



TERRORISM: EMERGENCE OF NIA AND ITS INCOMPATIBILITY

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I. Abstract

*“Terrorism is a significant threat to peace
and security, prosperity and people.”*

-Ban-ki-Moon¹

The Indian democracy takes a significant step for building a self-reliant economy being a developing country. The National Investigation Agency (NIA) which is the Indian central organisation to combat terror came into existence on 31st of December 2008 with the enactment of the National Investigation Agency Act in the same year. With the aftermath of a series of terror attacks which took place in Mumbai in the year 2008, the centre-state relations resulted in incorporating such agency. Being the Counter Terrorism Law Enforcement Agency the nation still observes mammoth terror attacks like those in Uri, Pulwama and the most recent in Kashmir. Terrorism is identical to not being confirmed by law or ‘being unlawful’. The Unlawful Activities (Prevention) Act, 1967 aids to curb the same. The recent amendment in both such legislations under the UPA government further empowers the power of NIA in India. Until now, the Unlawful Activities (Prevention) Act, 1967 allowed the government to proscribe terrorist organizations, but now allows the government to proscribe individuals as

terrorists. The National Integration Council appointed a Committee on National Integration and Regionalization to look into, the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. Pursuant to the approval of recommendations of the Committee, the Constitution (Sixteenth Amendment) Act, 1963 was legislated to enforce, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. Hence this paper will be further covering the aspect of the threat to the economy which is a contrast even after the constitution and functions of NIA.

Keywords - democracy, NIA, terrorism, unlawful activity, sovereignty, integration

II. INTRODUCTION

The need for an Investigation Agency in India

The Central Counter Terrorism Law Enforcement Agency which comes under the ministry of Home Affairs mainly focuses to combat terror in India. With certain crimes, particularly terrorism; often having an interstate or international dimension, it is truly difficult for a law enforcement body to prevent or investigate such offences if it has a limited jurisdiction. The need for a national body that can coordinate and supervise the investigation of such criminal activities that have national or cross-border repercussions was essential. Additionally, in order to prevent such offences from occurring in the first place, sharing of substantial information and gathering comprehensive intelligence

¹ Quotes on terrorism, available at; <https://www.goodreads.com/> last seen on 05/12/2019



across many jurisdictions had to take place as well. State law enforcement agencies, with their limited jurisdictions, looked forward for the creation of a national agency to remove such ambiguousness for the investigation of these crimes. The Supreme Court received materials from the National Human Rights Commission, the Soli Sorabjee Committee, the Bureau of Police Research & Development² (BPR&D) and the Second Administrative Reforms Commission on the need and scope of a national investigation agency.

Thus, it can be safely asserted that we do have a pressing need to declare certain offences having inter-state and international ramifications as “federal offences” to be investigated by a designated Federal Agency having the required level of expertise.

Constitutional validity of the NIA

If we look into areas of public order and policing, it lies in the legislative competence of the States and not with the Centre. The legal validity of the National Investigation Agency can be traced in *Entry 93⁴ List I of the Seventh Schedule to the Indian Constitution* which gives power to the Centre to legislate regarding, “offences against laws with respect to any of the matters in this List.” This can be interpreted as the need to establish a national agency for investigation. But in the absence of such agency, Articles 249 and 252⁵ which particularly focus on the ‘powers of the parliament to legislate on the

matters in State List, in the interest of the nation’ would play an important role.

According to the materials submitted by the Soli Sorabjee Committee to the Supreme Court, the Ministry of Law advised the Ministry of Home Affairs that ‘police’ comes under the jurisdiction of state and thus its functions can’t be conferred on an existing provision by Parliamentary Law or new Central Police Force except under Article 249 or 252⁶ of the Constitution”.

Other suggestions which are put state that Entry 1 of List I (the defence of India), read with Article 355⁷ of the Constitution, is sufficient to allow the Centre to legislate in this matter. However, even on this view of the matter, it appears that the Centre may only be able to legislate on matters relating to terrorism and not necessarily create a new national policing agency without amending the Constitution.

Ministry’s opinion that in the absence of a constitutional amendment the creation of a national investigation agency with enforcement powers must rely on recourse to Article 249 or 252 of the Constitution is correct⁸. When a national policing agency, like the Central Bureau of Investigation, is supposed to investigate in the matter of such cross-jurisdictional crimes, it can only proceed if there is the consent of the State concerned. By contrast, the newly created NIA can assume jurisdiction over a Scheduled Offence suo moto or on its own.

² The need and importance of Investigation agency, available at; <http://www.bprd.nic.in/> last seen on 24/12/19

³ Notes on federal offences, available at; <https://mha.gov.in/.pdf> last seen on 24/12/19

⁴ Constitution of India

⁵ Idib

⁶ Idib

⁷ Idib

⁸ Ministry of Home Affairs reports, available at; <https://www.mea.gov.in/> last seen on 26/12/19



NIA Functioning and its drawbacks

Powers mainly focus on investigating matters instead of prevention being regressive in nature

Section 3(2) of the National Investigating Agency Act⁹ states that the NIA has the power to investigate across India within its boundary of any offences listed in the attached schedule. However, the NIA has not been given the necessary powers to *prevent* the enumerated offences. *In matter for any law enforcement body to prevent the crimes, it requires more powers than just supervising and investigating crimes.* Provision has to be made for the sharing, collection, collation, analysis and dissemination of intelligence. As pointed out by numerous committees, the failing of the CBI in relation to combating corruption has been that it is strictly an investigative agency. In order to make NIA effective to prevent a federal crime, it needs to be able to warehouse, process and coordinate the flow of critical information. By way of example, the U.S. Federal Bureau of Investigation was significantly restructured after 9/11 so that it could engage in, and collaborate with others on, counterintelligence activities. It is suggested that prevention can be observed by firstly focusing on the acquisition of information and then acting on that information¹⁰.

The NIA Act is silent on information sharing, how information and intelligence is to be obtained, and on the NIA's relationship to

other agencies that presently gather information. In fact, this oversight may severely compromise the NIA's ability to investigate Scheduled Offences, let alone prevent them¹¹.

The National Investigation Agency (Amendment) Bill, 2019¹² thereby increases a quantum of powers to the said agency but again on investigating matters alone. By increasing the number of scheduled offences to be investigated and prosecuted by the agency, and also increasing its jurisdiction as well strengthening the special courts under the Act, the legislative efforts can be seen in a developing way as well.

But the question lies as to why to wait to investigate and prosecute the offences in the incidents when we have the resources and the manpower to not let that event happen in its first place?

The Act is schemed firstly, on the basis of the Central government determining that an occurrence or an event actually categorizes as a Scheduled Offence within the Act or not and then secondly, deciding whether it allows the NIA to investigate it as it focuses on investigation and not prevention. Also to mention that these determinations are solely made by the political executive instead of a professional expert who heads up the agency, again being a negative factor. The solution could simply lie if the matters are to be given to the professional expert to decide and not involved with politics.

⁹ The National Investigation Agency Act, 2008

¹⁰ Drawbacks of NIA, available at; <https://www.nia.gov.in/our-legal-framework.htm> last seen on 27/12/19

¹¹ Functions of NIA, available at; <https://www.humanrightsinitiative.org/> last seen on 26/12/19

¹² NIA Amendment Bill 2019, available at; <http://prsindia.org/> last seen on 26/12/19



The NIA will now be able to investigate offences outside India and this can be seen as an innovative step. The Indian Penal Code in any case extends to extra-territorial crimes committed by Indians but the NIA will now be able to investigate such crimes even if no Indian nationals are involved and the offence does not fall to the territory of India. For example, people like Pakistani terrorist Hafiz Saeed is termed as accused by investigative agencies in India without any kind of specific provision, as the Code of Criminal Procedure allows any such crimes to be registered as long as the offence takes place within the territory of India or its consequence ensues in India. They are being inspected through the various agreements between the two nations and their international treaties.

As of now, the amendment shall not bring any significant difference apart from India stating that the nation can now investigate any crimes at any place. Basically, this would depend completely upon cooperation from foreign states. Most of the foreign territories shall not permit a full-fledged investigation of their nationals by the NIA.

NIA and its Incompatibility

Generally we can observe the weakness of this agency despite the powers entrusted to it by the legislature. The recent cases can be seen, starting from, when a convoy of vehicles carrying security personnel were attacked in Pulwama district in Jammu and Kashmir, famously known as the *Pulwama Attack of 2019*¹³, headed by Pakistan-based Islamist group Jaish-e-Mohammed (JeM). This even stated to be the deadliest attack,

claiming 40 Central Reserve Police Force deaths. Four of the operatives of such attack were tried and a charge sheet was filed against them under *Section 120 B*¹⁴ being criminal conspiracy, *Section 121 A*¹⁵ being waging, or attempting to wage war, or abetting waging of war, against the government of India under the Indian Penal Code, and other sections of the Unlawful Activities (Prevention) Act¹⁶ (UAPA) and of the Explosives Substances Act¹⁷.

As seen in the National Investigation Agency Act of 2008, particularly *section 3*¹⁸ the powers of NIA limit merely to the investigation matters and procedures instead of giving preventive measures, the agency being 'investigation' agency. This proves to be narrowed aspect as clearly investigation comes after a tragedy or an attack has occurred whereas prevention comes before it.

In the deadliest attack in Uri on the security forces in Kashmir which was again planned as well as executed by the Jaish-e-Mohammed, a massive fire caused by four terrorists resulted in 13 jawans being burnt alive instantly along with many others being burnt severely. The terrorists spoke Pashtun (one of the tribal languages spoken in Pakistan) which clearly indicated the assistance of Pakistan in such an attack. As what NIA would have done, it probed into the matter and inspected for the same. NIA reports said that a First Information Report (FIR) was registered as per under *sections 16* (punishment for terrorist act), *section 18* (punishment for conspiracy,) and also *section*

¹³ Pulwama attack 2019, available at; <https://timesofindia.indiatimes.com/> last seen on 28/12/19

¹⁴ The Indian Penal Code 1860

¹⁵ Ibid

¹⁶ The Unlawful Activities (Prevention) Act, 1967

¹⁷ The Explosive Substances Act, 1908

¹⁸ Supra 9



20 (punishment for being member of terrorist gang or organization) of the Unlawful Activities (Prevention) Act, 1967, also, *section 302* (murder), *section 307* (attempt to murder), *section 436* (Mischief by fire or explosive substance with intent to destroy house, etc) and *section 120B* (criminal conspiracy) of the Indian Penal Code¹⁹. The agency also inquired with the Jammu and Kashmir police and even looked forward in getting the DNA samples of those four terrorists.

As per the powers already vested with the agency under the Act, it acts reasonably but the flaw lies with the prevention matter which could be taken accordingly if we probe into all such attacks happened even after the constitution of this agency in 2008.

If we study the preamble of the National Investigation Agency Act 2008, it aims to 'investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State²⁰, so for the matters of prosecution of the offences in the interest of the nation itself, the task of prevention surely plays a massive role. As correctly said in the cases of the health of a person, '*Prevention is better than cure*,' similarly, the case lies with our nation.

India and its counter-terrorism policy after Mumbai attacks

Being a constant target of the Islamist militants, India faces a lot of terror-based attacks. Despite all the national security

institutions particularly like the National Security Council which aides the Prime Minister of the nation to take decisions in matters of security and strategic interest. National Security Advisory Board, Indian Police Services, Central Industrial Security Force and others along with important legislations like Unlawful Activities (Prevention) Act 1967 which obviously aims to prevent or to curb such activities as defined under *section 2(o)*²¹ of the act, which harms or disrupts the sovereignty as well as territorial integrity of India, also assist in curbing such attacks to a limit²². Yet there is a huge factor which narrows the whole efficiency of such institutions that is, lack of coordination in the internal security system, poorly trained and equipped police personnel who are hired on the basis of political patronage and are involved in corruption. Instead of making efficient and effective use of the resources and established institutions, the departments keep themselves busy in activities like money laundering, bribing and being involved in other forms of corruption as well.

Even if the committees, intelligence bureaus and task forces act as coordinating mechanisms passing through Centre and State, yet they prove to be slow and burdensome²³.

Apropos the failure of India in its counter-terrorism, the recent amendments so made in the National Investigation Agency Act 2019 along with Unlawful Activities Prevention Amendment Act 2019²⁴ (UAPA) strengthens

¹⁹ Supra 14

²⁰ Supra 9

²¹ Supra 16

²² India and its counterterrorism policy, available at; <https://economictimes.indiatimes.com/r> last seen on 28/12/19

²³ Need to strengthen the counterterrorism policy in India, available at; <https://thewire.in/government/e> last seen on 28/12/19

²⁴ UAPA Amendment Bill 2019, available at; <http://prsindia.org/billtrack/> last seen on 27/12/19



the government to curb terrorism and so indirectly imposes a restriction on the right to dissent of the people thereby empowering the internal security institutions of India. Yet again *section 35* of the UAPA 2019 is highly debatable as it is clearly violating article 19 being freedom of speech and expression of the people under the Indian Constitution. Hence we can have a general understanding that the said amendments in these legislations couldn't prove a major role in curbing events like those of terrorism but merely improves the investigation process after the terror incident takes place and also goes to declare an individual as a terrorist under the amended UAPA act.

III. Conclusion and Justification

The extent of what the NIA will investigate is ironically unsatisfactory and potentially too broad. The offences which require national response under NIA shall not be empowered to investigate such trans-national crimes. Offences like cyber crime, human trafficking, and drugs trafficking are recently shown in the Schedule of Offences to the NIA Act. It does not matter if these offences have a direct link with the terrorism or not, but the prevention and investigation of these offences are best dealt by a national response. The offences, like terrorism, are by their very nature, national or international in scope and design. Further, they might have overt or covert links to terrorism. The NIA serves to look at all national crimes and accordingly makes the necessary linkages. On the contrary, it can be seen that looking into the presence of the political discretions and the extent of activities now covered under the Unlawful Activities (Prevention) Act, the scope and functioning of the new agency is possibly much too wide and intrusive for comfort.

Apparently, the ultimate goal of the NIA is to make sure that Indians are secured by addressing the gaps in our present approach in preventing and investigating offences with a transnational character. However, the NIA can only work if it has the cooperation of State governments, irrespective of their political affiliation, and has the long term confidence of ordinary people. Unfortunately, there are serious questions about the constitutional validity of the NIA. In addition, the NIA has to overcome the fact that it was created in haste, it repeats the systemic shortcomings of other police agencies in India, it is potentially open to political interference and it arguably should have jurisdiction over additional offences that have a trans-national character. The only way to potentially make the NIA different and much more effective is to debate its shortfalls openly and honestly, draw in a variety of voices, and incorporate checks and balances that will minimize the possibility of failure. Sections 23 and Section 24 of the NIA Act, which empower the Central government to remove difficulties and make rules, provide the opportunity to make considerable improvements to the NIA such as clarifying what "other relevant factors" can be considered in directing the Agency to investigate a Scheduled Offence. By mustering the requisite political will at both Centre and State levels, perhaps the NIA can become an exemplar for overall changes in future policing.
