New Laws Against Terror – Implications for the Armed Forces*

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Introduction

The major security challenge faced by India today is to combat terrorism perpetuated by militant and terrorist groups. There is also the reality of a number of nuclear weapon states in the neighborhood. Equally daunting is the threat from insurgencies, spurred by tribal and ethnic aspirations and left wing ideologies. A democratic country having rule of law cannot but rely upon effective legislative tools coupled with a robust investigative law enforcement machinery to match the ill designs of terrorist networks. In the absence of an effective internationally binding legal instrument, backed with requisite force to ensure compliance, enactment of domestic statutes is the only viable option. India's response to the increasing destruction caused by terrorists having global network saw strengthening of internal laws. Appendix A enumerates the existing laws having relevance to the fight against terror as the position stood prior to 26/11.

New Statutes Legislated Post 26/11

The following new Statutes were legislated by the Indian Parliament during December 2008 :-

(a) The Unlawful Activities (Prevention) Amendment Act, 2008 (in short "the UAPA")
(b) The National Investigation Agency Act, 2008 (in short "the NIAA")
(c) The Criminal Law Amendment Bill, 2006

The NIAA introduced a new dimension in the fight against terror by empowering the Central Government to set-up a National Investigation Agency for probing certain grave offences characterised as "Scheduled Offences". The authority to constitute and superintendent the Agency is retained in the Central Government which can suo-motu direct the Agency to investigate the matter. Various steps that go about to trigger the investigation process are shown in Appendix B. The Legislation provides for constitution of Special Courts for trial of Scheduled Offences investigated by the Agency. The task to actually undertake the prosecution is to be handled by Public Prosecutors to be appointed by the Central Government. The trial can be held in the absence of the accused or even his pleader. Identity and addresses of witnesses can be kept secret. The trial can be held at any place and on day-to-day basis on all working days. The notion of an open trial has been disregarded in the NIAA where the Special Court may direct that whole or any part of the proceedings will not be published in any manner. An appeal shall lie against a judgement of the Special Court only to the High Court and has to be submitted within 30 days from the date of pronouncement. The Appeal is to be disposed within a period of three months.

Purpose of NIAA and Problems

The intent and purpose of NIAA, as discernible from its preamble, is to craft a machinery for improved investigations and prosecution of serious offences. However, the text of the Act does not empower the NIA with any role or authority in the matter of prosecution. The following are the major problem areas that impose difficulties before the prosecutors which would, therefore, remain unattended:-

(a) Extra-ordinary secrecy
(b) Intimidation and threats
(c) Absence of hard evidence due to meticulous planning
(d) Conspiring acts, spread over various countries
(e) Shortage of foreign language experts

Resultantly, the follow-up of a successful Army mission against terrorists may culminate in proper investigation, only to be negated by half-hearted or ineffective prosecution. Instances are not uncommon when militants apprehended by the Security Forces were subsequently acquitted at their trial due to faulty prosecution.

The NIAA was drafted and made to sail through the parliamentary passage with undue haste. It is doubtful whether due scrutiny was carried out and comments of all concerned sought in its preparation. NIAA presents a few areas that offer scope for legal complications at a later stage. The statute does not include within its ambit certain grave offences committed in conjunction with terrorist acts. These offences could relate to Official Secrets Act or under the Conservation of Foreign Exchange and Prevention of Smuggling Act or under the Military Laws like the Army Act, Navy Act or the Air-force Act.

Another area where legal hurdles might be encountered is the one pertaining to jurisdiction of Special Courts set-up to try offences under the NIAA. The Central Government and the State Governments are both invested with powers to constitute Special Courts3. The authority provided to the Central Government under Section 11 does not give it a final say in the matter. There have been numerous instances in the past where the Central and State Governments adopted contradictory stands in relation to the version and role of the Armed Forces while deployed to deal with anti-national instances. Given such a history of Central – State relations, likelihood of a clash taking place in the matter relating to setting-up a Special Court or otherwise cannot be ruled out. The Act does not offer any authoritative solution in this regard.

Yet another grey area is the one concerning framing of rules meant to implement the Act. The Statute has given, rule making power to the Central Governments as well as to the High Courts. There could be situations where different High Courts take differing positions in matters concerning reporting of crimes, collection of evidence and recovery of exhibits etc. This may turn out to be problematic for military personnel who require a consistent and uniform policy in matters pertaining to operations and functional procedures.

Implications for the Armed Forces

It may be remembered that the power to arrest conferred upon an officer, JCO or NCO under the Armed Forces (Special Powers) Act (in short "AFSPA") was without any statutory fetters. However, it is not so in the NIAA. Vide Section 3(2) of the NIAA, power to arrest and investigate in relation to a Scheduled Offence shall be subject to the liabilities imposed upon the police officers. Viewed from that angle, the restriction and limitations set out under the Criminal Procedure Code or the Police Act may have to be read in AFSPA also and thereby restricting the functioning of the troops.

Designated authority has been empowered under Section 43F to demand information from any officer (read military commander) in his possession in relation to any offence within the purview of the Act. This power of the designated authority is quite potent as it is "notwithstanding anything contained in any other law". Failure to furnish information is punishable with maximum three years imprisonment. Now visualise a situation where the Designated Authority calls upon the commander of an Army unit or formation to deliver information which is militarily sensitive and not meant to be divulged. But for the NIAA provisions, the military would respond to any such demand to part with sensitive information based upon the doctrines of military necessity and 'need to know'. Any insistence to supply the information would be countered by citing the privilege available under the Indian Evidence Act. Significantly, an option for such a denial may not be available anymore in view of Section 43F.

The Preamble – UAPA Act 2008

The UAPA was first enacted in 1967. It underwent major amendments in 1969 (Act 24 of 1969), 2004 (Act 29 of 2004) and 2008 (Act 35 of 2008). The preamble of any Act is its heart and soul. The preamble in the case of UAPA Act, 2008 is indicative of the very need for new legislation. Significantly, the text of preamble spread over 19 lines makes seven references to the Untied Nations or the Security Council without referring even once to the Mumbai attacks. Perhaps the law-makers were more concerned with India's obligations under international instruments or wanted to underplay the domestic compulsions which necessitated introduction of the amending Act. The object of the UAPA Act 2008 as revealed by its preamble is "to make special provisions for the prevention of, and for coping with terrorist activities."

Analysis – UAPA Act 2008

The new Act is quite harsh in its approach. It has created new offences with strict punishments. A mere placing of demand for procurement of radio-active substances or for lethal weapons with the intention of abetting a terrorist Act, attracts upto 10 years imprisonment, even if the demand did not materialise.

The term 'terrorism' has not been defined in the Act. Consequently, what action would constitute 'training in terrorism' would remain obscure. Hence, the new clause carrying maximum penalty of life imprisonment for one who has organised a camp for such a purpose is pregnant with frightful consequences; more so, when the training may not have resulted in any actual terrorist act.

The new Act exhibits lack of clarity as regards its jurisdiction. Section 1(2) declares that it extends to the whole of India besides being applicable to citizens of India outside India and Government servants wherever they may be. At the same time, the definition of an 'unlawful association' as incorporated in Section 2(p)(ii) in the area of offences pertaining to promoting enmity or against national integration 4 within the State of Jammu and Kashmir have been left out.

There are several areas in which the UAPA affects the functioning of the soldiers deployed on counter-terrorist tasks in a major way. By introducing the notion of a 'terrorist gang', the Act has facilitated operations against a group of terrorists who may not be known to belong to any of the known terrorist organisations. Secondly, any evidence pertaining to collection and raising of funds for terrorist acts may be used to prosecute an offender under Section 17, even if the funds collected were not actually used for commission of a terrorist act. Thirdly, the efforts of law-enforcement agencies have been boosted up by inserting two new sections, namely, 18A and 18B that make organising of terrorist camps and recruitment of persons for commissioning of a terrorist act, culpable offences. The troops would need to carefully gather information where an apprehendee is not an Indian citizen and has entered the country unauthorisedly or illegally so that the same can be mentioned in the report to be furnished to the Police authorities, which would be a major ground to deny bail to the offender.5

The UAPA has introduced the role of a Designated Authority vested with the powers to arrest and search etc. (Section 43A). The Act also states that nothing contained in UAPA shall affect the jurisdiction exercisable by any authority under any law relating to the Army etc. (For example AFSPA). However, it is not clear whether the powers of arrest, search and seizure enumerated under AFSPA are to be exercised with the clearance or in conjunction with the Designated Authority.

By virtue of Section 69 of the Army Act, the trial of an offender subject to the Army Act for an offence triable by any Criminal Court can be held in any place in India or beyond. However, a trial for an offence under the UAPA can only be held in India.6 Therefore, an Army person can only be tried by a Court Martial held in India, in the event he is to be proceeded against for committing an offence under the UAPA, despite the provisions of the new

Act applying to him, “wherever he may be”. The reach of a Court Martial thus stands constricted to proceed against an offender.

Legal confusion may be encountered in the employment of military personnel. AFSPA provides for deployment of Armed Forces in an area declared as disturbed or dangerous by the Governor of a State or by the Central Government. Once a State or part of a State is notified to be disturbed or dangerous, then Armed Forces personnel of the rank of an NCO and above operating in that area come to be vested with powers to search, seize, destroy and use force. Such powers are available to them without any reference whatsoever to an unlawful activity or a terrorist act. On the other hand, empowerment for search, seizure and arrest under the UAPA may only be issued by a Designated Authority. It would, therefore be argued that while Armed Forces personnel employed in operations under UAPA would need to be empowered by a Designated Authority to undertake search, seizure etc., while they do not need any such authorisation under the AFSPA while using force to the extent of even causing death.

CrPC Amendment Bill, 2006 also carries a few major changes that would have an unmistakable bearing on the Army’s standard operating procedures for units deployed on anti-terrorism missions. In the changed scenario, an accused is entitled to retain his counsel at the time of his interrogation. Such a provision will be applicable in the case of suspects captured by the security forces. Medical examination of an accused is also obligatory soon after he is taken into custody. Monetary compensation to a victim is similarly a new concept.

Conclusion

So far, legality of the new legislations remains untested in the form of case laws settled by the higher judiciary. Their text could do with a revision to avoid conflict of laws and the apprehension of Human Rights activists. Further, the framing of requisite rules needs to be taken up with care. The gaps in Statutory Laws would require to be filled by using relevant judicial precedents. Standard operating procedures will need to conform to the new laws. As regards its criticism by the fundamentalists’ lobby it may be recalled that the Supreme Court of India had once remarked:-

“…it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief.” 7

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