

# Investigation Of UAPA Cases - Does The NIA Act Offend The Federal System?

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## **Introduction.**

National Investigation Agency (NIA/Agency) was constituted by the NIA Act, 2008 for the investigation and prosecution of offences affecting the national security, sovereignty and integrity of the nation. The Agency became well-known among the public as the investigation of offences under the Unlawful Activities (Prevention) Act, 1967 (the law of terrorism) is mainly done by it. UAPA is one of the Acts adhered to the schedule to the NIA Act. The Agency is assigned with the pan India jurisdiction to investigate the offences covered in the Acts scheduled therein. There are predominant divergent opinions among the jurists and politicians as to the propriety to pass a legislation authorizing the Central Government to decide to entrust the investigation of offences to any agency without the consent of the State Government, since constitutionally it is considered that the public order and policing are the subject matter of the State Government, and in the case of criminal law and criminal procedure both the Governments enjoy powers simultaneously.

## **The Way the Investigation is Rerouted to the NIA.**

Section 6 of the NIA Act empowers the Central Government to usurp the investigation. It stipulates that whenever a case of scheduled offences is registered at any police station in India, the officer-in-charge of the police station shall forward the report to the State Government, which, in turn shall be forwarded expeditiously to the Central Government and within fifteen days from the date of receipt of it, the latter shall determine, on the basis of information made available by the former or received from other sources, whether the offence is a scheduled offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency. If the Central Government is of the opinion that it is to be investigated by the Agency, it shall direct the Agency to conduct the investigation. This apart, in any case, if the Central Government is of the opinion that a scheduled offence has been committed which is required to be investigated under the NIA Act, it may *suo motu* direct the Agency to investigate it. Once the Central Government has taken the decision entrusting the investigation to NIA, the State Government and its police officer investigating the offence shall forthwith transmit the relevant documents and records to the Agency sans proceeding further. Till the Agency takes up the investigation, it shall be the duty of the officer-in-charge of the police station to continue the investigation. Of offences to which the NIA Act extends committed outside India, the Central Government may direct the Agency to register the case and take up investigation as if such offence has been committed in India.

The provision of law being the above, it is apparent that the State Governments have no say if the Central Government decides to get the cases investigated by the NIA. The legal sanctity of giving such a power by a statute is being examined here.

## **Federal System and the Separation of Powers**

The federal system of governance has been evolved to bind the country into one political union several autonomous, distinct, separate and disparate political entities or administrative units. The distribution of legislative powers between the Centre and the States is the most important characteristic, rather the core, of any federal system.<sup>1</sup> This essential feature of federal system is discernible from the three lists such as the Union List, State List and the Concurrent List come under Seventh Schedule of the Constitution. It is needless to say that encroaching into the dominion allotted to one by the other would affect the smooth functioning of the federal system.

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<sup>1</sup> M P Jain , Constitutional Law of India, edited by Jasti Chelameswar and Dama Seshadri Naidu, JJ



As regards the investigation of offence committed in a State, it was held by the Supreme Court, that keeping in view the various entries contained in List I of the Seventh Schedule of the Constitution, there cannot be any doubt whatsoever that in the matter of investigation of the matter committed in a State, the jurisdiction of the Central Government is excluded<sup>2</sup>.

### **Constitutional Validity of the NIA Act.**

The Constitutional validity of the NIA Act has been challenged before the Bombay High Court in *Pragyasingh Thakur vs. State of Maharashtra, ATS, Mumbai, Uol and NIA*<sup>3</sup> contending that the Parliament lacks competency to constitute an agency for the investigation of offences as the policing stands in the State List of the Seventh Schedule to the Constitution. The Court rejected the contention by noting the entries in List-I and in List-III and by reading them together and harmoniously came to the conclusion that the Parliament is competent to enact the NIA Act. The Court has considered that when the parliament is competent to enact the law for the subjects enumerated in the schedule to the NIA Act, it is equally competent to create an agency for the investigation of the offences specified in it. Another aspect considered by the Court was the Entry 8 of List I (Union List) entitled as "Central Bureau of Intelligence and Investigation". It was observed that if such Central Bureau of Intelligence and Investigation could be set up by the Parliament, then, the powers could not be restricted when it decides to enact a legislation so as to constitute an Investigating Agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States, etc. In addition to this, the Court held that even if it is assumed that the State has power to make a law in relation to Police, still going by the wide wording of Entry-1 and Entry-2 of List-III, the Concurrent List, it is clear that the Parliament is competent to enact the NIA Act, 2008.

### **Allegations of Political Affability of the NIA.**

To its shame, the NIA, though it is in its springtime still, had already invited allegations of political courtesies and partiality towards a particular sect. First shocking revelation was made by its own Special Public Prosecutor Smt. Rohini Salian.<sup>4</sup> She had appeared in the 2008 Malegaon blast case involving Hindu extremists. On 25/6/2015 she said that the Agency told her to go soft in the case after the new government took over at the Centre. In another case, in which persons having strong connection with RSS were the accused (Ajmir Dargah Bomb Blast Case), when most of the key accused were acquitted, the 'scroll.in' reported on 14/8/2015<sup>5</sup> that 'Not just Rohini Salian: Public Prosecutor in Ajmer blast case is also unhappy with NIA' as the Public prosecutor expressed disappointment with the lack of interest shown by the NIA during the trial. In other cases like Samjhauta Express bomb blast case<sup>6</sup> and Hyderabad Mecca Masjid Blast Case<sup>7</sup> also the conduct of NIA was said to be doubtful.

The instances of NIA going affable with accused belong to a particular sect indicates that the history of the NIA is not an unblemished one. It is not out of place to note that several State investigating agencies and the CBI were proved to have investigated terror related cases in intelligent manner. Though it was before the formation of NIA the investigation of Bombay attack (Ajmal Kasab's Case) and the Parliament attack cases were done by State investigating agencies in befitting manner. It is learnt that the State Government of Kerala also is in its way to form a State level Anti-Terrorist Squad.

### **Issues Related to Offences of National Security**

All the offences coming under the schedule to the NIA Act are offences pertaining to national security. It can be argued that, unless there is a centrally constituted agency for the investigation of such offences the real goal cannot be accomplished. This argument is irrelevant for the reasons, on the one hand that the investigation of offences and prosecution of the accused is to punish the guilty and

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<sup>2</sup> Bhavesh Jayanti Lakhani vs. State of Maharashtra. (2009) 9 SCC 551.

<sup>3</sup> 2014 ALL MR (Cri) 457 : 2014 (1) Bom CR (Cri) 135 : MANU/MH/1680/2013

<sup>4</sup> <https://www.thehindu.com/news/national/other-states/nia-told-me-to-go-soft-in-malegaon-2008-blast-case-says-special-public-prosecutor-rohini-salian/article7354066.ece> accessed on 10/01/2020.

<sup>5</sup> <https://scroll.in/article/747397/not-just-rohini-salian-public-prosecutor-in-ajmer-blast-case-is-also-unhappy-with-nia> accessed on 10/01/2020.

<sup>6</sup> <https://thewire.in/security/samjhauta-express-bombing-with-a-prosecutor-like-the-nia-who-needs-defence> accessed on 11/01/2020

<sup>7</sup> <https://thewire.in/security/mecca-masjid-blasts-case-verdict-explainer> accessed on 10/01/2020



whoever is the agency investigating the case, if that aim is assured there will be no difference, and on the other, if the Constitution does not envisage such a central police agency, it cannot be established. If it is a matter of expertise it can be achieved if special bodies are constituted for investigation of such cases. It cannot be assumed that the police officers of the State are not adept in investigation. And if at all it is accepted that that argument is relevant, presupposing a permission of the State Government for such an investigation to be done by the central agency cannot be considered unwarranted since the primary presumption must be that the State Governments do not have any interest against the larger interest of the nation.

### **Scope to Question the Constitutional Validity of the NIA Act Not Exhausted.**

Even though the Bombay High Court held that the NIA Act is constitutionally valid, it is put forward that there are some important matters left out by the Court from addressing therewith. The Court did not say in clear terms that the Parliament only has the power to constitute an agency for the investigation of the offences covered in the schedule to the NIA Act. The Court was of certain opinion that both the State Legislature and the Parliament has the power to legislate it being a piece of legislation concerning criminal procedure. It is correct that the criminal procedure is one of the items in the Concurrent List so that both these Legislatures can enact law for the criminal procedure. As per the Code of Criminal Procedure, 1973, the power to investigate into the offence is vested with the station house officer to whom the information regarding the commission of a cognizable offence is reported. And, in either case, whether it is a cognizable or non-cognizable case, if the information is given to such officer, it is his duty to enter it into a register prescribed by the State Government (s. 154 and 155 of the Code). The police station is defined to mean as any post or place declared generally or specially by the State Government, to be a police station, including any local area specified by the State Government in this behalf (s. 2[s]). The NIA Act doesn't contemplate any such police station, whereas its s. 3 (3) only considers that the officers of the NIA would be the officer-in-charge of police station in which he is present. The police station, as per the Code still remains to be the same. The power given to the State Government to investigate into the offences by provisions in the Cr PC is the product of the Constitutional mandate (contained in the List II of the Seventh schedule). If the Central Government forms an Agency for the investigation of cases, it must conform to that command especially when Entry No. 2 in List II is police.

Thus it is clear that the power to investigate the offence stands in the realm of the State Government, though the power to enact the law relating to criminal procedure comes under the Concurrent List. If at all the Parliament enacts the procedural law, it can only vest the power to investigate crimes with the State Government.

In this juncture, it would be profitable to have a look into the minds of the framers of the Constitution as regards the investigative powers of the State by prying to the Constituent Assembly debates. The Bombay High Court, in *Pragyasinh's* case (supra) has given much emphasis on the Entry 8 of Union List entitled "Central Bureau of Intelligence and Investigation". The Constituent Assembly Debates would show that by making such an Entry the framers of the Constitution did not intend to give powers to the Central Government for investigating crimes. On 29 August, 1949 there was a heated discussion on this particular Entry in the Assembly. The original Entry was "Central Intelligence Bureau". When it was proposed to make it as it stands now, there were objections. Dr. B. R. Ambedkar said on this proposal:

The idea is this that at the Union office there should be a sort of Bureau which will collect all information with regard to any kind of crime that is being committed by people throughout the territory of India and also make an investigation as to whether the information that has been supplied to them is correct or not and thereby be able to inform the Provincial Government as to what is going on in the different parts of India so that they might themselves be in a position to exercise their Police powers in a much better manner than they might be able to do otherwise and in the absence of such information.<sup>8</sup>

Again there were discussions. One of the members, *inter alia*, pointed out that the members have already conceded to the idea that the investigation of crime is a provincial subject and therefore, if the Assembly now allow the Central Government also to investigate, the result would be that for a single crime there must be two parallel investigations, one by the Union Government and other by the State

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<sup>8</sup> [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/9/1949-08-29](https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-29) accessed on 23/11/2019.



Government. The members demanded to delete the word 'and investigation' from the Entry. Then, summing up the discussion, Dr. B. R. Ambedkar said:

The point of the matter is, the word "investigation" here does not permit and will not permit the making of an investigation into a crime because that matter under the Criminal Procedure Code is left exclusively to a police officer. Police is exclusively a State subject; it has no place in the Union List. The word "investigation" therefore is intended to cover general enquiry for the purpose of finding out what is going on. This investigation is not investigation preparatory to the filing of a charge against an offender which only a police officer under the, Criminal Procedure Code can do.<sup>9</sup>

From the above, two aspects are clear. The mandate of the Constitution is not to give power of investigation of offence to the Centre and the Entry No 8 of the Union List entitled "Central Bureau of Intelligence and Investigation" was incorporated not to grant that power. The framers might have considered that, in a federal system, giving power of investigation into offences to the Centre may affect adversely the relation between the Central and the State Governments. In this regard, it is worth noting that the investigations conducted by the CBI within the State territories are only with the consent of those Governments as provided in section 6 of the Delhi Police Establishment Act, barring exceptions by the orders of the Constitutional Courts.

The High Court of Gauhati, in *Navendra Kumar vs. Union of India*<sup>10</sup>, while considering the Constitutional validity of the CBI, has taken the Constituent Assembly debates into account to test whether the framers of the Constitution were supportive of the idea of formation of an investigating agency at national level and held that investigation into an offence is in the realm of the State, though the decision holding that the CBI lacks Constitutional backing was based on other grounds too.

Hence, the scope to challenge the Constitutional validity of the NIA Act is not exhausted.

#### **Are NIA Officers Not Police Officers?**

Only police officers are empowered to investigate the offences, generally. Entry No. 2 in the State List is Police. Police in this context does not mean merely the matters related to security. Entire police functions such as the establishment of police force, the investigation and prosecution of offences and the maintenance of law and order would come under the purview of the term police in this item. The officers of the NIA are given power to investigate the offence, and hence they are now doing police functions sans the name police. In view of Entry No. 2 in List II, there is no scope for the establishment of police by the Centre, except as provided in Entry No. 2A of List I.

#### **Scope to Amend the NIA Act.**

On the one side it renders possible to challenge the Constitutional validity of the NIA Act anew in the aforesaid terms, and, on the other, if at all it is found that the formation of such an agency is valid as the power emanates from the Concurrent List, as per the scheme of the Constitution, the State Governments would be at liberty to amend the NIA Act to water down it for requiring the Centre to seek their consent before rerouting the investigation of such offences to the NIA. Naturally, if such an amendment creates any conundrum by going repugnant to the original enactment made by the Parliament, it may necessitate the assent of the President, as envisaged in Article 254 (2). Anyhow the State Legislatures enjoy such a power, I believe. Unless the State Governments get a right of audience over the issue, in the long run, the federal system of governance of our nation will be badly affected and also it will be a big question what the prospect the Anti-Terrorist Squads of various State Governments can create, when the Central Government, at times, authoritatively and arbitrarily redirects the investigation to NIA?

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<sup>9</sup> Ibid

<sup>10</sup> 2013 Cri LJ 5009

