

Laws without Accountability

Will the new anti-terror laws aid the fight against terror or be abused by the police?

When Parliament resumed its sitting in December, the two principal political formations had just fought each other to a stalemate in five state assembly elections. The BJP's effort to milk the Mumbai tragedies for electoral advantage had conspicuously failed. And Parliament taking the signal that it needed to get over the partisan rancour that normally follows every terrorist strike, acted with alacrity to enact two pieces of legislation, which in one form or the other have been demands of the opposition.

Heightened public concern about terrorism ensured that the sensibilities of the states, which enjoy exclusive jurisdiction over law and order under the constitutional division of powers, would not be an impediment. The National Investigation Agency (NIA) that will be created under the new laws will have an intrusive jurisdiction into law and order matters all over. And when all the self-congratulation is done, it needs to be asked whether it would improve efficiencies in investigation and lend a sense of purpose to the prosecutorial process, or merely add another layer of complexity to a muddled bureaucratic apparatus.

The NIA is quite the centrepiece of the new legislation. It would be a police force created and administered by the central government, which would endow all personnel above the rank of sub-inspector with powers throughout Indian territory. This conferment of powers would be at the sole discretion of the centre, though the trigger to activate that process is nominally in the hands of the states.

In plain terms, a police station that records evidence under the relevant section of the Code of Criminal Procedure *shall* send the statement to the state government on any suspicion that the offence indicated could fall within the schedule of the NIA Act. The state government *shall* then forward this information to the centre, which would, on the basis of this and all other inputs, decide within 15 days on invoking the power of the NIA. Once the NIA enters the investigation, the authority of state government agencies would stand extinguished. All relevant records and material *shall* accordingly be transferred to the NIA.

The Terrorism and Disruptive Activities (Prevention) Act of 1987 (TADA) and the Prevention of Terrorism Act of 2002 (POTA) allowed both the state and centre to establish special courts for trying relevant crimes. The NIA Act reserves this as an exclusive power of the centre, though the chief justice of the concerned state would be consulted on personnel choices.

A special court established under the NIA Act could hold hearings in camera and conduct summary trials when charges involve imprisonment for a period of up to three years. Its hearings would be conducted on a day to day basis and would enjoy precedence over all other cases. A judgment it renders could be appealed in the relevant high court, which would hear it in a bench of two judges and dispose of it "as far as possible" within three months.

The key concession made by the new legislation to the civil rights discourse is in disallowing confessions made to the police as evidence in trial. But the amendments that have been introduced in the Unlawful Activities (Prevention) Act of 1967 bring in another undesirable feature of POTA, which is to reverse the burden of proof when fingerprints of the accused are found at the site of a terrorist act, or weapons and material used in the attack are found in his possession. This raises numerous troubling ghosts from the past, when police personnel involved in blatantly illegal acts have planted incriminating evidence to obscure the magnitude of their misdeeds.

The creation of the NIA runs contrary to the specific recommendations of the Administrative Reforms Commission, which had in a recent report proposed a special wing within the Central Bureau of Investigation (CBI) to deal with terrorism. Though originally created to deal with corruption in central government establishments, the CBI has by convention also become the agency to go to for lending a façade of probity to politically sensitive criminal investigations. The process of transferring a matter to CBI jurisdiction is relatively simple, involving the discretion solely of the state government. It is another matter that it has often proven fractious, since bureaucratic rivalries and political partisanship are never far below the surface.

The language of the NIA Act specifies that state agencies "shall" undertake certain actions in defined situations. Whether this amounts to a categorical imperative or merely to a "best endeavour" demand is a matter that legal experts will have to sort out. Yet even if the matter is settled in law, it is not apparent that its translation into actual practice will be smooth. Bureaucratic indecision and the infirmities of judgment could still be formidable obstacles.

Given their deeply ingrained operational procedures, police forces all over the country have been known in cases involving high levels of public anxiety to follow a policy of ruthlessly eliminating risks, to hold suspects in detention for indefinite periods of time,

and to allow prejudice to guide them rather than the demands of the law. It was not the formal wording of TADA and POTA that made them instruments of oppression, but the wholly muddled operational procedures followed by those empowered by these laws.

Apart from all its other provisions, the new legislation allows for the detention of terrorism suspects for up to 180 days, while

the case against them is investigated. Perhaps the emphasis should have been the opposite: to allow for fewer days of detention than the 90 allowed under ordinary law. It is only under some such compulsion of accountability that public agencies are known to undertake a thorough reform of their operational procedures as a matter of priority.