FRONTLINE
Volume 26 - Issue 01 :: Jan. 03-16, 2009
INDIA'S NATIONAL MAGAZINE
from the publishers of THE HINDU

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TERROR IN MUMBAI

Limits of law

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The hasty passage of the new anti-terror laws does not signify an adequate response to internal security challenges.

ON December 12, 2008, a group of 40 eminent citizens of the country, including former Prime Minister Inder Kumar Gujral and former Chief Justices of India V.R. Krishna Iyer and J.S. Verma, wrote a joint open letter to all politicians emphasising that police reforms were crucial to address effectively the threats to national integrity. The letter called for swift reform and urged all politicians to work collectively towards this end.

Four days later, talking to *Frontline*, Union Minister of State for Home Sri Prakash Jaiswal claimed that the United Progressive Alliance (UPA) government had taken the call in all seriousness and two bills brought by the Union Home Ministry – The National Investigation Agency (NIA) Bill, 2008, and The Unlawful Activities (Prevention) Amendment Bill, 2008 – reflected the government's resolve to advance meaningful reforms to fight the threats to national integrity. Jaiswal added that these Bills were only one of the many steps that the government was planning.

Undoubtedly, the Minister perceives these bills as significant initiatives on the internal security front. But do they signify a concrete movement towards substantial police reforms? Or at least an adequate response to repeated challenges to internal security? A closer look at the manner in which the Bills were passed in Parliament, as well as their provisions, does not result in an affirmative answer. What stands out in the exercise is an undue haste to get the Bills passed.

Introduced in the last session of 2008, the two key Bills were passed within four days of their introduction, without adequate scrutiny or deliberation. Home Minister P. Chidambaram, who introduced the Bills, sought the support of members, cutting across party lines, without convincingly explaining the urgency to enact them. Indeed, he also indicated that there might be a need to make changes in the Bills when he said that the government would take a relook at the laws in February and, if necessary, consider the amendments proposed by the Opposition.

Government under pressure

What then was the justification for hurrying through the Bills? By all indications, the government seems to have been spurred by an urge to come up with a part-response to the cynicism among a section of the TV-watching middle classes in urban India about the political class in general following the failure to prevent the Mumbai attacks. The government seems to see these laws as ways to correct the public perception of not having done enough to combat terrorism. Chidambaram himself hinted as much when he told the Rajya Sabha: "People are looking at us. As I speak today, people are watching us.

People will watch us on television tomorrow. People are asking, 'Is the Parliament of India the sentinel on TV? Is the Parliament of India an appropriate sentinel to guard our liberty?'"

While these words point towards the real pressures faced by the government, the formal premise put forward to bring in the Bills is the all-party meeting of November 30. The meeting had called for urgent, effective measures to strengthen internal security. But, by the Home Minister's own admission, these are not preventive but punitive laws. "These laws spring into action only after the crime is committed or when an attempt is made to commit a crime or in one or two cases, preparation is made to commit a crime. The jehadi terrorist is not deterred by these laws," he told the Rajya Sabha, adding that these Bills sought to meet the objectives of speedy and efficient investigation, fair and speedy trial, and deterrent punishment.

Although the government wanted a quick enactment of the Bills to project a picture of unity in Parliament, both the Congress and the Bharatiya Janata Party (BJP) engaged in an ugly spat on which party deserved greater credit for the harsh provisions.

The BJP's prime ministerial candidate, Lal Krishna Advani, and Arun Jaitley accused the Congress of being apologetic about enacting the two laws. They claimed that the Unlawful Activities (Prevention) Amendment Bill was modelled on the Prevention of Terrorism Act, 2002, enacted by the National Democratic Alliance (NDA) government their party led. Abhishek Manu Singhvi and Kapil Sibal of the Congress retorted that it was a Congress government that had enacted POTA's precursor, the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985, which was allowed to lapse in 1995.

Key changes

The Unlawful Activities (Prevention) Act, 1967, was originally conceived to fulfil the need to install reasonable restrictions, in the interests of the country's sovereignty and integrity, on the freedom of speech and expression; the right to assemble peaceably and without arms; and the right to form associations or unions.

Parliament amended the Act in 2004, following the repeal of POTA. This amendment changed the original character of the Act completely by making it a piece of specifically anti-terror legislation, permanently on the statute books, unlike TADA and POTA, which had sunset clauses. TADA was initially meant for two years but was extended every two years until it was allowed to lapse in 1995. POTA, which originated through an ordinance on October 24, 2001, was to remain in force for three years. The sunset clause implied a periodical review by Parliament of the draconian laws and therefore meant an in-built safeguard against abuse.

The latest amendment, coming as a knee-jerk reaction to the Mumbai attacks, could not have been expected to consider the relevance of a sunset clause either.

The 2008 amendment makes certain key changes. A new section, 43D, has increased the maximum period of custodial interrogation of a terror suspect to 180, a significant increase over the 90 days allowed under Section 167 of the Code of Criminal Procedure (CrPC). The reasons cited for this are not convincing.

Arun Jaitley told the Rajya Sabha that the longer remand period would help to gather evidence internationally by affording more time to send letter rogatories and seek the extradition of wanted criminals. But then why subject Indian suspects to such long detention when their interrogation can be completed in 90 days? Singhvi's reasons were even less convincing. Terrorists inspired fear, he said, and this led to slow investigation, and witnesses were more difficult to find.

Sitaram Yechury of the Communist Party of India (Marxist) pointed out

in the Rajya Sabha that in the United States no citizen could be detained for more than two days without charges being framed.

"In Canada, suspects cannot be detained for more than one day. In Russia, the maximum period permissible for detention of a suspect is five days. France limits the period to six days, while Ireland restricts it to seven days. In Turkey, this period can last only up to seven and a half days. In the U.K. [United Kingdom], the House of Lords returned the proposal to increase the period under detention from 26 to 48 days," he said. The government could not convincingly explain the glaring distinction between India and other countries with regard to the period of custodial interrogation. The 90-day period was perhaps the longest in the world; doubling this period just to appear stringent makes no sense.

Presumption of guilt

Another new provision, Section 43E, introduces the presumption of guilt of an accused, an obnoxious provision that was also present in POTA. Under this Section, if it is proved that arms or explosives or any other substances specified in Section 15 were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature were used in the commission of an offence, the court shall presume, unless the contrary is shown, that the accused has committed such offence. Our criminal justice system is based on the presumption of innocence until proved guilty.

Here is what Ashwani Kumar, Minister for Commerce and a lawyer by training, had to say in the Rajya Sabha about this specific provision:

"It is a cardinal rule of jurisprudence that a person is presumed to be innocent until proved to be guilty. I do not think that that has been reversed. All it says is that if a person is found with a weapon of destruction in his possession, the onus would shift temporarily, for that limited purpose, upon him to prove that that cannot lead to an inference of guilt against him. In criminal jurisprudence, the onus of proving the guilt of the accused is invariably, and always, on the prosecution. That principle has not been negatived in this Bill… It is a case of … stolen goods; if stolen goods are found in somebody's possession, it is for him to prove or establish how these goods came into his or her possession in the first place."

Observers found it paradoxical that members of the Treasury Benches who are also established Supreme Court lawyers, specifically, Singhvi and Sibal, argued that the Supreme Court decisions in the Kartar Singh and PUCL (People's Union for Civil Liberties) cases validating TADA and POTA were suspect. They made this point while justifying their decision not to make confessions made before a police officer admissible as evidence in court, though TADA and POTA allowed this. But by that logic, extended detention could also be suspect. In any case, the recent amendments have the potential of unsettling a lot of what is today taken for granted in the realm of Supreme Court precedents on anti-terrorism law, experts say. Judges in several countries have taken a dim view of such provisions.

Independent experts say any judge with integrity and a commitment to the oath taken to uphold the Constitution would be careful about convicting someone of a serious offence based only on "circumstantial evidence" and reverse onus provisions.

So, in the Zuma case (1995) in South Africa, the challenged provision stated that an accused person who wanted to retract a confession made before a magistrate would have to establish that the confession was given involuntarily.

This provision might seem quite reasonable and pragmatic, but the South African Constitutional Court unanimously struck down the provision as infringing upon the presumption of innocence. This decision was endorsed in subsequent cases in 1996 and 2002.

The language of Section 43E (b) is vague. What does "any other definitive evidence suggesting the involvement of the accused in the offence" mean? Who decides what is "definitive evidence"? The judicial test for such provisions usually is whether the reversal of onus enables a person who is innocent to be convicted. Experts fear that innocent people or those with only an unknowing, tangential connection to the offence can end up being convicted of direct complicity.

While the legislator may want to draft things broadly with a view to giving investigators and prosecutors the maximum latitude, this is precisely the type of situation that breeds abuse of emergency powers, and judges are quite alive to this. Faced with extraordinary circumstances, judges are more willing to give latitude, but they would prefer, in order to maintain the rule of law, to have narrowly crafted exceptions, experts caution.

Federal agency

The NIA Bill creates a federal investigating agency to supersede the State police in the case of investigation and trial of offences under certain Acts specified in its schedule. The first information as to the commission of the offence will be registered in the police station and then forwarded to the State government. The State government shall forthwith forward it to the Central government, which may, in view of the gravity of the offence and other relevant factors, direct that the case be taken up with the NIA. Otherwise, the case remains with the State agency. The NIA may associate the State agency with the investigation, if it is expedient to do so. The NIA may also return the case to the State for investigation.

Special courts

The Act provides for the constitution of a special court to try the offences investigated by the NIA. The Chief Justice of the High Court will nominate the special judge, and the case is to be tried on a day-to-day basis. Appeals against the orders of the special court will lie with the Division Bench of the High Court and the appeals should be disposed of within three months.

The Acts mentioned in the Schedule include the Atomic Energy Act, 1962; the Anti-Hijacking Act, 1982; the Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982; the SAARC Convention on (Suppression of Terrorism) Act, 1993; the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002; the Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005; the Unlawful Activities (Prevention) Act, 1967; and offences under Chapter VI of the Indian Penal Code (Sections 121 to 130) dealing with offences against the State and Sections 489-A to 489-E of the IPC (dealing with counterfeit currency notes).

Suggestions from the Left

Yechury suggested amendments to the two Bills to address concerns about possible abuse. He suggested that the UAPA and the IPC sections be brought under a separate schedule in the NIA Bill so as to make the association of State governments in the investigation and trial of the offences mandatory. In the UAPA (Amendment) Bill, he suggested amendments to restore the period of custodial interrogation to 90 days, presumption of innocence of the accused, and deletion of the provision seeking to punish anyone failing to furnish information relating to terrorist offence with imprisonment for three years or with a fine or with both (Section 43F [2]).

D. Raja of the Communist Party of India suggested the deletion of the entire clause enabling presumption of guilt of the accused. The Rajya Sabha rejected all the amendments before the passing the Bills.

However, Chidambaram's statement on a probable relook at the laws in

the next session makes it clear that the debate will continue. Participating in the debate in the Lok Sabha, Sibal said that the two Bills needed to be followed up with measures within the security establishment and the police machinery aimed at genuine reform. He said the police needed to be "empowered" and, thereby, the people.

Sibal had apparently taken his cue from the letter written by eminent citizens, which had noted that central to police reforms was avoidance of undue and illegitimate political interference in policing, improving recruitment procedures and training, enhancement of infrastructure and developing systems of accountability. But it is evident that the government has a long way to go to achieve these objectives.