Demystifying the Terror Laws: A Discussion on The Unlawful Activities (Prevention) Act and The National Investigation Agency Act

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The Unlawful Activities (Prevention) Act, 1967 aims to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith.[1]

The National Investigation Agency Act, 2008, on the other hand, was enacted to constitute an investigation 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 and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organisations and for matters connected therewith or incidental thereto.[2]

Both legislations are interconnected and entwined with each other in so much as the National Investigation Agency [hereinafter called NIA] has been set up as a national level agency to investigate offences under The Unlawful Activities (Prevention) Act [hereinafter called the UA(P) Act]. In addition, the NIA can investigate offences under The Atomic Energy Act, The Anti-Hijacking Act, The Suppression of Unlawful Acts against Safety of Civil Aviation Act, The SAARC Convention (Suppression of Terrorism) Act, The Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, Chapter VI of the Indian Penal Code [sections 121 to 130 (both inclusive)] and Sections 489-A to 489-E (both inclusive) of the Indian Penal Code.[3]

There has been a lot of discussion on the effect that the taking over of investigation of the UA(P) Act offences by the NIA has on the federal structure of the Indian Constitution. The

[1] Preamble to the UA(P) Act

[2] Preamble to the NIA Act

[3] The Schedule, NIA Act

discussion on the validity of the NIA Act on the anvil of the Constitution is reserved for Part III of this Paper.

Here in Part I, I shall discuss the issue of jurisdictional courts for offences under the UA(P) Act and the effect the judgment of the Hon'ble Supreme Court in ***Bikramjit Singh v. State of Punjab***[4] has had on it.

However, prior to that, I deem it appropriate to reproduce the scheme of investigation of Scheduled Offences under the NIA Act.

Section 6 of NIA Act mandates that on receipt of information and recording thereof under section 154 of the Code (meaning Cr.P.C.) relating to any Scheduled Offence the officer-in-charge of the police station shall forward the report to the State Government forthwith[5]. The State Government shall then forward the report to the Central Government as expeditiously as possible[6]. The Central Government shall then determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, 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[7]. Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence[8]. If the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, *suo motu*, direct the Agency to investigate the said offence[9].

Section 6(6) of the NIA Act mandates that when such direction under sub-sections (4) and (5) are received from the Central Government, the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

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[4] 2020 SCC OnLine SC 824

[5] Section 6(1), NIA Act

[6] Section 6(2), NIA Act

[7] Section 6(3), NIA Act

[8] Section 6(4), NIA Act

[9] Section 6(5), NIA Act

Section 6(6) is implicit in its meaning that it is the State Police which shall carry on with the investigation of the case till receipt of direction from the Central Government as to the NIA taking over the investigation of the case.

Section 6(7) removes all doubts in this regard by making it clear that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.

Under Section 8, it is mandated that offences connected with the Scheduled Offences can also be investigated by the Agency. The investigation of such cognate offences will, thus, follow the route laid down in Section 6.

Part I: Court under the UA(P) Act read with the NIA Act

Let me now delve into the issue of jurisdictional courts. At the outset, I deem it worthwhile to list the offences under the UA(P) Act.

Chapter III of the UA(P) Act penalizes the following offences.

1. Penalty for being member of an unlawful association, etc. (Section 10)
2. Penalty for dealing with funds of an unlawful association. (Section 11)
3. Penalty for contravention of an order made in respect of a notified place. (Section 12)
4. Punishment for unlawful activities. (Section 13)

Chapter IV of the UA(P) Act penalizes the following offences.

1. Punishment for terrorist act. (Section 16)
2. Punishment for raising funds for terrorist act. (Section 17)
3. Punishment for conspiracy, etc. (Section 18)
4. Punishment for organising of terrorist camps. (Section 18A)
5. Punishment for recruiting of any person or persons for terrorist act. (Section 18B)
6. Punishment for harbouring, etc. (Section 19)
7. Punishment for being member of terrorist gang or organization. (Section 20).
8. Punishment for holding proceeds of terrorism. (Section 21)
9. Punishment for threatening witness. (Section 22)
10. Punishment for offences by companies, societies or trusts. (Section 22C)
11. Enhanced penalties. (Section 23)

Chapter VI of the UA(P) Act penalizes the following offences.

1. Punishment for offence relating to membership of a terrorist organization. (Section 38)
2. Punishment for offence relating to support given to terrorist organization. (Section 39)
3. Punishment for offence of raising fund for a terrorist organisation. (Section 40)

Of these offences, Sections 10(b), 16, 17, 18A, 18B, 19, 20, 21, 22 C, 23, 38, 39 and 40 carry a maximum term of imprisonment which may exceed 7 (seven) years. Going by Part II of the First Schedule of the Criminal Procedure Code, these offences would be triable by a Court of Session. The others apparently would be triable by a Magistrate of First Class. I will come to this in a while.

Now, the definition of a "court" under the UA(P) Act as per Section 2(d) is a criminal court having jurisdiction, under the Criminal Procedure Code, to try offences under the UA(P) Act and includes a Special Court constituted under section 11 or under section 22 of the NIA Act.[10]

Turning to the NIA Act, it is seen that as per Section 2(h) thereof, a "Special Court" means a Special Court constituted under section 11 or, as the case may be, under section 22.

According to Section 11(1) of the NIA Act, the Central Government shall, by notification in the Official Gazette, for the trial of Scheduled Offences, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

Vide Notification No. S.O. 2215(E), dated New Delhi, the 1st September, 2009, the Central Government has notified the Special Court of the Special Judge, Central Bureau of Investigation, Assam as the Special Court under section 11(1) of the NIA Act for the trial of Scheduled Offences.

The jurisdiction of the Special Court extends to the whole of the State (of Assam) for any Scheduled Offence investigated by the NIA.[11]

[10] Section 2(d), UA(P) Act was amended by Section 2 of the Amendment Act of 2019.

[11] Section 13, NIA Act

Pertinently, according to Section 22(1) of the NIA Act, the State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule. And as per Section 22(2)(ii) thereof, the jurisdiction of the Special Court(s) extends to the whole of the State for any Scheduled Offence investigated by the investigating agency of the State.

Now, as far as the State of Assam is concerned, the State Government has not constituted any Special Court under section 22(1) of the NIA Act. In such a situation, Section 22(3) of the NIA Act comes into the picture which provides that the jurisdiction conferred by the NIA Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-section (1) in the case of any offence punishable under the Act, notwithstanding anything contained in the Criminal Procedure Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under Chapter IV.

Returning now to the offences under the UA(P) Act which are Scheduled Offences under the NIA Act, it is seen that the offences can be bifurcated into two kinds- those with a maximum imprisonment of over 7 (seven) years, and those with a maximum imprisonment of 7 (seven) years and under. When read with Part II of the First Schedule of the Criminal Procedure Code, offences which carry a maximum punishment of more than 7 (seven) years would be triable by the Court of Session and the others by Magistrates of First Class.

However, in ***Bikramjit Singh (supra),*** the Hon'ble Supreme Court, after analyzing this Scheme of the Criminal Procedure Code, has stated in unequivocal terms:

> *"This Scheme has been completely done away with by the 2008 Act (NIA Act) as <u>all</u> scheduled offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated Court by notification issued by either the Central Government or the State Government, the fall back is upon the Court of Session alone."*

The Hon'ble Supreme Court has made it abundantly clear, *"for <u>all</u> offences under the UAPA, the Special Court alone has exclusive jurisdiction to try such offences."*

Thus situated, in the context of Assam, whenever any of the Scheduled Offences under the NIA Act which include all offences under the UA(P) Act are investigated by the NIA, the

trial of such offences shall be done by the Special NIA Court constituted by the Central Government. However, when any of the Scheduled Offences including the UA(P) Act offences are investigated by the State Police, considering the absence of a Special NIA Court set up by the State Government, the Court of Session of the division where the offence took place shall try such offences.

Further, the Special NIA Court (for NIA investigated offences) and the concerned Divisional Court of Session (for State Police investigated offences) shall be the original court of jurisdiction. This is in light of Section 16 (1) of the NIA Act which mandates that the Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.

For Scheduled Offences including UA(P) Act offences such as under sections 10(a), 12 and 22, which are punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special NIA Court or the Divisional Court of Session shall try them summarily in light of Section 16(2) of the NIA Act.

The Special NIA Court or the Court of Session, as the case may be, being the original court of jurisdiction for the Scheduled Offences including the UA(P) Act offences, will also possess sole jurisdiction for authorizing remand of any person accused of any such offence. Unless otherwise authorized expressly, a Magistrate will be bereft of statutory authority to order the remand of any such person under section 167, Criminal Procedure Code.

Under the UA(P) Act, Section 43-D(2) provides that

> *"Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—*
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> *(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and*
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> *(b) after the proviso, the following provisos shall be inserted, namely:—*
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> *Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:*

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody"

In ***Bikramjit Singh (supra),*** the Hon'ble Supreme Court taking note of the fact that the Special Court may take cognizance of an offence without the accused being committed to it has held:

"...the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, "the Court" being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself".

Thus, if it is the Special Court or the Court of Session, as the case may be, which can extend time for detention of the accused from 90 (ninety) days to 180 (one hundred and eighty) days, albeit after being satisfied with the report of the Public Prosecutor, it is evident that it will not be a Magistrate who would be authorizing the detention of any person accused of a UA(P) Act offence. A statute carries with it a presumption of consistency. It must not give rise to absurdities. It would be absurd for a Magistrate to authorize remand of an accused person but when a prayer for extending the detention under section 43-D(2) of the UA(P) Act comes up before him, for him to transfer the prayer to the Special Court or the Court of Session.

Here, one must remember that the Special Courts constituted under the Prevention of Corruption Act, Protection of Children from Sexual Offences Act etc. are the remanding courts for persons accused of offences under the Acts.

In ***A.R. Antulay v. R.S. Nayak***[12]**,** the Hon'ble Supreme Court after discussing the provisions of the Prevention of Corruption Act *pari materia* to Section 16, NIA Act, observed that the Special Judge empowered to take cognizance of the offences under the Act must act as a Magistrate.

The Hon'ble Supreme Court while dealing with the Special Judge's power to remand under section 167 Criminal Procedure Code in the context of The Criminal Law (Amendment Act) 1952 made the following observations in ***State of T.N. v. V. Krishnaswami Naidu***[13]:

"We will now examine the provisions of Section 167 of the Criminal Procedure Code. Section 167 of the Criminal Procedure Code requires that whenever any person is

[12] AIR 1984 SC 718

[13] (1979) 4 SCC 5

arrested and detained in custody and when it appears that the investigation cannot be completed within a period of 24 hours the police officer is required to forward the accused to the Magistrate. The Magistrate to whom the accused is forwarded if he is not the Magistrate having jurisdiction to try the case may authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days on the whole. If he has no jurisdiction to try the case and if he considers that further detention is necessary he may order the accused to be forwarded to any Magistrate having jurisdiction. The Magistrate having jurisdiction may authorise the detention of the accused person otherwise than in custody of the police beyond the period of 15 days but for a total period not exceeding 60 days. In the present case the accused were produced before the Special Judge who admittedly is the person who has jurisdiction to try the case. The contention which found favour with the High Court is that the words "Magistrate having jurisdiction" cannot apply to a Special Judge having jurisdiction to try the case. No doubt the word "Special Judge" is not mentioned in Section 167 but the question is whether that would exclude the Special Judge from being a Magistrate having jurisdiction to try the case. The provisions of Chapter XII CrPC relate to the information to the police and their powers of investigation. It is seen that there are certain sections which require the police to take directions from the Magistrate having jurisdiction to try the case. Section 155 (2) requires that no police shall take up non-cognizable case without an order of the Magistrate having power to try such case or commit the case for trial. Again Section 157 requires that when the police officer has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report. Section 173 requires that on the completion of every investigation under the chapter the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence a police report as required in the form prescribed. Section 8 of the Criminal Law Amendment specifically empowers the Special Judge to take cognizance of the offence without the accused being committed to him. In taking cognizance of an offence without the accused being committed to him he is not a Sessions Judge for Section 193 CrPC provides that no Court of Session Judge shall take cognizance for any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Strictly he is not a Magistrate for no Magistrate can take cognizance as a Court of Session without committal. The Criminal Law (Amendment) Act being an amending Act the provisions are intended to provide for a speedy trial of certain offences. The Criminal Law (Amendment) Act is not intended to be a complete Code relating to procedure. The provisions of the CrPC are not excluded unless they are inconsistent with the Criminal Law (Amendment) Act. Thus read there could be no difficulty in coming to the conclusion that the CrPC is applicable when there is no conflict with the provisions of Criminal Law (Amendment) Act. If a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail it will lead to an anomalous situation. A Magistrate other than a Magistrate having jurisdiction cannot keep him in custody for more than 15 days and after the expiry of the period if the Magistrate having jurisdiction to try the case does not include the Special Judge, it would mean that he would have no authority to extend the period of remand or to release him on bail. So also if the Special Judge is not held to be a Magistrate having jurisdiction, a charge-sheet under section 173 cannot be submitted to him. It is relevant to note that the General Clauses Act, Section 32 defines a

Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires in the manner stated in the sub-sections. If the context otherwise requires, the word "Magistrate" may include Magistrates who are not specified in the section. Read along with the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for the purposes of Section 167."

The aforesaid ratio and reasoning has been accepted by a Three Judges' Bench of the Hon'ble Supreme Court in the case of ***Harshad S. Mehta v. State of Maharashtra***[14]**.**

From a conspectus of the authorities cited above, it is seen that it is the Special Court alone which has the power to remand a person accused of the Scheduled Offences including offences under the UA(P) Act.

It is, in fact, seen that it is the Special NIA Court which has been taking up the remand of persons accused of UA(P) Act and other Scheduled Offences when the offences are investigated by the NIA.

It is only when such offences are investigated by the State Police, that the issue of remand jurisdiction vexes many.

But it is evident from the discussion made above, that the Divisional Court of Session *(which is the original court of jurisdiction for the trial of such offences and which has been mandated by Section 22(3) of the NIA Act to follow the procedure under Chapter IV thereof)* has the sole authority to take up remand of persons accused of Scheduled Offences including offences under the UA(P) Act investigated by the State Police.

With this, I conclude Part I of my paper. In Part II, I propose to discuss the issue pertaining to bail under the UA(P) Act and the NIA Act.

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[14] (2001) 8 SCC 257