

The National Counter Terrorism Centre vs. Federalism

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One thing that the Constitution of India makes very clear is that all laws to be enacted by Parliament or the State Legislature have to be in accordance with the provisions of the Constitution of India and that the vires of any law can be called into question before the High Court in the matter of State legislation and before the Supreme Court both in the matter of State Legislation and Federal Legislation. Under Article 141 of the Constitution the law declared by the Supreme Court is binding on all courts in India, which means all authorities in India. Under Article 144 all civil and judicial authorities in India are required to act in aid of the Supreme Court. In other words, the Legislature is bound within the confines of the Constitution in the matter of its legislative jurisdiction and scope and the Supreme Court and High Courts have the authority to call into question the legality of legislative action if challenged before the court.

The legislative competence of Parliament and the State Legislatures is given in the Seventh Schedule of the Constitution, framed under Article 246. Whereas under Entry 1 of List I of the Seventh Schedule the defence of India is the responsibility of the Union and under Entry 2A the deployment of armed forces in aid of civil power lies within the competence of the Union Government, under List II public order and police lie firmly within the jurisdiction of the States. Under List III criminal law and criminal procedure as defined in Entries 1 and 2 of List III fall within the concurrent jurisdiction of Parliament and the State Legislatures. That is why the Code of Criminal Procedure and Indian Penal Code are central Acts, but the State Governments from time to time have made suitable amendments, subject to the President's prior approval. In addition to the Indian Penal Code there are a number of other Acts which define activities which are crimes and carry penalties, including imprisonment, fines, forfeiture, etc. For example, the Forest Act prescribes penalties for forest offences. The Excise Act, both Central and State, defines offences and provides for penalties. These two Acts give certain investigative powers to the forest and excise officers respectively. In other words, Substantive Acts define crimes other than IPC crimes but ultimately procedure for investigation, submission of charge sheet and cognisance by courts all come within the ambit of the Code of Criminal Procedure.

Because of the Constitutional position as contained in the seventh schedule an agency such as Delhi Special Police Establishment, popularly called CBI, has jurisdiction only in the Union Territories and over Central Government servants in matters falling under such Acts as the Prevention of Corruption Act. DSPE acquires jurisdiction in a State only if the State Government permits this in writing. Even where DSPE investigates a case it is required to do so as per the provisions of Chapter XII Cr.P.C. That is why the police station of the DSPE is recognised as a police station for the purpose of Chapter XII Cr.P.C. in matters relating to offences investigated by DSPE. The jurisdiction to investigate begins with the FIR lodged under section 154 Cr.P.C. the procedure for investigation is given in Chapter XII and ultimately under section 173 Cr.P.C. the investigation ends with the report of the investigating officer on completion of investigation in which a charge sheet is forwarded to the competent court if a prima facie case is proved, or a report requesting the court to allow closure of the investigation because the offence cannot be brought home to any person or persons. This procedure applies across the board, whether the offences be under IPC or under special Acts such as the Unlawful Activities (Prevention) Act, 1967. These provisions cannot be bypassed.

After the terrorist attack on Mumbai on 26.11.2008 the Central Government decided that we need to build up our counter terrorism capabilities. At present the Intelligence Bureau is the nodal agency for all counter terrorism activities. The Intelligence Bureau has no statutory status, despite the fact that under Entry 8 of List I of the Seventh Schedule Parliament is competent to legislate both on the Central Bureau of Investigation and the Intelligence Bureau. IB, therefore, has been set up by executive order, but it has no legal authority to investigate an offence, arrest persons or detain them, ask for remand or prosecute people in court. The complaint is that because IB has no legal powers, it functions in grey areas where it exercises extra legal powers but is not accountable for its actions. All governments throughout the world have secret intelligence units and organisations, but in most cases they work under some law. For example, in the United States both FBI and CIA

have been created by law. If IB does not have any legal jurisdiction, certainly no agency created under the aegis of IB can have any legal jurisdiction. Government of India, however, has decided that it will set up a National Counter Terrorism Centre (NCTC), which will have the powers of search, seizure and arrest. It is argued that this organisation will be created under the Unlawful Activities (Prevention) Act, 1967 as amended from time to time. Let us see the wordings of the Act. Under section 43 of the Act the officers competent to investigate offences under the Act have been listed. In the case of Delhi Special Police Establishment an officer of or above the rank of Deputy Superintendent of Police may investigate an offence. In metropolitan areas an officer of or above the rank of Assistant Commissioner of Police may investigate an offence and in all other districts an officer of or above the rank of Deputy Superintendent of Police may investigate.

Under section 43A the designated authority specially empowered by the Central or State Government, on gaining knowledge of a design to commit an offence under the Act may authorise a subordinate officer to arrest the person likely to commit the offence and to search any building, conveyance or place connected with the offence and seize all materials, etc, connected with the offence. However, any person so arrested has to be handed over without delay to the nearest police station under section 43 (B) (2) of the Act. A designated authority means a Central Government officer not below the rank of Joint Secretary, or an officer not below the rank of Secretary to the State government as may be specified by the Central or State Government. The phrase is designated authority, who shall be an officer of a particular rank. This does not include an organisation, NCTC, because an organisation cannot be persona designata. My submission is that the Central Government is not competent to designate an entire organisation which is a part of IB and, therefore, like IB, has no legal status, as the designated authority. NCTC per se as an organisation which can strike, arrest, search and seize on information being received of a likely act of terrorism is a nonstarter ab initio. My own view is that the Union Home Minister and the Union Cabinet have been ill advised in the matter of setting up NCTC as an umbrella counter terrorism organisation empowered to carry out strike operations. Such authority can only be given to an organisation which is either a police force or has been duly empowered by a law made in this behalf.

Let us come to the subject of Federalism and the Indian Constitution. In their wisdom our founding fathers made police a State subject. The Central Government cannot acquire police powers so long as the Constitution stands un-amended. Criminal law being in the Concurrent List, Parliament has the right to legislate on the issue of criminal justice and criminal procedure, but in doing so it cannot encroach upon the powers of the State enshrined in List II of the Seventh Schedule. In other words, the Code of Criminal Procedure can prescribe how all police forces in India will investigate and prosecute penal offences. It cannot, however, create police powers, nor can the Central Government acquire police powers. The only circumstance in which this can be done is if the Central Government, with the consent of State Legislatures, legislates on the State List subject of the police under Article 252. We are not talking here about temporary legislation for a prescribed period under Articles 249 and 250 of the Constitution because both relate to extraordinary situations calling for immediate action at national level. Any attempt by the Central Government to bypass the provisions of Article 246 and the Seventh Schedule would be a direct attack on the federal structure of India.

It is no one's case that countering terrorism, both externally sponsored and home grown, is not vitally important for national security and ensuring the integrity and the sovereignty of India. The United States has a stronger federal structure than India because there all residuary powers vest in the States, whereas in India under Article 248 residuary powers vest in Parliament. However, when there is a matter of vital national interest a compromise is found between State autonomy and Federal authority. The Federal Bureau of Investigation was set up as a counter to the criminal gangs which operated in the United States in the early part of the twentieth century and which, because of the inter-state ramifications, could not be controlled by the State and local police. The Federal Bureau of Investigation was set up by an Act of Congress, to which no State objected and was given jurisdiction to investigate any matter in which State boundaries were transgressed. By interpretation and practice FBI acquired jurisdiction where, for example, telephone calls were made across State boundaries or where the postal system which is federal, was used for carrying information about a crime. When the tragedy happened on 11th September 2001 when aircraft were crashed into the twin towers of the World Trade Centre in New York and the Pentagon in Washington DC, a Department of Homeland Security was created with far ranging

powers which cut across State boundaries, a National Counter Terrorism Centre was set up and government vowed to insulate the United States from future terrorist attacks. Every American applauded these moves and the States welcomed them. In India, on the other hand, because of highly partisan politics, the State Governments are opposing every move of the Centre to create a nation wide network of counter terrorism units and organisations.

Our States are extremely wary of increasing the coercive powers of the Central Government because the track record of the Intelligence Bureau and DSPE in its avatar as CBI is so bad as to completely erode all trust and confidence. CBI has been used selectively for political witch-hunting and IB has been shamelessly used to further the political interests of the ruling party. This is in keeping with the manner in which the Income Tax Department has also been used against political adversaries. It is the duty of the Central Government to enter into an open dialogue with the State Governments and convince them that it is in the national interest to have an NCTC with certain over-riding powers in the limited area of counter terrorism operations. There should have been a series of consultations between senior civil and police officers of the Centre and the States, followed by high level discussions at political level. The Central Government should have in advance prepared a manual giving the bounds within which NCTC would operate, the standard operating procedures for any operations and the role of the State Police before, during and after the operations. This would have built mutual trust and confidence. Obviously the Union Home Ministry did not think any of this was necessary. The net result has been a complete break-down of confidence and almost obstinate opposition to the very idea of centralised action, with at least eight States combining to oppose the Centre. This is not a very happy situation, especially because uncertainty would only encourage anti-national elements. We cannot afford this.

The Prime Minister must show true leadership in now ensuring that there is consultation and consensus, followed by action. The system has been damaged but the situation can still be retrieved. The Prime Minister and Mr. Chidambaram have two choices: (1) Play the ostrich and pretend everything is just fine. (2) Show statesmanship, bring the States on board and create a truly effective counter terrorism organisation.
