

INDIA

An appeal against death sentences

The execution of four persons whose sentences of death were confirmed by the Supreme Court of India on 11 May 1999 would be a grave and retrograde step for human rights in India. Nalini [f], Santhan [m], Perarivalan [m] and Murugan [m] are currently awaiting a decision by the Supreme Court on a petition calling for review of its 11 May order.

At a time when positive steps are being taken towards abolition of the death penalty worldwide and in the same year that the UN Commission on Human Rights has urged governments to hold a moratorium on executions, Amnesty International is calling on India to move towards abolition and honour its commitments made when ratifying international human rights standards including those ensuring that all people charged with any criminal offence are tried under proceedings conforming to international standards for fair trial.

In April 1999, the UN Commission on Human Rights passed a resolution (1999/61) calling on all States that still maintain the death penalty to "progressively restrict the number of offences for which the death penalty may be imposed; to establish a moratorium on executions, with a view to completely abolishing the death penalty; and to make available to the public information with regard to the imposition of the death penalty". India abstained in the vote on this resolution.

Amnesty International opposes the death penalty in all cases and campaigns against its use worldwide, arguing that it is a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment. In issuing this appeal, Amnesty International is joining a growing number of human rights organizations and activists in India who are raising concerns about the continuing use of the death penalty.

Amnesty International's concerns about the death penalty are compounded when the judicial process involved fails to meet international standards for fair trial. When the death penalty is applied, miscarriages of justice are irrevocable. This document outlines a number of concerns about the trial of those sentenced to death.

Background

In January 1998, a trial court specially established within the jail complex at Poonamallee in Tamil Nadu sentenced 26 people to death in connection with the 1991 assassination of Mr Rajiv Gandhi. The accused were detained, charged and tried under provisions of the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA). They were also tried under other charges including conspiracy to murder, offences under the Arms Act, the Explosive Substances Act and the Foreigners Act. The trial lasted four years. The conviction of the accused by the trial court relied heavily on confessional statements made by many of the accused and recorded by police following their arrest.

The accused were convicted and sentenced to death in a space of two hours on 28 January 1998 in a judgement that shocked many observers. Lawyers for the defence called it a "judicial massacre". Appeals against the convictions and sentences were submitted to the Supreme Court in February 1998.

On 11 May 1999 a three-judge bench of the Supreme Court gave its judgement on the appeals, the three judges giving separate judgements. Two of the judges upheld the sentences of death against four: Nalini, Murugan, Santhan and Perarivalan. One of the judges however -- Justice Thomas -- while agreeing on the sentences against Murugan, Santhan and Perarivalan, dissented in his opinion on the sentence of death against Nalini arguing that she had a child whose father (Murugan) had also been sentenced to death and that therefore sentencing her to death would orphan the child. As his was the only dissenting judgement on this issue, the death sentence against Nalini was upheld.

At the same time, the judges commuted the sentences of three other people to life imprisonment and further ordered the release of 19 people judging that they had already served their sentences for the crimes for which they were convicted because of the time spent in custody awaiting and during trial.

In their judgement on the appeal, the Supreme Court judges pointed out several flaws in the convictions by the trial court. In particular, in ordering acquittal or release, the judges questioned the evidence on which several of the accused were convicted of conspiracy to murder, as well as other offences, inferring that the trial court had found several of the accused guilty by association and raising concerns that basic standards for fair trial including presumption of innocence and the need for proof of guilt beyond reasonable doubt had not been met during the trial process.

In the case of two of the original accused for example, the Supreme Court exposed the way in which the prosecution had implicated them and the trial court sentenced them with no other evidence than their marital relation. Both Shanti [f], and Selvaluxmi [f], wives of other accused, were deemed by the Supreme Court judges to have been innocent of any conspiracy, although guilty of "harbouring" their husbands. Justice Thomas in his judgement commented of Shanti: "*She is the wife of [Jayakumar]. Except the fact that she accompanied her husband from Sri Lanka in September 1990 and continued to live with him in India we are unable to find any involvement for her in the conspiracy to murder Rajiv Gandhi. Learned Special Judge has considered her case, tagging it with her husband's case... We have not come across any material, apart from her living with her husband..., to suggest that she had any role in the conspiracy. It is very unfortunate that for the role played by her husband she has been sentenced to death*". Both the women's convictions for "harbouring" (under section 212 of the Indian Penal Code) were upheld but they were released having been judged to have spent sufficient time in custody.

Perhaps most significantly, in their judgement on the appeal, the Supreme Court judges ruled that the 26 people should not have been detained, charged or convicted under TADA and acquitted them of all charges under the Act. The judges agreed with the argument put by the defence in the appeal to the Supreme Court that the assassination of former Prime Minister Rajiv Gandhi was not a "terrorist act" as defined in section 3(1) of the Act¹. They reasoned that the plan to assassinate Rajiv Gandhi was provoked by a personal sense of betrayal by the leadership of the Liberation Tigers of Tamil Eelam (LTTE) as a result of his policy on Sri Lanka when he had been Prime Minister rather than an attempt to "overawe" the Government of India.

Those who remain under sentence of death had their convictions upheld under section 120-B (criminal conspiracy) read with section 302 (murder) of the Indian Penal Code.

Despite concluding that the accused should not have been charged or convicted under TADA, the Supreme Court dismissed arguments that this cast in doubt their conviction on other charges. Pre-empting arguments that evidence obtained under provisions of TADA should be disregarded -- most notably confessional statements to police which would not have been admitted as evidence in an ordinary trial (see below) -- the Supreme Court judges argued that section 12 of TADA provides for individuals to be tried for other offences under provisions of TADA if the crimes are being tried concurrently.

In coming to this conclusion, Amnesty International is concerned that the Supreme Court failed to consider the incompatibility of certain sections of TADA with international standards for fair trial set out in Article 14 of the ICCPR (see below).

Following the confirmation of the sentence by the Supreme Court, the date of execution for Nalini, Santhan, Perarivalan and Murugan was reportedly set by the trial court for 9 June. However, a petition calling for review of the Supreme Court's order was received on 7 June and a stay of execution granted by the Court. The review petition was scheduled for hearing by the Supreme Court judges on 19 July but was re-scheduled on 15 July to be heard on 17 August².

¹ Section 3(1) of TADA defines a "terrorist act" as one carried out "to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people".

² In addition to the filing of a Review Petition, calling on the Supreme Court Bench to review its 11 May 1999 order, those sentenced to death have the right to petition the President of India for clemency. The President has powers under Article 72 of the Constitution to commute the sentence.

Amnesty International believes that the trial court's sentencing of all 26 accused to death represented a knee-jerk reaction based on a misguided perception that the death penalty is an appropriate or effective means of deterrence or retribution. Both the trial court judge and one of the Supreme Court judges referred explicitly to the need to provide strong sentencing as a means of deterrence. However, numerous studies conducted in different countries and using different methodologies have failed to establish that it deters crime more effectively than other punishments.

The Death Penalty in India

The Indian Constitution protects the right to life, however, the death penalty remains a lawful judicial punishment for a number of offences including murder and conspiracy to murder. The number of offences carrying the death penalty in India increased in the 1980's, and offences carrying the death penalty are now found in numerous laws. In early 1999, the Home Minister proposed extending the death penalty for the crime of rape -- a proposal that was criticised by many organizations working on the issue of violence against women as a political gesture.

The Supreme Court of India has ruled that the death penalty can only be applied in the "rarest of the rare" cases. Yet on average a dozen executions are carried out in India every year for criminal offenses. Most of those executed are the poor and illiterate. Statistics on the application of the death penalty within the country continue to be unavailable despite repeated requests for this information. In a resolution adopted on 24 May 1989, the UN Economic and Social Council, of which India is a member, urged Member States to "publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law".

Concerns about the fairness of the trial

As referred to above, the accused were tried under provisions of TADA. Provisions of the Act contravene international standards for fair trial, concern about which had been repeatedly expressed by the Human Rights Committee³, the National Human Rights Commission of India and numerous human rights organizations including Amnesty International⁴. As a direct result of national and international criticism, the Act was allowed to lapse in mid-1995 when it came before parliament for renewal. However,

³ The Human Rights Committee is the body of experts which monitor state parties' implementation of provisions of the International Covenant on Civil and Political Rights. India, as a state party, is obliged to fully implement provisions of this human rights treaty.

⁴ See *India: The Terrorist and Disruptive Activities (Prevention) Act: The lack of scrupulous care*, November 1994, AI Index: ASA 20/39/94

provisions of TADA continue to be used retrospectively and hundreds remain in detention under its provisions, many still awaiting trial. Cases can still be filed under TADA under section 14 which provides that it should be applied to active trials and to defendants tried in the future in connection with offences alleged to have been committed prior to the lapsing of the Act.

Contrary to international standards, TADA does not explicitly require that statements made to the police as a result of torture or ill-treatment be excluded as evidence against the accused. Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) to which India is a party requires that in the determination of any criminal charge, no one should be compelled to testify against himself or to confess guilt. In addition, Article 15 of the Convention against Torture explicitly prohibits the use in evidence of statements which it has been established have been made as a result of torture⁵.

Sections 25 and 26 of the Indian Evidence Act 1872 explicitly prohibit the admissibility of confessions made to police officers as evidence. These provisions were introduced and remain in Indian law because of the acknowledgement that “confessions” are regularly extracted by police through torture or duress in India.

However, these sections of the Indian Evidence Act are surpassed by Section 15 of TADA which allows for the admissibility of confessional statements made to police. In giving a judgement on the constitutionality of TADA in 1993, a Supreme Court judge referred to this section calling it “unfair, unjust and unconscionable, offending Article 14 and 21 of the Constitution” (guaranteeing, respectively, the right to equality before the law and the right to life and personal liberty)⁶.

Seventeen of the 26 people originally sentenced to death, including the four currently under sentence of death, gave confessional statements to police under Section 15 of TADA. These confessional statements were heavily relied on in the trial of the accused. All these statements were retracted by the accused, who swore before the designated court that the confessions had been extracted under threat and coercion by police who had obtained their signatures on blank pieces of paper. When affidavits were filed in the court by Perarivalan and others at the pre-trial stage in early 1992, these were rejected on the grounds that they would be dealt with at trial stage. However, to Amnesty

⁵ While India has yet to ratify the Convention, as a signatory, India is required not to do anything contrary to its object and purpose.

⁶ His was a dissenting judgement as the majority judgement was to uphold the constitutionality of Section 15 (Kartar Singh vs. State of Punjab, Writ Petition No. 1833 of 1984).

International's knowledge, allegations of coercion in extracting confessional statements were never impartially investigated at the trial stage as international standards require.

Amnesty International believes that allegations by those sentenced to death that their trial was not fair -- in particular the manner in which their confessional statements were obtained -- should be impartially investigated.

Under Section 19 of TADA those sentenced after conviction by a trial court can appeal only to the Supreme Court. Ordinarily, people tried, convicted and sentenced in a lower court would have that conviction and sentence confirmed by the High Court. Under section 366 of the Code of Criminal Procedure (CrPC), it is the duty of the High Court to look again at the evidence and come to an independent conclusion with regard to the guilt of the accused on the merits of the case. If the conviction and sentence is upheld, the defendant then has the right to appeal to the Supreme Court. The Human Rights Committee has interpreted Article 14(5) of the ICCPR (*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*) as meaning that if domestic law provides for more than one instance of appeal, the convicted person must have access to each of them⁷. By denying the defendants the opportunity to have their conviction and sentence confirmed by a higher court which would examine all the evidence, before appealing to the Supreme Court, Amnesty International believes that the defendants have been denied an important right of review -- provided in Indian law and reinforced in international standards for fair trial -- for those sentenced to death: this despite the fact that they were acquitted of charges under TADA.

In addition, concern has been expressed about the time taken by the trial court judge between passing judgement on the guilt of the accused and pronouncing sentence: the sentence was reportedly pronounced only two hours after the judgement was given. There is a mandatory legal requirement in the CrPC for an effective and substantial opportunity to be given to the accused for being heard on the question of sentence. It appears that counsel for the defendants were not given an opportunity to present information to the trial court which would have had a bearing on sentence.

⁷ Views expressed by the Human Rights Committee in Raphael Henry v Jamaica, Communication No.230/1987, CCPR/C/43/D/230/1987, paragraph 8.4.

Amnesty International's recommendations

Amnesty International hopes that the Supreme Court will consider the review petition filed by counsel for those sentenced to death in light of the concerns raised in this appeal and commute the sentences of death.

In the event that the review petition is rejected, Amnesty International is calling on the President of India to exercise his powers to commute the sentences.

In addition, Amnesty International is calling on the Government of India to undertake the following:

- *Take steps towards the abolition of the death penalty including declaring a moratorium on executions and at a minimum making a commitment not to extend the scope of the death penalty;*
- *Ratify at the earliest the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at the abolition of the death penalty;*
- *Ratify at the earliest the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

WHAT YOU CAN DO:

You can write letters to the President of India (who has powers to commute the death sentences if the review petition is rejected) and the Minister of Home Affairs outlining the recommendations made in this report:

Mr Narayanan

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Rashtrapati Bhavan
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Mr L.K. Advani

**Minister of Home Affairs
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