



# Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

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## National Investigating Agency: A Critical Analysis

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*Received 20 January 2023; Accepted 08 February 2023; Published 11 February 2023*

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*This article discusses the National Investigation Agency (NIA) and the criticisms faced by it. The Act was enacted to provide a safeguard to our nation against acts of terrorism. The purpose of this act, how the Agency does its investigation, and the prosecution and the trial of cases to be done in special courts are examined at length. NIA being born for a noble purpose also has its fair share of demerits and ambiguity pointed out by many. The case of Gautam Navlakha is taken as a case study and its peculiarities are discussed. It was during the Bhima Koregaon riots when the Centre deemed his speech a threat to national security and booked him. This case still finds itself in the headlines. Other laws like the Unlawful Activities Prevention Act (UAPA) have kept people under trial, and the chargesheet is yet to be filed in the majority of cases. The State of Chhattisgarh challenging the constitutionality of this Act and politically motivated nature and overreach on part of the Centre is also analyzed.*

**Keywords:** *nia, anti-terrorism, riots, investigation agency, constitutionality.*

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### INTRODUCTION

The National Investigation Agency was formed right after the 2008 terrorist attack. Former Union Minister P. Chidambaram introduced the bill of NIA. According to his vision, it will deal with the eight laws that were mentioned in its schedule, and the State's rights and the Central government's obligations to look into the more significant cases will be balanced. It is a national-level counter-terrorist organization to investigate and prosecutes crimes that affect the security,

freedom, and integrity of India. It also investigates violations of the statutes passed to execute the international treaties, accords, conventions, and resolutions of the United Nations, its agencies, and other international organizations.<sup>1</sup> The NIA has looked into 463 instances over the years, including well-known ones like the Elgar Parishad case, the Malegaon 2008 bomb case, and the Ambani terror fear case, in addition to several cases involving the financing of terrorism in Kashmir and cases from Naxal-affected areas. It was constituted, by the central government notwithstanding anything in the Police Act, of 1861 to investigate and prosecute offenses in Schedule 4. The officers of the agency shall have the same duties, privileges, and powers the police have regarding an investigation. This investigating wing's superintendence lies in the hand of the Central Government. A director general is appointed by the Centre for the administration of the Agency whose powers are in congruence with that of a director general of the Police force in a State.<sup>2</sup> Its main headquarter is in Delhi with a branch in other states like Hyderabad, Lucknow, Kolkata, etc. Centre intends to set up NIA headquarters in every state by 2024.<sup>3</sup>

This enactment not only applies to citizens of India but also outside of it, government personnel where ever they may be, and people on ships and aircraft that were registered in India. The 2019 amendment added to the list that it also applies to persons who have committed scheduled offenses outside India to a citizen of India or that offense affects the interest of our country. Offenses under this act are to be tried in a special court which means a sessions court has to be designated as Special Court. Scheduled offenses mean the legislations listed in the schedule of the NIA Act.<sup>4</sup>

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<sup>1</sup> Devesh K. Pandey, 'Explained | The functioning of the National Investigation Agency' (*The Hindu*, 3 July 2022 ) <<https://www.thehindu.com/news/national/explained-the-functioning-of-the-national-investigation-agency/article65596033.ece>> accessed 10 January 2023

<sup>2</sup> National Investigation Agency (Amendment) Act, 2019

<sup>3</sup> 'NIA branches to be set up in all states by 2024: Amit Shah' (*Hindustan Times*, 28 October 2022 ) <<https://www.hindustantimes.com/india-news/nia-branches-to-be-set-up-in-all-states-by-2024-amit-shah-101666897025779.html>> accessed 10 January 2023

<sup>4</sup> National Investigation Agency (Amendment) Act 2019

## **HOW INVESTIGATION IS DONE BY THE NIA**

When an FIR is lodged about any scheduled offense in the police station, the officer in charge forwards it to the State. Then the State shall forward the same to the Central Government. The Centre should determine the basis of the report by the state within fifteen days of receiving and contemplate whether it is a scheduled offense or not, and its gravity, to conclude whether its fit for further investigation by the Agency. The Central Government also can take suo moto action to investigate if it thinks that the offense comes under scheduled offenses. The Centre can give state police the instructions to stop the investigation and transfer it to the agency with the relevant records and documents. The police have to continue with their investigation until the Agency takes up the matter.<sup>5</sup>

The Agency has the power to either request the state to associate itself with the investigation or it may with approval of the Centre transfer the case to the State for investigation and trial. The State shall at all times extend assistance and cooperation to the Agency for investigation. The State has the power to investigate and prosecute the Scheduled offense as otherwise provided under the act.<sup>6</sup>

## **SPECIAL COURTS UNDER NIA**

The Central Government in consultation with the Chief Justice of the High Court shall designate the Court of Session to be a Special Court. Any issues of jurisdiction of the special court shall be referred to the Central Government and it decides to be final. The judge of the court session shall act as the special judge till the completion of the trial or till he continues as a judge. The special court may sit in any other place than its usual, on its own, or as an application made by the public prosecutor. The jurisdiction of the Special Courts lies within the local territory in which the scheduled offense is committed. Exceptions can be the situation of exigencies such as its impossible to conduct a fair and speedy trial, risks of breach of peace, the safety of the stakeholders, and if it is not in the interest of justice. The Supreme Court or the High Court may

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<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

transfer it to any other state or any other special court, respectively. The Special Court can try the connected offense of the accused under this Act or any other offense. The Special Court after taking cognizance feels that it is not triable by it, it may transfer the case to any court, having jurisdiction under the code of criminal procedure and the court to which it has been transferred may proceed with the trial.<sup>7</sup>

Appeals can be made to the High Court from Special Courts from judgment, sentence, and order but not an interlocutory order. The appeal is to be heard by a division bench of the High Court and to be disposed of within the period of three months. The appeal shall be preferred within thirty days from the date of the judgment or sentence or order, except if the High Court is satisfied with the reason why the appellant had not appealed within thirty days then only it can be extended.<sup>8</sup>

### GAUTAM NAVLAKHA CASE

One of the most controversial cases concerning the NIA. Gautam Navlakha who is a famous human rights activist had allegedly given some provocative speeches at the Elgar Parishad and was arrested by the NIA. His house arrest is extended till February 17<sup>th</sup>.<sup>9</sup> Now, he must take permission from the courts who directed him to take permission from NIA to make a call to his daughter living abroad.<sup>10</sup> This shows how a common man's liberty is not given the high pedestal it deserves due to this enactment and political overreach on behalf of the government.

The facts of the case go like during Elgar Parishad which is a cultural celebration violence broke out. Instigating speeches were activists and one of them was Gautam Navlakha, he was not present at Elgar Parishad but was arrested for plotting and Maoist links after 8 months of the events. According to the police anti-terrorist activities, conspiracy to assassinate Modi, and ideas

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<sup>7</sup> *Ibid*

<sup>8</sup> *Ibid*

<sup>9</sup> 'SC extends till Feb 17 house arrest of Gautam Navlakha' (*The Statesman*, 9 January 2023)

<<https://www.thestatesman.com/india/sc-extends-till-feb-17-house-arrest-of-gautam-navlakha-1503145387.html>> accessed 14 January 2023

<sup>10</sup> 'Navlakha wants to dial daughter in Spain; get NIA nod, says SC' (*The Times of India*, 10 January 2023)

<<https://timesofindia.indiatimes.com/india/navlakha-wants-to-dial-daughter-in-spain-get-nia-nod-says-sc/articleshow/96866874.cms>> accessed 15 January 2023

to overthrow the government transacted during the chaos. To transport Navlakha from Delhi to Pune, where the FIR was filed and the case fell under the purview of the Pune court, the police submitted a "transit remand application" to a Delhi magistrate. Navlakha promptly filed a complaint with the Delhi High Court challenging the legitimacy of his arrest. The Delhi High Court ordered that he be held under house arrest in Delhi till further orders on August 28, 2018, while also staying the Magistrate's order.<sup>11</sup> Write a petition was filed in Supreme Court stating arrests were to curb independent voices. The Supreme Court, however, denied the request for an independent investigation but allowed the accused—including Gautam Navlakha—to remain under house arrest for another four weeks and to seek any legal remedies from a court with the appropriate jurisdiction.<sup>12</sup>

Delhi High Court held his arrest was not sustainable in the eyes of law and directed him to end house arrest. He went to the Bombay High Court to quash the FIR against him. Court did not find anything incriminating against him but later dismissed his petition when the state provided documents against him. The sessions court rejected his application for bail as well as the appellate courts. Supreme Court also directed him to surrender himself to judicial custody. Then he applied default bail u/s 167. Both NIA special court and the Bombay High Court denied his bail. Aggrieved by this he approached Supreme Court.<sup>13</sup>

**Issue:** Whether Navlakha's house arrest would amount to "custody" under Section 167 of the Criminal Procedure Code, 1973, for default bail purposes?

**Arguments made on behalf of Mr. Navlakha:** Navlakha claimed that because the investigating officers had permission from the Delhi High Court to question him while he was under house arrest, he was thus in police custody. The Maharashtra Police continued to investigate him while he was under house arrest for offenses under the IPC and UAPA. He added that the Delhi High Court decision from October 1, 2018, ruling that the duration of his house detention was unlawful, does not render that duration null and void. The length of detention was not

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<sup>11</sup> *Gautam Navlakha v The State of Maharashtra* (2020) Criminal Anticipatory Bail Application No 2461/2019

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

eliminated by changing the type of remand from transit remand in police custody to confinement at Navlakha's house.<sup>14</sup>

**Arguments made by NIA:** According to the NIA, if the chance for an interrogation of the accused is not present, then the time of incarceration would not be sufficient to meet the requirements of Section 167. In addition, the Delhi High Court's judgment for a period of house arrest did not constitute a violation of Section 167. According to the NIA, detention cannot "end" unless the detainee is released on bail or is acquitted. The term "custody" would not apply to Navlakha's house arrest because he was not released on bail and was not taken into judicial custody at the end of it.<sup>15</sup>

**Judgment:** The Supreme Court noted that a magistrate must issue the detention order by Section 167(2) of the Criminal Procedure Code. Gautam Navlakha was first ordered to be held in custody for a period of two days by the magistrate. After ruling the imprisonment to be unlawful, the Delhi High Court overturned the Magistrate's order and imposed house arrest. This house arrest order did not modify or further the magistrate's original directive. Furthermore, the High Court did not follow the rules that must be followed when a Magistrate orders custody under Section 167. The Delhi High Court, which "did not claim to operate under Section 167," issued the house arrest order, the Supreme Court found. His time under house arrest could not be included in the 90 days needed to qualify for default bail under Section 167 of the CrPC.<sup>16</sup>

## CHALLENGES FACED BY NIA

The state of Chhattisgarh has challenged the constitutionality of NIA as it violates the separation of powers between the State and the Centre. The plaint was filed under article 131 of the constitution which deals with the Supreme Court's jurisdiction in case of conflict between the State and the Centre. The State government argues that NIA took the state's power to

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<sup>14</sup> 'Gautam Navlakha v National Investigation Agency' (*Global Freedom of Expression*)  
<<https://globalfreedomofexpression.columbia.edu/cases/gautam-navlakha-v-national-investigation-agency/>>  
accessed 05 January 2023

<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid*

investigate. As there are no rules governing this Act, makes it arbitrary. The law breaches the federal principle contained in the Constitution because there is no provision for getting the approval of the State government before operating in its territory. The Act's provision also goes against the State's sovereignty. It is in contradiction to the distribution of power under schedule 7 of the Constitution as the territorial jurisdiction of any state which was investigated by the police was taken away. The State of Chhattisgarh has prayed to Supreme Court to either declare NIA unconstitutional or repeal sections 6,7,8 and 10 of the Act.<sup>17</sup>

There is no concept of federal crime in India. Even though criminal law may be on the concurrent list but this Act gives the Centre encompassing power to prosecute. But in another argument, it could be said that NIA is a truly federal agency as it works together with the state to solve grave crimes. As mentioned in the Act, it aims to prosecute issues relating to the security, integrity, and sovereignty of India, these terms seem vague and their ambit of meanings could be construed on the whims and fancies of the Central government. It has been expanding its jurisdiction since its inception. In 2020, it got the power to overtake and investigate matters regarding NDPS Act as well. Law and order is a state concern according to the Constitution. Questions have been made about how the NIA is violating sovereign rights while purportedly combatting terrorism. According to a US Embassy cable obtained by The Hindu in 2011, the powers of the NIA might be challenged in court as violating the constitution's clauses governing Center-State relations as told to the FBI by our former Home Minister P Chidambaram.<sup>18</sup>

## CONCLUSION

In principle, the whole act seems like a great way to track and curb terrorist-related crimes. But in reality, it is the political overreach on part of the central government. The perfect example would be the Bhima Koregaon Elgar parishad riots whose ramifications we still could find in

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<sup>17</sup> 'Chhattisgarh Files Suit Against Centre in Supreme Court Challenging NIA Act' (*The Wire*, 15 January 2020) <<https://thewire.in/law/chhattisgarh-files-suit-against-centre-in-supreme-court-challenging-nia-act> > accessed 12 January 2023

<sup>18</sup> 'NIA, India's only truly federal agency which has more powers than CBI' (*The Federal*, 28 September 2022) <<https://thefederal.com/explainers-2/nia-indias-only-truly-federal-agency-which-has-more-powers-than-cbi/#:~:text=The%20Act%20made%20the%20NIA,more%20powerful%20than%20the%20CBI.>> accessed 10 January 2023

daily headlines. Recently Amit shah proposed setting up branches of the agency in all the states by the year 2024 and also asked them to join hands with the Centre to curb organized crimes. A joint strategy is to be prepared for security problems be they internal or external. NIA has extraterritorial jurisdiction and the power to confiscate the property acquired by terrorists. The new step would be instrumental in the development of the joint strategy the government has adopted. Mr. Shah stated even though law and order is a state subject, technology has made it borderless. Hence State and Centre have to join hands and work towards fighting cybercrimes and financial crimes.<sup>19</sup> This seems like an overreach on part of the government, as there are overshadowing the authority of the state to investigate and prosecute as it has the power to suo moto take up cases it thinks fit.

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<sup>19</sup> 'NIA branches to be set up in all states by 2024: Amit Shah' (*Hindustan Times*, 28 October 2022) <<https://www.hindustantimes.com/india-news/nia-branches-to-be-set-up-in-all-states-by-2024-amit-shah-101666897025779.html>> accessed 10 January 2023