconian law is being used. Based on public information on the NIA website, the 'Crimes in India' reports released by the National Crime Records

Bureau and Replies to Questions raised in the Parliament, the PUCL report throws light on a widespread pattern of abuse.

Though the UAPA is supposed to be used for serious threats the conviction rate remains abysmally low. Based on NCRB figures, the report states that between 2015 and 2020 the conviction rate for cases under the UAPA was 27.57% compared with 49.67% in Cognizable Offences under the Indian Penal Code. The conviction rate calculated based on the number of persons arrested is far lower at just 2.80%. The PUCL report shows that most prosecutions are "... devoid of merit and did not warrant initiation of any prosecution in the first place, much less under the UAPA."

However because of the stringent conditions for bail, the people continue to languish in jail through the trial despite having been wrongfully implicated. In 2020 for instance, of the total number of people arrested, ie, 1321, only 16.8% were given bail the report stated.

An examination of cases investigated by the NIA by the PUCL shows widespread use of Section 18 (punishment for conspiracy, etc.) which was invoked in 238 of 357 cases the NIA prosecuted. In 152 or 64% of the cases no incident was reported. So people continue to languish in prison based on vague claims of the police, making detention without trial the defacto object of the law.

PUDR has consistently drawn attention to the fact that the process itself is the punishment as has been evident with the incarceration of PUDR member Gautam Navlakha. Navlakha was granted house arrest by the Bombay High Court but under extremely stringent conditions with the NIA opposing the house arrest tooth and nail. Navlakha was arrested in 2018 and transferred to Taloja jail in

2020. Charges have not been framed yet. During his incarceration in Taloja jail Navlakha has been denied spectacles, a mosquito net and even a P.G. Wodehouse novel all of which were opposed ostensibly on grounds of national security. Another accused in the Bhima Koregaon case activist 84-year old Father Stan Swamy died in jail after his requests for release for medical treatment were turned down. PUDR had published a report on Father Stan Swamy's incarceration and death and also drawn attention to the expanding role of the NIA in the Elgar Parishad case The recent PUCL report states that majority of the UAPA cases investigated by NIA, ie, a total of 88% have been taken over from the various state investigating agencies, often without the concurrence of the state government such as the Bhīma Koregaon case. Some cases taken over by the NIA seem to have little to do with national security the PUCL points out, such as a man who was charged under UAPA in Tamil Nadu for a Facebook post that remarked on whether India had really got Independence to celebrate Independence Day.

In a further expansion of the NIA, the government has now announced it intends to open offices of the National Investigation Agency in every state by 2024 despite the opposition of several state governments. In 2019, amidst a series of fast-tracked legislations, the Central Government also amended the NIA ACT. PUDR had pointed out how the 2019 Amendment had extended the power of the NIA over the state police. The purview of the NIA, which till then was limited to offences under the UAPA and the Atomic Energy Act was expanded to include offences related to human trafficking, counterfeit currency, manufacture or sale of prohibited arms, cyber-terrorism and offences under the Explosive Substance Act, 1908.

The move to open NIA offices in every state to further strengthen central control over matters under state jurisdiction, comes in

the wake of increasing countrywide raids by Central government agencies whether CBI, ED or NIA itself, with selective targeting and political point-scoring. The NIA currently has 12 regional offices: Hyderabad, Guwahati, Kochi, Lucknow, Mumbai, Kolkata, Raipur, Jammu, Chandigarh, Ranchi, Chennai, and Imphal.

*Ring the bells that still can ring,*
*Forget your perfect offering*
*There is a crack, a crack in everything*
*That's how the light gets in*
– Leonard Cohen