

The issues concerning nctc law constitutional administrative essay

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" The controversy over the NCTC, and the growing distrust between the centre and states, has weakened the fight against terrorism and would have pleased the terror groups"- Ved Marwah[1]1. India is affected with all types of terrorism: ideological, religious, and ethnic terrorism. The roots of ' Jehadi terrorism' are in our neighbourhood and the neighbour harbours deep animosity for our country since its birth. It has no hesitation in using terrorism as a tool to achieve its expansionist designs.[2]It is truly amazing that in a country, where terrorism poses the most serious threat to national security, setting up of a NCTC become an issue of fierce controversy.[3]And yet, even after more than three years since the daring 26/11 terrorist attack in Mumbai, which held the commercial capital of the country to ransom for two days, country could not put in place an effective strategy to counter terrorism. Instead political rulers, both in the states and at the centre, are shamelessly playing politics with this threat to gain electoral advantage. Whether it is law or administrative mechanism for effectively dealing with this growing menace, India is stuck because of partisan politics.[4]Chief Ministers, States Director Generals of Police and Chief Secretaries Concern over NCTC². The newly constituted NCTC has run into strong political resistance with a group of Chief Ministers coming out in the open to oppose its powers. The face-off could trigger serious doubts about the effectiveness of the agency, billed to be the country's principal counter terror body after its launch on 01 March 2012.[5]3. A diverse group of Chief Ministers i. e. Orissa's Naveen Patnaik, Bihar's Nitish Kumar, West Bengal's Mamata Banerjee., Tamil Nadu's J Jayalalithaa, Prem Kumar Dhumal of Himachal Pradesh, BJP leader Arun Jaitley, Manik Sarkar of Tripura, Shivraj Singh

Chouhan of Madhya Pradesh, Telugu Desam Party leader N Chandrababu Naidu and his Gujarat counterpart Narendra Modi raised their concerns on NCTC.[6]4. The Chief Ministers of Orissa, Bengal, Madhya Pradesh, Tamil Nadu, Gujarat, Tripura, Bihar, Himachal, Jharkhand and Karnataka had written to the government saying the NCTC was anti federal.[7]They questioned the manner in which the agency was set up, without taking states on board, and demanded that the decision be reversed.[8]Telugu Desam Party leader N Chandrababu Naidu called for revocation of the notification setting up the NCTC with the objective of improving the country's response to the threat of terrorism.[9]5. Mr Patnaik was the first to raise the red flag and was instrumental in rallying his peers around. He said, " My concern is the authoritarian notification with draconian overtones about law and order among others in which the state governments have not been consulted." [10]Along with Mamta Banerjee, Patnaik has already lodged a strong protest with Prime Minister Manmohan Singh.[11]Centralising tendencies of congress led UPA had been highlighted most notably, by Narendra Modi, Chief Minister of Gujarat and Selvi J. Jayalalithaa, Chief Minister of Tamil Nadu. She in the Chief Minister's meeting said that, " the way things are evolving with the creation of the National Intelligence Agency and NCTC, we seem to be headed towards an autocracy consisting of a " Government of the Centre, by the Centre, for the Centre".[12]They also cited that ' Public Order' and ' Police' are state subjects and therefore[13], a proposal to amend these subjects under entry 22, 30 and 93 of List I (Union List) with entry 2 of List III (Concurrent List), Schedule VII of the Constitution of India, would encroach on the powers of the states and violate the federal

character of the country.[14]6. Selvi J. Jayalalithaa also pointed out needlessness of a provision on standing council of NCTC that indicates, " The standing council shall ensure that NCTC is the single and effective point of control and co-ordination of all counter terrorism measures." What would the nation gain by ensuring that the NCTC is the single and effective point of control and co-ordination of all counter terrorism measures?[15]This provision could be interpreted as the will of the four members of the NCTC presiding over the standing council in case of any disagreements with the heads of the anti terrorist forces of the states. Hence, no matter may be put to vote in any meeting of the standing council, but the heads of the state anti-terrorist forces would have to be content to merely receiving directions from the NCTC. The opinion and voices of the NCTC would prevail over the meetings of the standing council and to quote Selvi J. Jayalalithaa, the state anti-terror forces, " would only play second fiddle to the personnel at the centre. Nothing can be more damaging to the fight against terrorism".

[16]She on 02 April 2012 urged Prime Minister Manmohan Singh to convene a meeting of Chief Ministers for exclusively discussing the issue of establishing the NCTC. Reiterating her opposition to the NCTC and calling upon Prime Minister to keep in abeyance its formation, she, in her letter to the Prime Minister, stated: " The views of various Chief Ministers will have to be given due consideration and a purposeful discussion on the counter terrorism should be made possible." [17]7. The Chief Ministers also apprehended that the NCTC, to be made operational from 01 March 2012 will infringe upon the powers and rights of the states. The decision should have been taken only after adequate consultation and with the consent of the

state governments.[18]8. The state Director General of Police and Chief Secretaries expressed concern on two issues firstly, how will the power accorded to NCTC under Section 43 (where the Centre will have police powers) be exercised? And secondly what will be the scope and function of the standing council that is proposed to have state representation?

[19]Whereas their Chief Minister's pointed that creation of centre is anti federal.[20]

Other Issues

9. The several constitutional, legal, procedural and administrative difficulties would be significant in giving effect to the NCTC in its present form in India.

[21]They are discussed in subsequent paragraphs. 10. Clause 2. 1. This

clause of the order lays down that the NCTC would be located in the

Intelligence Bureau.[22](a)The stated objectives for setting up of the NCTC is

that it would be the " single and effective point of control and co-ordination

of all counter terrorism measures" and that the measures would include

integrating all intelligence pertaining to terrorism, analysis and effective

response. It is no secret that the Indian intelligence organisations are loathe

sharing intelligence between them and with each other and that there is a

deep-rooted rivalry between the Intelligence Bureau and India's external

intelligence arm, the Research and Analysis Wing. In fact, Major General V K

Singh, a retired officer of the Indian Army who worked at Research and

Analysis Wing, in his book, ' India's External Intelligence: Secrets of the

Research and Analysis Wing' has also alluded to this. Unless and until a spirit

of amity and unity of purpose is developed amongst the Indian intelligence

fraternity, it would be foolish to give precedence to the Intelligence Bureau in

this matter.[23](b)Cross-border terrorism would be one of the most important areas for the NCTC, intelligence inputs would come through Research and Analysis Wing, Intelligence Bureau, Military Intelligence and even the foreign intelligence agencies. Hence, it would always be better to create a body which shall stay above old rivalries and be immune to deep fissures.[24](c)While integrating all intelligence including analysis would come within the domain of the NCTC. Giving the power of effective response to the NCTC would be diluting the core focus of other intelligence agencies.

[25]11. Clause 2. 3. This clause deals with the provision of staff and personnel for the NCTC.[26](a)With respect to this clause a possible area which needs to be looked into is whether the officers of the NCTC would be allowed permanent commission there and the matter of seniority and pay grade/ scales of officers on return to the parent agency need to be delineated as well. Many of these intelligence agencies from where NCTC is to source officers, themselves get personnel on deputation/ secondment from other agencies like the Indian Police Service etc, so a possible confusion may arise in these circumstances. To comment on the internal dynamics, the NCTC would, in fact be controlled by the Intelligence Bureau and its personnel, as the officers from the other agencies/ branches would be only on deputation and secondment.[27](b)There is no mention made of the state intelligence agencies, which can adapt better to the local realities and circumstances.[28]As rightly pointed out by Selvi J. Jayalalithaa, Chief Minister of Tamil Nadu at the Meeting of the Chief Ministers on NCTC (05 May 2012 at Vigyan Bhavan, New Delhi), ' there should be a provision allowing the NCTC to source personnel and officers from the respective state

intelligence agencies’.[29]12. Clause 2. 5. Duties and Functions. This clause states that, apart from co-ordinating actions for counter terrorism and integrating intelligence pertaining to terrorism, it is to pursue or mandate other agencies to pursue the different leads.[30]How can we expect a centre nestled in the Intelligence Bureau, with its head being an Additional Director Intelligence Bureau, mandating for example, the Research and Analysis Wing, which is led by a Cabinet Secretary? Or for that matter, how can it direct other statutory agencies, who have got a separate chain of command? [31]13. Clause 2. 5(iii). It. directs NCTC to maintain a comprehensive database of everything related to terrorism and terrorists. In addition, it was opined that the purview of this function should be enhanced to include suspected terrorists and organisations as well as transnational groups, individuals or foreign entities which may not be terrorist organisations or individuals but are inimical or hostile to India.[32]14. Clause 3. 1. This clause indicates that the Director NCTC would be the ‘ Designated Authority’ under Section 2(e) of the Unlawful Activities (Prevention) Act 1967 and the designated officer has been vested with reasonable powers. Under Section 25 of the Act, the designated officer can pass directions on any property which has been seized or attached, for reasons of it being procured through the proceeds of terrorism, either confirming or revoking such seizure or attachment. Further, under Section 30 of the Act, the designated authority can either choose or refuse to investigate any claims or objections to the attachment or seizure of a property under Section 25, and has even been vested with the powers of a Civil Court (Section 31) for making a full and final inquiry into the matter before it. Section 43 A of the Act has vested the

Designated Authority with the power to either direct other instrumentalities or take it upon himself, to arrest or search a building, conveyance or place. Therefore, the Director of the NCTC has been vested with investigative powers, which when read with Clause 3. 2 of the NCTC Order [Officers of the NCTC can arrest and search], gives the NCTC powers otherwise reserved for the police or investigative agencies.[33]15. Clause 3. 2. It gives officers of NCTC, the power to arrest and search, as contained in Section 43 A of the Unlawful Activities (Prevention) Act 1967.[34]This has been the primary bone of contention between the state governments and the congress led UPA government at the centre. Powers of search and arrest are given to the investigative agencies in fulfilment of their law and order duties and responsibilities.[35]16. It has been opined that giving police powers to the NCTC would be dangerous as well as futile on following counts.(a)The Intelligence Bureau is not an agency which is, or should be, concerned with the administration of criminal justice. Its mandate is to collect information that the law enforcement agencies can use to direct and inform the course of a criminal investigation and not to pass opinion on the evidentiary value of such intelligence. It has been argued that any blurring of the distinction between intelligence-gathering and policing would leave open the likelihood of abuses. Moreover, there is already a central investigative service with a nationwide jurisdiction, the National Intelligence Agency. This leads us to question as to why the NCTC needs similar powers, which would only help in duplication of efforts and clash of jurisdiction.[36](b)From a political point of view, the concerns regarding the Intelligence Bureau are amplified because it has ' historically taken an expansive view of national security notably, by

devoting extensive resources to political surveillance'. Therefore, further arming it with the power to arrest will expand the possibility of political misuse.[37](c) Finally, as pointed out by several experts, India's counter terrorism efforts have dithered because state police forces lack the training, infrastructure and manpower needed to conduct effective investigations. Giving NCTC the power to arrest will not help in plugging these fundamental lacunae.[38]17. It is an executive order, which was passed without any discussions, debate or the rigours of a Standing Committee of the Parliament.[39]18. Deprivation of a Person of his Liberty. Arrest means the deprivation of a person of his liberty by legal authority or at least by apparent legal authority. In a democratic society like ours, the law does not tolerate the detention of any person without legal sanction. The right of personal liberty is a basic human right, and is recognised by the Constitution of India as well as in the Universal Declaration of Human Rights of the General Assembly of the United Nations. The right to personal liberty is also enshrined in the International Covenant on Civil and Political Rights to which India is a party. The celebrated decision of *Maneka Gandhi vs. Union of India* [(1978) 1 Supreme Court Case 248] laid down that not only the very action of arrest, but also the procedure contemplated for arrest must be 'right, just and fair'. The apex court in that judgment held that the procedure cannot be arbitrary, fanciful or oppressive, as in those circumstances it would not amount to any procedure at all and would eventually fail to satisfy the requirement of Article 21 of the Constitution. It has been a long held belief that personal liberty, being the cornerstone of our socio-legal framework, the legal provisions concerning arrest bears special significance. Thus, it may be

safely concluded that such powers depriving the right to life or liberty of any individual cannot be given through any executive order, except through a law passed by the Parliament. Executive orders are meant to give effect to any law or statute, or promulgated to tide over certain problems in the implementation of any statute, or for administrative convenience, but cannot, under any circumstances, take away or abridge fundamental rights. Such executive order is liable to be struck down as void ab-initio.[40]19.

State List. Public order and police come within the legislative and executive domain of the States of the Union as mentioned in Entries 1 and 2 respectively of List II, Schedule VII of the Constitution of India. This does not prevent the central government from making provisions for the preventive detention for reasons connected with Defence, Foreign Affairs, or the Security of India [Entry 9, List I]. The authority of the NCTC is not limited to making preventive detentions [the National Security Act is already in force for that], thereby preventing the central government from exercising its authority under this entry. Nor would this exercise of power be justified under Entries 1 and 2 of the Concurrent List (List III) of the Seventh Schedule to the Constitution of India dealing with Criminal Law and Criminal Procedure respectively.[41]20.

Consultation with States. The Sarkaria Commission recommended prior consultation with the states, individually and collectively, in respect of overlapping and concurrent jurisdictions, which should be adhered to, except in rare and exceptional cases of extreme urgency or emergency, though it may not be necessary to make such consultation a matter of constitutional obligation, and that ordinarily, the Union should occupy only that much field of a concurrent subject on which

uniformity of policy and action is essential in the larger interest of the nation, leaving the rest and the details for action by the states[42]within the broader framework of the policy laid down in the Union Law.[43]21. Justice M M Punchhi Commission on Centre-State relations noted that a federal system alone can take the country forward as a united, democratic republic. The commission further opined that the tilt in favour of the Union had increasingly accentuated over the years even outside the security needs of the country, leading to avoidable over centralisation even in developmental matters and hence, recommended that these emerging contradictions in federal constitutional practice have to be addressed early in the interest of not only better Centre-State relations but also to sustain the very unity and integrity for which the tilt in favour of the centre was originally conceived. It is a pity that the congress (UPA) government has decided to throw all of these into the wind.[44]

Difference from US Concept

22. The NCTC, which is meant to co-ordinate intelligence collection, analysis and assessment and follow-up action in matters relating to terrorism, will differ from the NCTC set up of US.[45]These differences are covered in subsequent paragraphs. 23. In the US, the NCTC is an independent institution functioning under the supervision of the Director, National Intelligence that co-ordinates functioning of counter terrorism divisions of various agencies of the intelligence community. The chiefs of the various intelligence agencies having any role in counter terrorism do not have any powers of supervision over it. The idea of making it independent was to ensure that it would take an objective view of the functioning of the counter

terrorism divisions of different agencies and ensure proper co-ordination. The expectation was that being an independent agency, its functioning will not be affected by inter agency clashes and egos.[46]24. Whereas the NCTC being set up in India will not be an independent institution. It will be a part of Intelligence Bureau and Director, Intelligence Bureau, will supervise its functioning. This could come in the way of an independent audit and supervision of the functioning of the counter terrorism division of the Intelligence Bureau. Whatever deficiencies exist presently in the exercise of the counter terrorism functions of the Intelligence Bureau, will get duplicated and magnified instead of being identified and rectified.[47]25. The NCTC in the US has no powers of arrest, interrogation, investigation and prosecution. The responsibility in these matters continues to be that of the Federal Bureau of Investigation. In India, the NCTC has been given the powers to arrest and carry out searches under Section 43 A of the Unlawful Activities (Prevention) Act, 1967.[48]

Central Government Response

26. The framers of our Constitution, while avoiding a dogmatic approach, fashioned a sui generis system of two tier polity in which the predominant strength of the Union is blended with the essence of co-operative federalism. As noted in the Sarkaria Commission report, several features and provisions of the Constitution appear to have been deliberately designed to institutionalise the concept of co-operation.[49]For this, centre adopted two pronged strategy.(a)The Prime Minister will assuage feeling of the states that the NCTC is not an attack on the federal structure of the country.[50](b)The government will then do the legal explaining especially on fears about the

possible misuse of the NCTC to settle political scores.[51]27. Similarly as the chorus against the proposal to set up a NCTC grew louder with 13 states opposing the move, the centre has said it is ready for a dialogue to remove misgivings. Human Resource Development Minister Kapil Sibal on 21 February 2012 said that " If states have any concerns, the central government is willing to have a dialogue,"[52]The Home Minister had to beat a hasty retreat even though he was likely to put into place a mechanism that may be less intrusive than that which was envisaged now.[53]The Home Ministry directed that a meeting of the Chief Secretaries and Directors General of Police of all the states planned to sort out the thorny issues on NCTC.[54]28. The Prime Minister said the idea of forming NCTC had been under consideration since the Group of Ministers report of 2001 suggested a Joint Task Force on intelligence and the report was accepted by the government of the day.[55]" It was also suggested by the Second Administrative Reforms Commission that a National Centre for Counter Terrorism be established,"[56]he said in the letter.[57]Prime Minister Manmohan Singh wrote to seven Chief Ministers, explaining that the primary purpose of the NCTC, located within the Intelligence Bureau, was to coordinate counter terrorism efforts throughout the country, as the Intelligence Bureau had been doing so far, he stressed that it was for " this reason that the NCTC has been located within the Intelligence Bureau and not as a separate organisation." However, noting concerns of the Chief Ministers about the manner in which the NCTC would function, Dr. Singh said he had asked Home Minister P. Chidambaram to address them suitably in consultation with them. On the apprehensions of the Chief Ministers on

encroachment of the states' rights and turf, Prime Minister on 21 February 2012 assured them that in forming the NCTC, it was not the centre's " intent in any way to affect the basic features of the constitutional provisions and allocation of powers between the states and the Union".[58]29. Seeking to allay their apprehensions, Union Home Minister P Chidambaram had written to 10 non-congress Chief Ministers, assuring them that the " next steps" on the NCTC would be taken only after consulting the states. In his letter, Mr. Chidambaram had said the powers conferred under Section 43 A of the Act must be read with the duty under Section 43 B to produce the person or article without unnecessary delay before the nearest police station (which will be under the state government).[59]30. To build confidence in state machinery a high-level meeting on internal security was organised by centre in Delhi on 12 March 2012. The meeting was chaired by Union Home Secretary R K Singh and attended by states' Chief Secretaries, Home Secretaries and State Police Chiefs. Issues concerning Centre-State responsibilities in NCTC were discussed.[60]In the meeting it was opined that all issues would be addressed amicably in forthcoming Chief Minister's meetings as many decisions needs political approval. 31. Prime Minister Manmohan Singh on 02 April 2012 made it clear that " adequate and full consultations will take place" before the next steps relating to the NCTC were taken. Defending the government's decision to establish the counter-terror hub, Dr. Singh said that the Multi Agency Centre that was established in 2001 was a pre-cursor to the NCTC and the need for a single and effective point of coordination was discussed at meetings on internal security held on 12 March 2012.[61]32. The Prime Minister assured that the government was

committed to providing fully secured living conditions to its citizens and it would take every possible step to deal with the menace of terrorism. " In fact, the setting up of the NCTC is an important step in that direction. Concern has been raised that the central government is trying to encroach upon the jurisdiction of the state government and it has been suggested that they should be taken into confidence before the NCTC becomes operational. The question of setting up the NCTC has been discussed at various forums". [62]33. In an effort to seek cooperation of the states, the centre had issued a plan of six-step Standard Operating Procedure, under which state anti-terror units will also be an important part of the NCTC and state's Director General of Police will form part of its council.[63]34. The annual meeting of Chief Ministers on Internal Security, scheduled on 16 April 2012[64]was rescheduled to 05 May 2012. Central government was hopeful that this meeting will resolve the issues concerning NCTC.

Status after the Meetings

35. Despite a push by the Prime Minister and the then Home Minister Mr P Chidambaram, there was no progress in consensus with state Chief Ministers for formation of the NCTC.[65]After the day-long meeting, the Home Ministry came out with a statement, saying that " The need to make the states an effective stakeholder in all aspects of counter terrorism domain and in the proposed NCTC format was a general view expressed by most states and Union Territories". The states favoured the need to rework the NCTC order to amplify the powers, functions and duties of the standing council, powers of arrest and the need to ensure that the proposed anti terror body was also equally obliged to respond to state governments' requests and the need to

provide resources to upgrade state capabilities[66]. 36. The Home Minister indicated to review the structure and suggested proposal to remove the NCTC from the ambit of the Intelligence Bureau. While the powers to arrest are being said to be used under exceptional circumstances whether this would satisfy the states or not remains to be seen for, who will determine that the circumstances are exceptional for exercising the powers and what motives are ascribed will always remain suspect.[67] However it was opined that for starters NCTC will be a much diluted one than what the government had originally envisaged.[68]