

ISSUES PAPER ON THE NATIONAL INVESTIGATION AGENCY ACT, 2008

The Commonwealth Human Rights Initiative (CHRI) is a non-partisan NGO that has researched policing issues and advocated for police reforms in India and elsewhere in the Commonwealth for over 10 years.¹ CHRI's technical expertise on policing has been acknowledged by the Supreme Court in *Prakash Singh v. Union of India (2006)* (hereinafter "*Prakash Singh*") and by the invitation to participate in the Ministry of Home Affairs' Police Act Drafting Committee (Soli Sorabjee Committee). CHRI is presently engaged with the Supreme Court appointed Monitoring Committee whose mandate is to periodically report to the Court on governmental compliance with the directives it has issued in the *Prakash Singh* case.

In the aftermath of the Mumbai terror attacks the Lok Sabha has done 3 significant things:

1. Amended the Unlawful Activities (Prevention) Act, 1967;
2. Created Special Courts for the trial of Scheduled Offences; and
3. Created the National Investigation Agency

These three initiatives are intertwined and hold significant import for civil liberties. However, this brief will only address the issues raised by the creation of the National Investigation Agency and does not include an analysis of the Special Courts or the recent amendments to the Unlawful Activities (Prevention) Act, which are themselves extremely problematic.

A. NECESSITY OF A NATIONAL INVESTIGATION AGENCY

With certain crimes often having an interstate or international dimension, it is incredibly difficult for a law enforcement body to prevent or investigate such offences if it has limited jurisdiction. A national body that can coordinate and oversee the investigation and enforcement of criminal activities that have national or cross-border repercussions is essential. In addition, in order to prevent such offences from occurring in the first place, substantial information sharing and comprehensive intelligence gathering across many jurisdictions has to take place. As pointed out in an earlier MHA proposal on this issue, with the creation of a central law enforcement agency "the inter-State linkages of the conspiracies and activities of organized crime syndicates and of terrorist groups can be better traced and their ramifications tackled in their entirety for effectively neutralizing the threats that they pose to national security."² State law enforcement agencies, with their limited jurisdictions, cannot do this alone. In the absence of a national mechanism, prevention and investigation of all-India crime will remain uncertain and ad hoc.

The creation of a national agency has been in the minds of many for a long time. In *Prakash Singh* the Supreme Court received materials from the National Human Rights Commission, the Soli Sorabjee Committee, the Bureau of Police Research & Development (BPR&D) and the Second Administrative Reforms Commission on the need and scope of a national investigation agency. For instance, the BPR&D stated:

¹ Please refer to CHRI's website at www.humanrightsinitiative.org to download relevant publications.

² See paragraph 8 of the Soli Sorabjee Committee's submission to the Supreme Court in the matter of *Prakash Singh & Others v. Union of India & Others* regarding investigation of cases of terrorism and organised crimes.

The rapidity and relative ease of the adoption of new technologies and innovative methods of planning, coordinating and execution of cross-border crimes by the organized crime-terrorist nexus has outpaced the speed with which the Law Enforcement Agencies at the state level have been able to afford to “modernize” themselves in terms of the resource base, expertise level, adoption and assimilation of new technologies of crime detection and prevention, adequately trained manpower to take on the new age tech-savvy terrorist organized crime nexus. 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.

Although the Court reserved judgement on this particular issue, the materials submitted generally agree that (a) a national investigation agency is needed; and (b) that a national investigation agency should have *suo moto*³ jurisdiction over an offence that:

- Has international/interstate ramifications; or
- Relates to the security of the nation; or
- Relates to the activities of the Central government; or
- Relates to corruption in All India Services; or
- Relates to government currency and cross-border offences and have the potential to threaten the security and integrity of the nation.

B. ISSUES RAISED BY THE CREATION OF THE NATIONAL INVESTIGATION AGENCY

The sudden creation of the National Investigation Agency (hereinafter “NIA”) came in immediate reaction to public clamour after the events in Mumbai, the latest in a string of horrific terrorist attacks. But the complex topic of creating a national policing agency has not been the subject of any recent government public white paper. No comprehensive analysis of the issues was done, no review of existing legislation and capabilities has been conducted, and an invitation was not extended to the States or civil society to suggest possible alternatives. The haste in which this Act has been conceived has left unresolved many issues about the NIA’s constitutional validity, functioning, and scope.

1. CONSTITUTIONAL VALIDITY OF THE NIA

The constitutional basis for the creation of the NIA remains a matter of debate. The areas of policing and public order lie within the exclusive legislative competence of the States and not with the Centre. States would be extremely chary of accepting or cooperating with any agency that encroached on that power.

Earlier committees, tasked with examining a possible national investigation agency, have repeatedly pointed out that “it should be clearly understood that the aim of creating such an agency, by whatever name called, cannot be to usurp the powers of the State, but on the other hand, it should be an agency meant to *assist* them in the nation’s fight against terrorism and inter-State or trans-national organized crime which jeopardise national security.”⁴

³ *Suo moto* is defined as “on its own motion”.

⁴ See paragraph 26 of the Soli Sorabjee Committee’s submission. Emphasis added.

According to the materials submitted by the Soli Sorabjee Committee to the Supreme Court in *Prakash Singh*, the Ministry of Law advised the Ministry of Home Affairs “that ‘police’ is a State subject and its functions cannot by a Parliamentary Law be conferred on an existing or new Central Police Force except under Article 249⁵ or 252⁶ of the Constitution”. Due to the constitutional difficulties posed by creating a Central Law Enforcement Agency, the Law Ministry advised the MHA that the setting up of such an agency should be included in the Terms of Reference of the new Commission on Centre-State Relations.

Some have suggested that Entry 93 of List I, which provides the Centre the power to legislate on “offences against laws with respect to any of the matters in this List”, provides the legal rationale for the Centre to create a national investigation agency. Others argue that Entry 1 of List I (the defence of India), read in conjunction with Section 355⁷ of the Constitution, is sufficient to allow the Centre to legislate in this manner. However, even on this view of the matter, it appears that the Centre may only be able to *legislate* on matters relating to terrorism⁸ and not necessarily create a new national policing agency without amending the Constitution. It would appear that the Law 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 correct.

Hitherto, when a national policing agency, like the Central Bureau of Investigation, is required to investigate a cross-jurisdictional crime it can only do so at the request or with the consent of the State concerned. By contrast, the newly created NIA can assume jurisdiction over a Scheduled Offence *suo moto*.

It is in deference to the concerns and sensibilities of State governments that the scope of offences that the NIA can investigate, as listed in the schedule attached to the Act, has been circumscribed. The wording in the Act’s *statement of objects and reasons* is intended to allay States’ concerns when it states, “the Government after due consideration and examination of the issues involved, proposes to enact a legislation to make provisions for establishment of a National Investigation Agency in concurrent jurisdiction framework, with provisions for taking up **specific cases** under **specific Acts**.”⁹

However, given the expanded definition of what constitutes a “terrorist act” in the recently amended Unlawful Activities (Prevention) Act, 1967, the concern remains that the NIA may investigate all kinds of activities that until now have lain in the exclusive jurisdiction of the State. For instance, the *statement of objects and reasons* for the Act demonstrates the inherently political calculations involved in defining what “terrorism” is when it chooses to highlight “Left Wing Extremism”, without clarifying how Left Wing Extremism is defined and why it is more of a concern than say “Right Wing Extremism”.

⁵ This article permits Parliament to legislate with respect to the State List in the national interest for a period of one year.

⁶ This article makes it possible for Parliament to make such laws relating to State subjects for those States whose legislatures empower Parliament in this regard by way of resolution.

⁷ It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.

⁸ See *PUCL v. Union of India* [(2004) 9 SCC 580].

⁹ Emphasis added.

These sorts of exclusions and inclusions reflect the inherent problems in having overbroad subjectivity embedded in the operating legislation. Section 6(3) of the Act states that the “Central Government shall determine ... within 15 days ... 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.”¹⁰ The open-endedness of phrases such as “other relevant factors” (without explaining what these factors might be) allows in the possibility of political expediency playing a role in the Centre’s determination of whether to direct the Agency to investigate or not. In addition, Section 7 of the Act also permits the consideration of “other relevant factors” when deciding whether to collaborate or transfer an investigation to the State. While it is perfectly reasonable for there to be concurrent jurisdiction over Scheduled Offences, and to transfer investigations to the State when it is better suited to look into an offence, the circumstances for assuming jurisdiction (or collaborating/transferring investigations) should not be subject to the uncertainty created by broad phrases like “other relevant factors” but be able to be tested for rationale against carefully stated criteria.

2. FUNCTIONING OF THE NIA

Powers focus only on investigation, not prevention: Section 3(2) of the Act states that the NIA has the power to investigate throughout India any offences listed in the attached schedule. However, the NIA has not been given the necessary powers to *prevent* the enumerated offences. In order for any law enforcement agency to properly prevent crime, it requires more than simply powers of investigation and enforcement. 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 for the NIA to be effective in preventing federal crime¹¹, 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 was accepted that prevention is best served by the acquisition of information and then acting on that information. 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* them.

Failure to define “superintendence”: The scheme of the Act is based on the Central government first making a determination that an event on the ground is actually a Scheduled Offence and then secondly, deciding whether it wishes to direct the NIA to investigate it.¹² These determinations are made by the political executive rather than the professional expert (the Director General who heads up the Agency). For confidence to build in policing bodies, the decision making process needs to be seen as being outside all extraneous political considerations and in the hands of a professional expert who seeks to

¹⁰ Emphasis added.

¹¹ Defined by the Ministry of Home Affairs as “offences that have inter-State and/or international/trans-national ramifications and which affect national security through activities aimed at destroying the sovereignty, integrity and unity of India and/or thwarting the economic progress and development of the country.”

¹² See Section 6(3) of the NIA Act.

augment the States' and Centre's capacity to deal with issues that impinge on national security.

However, Section 4(1) of the Act states that, "the superintendence of the Agency shall vest in the Central Government" without defining what superintendence means. In the past, the failure to define superintendence in police acts at both the State and Central levels has demonstrably led to the politicisation of policing with all its attendant ills. The creation of a brand new law enforcement agency provided an opportunity to remedy this situation by clearly defining the powers and functions of the political executive and the operational responsibilities of the Director General. Decisions on whether an offence warrants NIA involvement ought to reside with the Director General. Much of the suspicion that arises with the creation of a new law enforcement agency could have been allayed if the potential for illegitimate political interference had been curtailed rather than enlarged. Instead, section 6(3) increases the likelihood that political considerations will influence investigative decision-making when it states that, "**the Central Government shall determine ... within 15 days ... whether the offence is a Scheduled Offence or not.**"¹³

As presently constituted, the same difficulties that attend the politicisation of policing throughout India are reflected in the construction of the NIA. A golden opportunity to reform the way this country approaches policing was missed by not ensuring that "superintendence" was carefully defined so that it permitted a professional expert to make key administrative and investigative decisions rather than a political actor. The failure to do so may permit illegitimate political interference to creep into the functioning of the NIA.

Delay is institutionalised: Section 6(2) of the Act states that once the State government receives a report on a Scheduled Offence, it shall forward the report to the Central government **as expeditiously as possible**. It is unclear what that means precisely. In addition, section 6(3) permits the Central government to take 15 days before making a decision on whether the offence in question is truly a Scheduled Offence and whether the NIA should investigate it. Given the desperate need for quick responses to crisis situations, and in this age of electronic communication, it is unclear why the Act does not compel the State government to forward the report within 24 hours and to provide the Central government with a much shorter window of time within which to make their determination.

3. **SCOPE OF THE NIA**

The scope of what the NIA will investigate is paradoxically insufficient and potentially too broad. With respect to the former, the table at **Appendix A** summarises what category of offences other countries give their federal agencies *suo moto* jurisdiction over, how India currently handles the issue, and the suggestions from various committees and governmental bodies on what offences an Indian national investigative agency should have *suo moto* jurisdiction over. As shown in the table, the NIA is not empowered to investigate a number of interstate and trans-national crimes that require a national response. For example, human trafficking, drug trafficking, cyber crime and organised crime are not included in the Schedule of Offences to the NIA Act. Whether these crimes have a direct link to terrorism or not, the fact is that the prevention and investigation of these offences are best served by a national response. These crimes, like terrorism, are by their very nature, national or international in scope and design. In addition, they can often

¹³ Emphasis added.

have overt or covert links to terrorism. An NIA that is most effective is one that looks at all national crimes and is able to make the necessary linkages.

On the other hand, it can be argued that given the presence of the political discretions discussed above and the breadth of activities now covered by the Unlawful Activities (Prevention) Act, the possible scope and functioning of the new agency is much too broad and intrusive for comfort.

C. WAY FORWARD

Ostensibly, the ultimate objective of the NIA is to make Indians more secure by addressing the gaps in our current approach to preventing and investigating offences with a trans-national 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 minimise the possibility of failure. Sections 23 and 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.

As of January 5, 2009

APPENDIX A: SUO MOTO JURISDICTION FOR FEDERAL OFFENCES

	U.S. Federal Bureau of Investigation	Royal Canadian Mounted Police	Australian Federal Police	CBI (India)	NHRC (India)	Sorabjee Committee	Malimath Committee	MHA (India)	Padmanabhaiah Committee	BPR&D	National Investigation Agency
Counterterrorism	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓
Counterintelligence	✓ †	CSIS	ASIS	R&AW		✓	✓	✓		✓	
Human Trafficking			✓		✓						
Major Fraud (incl. money laundering & counterfeit currency)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Cyber Crime	✓		✓		✓	✓		✓		✓	
Public Corruption	✓			✓	✓				✓		
Organised Crime	✓	✓	✓		✓	✓		✓	✓	✓	
Aviation Crime		✓	✓		✓	✓	✓	✓	✓	✓	✓
Drug Trafficking		✓	✓		✓	✓	✓	✓		✓	
Atomic Energy								✓		✓	✓
Civil Rights	✓										
Special Crimes	✓ ‡			✓	✓ ±				✓ ‡		

†Along with CIA and State Department

‡Theft of Art, Gems and Antiquities

±Extortion (incl. kidnapping for ransom)