

## THE NATIONAL INVESTIGATION AGENCY: AN APPRAISAL

---

**Harpreet Kaur\***

### ABSTRACT

*Terrorism has been a menace to civil societies since time immemorial. Amid global issues such as climate change, human rights violations, and communal disharmony, the problem of terrorism still looms large. Terrorism, in the simplest terms, is the use of violence as a form of intimidation to achieve political aims. This may be carried out by religious extremists, or it may also be perpetrated by other interested political actors such as nationalists and pseudo-activists, irrespective of religion. To counter the persistent acts of terror upon the country, the need for a centralised investigating agency was felt by the legislators in 2008, following the horrifying terror attacks on Mumbai, where seemingly the counter-terrorism apparatus had collapsed, resulting in considerable delay in halting terror operations in the city. **The National Investigation Agency Act** was passed in 2008, and **The National Investigation Agency** came into existence on 31<sup>st</sup> December 2008.*

**Keywords:** NIA, Terrorism, Legislature, Constitutional Validity, Jurisdiction, Lacunae, Investigation, Prosecution.

### RATIONALE BEHIND THE NIA

As mentioned earlier, the triggering effect for the formation of the National Investigation Agency was produced by the Mumbai Terrorist Attacks of 2008, which horrified not only the city they targeted but the whole nation. The legislative pillar, at that time, felt that it was the need of the hour to establish a special national policing agency to effectively prosecute and investigate a selected class of criminal offences that constitute a direct threat to national security.

**Counter-Terror Force:** Terrorism has been a persistent threat to Indian national security. To counter terrorism on a central level, and for timely neutralisation of national security threats, a national investigation and prosecution force was necessary.

---

\*BA LLB, FOURTH YEAR, UNIVERSITY INSTITUTE OF LEGAL STUDIES, PANJAB UNIVERSITY, CHANDIGARH.

**Need for a central agency:** Policing in India is a state matter i.e., to be administered by the state and not the centre. However, in certain cases of national importance, the state borders create numerous obstructions in the efficient and timely investigation of organised terrorism of interstate dimensions. To do away with these obstructions, a central agency was needed.

**Recommendation of the Second Administrative Reforms Commission of India:** Eminent experts and committees, including the Second Administrative Reforms Commission of India, The National Human Rights Commission (NHRC), The Soli Sorabjee Committee, and The Bureau of Police Research and Development (BPR&D) had recommended the formulation of a standing national force to counter 2008 Terror-stricken Mumbai-like situations. The recommendations unequivocally stated that the erstwhile law was inefficient, and certain offences needed to be classified as 'federal offences' which in turn necessitated the establishment of a federal prosecution and investigation agency.

### CRITICAL APPRAISAL

Ever since its creation, the agency has had a debate revolving around the constitutionality of the NIA itself. Following the national outburst and turmoil after the 2008 attacks, the act was passed as a reaction to public clamour within a month of the incident. Circumstances surrounding the enactment of the NIA Act, have also led experts and scholars to allege that the act was a hasty reaction to a stressful national weather, and was passed without seeking alternatives, or opinions of the state governments.<sup>1</sup>

There remains a question whether the NIA has been established as a cure for a disease, or as a necessary evil, or whether the central government has tried to kill one poison with another. Experts around the nation still dispute the constitutional validity of the agency as well as the provisions of the Parent Act. There are several questions regarding the scope of its powers, jurisdiction, and modus operandi. These are discussed in detail below.

**Centre's encroachment upon matters in the State List:** The issues of policing and maintenance of public order lie squarely within the state list. Hence, these items are constitutionally within the exclusive legislative sphere of the states and not of the centre (Entry 1 and Entry 2 of List II). The research and discussions conducted by the police reform

---

<sup>1</sup> Commonwealth Human Rights Initiative 'Issue Paper on the National Investigation Agency Act, 2008' (2009) accessed on 02.09.2023

committee indicate that the ‘central agency’ was not to be created to encroach upon the policing powers of the state but to assist and aid them while operating *in tandem* with them.<sup>2</sup>

1. As the nation was faced with terror and turmoil, the act was seen as necessary, due to which it received the assent of most parliamentarians, barring some. The ones that dissented called for an amendment to necessitate an association between the state police and the NIA for the investigation of the scheduled crimes.<sup>3</sup> However, the resultant provisions of the act created an **open and unfettered jurisdiction** for the NIA to investigate scheduled offences across state borders, regardless of the state police.

2. Supporters of the constitutional validity of the agency argue that while policing and public order lie within the scope of the legislative power of the state, Entry 93 of List I, ‘Offences against laws concerning any matters in this list’ is sufficient to empower the central government to legislate on the matter of national policing. An alternative supportive view is that Article 355 read in consonance with Entry 1 of List I i.e., ‘Defence of India’ allows the central government to actively endeavour to set up a national investigation agency.

3. However, it appears from the heated debate of August 29, 1949, of the Constituent Assembly, that the framers of the Constitution never intended the investigation of crimes to be a union matter. Further stressing upon this point, Dr. B.R. Ambedkar stated, “The idea is this that at the Union office, there should be a sort of Bureau which will collect all information concerning 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>4</sup>

### **Suo-moto Jurisdiction of the NIA:**

1. The other central agencies of investigation such as the Central Bureau of Investigation have to seek prior consent of the State in question while investigating a cross-jurisdictional offence.

---

<sup>2</sup> The Model Police Act, 2006 (Based on Soli Sorabjee Committee Report)

<sup>3</sup> P. Chidambaram ‘A Counter Terror Architecture for India’ (2009) RSIS Monograph No. 27 accessed on 01.09.2023

<sup>4</sup> Chairman Dr. Rajendra Prasad ‘The Constituent Assembly Debates’ (First Published 1949) Vol. IX 9-15

However, this requirement has been removed from the scope of the NIA. The central agency can operate, prosecute, and investigate offences without prior consent, or association. It has been given the statutory right of unfettered, self-motivated jurisdiction.

2. Section 6 of the Parent Act gives the central government power to practically usurp the investigation of any scheduled offence through the NIA.

3. This provision has also raised questions over the nation's sensibilities regarding separation of powers in accordance with Indian Federalism.

### **Lacunae in Nomenclature and Classification:**

1. Considering the prospective objections and protestations to the legislation, it was added by the parliament that the act would only empower the National Investigation Agency to investigate and prosecute only specific acts, namely the Scheduled Offences.

2. However, there is no clear definition of the implications of the term 'terrorist acts' thus laying it open for the agency to interpret it as widely as possible at every instance where any minute terrorist apprehension is felt. In addition to this, various terms such as 'Left-Wing Extremism' have been added without giving an inkling of interpretation to them, to facilitate the State Governments, as well as the Agency to sagaciously apply their reasoning and determine whether a certain act warrants the NIA's participation, or whether it falls within the exclusive domain of the State Police.

### **A change in form, not in practice:**

1. On December 12, 2008, a group of 40 protesters assembled outside the Parliament and wrote an open letter to all politicians of the country stating that the passing of the NIA Bill would be merely performative. It would be an act to appease the horrified masses, but would not be able to bring any real change.<sup>5</sup>

2. Numerous experts also noted that the need of the hour was **not a change in structure, but a change in practice i.e., police reforms**. It was not through the construction of new buildings, but the reformation of the old ones, that national security could be shielded from witnessing another form of 2008 Mumbai. It further stated that the establishment of the NIA was a

---

<sup>5</sup> V. Venkatesan & Venkitesh Ramakrishnan 'Limits of Law' (2009) Frontline, Vol. 26

“shifting about of doors and windows, a shuffling of spaces that has no realistic effect upon the strength and utility of the edifice.”<sup>6</sup>

### **No Preventive Value:**

1. It has been noted that the NIA at best, is an investigating and prosecuting agency after the offences have taken place. Counter-terror experts around the nation have contested the preventive value of the agency apart from prevention induced by deterrence.

2. Former IB Director, Ajit Doval, in this regard states that no doubt, the establishment of a counter-terror agency is needed in the country, however, it shall not merely become one of the numerous ‘agencies’ disputing over jurisdictions. It should have some preventive powers as well. However, he goes on to state that, in his opinion, if the NIA had existed at a time preceding the Mumbai Terror Attacks of 2008, it would not have made a difference, and the acts would have taken place as they did. The NIA could have operated as a post-incident investigative outfit but nothing more. The structural provisions backing the NIA give it little to no preventive value. “Had this agency been existent at the time of the Mumbai carnage, none of the shortcomings that came to light would have been minimised.”<sup>7</sup>

### **Bill passed without adequate deliberations:**

1. Another contention regarding the unconstitutionality of the NIA Act is that it was enacted hastily, without adequate deliberations, which warranted an act of its importance. Following the Mumbai Attacks, the masses were in a state of disarray. There was an imminent and, apparently immediate requirement of an investigating agency at the central level to investigate, and largely, prevent such acts of terror from ever occurring again.

2. It was in these circumstances that the NIA Bill became the NIA Act within four days of its introduction. Even the BJP-led opposition favoured its enactment. Some dissenters such as the earlier mentioned CPI-M leader, Sitaram Yechury, though not completely dissenting, suggested some amendments to the bill, which were largely ignored and the bill was passed.

---

<sup>6</sup> Ajai Sahni ‘*A triumph of Form over Content*’ South Asian Terrorism Portal accessed on 03.09.2023

<sup>7</sup> Ajit Doval ‘*Will the National Terror Outfit become just another agency?*’ The Economic Times (12 January 2009)

3. The above-mentioned reasons indicate that the NIA Act was meant to act as an ‘immediate fix’ to the state of turmoil that the country was facing at the time it was passed.

#### **Failure to fill the institutional vacuum:**

1. It has been observed that the NIA was formulated to fill the institutional vacuum that existed in the Indian Investigation Machinery relating to the offences against national security.

2. However, the NIA has largely failed to fill that vacuum in the absence of constructive coordination with the State Police. It has wide jurisdictional powers *qua* the scheduled offences, however, in cases of cross-jurisdictional offences, it fails to work in tandem with the other agencies.

A statutory change is required to foster an understanding within the National Investigation Agency that to facilitate efficient apprehension, prevention, control, investigation, and prosecution of terror in India, an all-inclusive approach is necessary.<sup>8</sup>

#### **Allegations of Political Partiality:**

1. Within a short period of its existence, the National Investigation Agency was faced with numerous allegations of political partiality. There are loopholes within the provisions of the parent act which allow political interests to creep in. For instance, in Section 7 of the act, the NIA has been given the power to transfer cases to the state governments, considering the “gravity of the offence, and **other relevant factors...**” What may be included in these ‘relevant factors’ has been completely left open to the discretion of the agency. The option of transferring cases to the State Governments, may therefore, practically be used as per the whims of the agency dependent upon political interests.

2. Rohini Salian, the agency’s Special Public Prosecutor, who had appeared in the 2008 Malegaon Blast Case made the first disclosure of a shocking nature. In 2016, she said that she was told to ‘go soft’ in the case after the newly elected government took over at the centre.<sup>9</sup>

---

<sup>8</sup> Commission of Centre-State Relations Report ‘*Internal Security, Criminal Justice and Centre-State Cooperation*’ Vol. 5 (March 2010)

<sup>9</sup> Abdul Kader Kunju S. ‘*Explainer: Here’s how handing over UAPA cases to the NIA affects the federal system*’ The Wire (29 January 2020)

## WAY FORWARD

The NIA has undoubtedly been created to make the country more secure. However, it shall fail to achieve its aims until and unless it overcomes the fundamental challenges that it faces. It has to strengthen cooperation with the state governments to fill the institutional gaps that exist in the sphere of investigation today.

The agency has to operate in a streamlined and definitive manner to do away with the vagueness instilled into it, owing to the haste in which the NIA Act was passed in 2008. Through practice or precedent, concrete meanings are to be given to the terms 'terrorist acts', 'left-wing extremism' and 'other relevant factors' etc. to remove doubts from the modus operandi of the National Investigation Agency.

To practically take up the mantle of a 'Federal' investigation body, its powers and jurisdiction must be clearly defined, and the questions upon its constitutional validity need to be answered definitively.

