

# ANTI-TERRORISM COURTS AND PROCEDURAL (IN)JUSTICE: THE CASE OF THE NATIONAL INVESTIGATION AGENCY (NIA) SPECIAL COURTS IN SOUTH CHHATTISGARH, INDIA

—Shikha Pandey\*

*The National Investigation Agency Act, 2008 ('NIA Act') was enacted for setting up a central agency, namely the National Investigation Agency. It is responsible for the investigation and prosecution of offences related to national security. The NIA Act prescribes a specific procedure for investigating any offence classified as a 'Scheduled Offence' under Section 6 of the NIA Act. In doing so, the NIA Act empowers the Central Government and the state governments to designate Special Courts by notification and vest them with the powers to investigate and prosecute Scheduled Offences in accordance with the special procedures set out in the NIA Act. The aforementioned power has been exercised multiple times across India by the Central Government and the state governments. However, the powers vested in state governments pursuant to Section 22 of the NIA Act to designate Special Courts, have often been a point of debate and dispute before appellate courts. The dispute has been on the grounds of ambiguity and vagueness in the letter of the law. This paper examines the NIA Act and judicial precedents, to analyse the extent of the power vested in the state governments under Section 22 of the NIA Act. Using the empirical study from the conflict-torn region of Bastar in Chhattisgarh, the paper demonstrates that the vagueness and ambiguity in Section 22 of the NIA Act has been used by the state of Chhattisgarh to create an unintelligible classification of offences related to left-wing extremism, for trial by the Special Court in Bastar. The paper will also*

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\* Advocate and Legal Researcher, David W. Leebron Human Rights Fellow, 2018, hosted by Jagdalpur Legal Aid Group, Chhattisgarh, India.

*show that such classification has resulted in a violation of the procedural rights of individuals belonging to indigenous communities in Bastar.*

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## I. INTRODUCTION

The National Investigation Agency Act, 2008<sup>1</sup> ('NIA Act') was enacted in the wake of the terror attacks in Mumbai, with the objective of creating a federal investigative agency, namely the National Investigation Agency ('NIA'), for investigation and prosecution of national security-related offences. Falling under the jurisdiction of the Ministry of Home Affairs, Government of India, the NIA is amongst the few federal-level investigative agencies empowered to investigate and conduct prosecutions, which is a power ordinarily vested with state governments.

The NIA Act demarcates a category of offences, termed as 'Scheduled Offences'. These are offences under other penal statutes that can be investigated by the NIA, including, *inter alia*, offences under laws dealing with national security and terrorism. The NIA Act creates special procedures for trials that deviate from the ordinary law on criminal procedure, and curtails several procedural rights of the accused. It also provides for the designation of 'Special Courts' for the trial of these offences, though these Special Courts are not provided for under those penal statutes. This signals a return to an earlier trend under older, now repealed anti-terrorism laws,<sup>2</sup> of constituting Special Courts – a trend that had been discontinued in the anti-terrorism laws operating at present.

The implementation of the NIA Act has been fraught with legal challenges in the High Courts of various states on the issue of the purpose and scope of the NIA Act. The question that has been raised in appellate courts is whether

<sup>1</sup> The National Investigation Agency Act 2008 was amended by the National Investigation Agency (Amendment) Act 2019.

<sup>2</sup> The Terrorist and Disruptive Activities (Prevention) Act 1987 ('TADA'); The Prevention of Terrorism Act 2002 ('POTA').

the NIA Act is applicable to all cases registered under the Scheduled Offences or only to those cases registered under the Scheduled Offences in which the Central Government has expressly directed the NIA to carry out the investigation. This question has an important bearing on the administration of criminal justice and prosecution of Scheduled Offences in a region like Bastar in South Chhattisgarh, due to the region's unique social, geographic, and political characteristics.

The Bastar division of Chhattisgarh forms the epicenter of the armed conflict between the Naxalites, a Maoist insurgent group, and the Indian state – a conflict that has been going on for nearly two decades now. The region has a security personnel to civilian population ratio of 1:22, with more than 1,08,772 armed forces personnel deployed against the insurgents.<sup>3</sup> In conflict zones like Bastar, the enforcement of national security laws in criminal prosecutions targeted against *Adivasi* citizens often appears as an extension of the government's counter-insurgency operations through legal intervention.<sup>4</sup>

In May 2015, the Chhattisgarh state government issued a notification to constitute a Special Court under the NIA Act having jurisdiction over the seven conflict-affected districts of the Bastar region. This Special Court has jurisdiction over the trial of all cases registered in Bastar under Scheduled Offences, irrespective of whether the NIA is involved in the investigation or not. The indiscriminate use of national security laws against the *Adivasis*, coupled with the enforcement of the Special Court under the NIA Act, has led to a peculiar situation. Most Naxalite-related cases spread over the entire conflict region have been transferred to one NIA Special Judge who presides at the centre of power of Bastar i.e. Jagdalpur. The Special Court, in theory, is purposed to expedite the trial. However, the said notification has, instead, denuded the existing trial courts of jurisdiction over the cases that were to be tried under the ordinary criminal procedure. Since 2015, more than five hundred cases registered under the Scheduled Offences have been instituted and tried under special criminal procedures before the NIA Special Court in Bastar.<sup>5</sup> The administration of the law against the *Adivasi* population has led to the derogation of essential procedural safeguards against arbitrary prosecutions, denial of access to justice, and the denial of a right to a free and fair trial.

Part II of the paper explains the legal rationale behind the constitution and operation of Special Courts under the NIA Act. The paper argues that the

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<sup>3</sup> Gautam Navlakha, 'A Savage War for 'Development'' (2017) 52(21) Economic & Political Weekly 61.

<sup>4</sup> Geoff Dancy and Eric Wiebelhaus-Brahm, 'The Impact of Criminal Prosecutions During Intra-State Conflict' (2018) 55(1) Journal of Peace Research 47.

<sup>5</sup> From the period July 2015 to December 2019, the data has been received from the office of the Public Information Officer, Bastar District and Sessions Court, Jagdalpur. The data can be accessed from the author.

objective and purpose behind the NIA Act was not to create special procedures for the investigation and trial of *all* Scheduled Offences under the NIA Act. Instead, it is argued that the NIA Act only intended to create a specialized investigating agency (i.e. the NIA) and a ‘Special Court’ for the investigation and prosecution of offences by the NIA. In this context, the NIA Act goes on to provide the Central Government with unfettered powers to direct the NIA to investigate and prosecute Scheduled Offences before the Special Courts designated by it.<sup>6</sup> On the other hand, the investigating agencies of state governments can investigate and prosecute offences under the NIA Act only under specific circumstances, based on a determination made by the Central Government.

Like the Central Government, state governments are also empowered to designate Special Courts.<sup>7</sup> Relying on the Full Bench judgment of the Patna High Court in *Bahadur Kora v State of Bihar*<sup>8</sup> and an analysis of Sections 7 and 10 of the NIA Act, the paper delineates the limited circumstances that allow state governments to prosecute cases under Scheduled Offences before the Special Courts. Under the scheme of the NIA Act, state governments can exercise special powers of investigation and prosecution only after the Central Government entrusts the investigation to the NIA, and the NIA decides to either (i) associate the state government in the investigation, or (ii) transfer the investigation to the state government. Only under these twin circumstances can state governments invoke the provisions of the NIA Act. In all other cases, state governments must follow the ordinary criminal procedure for investigation and prosecution. This position of law is the subject matter of the paper, because in practice, state governments are arrogating to themselves the power to invoke the special provisions of the NIA Act, to indiscriminately investigate and prosecute all Scheduled Offences before the Special Courts designated under Section 22. This is the case even when the Central Government has not entrusted the NIA with the investigation. Sub-sections (A), (B), and (C) of Part II of the paper discuss the provisions of the NIA Act and judicial precedents to explain the circumstances under which the provisions of the NIA Act can be legitimately invoked by the state governments. Sub-section (D) of Part II discusses the erroneous classification of offences created by the Chhattisgarh state government between cases that are being tried in the designated Special Court in Bastar and other cases being tried under ordinary criminal procedure. The paper argues that this classification does not satisfy the ‘nexus test’ reiterated by the Supreme Court in *State of W.B. v Anwar Ali Sarkar*.<sup>9</sup> The classification of cases adopted by Chhattisgarh state government under the NIA Act is arbitrary, as it is not in consonance with the purpose of the NIA Act.

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<sup>6</sup> NIA Act, s 11.

<sup>7</sup> NIA Act, s 22.

<sup>8</sup> 2015 SCC OnLine Pat 1775.

<sup>9</sup> AIR 1952 SC 75.

Part III of the paper treats illustrations from the conflict-torn Bastar region of Chhattisgarh as a case study to substantiate the argument of the misuse of Section 22 by the Chhattisgarh state government. This section of the paper, supported by empirical analysis, demonstrates the aftermath of executive excess in the administration of the criminal justice system in one of the most remote areas of India. The empirical study also underscores the extent of the violation of due process of law and the right to access to justice, triggered by such executive misuse. In doing so, not only are the procedural rights of indigenous *Adivasi* citizens in Bastar (who form the bulk of the accused and incarcerated in this region) abridged, but the very core of the right to a fair, accessible, and speedy trial is jeopardized too.

Part IV offers recommendations for reforms in the criminal justice system by decentralizing the institutions of justice, increasing the court's accessibility to the grassroots, and means to improve procedural rights.

## II. THE NIA SPECIAL COURT: LEGAL RATIONALE AND OPERATIONS

### A. An Explainer to the NIA Act

The NIA Act was enacted with the objective of creating a central level investigative agency, the NIA, for the investigation and prosecution of national security-related offences. These are termed as 'Scheduled Offences', and are listed in the Schedule to the NIA Act.<sup>10</sup> It also provides for the designation of Special Courts for the prosecution of such Scheduled Offences investigated by the NIA or by the state investigating agency under specified circumstances as prescribed under the NIA Act.

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<sup>10</sup> 1. The Explosive Substances Act 1908;  
1-A. The Atomic Energy Act 1962;  
2. The Unlawful Activities (Prevention) Act 1967;  
3. The Anti-Hijacking Act 1982;  
4. The Suppression of Unlawful Acts against Safety of Civil Aviation Act 1982;  
5. The SAARC Convention (Suppression of Terrorism) Act 1993;  
6. The Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act 2002;  
7. The Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Act 2005;  
8. Offences under—  
(a) Chapter VI of the Indian Penal Code [s 121 to 130 (both inclusive)];  
(b) s 370 and 370A of Chapter XVI of the Indian Penal Code;  
(c) s 489-A to 489-E (both inclusive) of the Indian Penal Code;  
(d) s 25(1AA) of Chapter V of the Arms Act 1959;  
(e) s 66F of Chapter XI of the Information Technology Act 2000.

Scheduled Offences comprise special legislations, such as the Unlawful Activities (Prevention) Act, 1967 ('UAPA'), an anti-terrorism law, as well as specific provisions of the Indian Penal Code, 1860 ('IPC')<sup>11</sup> related to offences against the state. With the NIA (Amendment) Act, 2019, the Parliament has added further offences to the Schedule, i.e. cyber terrorism under the Information and Technology Act, 2000, Section 25(1AA) of the Arms Act, 1959,<sup>12</sup> human trafficking and counterfeiting currency notes under the IPC, and all offences under the Explosive Substances Act, 1908. This brings the total tally in the Schedule to ten penal enactments, in addition to four classes of offences under the IPC.

## 1. The Investigation

The procedure for investigation of Scheduled Offences is detailed under Section 6 of the NIA Act. This prescribes that when a First Information Report ('FIR') is registered for any Scheduled Offence by the officer-in-charge of the police station, the state government is obligated to forward the said report to the Central Government.<sup>13</sup> The latter shall, within fifteen days, after considering the gravity of the offence and other relevant factors, determine whether it is a fit case for investigation by the NIA.<sup>14</sup> If it is of the opinion that a Scheduled Offence has been committed which is required to be investigated under the NIA Act, the Central Government shall entrust the investigation to the NIA.<sup>15</sup> Thenceforth, the power of the state investigating agencies to investigate and prosecute ceases.<sup>16</sup> If the Central Government does not entrust the investigation to the NIA within fifteen days of receipt of the said report, the state investigating agency shall continue the investigation. It is also clarified that till the NIA takes up the investigation, it shall be the duty of the officer-in-charge of the police station to continue the investigation.<sup>17</sup> The Central Government also has the inordinate power to *suo motu* direct the NIA to investigate a Scheduled Offence, if it is of the opinion that it requires investigation under the NIA Act.<sup>18</sup>

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<sup>11</sup> The Indian Penal Code 1860, s 121 to 130, s 489-A to 489-E, s 370 and 370A.

<sup>12</sup> Arms Act 1959, s 25(1AA).

<sup>13</sup> NIA Act, s 6(2).

<sup>14</sup> NIA Act, s 6(3).

<sup>15</sup> NIA Act, s 6(4).

<sup>16</sup> NIA Act, s 6(6).

<sup>17</sup> NIA Act, s 6(7).

<sup>18</sup> NIA Act, s 6(5); *The State of Chhattisgarh v National Investigative Agency* Writ Appeal No. 511 of 2019. This case was with respect to the assassination of Bhima Mandavi, Member of Legislative Assembly, in April 2019. The power of Central Government to transfer the case to the NIA was challenged by Chhattisgarh state government before the High Court of Chhattisgarh. The High Court upheld the decision of the Single Bench that directed the state government to transfer the investigation to the NIA in light of the powers of the Central Government under s 6(5).

After the entrustment of the case by the Central Government to the NIA under Section 6, the role of the state government in the investigation and prosecution under the NIA Act is limited to two circumstances, as described under Section 7. Either the NIA may request the state government to associate itself with the investigation,<sup>19</sup> or with the prior approval of the Central Government, the NIA may transfer the case to the state government for investigation and trial of the offence.<sup>20</sup> Therefore, as per the scheme of the NIA Act, the role of the state government to investigate and prosecute offences in exercise of the special powers provided under the NIA Act only come into play once the preceding steps under Sections 6 and 7 have taken place.

In the absence of entrustment of the investigation by the Central Government to the NIA, the powers of the state governments to investigate and prosecute the offences listed in the Schedule are protected under Section 10 of the NIA Act. However, such investigation and prosecution shall be under the ordinary procedural law.

## 2. The Prosecution

After laying down the procedure for the investigation of the Scheduled Offence, the NIA Act also prescribes the power of the Central and state governments to ‘designate’ Special Courts. The 2019 Amendment substituted the earlier term ‘constitute’ with the term ‘designate’.<sup>21</sup> Under the NIA Act, the Central Government and state governments have an extraordinary power to decide any question relating to the jurisdiction of any Special Court designated by them, wherein the Government’s decision shall be considered as final.<sup>22</sup> This power prescribed under the NIA Act strikes at the heart of the fundamental principle of independence of the judiciary from interference by the executive.

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<sup>19</sup> NIA Act, s 7(a).

<sup>20</sup> NIA Act, s 7(b).

<sup>21</sup> The NIA Act, when enacted, prescribed the ‘constitution’ of Special Courts which is now substituted by the word ‘designation’. Prior to the amendment, the practice involved the appointment of a Special Judge on the ‘recommendation of the Chief Justice of the High Court’. The Central Government notified the designated Special Judge by her name in the gazette. (NIA Act 2008, s 11(3) [this section has been omitted by the Amendment Act]); Nehal Bhuta, ‘Back to the Future, India’s 2008 Counterterrorism Laws’ (*Human Rights Watch*, 27 July 2010) <<https://www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws>> accessed 26 April 2020. It has been argued that the practice of special judicial appointment of a judge by the executive to preside over a Special Court places a premium on judges whose concerns about state security overshadow concerns about the due process rights of the accused; Anil Kalhan and others, ‘Colonial Continuities: Human Rights, Terrorism and Security Laws in India’ (2006) 20 *Columbia Journal of Asian Law* 93, 99. Kalhan has argued that the executive encroachment on the independence of the judiciary creates a risk of political influence which is particularly pernicious in anti-terrorism cases which are more likely to be politically charged. Kalhan has also discussed the use of special law in discriminating against the Dalit, lower castes, tribal communities and religious minorities at 175-181.

<sup>22</sup> NIA Act, s 11(2) and 22(2)(i).

When the issues are of a judicial nature, only the judiciary should have the exclusive authority to decide whether an issue submitted for its decision is within its competence, as defined by law.<sup>23</sup>

The manner of operation and the prosecution conducted by the designated Special Courts is described in the following paragraphs.

Special Courts under the NIA Act are of two categories, those designated by the Central Government, and those by the state governments. The Special Courts designated by the Central Government are defined under Section 11 as:

The Central Government *shall*, in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, for the trial of Scheduled Offences, designate one or more Courts of Session as Special Court for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

Similarly, the second category of Special Courts are designated under Section 22. While the Central Government is under an obligation to designate a Special Court, this power is of a discretionary nature for state governments. The enactment defines the jurisdiction of Special Courts under Section 13 to extend to all Scheduled Offences investigated by the NIA that have been committed within the local jurisdiction of the Special Court.

On the basis of the provisions delineated above, the jurisdiction of the Special Courts can be predicated upon the investigation undertaken under the NIA Act. On the basis of the nature of investigation conducted under Sections 6, 7, and 10, the cases registered under Scheduled Offences can be classified into four broad classes:

[a] Where the Central Government directs the NIA to investigate the case either within fifteen days after receiving the report from the state government [Section 6(4)] or on *suo motu* direction at any stage [Section 6(5)].

[b] Where the Central Government directs the NIA to investigate the case, and the NIA requests the state government to remain associated with the case, i.e. NIA and state investigating agency, both investigate the case [Section 7(a)].

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<sup>23</sup> United Nations General Assembly, 'Basic Principles on the Independence of the Judiciary - General Assembly Resolutions 40/32 and 40/146' (29 November 1985); 'Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice' (Milan, 1985) 149; Constitution of India 1950, art 50; International Covenant on Civil and Political Rights, art 14(1).



[c] Where the Central Government directs the NIA to investigate the case, and the NIA, having sought prior approval from the Central Government, transfers the case to the state government i.e. only the state investigating agency investigates the case, but after approval from the Central Government [Section 7(b)].

[d] Where the Central Government does not direct the NIA to investigate the case, i.e. either it does not consider that the case falls within the ambit of a Scheduled Offence, or having regard to the gravity of the offence and other relevant factors, it considers that it is not a fit case for the NIA to investigate, the state investigating agency proceeds with the investigation and trial of the case [Section 10].

Based on this classification, the first two classes of cases are tried by the Special Courts designated under Section 11, as notified by the Central Government. It is also apparent that the third class of cases are to be tried by the Special Court designated under Section 22 by the state governments.

The status of trials classified under the fourth class of cases requires deliberation. If the Central Government does not direct the NIA to investigate the case, by default, the state investigating agency continues to investigate.<sup>24</sup> The question that arises then is, whether the investigation and prosecution of such a case is to be conducted as per the procedures in the Code of Criminal Procedure, 1973 ('CrPC'), the ordinary law of procedure in India, or whether the special procedure under the NIA Act would come into play, merely because these are Scheduled Offences, even though the Central Government does not consider them fit for investigation by the NIA. This is examined in the next sub-section of the paper.

## **B. Section 22 and the Question of Procedural Misuse**

For the purpose of reference the contents of Section 22 are quoted below:

### ***22. The Power of state government to designate<sup>25</sup> Special Court:***

- (1) *The state government may designate one or more Courts of Session<sup>26</sup> as Special Courts for the trial of offences under any or all the enactments specified in the Schedule.*

<sup>24</sup> NIA Act, s 6(7) and 10.

<sup>25</sup> The word 'constitute' has been substituted by the word 'designate' after the NIA (Amendment) Act of 2019.

<sup>26</sup> The words 'constitute one or more Special Courts' have been substituted by 'designate one or more Courts of Session' after the NIA (Amendment) Act of 2019.

- (2) *The provisions of this Chapter shall apply to the Special Courts designated<sup>27</sup> by the state government under sub-section (1) and shall have effect subject to the following modifications, namely-*
- (i) *references to “Central Government” in Sections 11 and 15 shall be construed as references to state government;*
  - (ii) *reference to “Agency” in sub-section (1) of Section 13 shall be construed as a reference to the “investigation agency of the state government”;*
  - (iii) *reference to “Attorney General for India” in sub-section (3) of Section 13 shall be construed as reference to “Advocate General of the State”.*
- (3) *The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is designated<sup>28</sup> by the state government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the 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 this Chapter.*
- (4) *On and from the date when the Special Court is designated<sup>29</sup> by the state government the trial of any offence investigated by the state government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is designated.*

This paper proceeds with the argument that the state governments have accorded a wider jurisdiction to the Special Courts created under Section 22 than what was intended by the legislature. Sub-section (1) gives discretion to the state government to designate Special Courts for the trial of any or all the enactments in the Schedule. At the threshold, Section 22 does not lay down the circumstances under which the state government’s investigating agency can investigate the Scheduled Offence under the provisions of the NIA Act. In the absence of this clarification, Sub-section (2) clause (ii) quoted above, equates the state investigating agency to the NIA. The clause modifies the reference to ‘Agency’ in Section 13<sup>30</sup> to be construed as the “investigation agency of the state government”. Therefore, this phraseology leads to an erroneous conclusion that analogous to Section 11, where the NIA happens to be the investigating agency in a case tried by the Special Court, the “investigation agency

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<sup>27</sup> The word ‘constitute’ has been substituted by the word ‘designate’ after the NIA (Amendment) Act of 2019.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> NIA Act, s 13(1).

of the state government” is assumed to play that role in a case tried by the Special Court designated under Section 22 of the NIA Act. This assumption then leads to the erroneous inference that the provisions of the NIA Act (instead of the CrPC) would get attracted once a Scheduled Offence is alleged, irrespective of whether or not the Central Government entrusted the case to the NIA as under Sections 6(4) or (5) of the NIA Act. This ambiguity in the provision has enabled the state governments to liberally interpret Section 22 to mean that the NIA Act can be employed every time an offence enumerated in the enactments in the Schedule is committed, whether or not the Central Government has thought it fit for investigation by the NIA.

This question assumes immense importance, especially in an internal conflict zone of the country such as Bastar, because of the large number of cases tried under national security related laws enumerated in the Schedule. In Bastar, while there are only three cases<sup>31</sup> that are currently under investigation by the NIA, more than five hundred cases investigated by the Chhattisgarh state investigating agency under the Scheduled Offences have been instituted before the Special Court designated under Section 22 of the NIA Act.<sup>32</sup> The procedures under the NIA Act, carved out to investigate and prosecute grave offences against national security, are extremely harsh and restrictive. Under the NIA Act, the Special Court is empowered to hold a summary trial for offences with punishment not exceeding three years,<sup>33</sup> as opposed to two years under the CrPC.<sup>34</sup> The Act also overrides the provision of the CrPC that prescribes that no sentence of imprisonment for a term exceeding three months can be imposed if there is a conviction after a summary trial.<sup>35</sup> Furthermore, the Special Court has the power to proceed with a trial in the absence of the accused or the pleader,<sup>36</sup> to take cognizance without committal proceedings by the magistrate having jurisdiction,<sup>37</sup> to conduct “in camera” proceedings if it so desires,<sup>38</sup> to hold proceedings at any place to be decided by the Special Court,<sup>39</sup>

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<sup>31</sup> ‘The Ambush on CRPF Team, Jheerum II, Tahakwada Incident, 2014’ (National Investigation Agency) <[www.nia.gov.in/case-detail.htm?52/Ambush+on+CRPF+team+Jheerum+II+Tahakwada+incident](http://www.nia.gov.in/case-detail.htm?52/Ambush+on+CRPF+team+Jheerum+II+Tahakwada+incident)> accessed 26 April 2020; ‘Darbha Jheerum Ghati Attack Case, 2013’ (National Investigation Agency) <[www.nia.gov.in/case-detail.htm?46/Darbha+Jheerum+Ghati+Attack+case](http://www.nia.gov.in/case-detail.htm?46/Darbha+Jheerum+Ghati+Attack+case)> accessed 26 April 2020; ‘Death of Mr Bheema Mandavi in an IED Blast by CPI (Maoist), Dantewara, Chhattisgarh, 2019’ (National Investigation Agency) <[www.nia.gov.in/case-detail.htm?263/Death+of+Mr+Bheema+Mandavi+in+a+IED+blast+by+CPI+Maoist+Dantewara+Chhattisgarh](http://www.nia.gov.in/case-detail.htm?263/Death+of+Mr+Bheema+Mandavi+in+a+IED+blast+by+CPI+Maoist+Dantewara+Chhattisgarh)> accessed 26 April 2020.

<sup>32</sup> See n 5.

<sup>33</sup> NIA Act, s 16(2).

<sup>34</sup> CrPC, s 260(1)(i).

<sup>35</sup> NIA Act, s 16(2).

<sup>36</sup> NIA Act, s 16(5).

<sup>37</sup> NIA Act, s 16(1).

<sup>38</sup> NIA Act, s 17(1).

<sup>39</sup> NIA Act, s 17(3)(a).

or if it considers “expedient or desirable”, to sit for any of its proceedings at any place other than the ordinary place of sitting.<sup>40</sup>

These special procedures deviate from ordinary criminal procedure that secures the rights of the accused at all stages of the trial. For example, the power of a Special Judge to take cognizance of the offence without the committal proceedings abrogates an essential step in the criminal trial and is contrary to the procedure of ordinary Sessions triable cases.<sup>41</sup> For ordinary Sessions triable cases, the case is first brought before the Chief Judicial Magistrate (‘CJM’) having territorial jurisdiction over the case, who, after ensuring the sufficiency of the material on record, commits the case to the Court of Sessions for trial.<sup>42</sup> Before the committal of the case, the accused also has a chance of applying for bail before the committing CJM, and can also approach the Court of Sessions<sup>43</sup> after the rejection of bail by the CJM.

It will be illustrative to examine an example of Bastar in the context of circumventing committal proceedings. Once the offence under the UAPA is registered, the case is immediately transferred to the NIA Special Judge in the District and Sessions Court of Bastar at Jagdalpur. For instance, if the accused is arrested in a case registered in Sukma and lodged in Sukma Sub-Jail (at a distance of more than 100 kilometres from the Special Court at Jagdalpur), the remand hearing takes place before the Special Judge at Jagdalpur instead of the CJM at Sukma, who otherwise had territorial jurisdiction over the case. For an accused, the production before the Special Court at Jagdalpur for remand hearings is fraught with challenges due to lack of security and vehicles to ferry the accused. Accessing legal representation also becomes difficult since the lawyers from Sukma, hired by the family of the accused, are required to travel to Jagdalpur for every remand hearing. The absence of the pleader of choice at the remand stage results in the denial of proper legal representation, and the accused is unable to bring complaints regarding custodial violence, forced confession, or medical illnesses to the notice of the court at the first instance.<sup>44</sup>

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<sup>40</sup> NIA Act, s 12.

<sup>41</sup> CrPC, s 193.

<sup>42</sup> CrPC, s 209.

<sup>43</sup> CrPC, s 439.

<sup>44</sup> Sodi Hunga s/o Joga Hunga, age 45 years, was the accused in FIR No. 16/2018 Police Station Kistaram, Sukma under UAPA, s 38, 39(1) and 39(2); Explosive Substances Act, s 4 and 5; IPC, s 147, 148, 149 and 307; Arms Act, s 25 and 27. Sodi was in judicial custody in Sukma Sub-Jail. He died of an ‘unknown illness’ on 28 February 2019. His remand hearing before the Special Court at Bastar District and Sessions Court, Jagdalpur was on 15 February 2019. The order-sheet dated 15 February 2019 recorded that the accused was not brought from the Jail and the production warrant was also unserved. The Special Court gave directions to the Sub-Inspector of Police Station Kistaram to comply with the remand proceedings by the next date of remand hearing fixed on 1 March 2019. On the next date, i.e. 1 March 2019, it was informed that the accused had died. The medical reports show that the police did not get a CT-Scan of the accused despite several requests by the doctors. The medical and

Another important procedural deviation under the NIA Act is the restriction on the legal remedy to seek bail.<sup>45</sup> The High Court under Section 439 of the CrPC has unfettered power to grant bail. However, under the NIA Act, the accused is prevented from approaching the High Court under this provision. Instead, on the rejection of bail by the Special Judge, the accused can only appeal against this order before the Division Bench of the High Court within thirty days<sup>46</sup> of the order. The NIA Act, therefore, imposes restrictions on the liberty of the accused that are not otherwise intended under ordinary procedural law, or even under substantive laws such as the UAPA for instance.

Treating all cases registered under the enactments mentioned in the Schedule to the NIA Act also abridges the procedures listed in the primary legislation pertaining to that particular offence. For instance, the provisions for bail under the UAPA get overridden by those of the NIA Act, UAPA being one of the enactments in the Schedule. The provision for bail under the UAPA already places a harsh burden of proving innocence for the grant of bail.<sup>47</sup> However, it still does not impede the High Court's unrestricted power to grant bail under Section 439 CrPC. The NIA Act, however, imposes additional restrictions that result in the denial of liberty to the accused.

Similarly, the power of the courts to choose the place of court proceedings "at any place" when it is "expedient or desirable" could legitimize holding court proceedings, for example, in a prison facility, or any closed premises. This not only denies the right to a public hearing, but also does not comply with the right to a trial proceeding that is fair, conducive, free of intimidation, and accessible to the relatives of the accused. Lastly, the arguments furthering the creation of Special Courts, which are based on the need for speedy disposal of cases, also do not resonate with reality. A study on special courts (including NIA Special Courts) has concluded that giving an already existing court an extra designation of 'Special Court' has resulted in increased workload on the courts and raised questions about efficiency due to the prevailing case pendency.<sup>48</sup>

Therefore, with the enactment of the NIA Act and the executive excess by state governments, the Parliament has re-enacted restrictions on the liberty of the accused that the substantive laws had never intended. It is also pertinent to note that in terms of revocation of procedural rights, the NIA Act is far more

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postmortem reports from Sukma Sub-Jail have been received after an appeal under the Right to Information Act 2005. The author has access to it for reference.

<sup>45</sup> NIA Act, s 21 is identical to TADA, s 20 and POTA, s 34.

<sup>46</sup> NIA Act, s 21(4).

<sup>47</sup> UAPA, s 43D(5).

<sup>48</sup> Sakshi, 'What is Special About Special Court?' *The Hindu* (5 January 2017) <<https://www.thehindu.com/opinion/op-ed/What-is-special-about-special-courts/article16978952.ece>> accessed 23 April 2020. The study was conducted by Vidhi Centre for Legal Policy, New Delhi.

detrimental, for it impacts a very wide range of substantive laws as mentioned in the Schedule. The NIA Act further enables the Central Government to abuse its powers to expand the scope of the Act by adding more offences to the Schedule. For instance, the recent 2019 amendment has incorporated offences pertaining to trafficking of persons and minors for sexual exploitation or forced labour to the Schedule, which are wholly unrelated to national security.<sup>49</sup>

### C. The High Courts' View on Section 22: The *Bahadur Kora* Judgment

The state of Bihar offers an instructive case study on the procedural misuse of Section 22 of the NIA Act and its rectification by judicial intervention. In Bihar, a Division Bench of the High Court in *Aasif P.K. v State of Bihar*<sup>50</sup> had held that since the UAPA is one of the enactments listed in the Schedule to the NIA Act, whenever an allegation is made against an accused under the provisions of the UAPA, the procedure prescribed under the NIA Act must be followed.<sup>51</sup> It was also held that even if the cognizance of offences was taken in accordance with the provisions of the CrPC and the investigation was undertaken by the state investigating agencies, and not by the NIA, the trial of such offences shall be conducted by the court as provided under Section 22.<sup>52</sup>

As a result of *Aasif's* judgment, the cases registered under the UAPA were indiscriminately transferred to the Court of Sessions for trial under the NIA Act. The immediate consequence of the application of the special law was a transgression from the bail provision. In Bihar, there was a phenomenal increase in the appeals against the orders passed by the Special Judge before the High Court.<sup>53</sup> The Division Bench of the High Court that heard the appeals under Section 21(4) observed that in none of these cases had the investigation been entrusted to the NIA by the Central Government under Sections 6(4) or (5) of the Act, nor had the investigation been transferred to the state investigating agency under Section 7(b). The counsels appearing for the accused as well as the public prosecutors pleaded that indiscriminate transfer of cases to Special Courts subjects the accused to stringent procedures under the special law.<sup>54</sup> This consequence of the implementation of *Aasif's* judgment prompted the Division Bench to refer the case to a Full Bench for a more detailed examination.

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<sup>49</sup> 'SC Issues Notice on Plea Challenging Validity of NIA Amendment Act 2019' (*LiveLaw News Network*, 20 January 2020) <<https://www.livelaw.in/top-stories/sc-issues-notice-on-plea-challenging-validity-of-nia-amendment-act-2019-151806?infinite-scroll=1>> accessed 23 April 2020.

<sup>50</sup> (2015) (1) P.L.J.R. 1017.

<sup>51</sup> *Bahadur Kora* (n 8) [2].

<sup>52</sup> Since the Bihar state government had not created a Special Court under s 22(1), a Sessions Court, as provided for under s 22(3) of the NIA Act was accorded the status of Special Court.

<sup>53</sup> *Bahadur Kora* (n 8) [3].

<sup>54</sup> *ibid.*

The Full Bench in *Bahadur Kora*,<sup>55</sup> after delineating the purpose and the objective of the law and interpreting Section 22 in the light of the procedures to be followed under Sections 6 and 7 of the Act, rejected the opinion held in *Aasif's* case. Unequivocally, the Court observed that the objective of the NIA Act is not to make the Scheduled Offences triable “invariably and exclusively” under the NIA Act or the Special Courts constituted under it. It is only when the offences are entrusted for an investigation to the NIA that they become triable by the Special Courts.<sup>56</sup> The role and purpose of Section 22 of the Act was identified to stem from Section 7 of the Act. The Court observed that Section 7(b) gives discretion to the NIA to transfer the case to the state government for investigation and trial of the offence, with the previous approval of the Central Government. Therefore, the state government can conduct the investigation and trial of the case under the NIA Act only if Section 7(b) is invoked. Barring that, the state government or its investigating agency does not have any authority or discretion to choose or pick up cases, in which the Scheduled Offences have been alleged, for investigation under the NIA Act.<sup>57</sup>

*Aasif's* case was held to be erroneous for it failed to consider the circumstances under which the investigating agency of the state government comes into the picture. Instead, it suggested that the NIA Act can be invoked once an offence punishable under the UAPA is alleged, whether or not any steps contemplated under Section 6 of the Act were taken.<sup>58</sup> The Division Bench in *Aasif's* case had proceeded as though the state investigating agency had the power to investigate the Scheduled Offences on its own accord. In a way, therefore, the Division Bench had conferred greater power on the state agency than the NIA in the context of trying Scheduled Offences. While the NIA could not investigate any case unless it was entrusted to it by the Central Government under Section 6, the decision of the Division Bench meant that the state investigating agency could investigate such offences without any requirement of entrustment by anyone whatsoever. This, in the view of the Full Bench, had virtually negated the scheme of the Act.<sup>59</sup>

Similarly, a Division Bench of the Madras High Court held that the starting point for the application of the NIA Act was the decision of the Central Government to proceed under the Act. Once the Central Government had informed that the case was not being investigated under the NIA Act, then the case on the file of the state government did not attract any of its provisions.<sup>60</sup> Following the decision, a Single Bench of the Madras High Court held that the executive notification issued by the Tamil Nadu state government to transfer

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<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* [27].

<sup>57</sup> *ibid* [29].

<sup>58</sup> *ibid* [26].

<sup>59</sup> *ibid* [32].

<sup>60</sup> Criminal Appeal Nos. 243, 340 and 524 of 2015 (High Court of Madras) [5].

the case in dispute investigated by the state investigating agency before the NIA Special Court was directly overruling the judgment of the Division Bench and was therefore non-est in the eye of law.<sup>61</sup>

The judgment in *Bahadur Kora* was not challenged before the Supreme Court of India. In fact, in an appeal under Section 21(4) before the Division Bench of the Rajasthan High Court,<sup>62</sup> the standing counsel for the NIA submitted before the Court that the NIA had accepted the *Bahadur Kora* judgment as the correct position of law. Thus, the NIA accepted that unless the investigation of a matter was entrusted to the NIA or the NIA transferred the same to the state investigating agency, the state investigating agency did not get the power to investigate or try the matter in accordance with the provisions of the NIA Act.<sup>63</sup> Despite this admission, the legal flaw remains unrectified in the criminal justice system in Bastar and is further accentuated by the large number of accused who are made to face trial before the Special Court.

However, Chhattisgarh is not the only state failing to adopt the correct position of law with regard to Section 22. The ambiguity in the law has resulted in conflicting judicial opinions on the correct interpretation of Section 22. The High Court of Delhi,<sup>64</sup> the High Court of Kerala,<sup>65</sup> and the High Court of Karnataka<sup>66</sup> have opined that Section 22 enables state governments to constitute Special Courts for the trial of offences under any or all of the enactments specified in the Schedule to the NIA Act. These judgments, however, do not examine the rationale of Section 22 within the scope and objective of the NIA Act, and the functions of the NIA and the state investigating agencies, in light of Sections 6 and 7. Unlike the *Bahadur Kora* judgment, the courts did not purposively interpret Section 22, incorporating a reading of the provision in its entirety, and also in the context of the intent of the statute.

#### **D. Examining the Purposive Interpretation of Section 22**

The Bastar region sees a large volume of cases involving left-wing extremism ('LWE'). Currently, it is estimated that there are above 4,000 *Adivasi* undertrials in jails in just over 1,100 cases in the Bastar division.<sup>67</sup> The sheer volume of cases involving LWE is evidenced by the fact that the District and Sessions Court of Dantewada (South Bastar) contains a designated court of

<sup>61</sup> *Abdulla v State* 2018 (2) MLJ (CrI) 608.

<sup>62</sup> *Jagdish Singh v State of Rajasthan* 2016 SCC OnLine Raj 5312 : 2016(4) RLW 3464 (Raj).

<sup>63</sup> *ibid* [9].

<sup>64</sup> *Sayed Mohd. Ahmad Kazmi v Union of India* 2014 SCC OnLine Del 1344 : (2014) 142 DRJ 673.

<sup>65</sup> *Sahadath Hossain v State of Kerala* 2016 SCC OnLine Ker 29125 : ILR (2017) 1 Ker 380.

<sup>66</sup> *Gauhar Aziz Khomani v State* Criminal Petition No. 8718/2017.

<sup>67</sup> Dipankar Ghose, 'Chhattisgarh: Committee to Reassess Cases Against Tribals Holds First Meet' *Indian Express* (Raipur, 15 May 2019).



Additional District Judge as a Special Court for the trial of all 'Naxalite Cases' even though no such offence exists in the statute books.<sup>68</sup> This Special Court is designated to exclusively conduct trials of LWE cases under ordinary criminal procedure. Apart from the Special Court for 'Naxalite Cases' and the NIA Special Court, all the other Additional District Judges in the four district courts in Bastar are equally competent to conduct the trial of offences related to LWE. This composition of the trial courts then necessitates an examination of the basis and rationale of the classification of offences to be tried either by special procedures under the NIA Act or ordinary procedures under the CrPC. In order to illustrate the arbitrariness of such classification, it is important and instructive to compare the powers and functions of the NIA Special Court in Jagdalpur designated under Section 22 and the Special Court for the trial of 'Naxalite Cases' in Dantewada.

Both these courts are Sessions Court trying cases related to LWE that are being investigated by the Chhattisgarh state investigating agencies. In all the cases being tried before both the courts, there is neither any involvement of the NIA in the investigation, nor has the Central Government considered them fit for investigation by the NIA. Even the incarcerated accused appearing before both the courts belong to similar socio-economic, ethnic, and alleged political leaning. Effectively, all such cases are equally placed and yet the state government has proceeded with a two-fold classification of these cases wherein one group is tried under ordinary criminal procedure whereas the other is tried under special procedures laid down in the NIA Act. Offences like the UAPA listed in the Schedule committed anywhere in the entire conflict area (four jurisdictional/seven administrative districts) including South Bastar District (Dantewada) are tried before the NIA Special Court. On the other hand, all the other offences related to LWE commonly invoked in the region: i.e. the Arms Act, the Explosive Substances Act, Chapter VI,<sup>69</sup> Chapter VIII,<sup>70</sup> and Chapter XVI<sup>71</sup> of the IPC and the Chhattisgarh Special Public Security Act, 2005, committed within the local jurisdiction of South Bastar District,<sup>72</sup> were to be tried before the Special Court for 'Naxalite Cases'. Quite clearly, there is no legal rationale in this distinction. There is an overlap between the LWE offences alleged under the penal code and the Scheduled Offences. This arbitrary classification subjects the cases tried before the NIA Special Court to special procedures under the NIA Act which could have been potentially tried by the Special Court for 'Naxalite Cases' under ordinary criminal procedure under the CrPC.

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<sup>68</sup> The Special Court for 'Naxalite Cases' has been operating since 2016 in District and Sessions Court of South Bastar at Dantewada.

<sup>69</sup> Of Offences Against the State.

<sup>70</sup> Of Offences Against the Public Tranquillity.

<sup>71</sup> Of Offences Affecting the Human Body.

<sup>72</sup> After the Amendment of 2019, the offences under the Explosive Substances Act and the Arms Act, s 25(1AA) will also be transferred to the NIA Special Court.

This analogy of the classification of LWE cases in Bastar distinctly resonates with Justice Vivian Bose's opinion in *State of W.B. v Anwar Ali Sarkar*:<sup>73</sup>

It may be that justice would be fully done by following the new procedure. It may even be that it would be more truly done. But it would not be satisfactorily done, satisfactory that is to say, not from the point of view of the governments who prosecute, but satisfactory in the view of the ordinary reasonable man, the man in the street. It is not enough that justice should be done. Justice must also be seen to be done and a sense of satisfaction and confidence in it engendered. That cannot be when Ramchandra is tried by one procedure and Sakharam, similarly placed, facing equally serious charges, also answering for his life and liberty, by another which differs radically from the first.<sup>74</sup>

In *Anwar Ali Sarkar*, the West Bengal Special Courts Act, 1950 which was instituted with the objective of providing a "speedier trial" for "certain offences" was challenged on the ground of denial of equal protection of the law enjoined by Article 14 of the Constitution. The Supreme Court declared the impugned provision as discriminatory and violative of Article 14 as the classification of offences was too vague, uncertain, and too elusive a criterion to form a rational basis for the discriminations made.<sup>75</sup> The Supreme Court expounded a two-fold test for any classification created by law to be proper and rational. Firstly, the classification must be founded on an 'intelligible differentia' which distinguishes those that are grouped together from others. Secondly, the differentia must have a reasonable relation, i.e. 'rational nexus', to the object sought to be achieved by the Act.<sup>76</sup>

## 1. Closer Examination of the Objective of the NIA Act

The NIA Act was created by virtue of the competence of the Parliament to make laws regarding the Central Bureau of Intelligence and Investigation (Entry 8 of the Union List), and criminal law and criminal procedure (Entries 1 and 2 respectively of the Concurrent List).<sup>77</sup> The purpose of creating the NIA and the Special Courts for the prosecution of cases is described in the "Statement of Objects and Reasons" of the NIA Act. This is to establish a national-level agency to investigate and prosecute offences affecting the sovereignty, security, and integrity of India in a "concurrent jurisdiction

<sup>73</sup> *Anwar Ali Sarkar* (n 9).

<sup>74</sup> *ibid* [104].

<sup>75</sup> *ibid* [53].

<sup>76</sup> *ibid* [58].

<sup>77</sup> *Pragyasingh Chandrapalsingh Thakur v State of Maharashtra* 2017 SCC OnLine Bom 493 : (2013) 6 ABR 1171.

framework". Evidently, as has been already stated, the purpose of the NIA Act was not to provide special procedures for the investigation and prosecution of offences enlisted in the Schedule, but to create a specialized investigating agency and a Special Court for the prosecution of the Scheduled Offences investigated by such agency. Within the concurrent jurisdiction of the NIA, the role of the state investigating agency is not usurped or displaced.<sup>78</sup> In fact, the power of the state governments to investigate and prosecute cases under Scheduled Offences is protected if the case is not transferred to the NIA by the Central Government.<sup>79</sup> Therefore, in the absence of involvement of the NIA, the NIA Act is not attracted, and the state investigating agency has to proceed under the criminal law and procedure it is ordinarily bound by.

The resounding requirement for a special law like the NIA Act had emerged from the concerns of functional limitations, restricted territorial jurisdiction, limited resources of the state police with respect to crimes that have inter-state and national ramifications, and the need for a specialized investigating agency to investigate crimes across states, as recommended by Second Administrative Reforms Commission.<sup>80</sup> Therefore, the purpose was to create an investigating agency for investigating offences related to national security that may require investigation across states, and only such cases are to be tried by the Special Court. The practice under Section 22, of invoking the Special Court's jurisdiction in cases that are deemed to be unfit for investigation by the NIA, or those that are being investigated by the state investigating agency in the ordinary course of action within its restricted territorial jurisdiction, is irreconcilable with the intended purpose of the NIA Act.

## 2. Judicial Response to Classification of Offences

As discussed in the preceding sections, the classification of offences emanating from the erroneous interpretation of Section 22 of the NIA Act violates Article 14 within the parameters suggested in *Anwar Ali Sarkar*. Though this paper relies on the two-fold test laid down in *Anwar Ali Sarkar*, it is pertinent to briefly discuss the limitations of this test for examining national security laws. Treating the preamble of the enactments and the object defined by them

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<sup>78</sup> *ibid.*

<sup>79</sup> NIA Act, s 10.

<sup>80</sup> 'Fifth Report: Public Order' (Second Administrative Reforms Commission, Government of India 1 June 2007) para 8.3.1; 'Malimath Committee Report on Reforms of Criminal Justice System' (Malimath Committee, Ministry of Home Affairs, Government of India 2003); 'Report of the Committee on Draft National Policy on Criminal Justice' (Madhava Menon Committee, Ministry of Home Affairs, Government of India 2007); 'Report of the Second Administrative Reforms Commission' (Second Administrative Reforms Commission 2008); 'Twenty Fourth Report on Working of Central Bureau of Investigation (CBI)' (Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law And Justice 2008); Anurag Deep and Fawaz Shaheen, 'National Investigation Agency Act 2008: Constitutionality, Desirability and Feasibility' (2015-16) 23 *Allahabad Law Journal* 174.

as sacrosanct for rationalizing the classification created by the laws may often override the concern of personal liberty of the accused. Based on the phraseology of the preamble, while the objective of “speedier trial” was considered vague in *Anwar Ali Sarkar*,<sup>81</sup> the same bench in *Kathi Raining Rawat v State of Saurashtra*<sup>82</sup> considered the expression “to provide for public safety, maintenance of public order and preservation of peace and tranquility in the State” to be a definitive and clear legislative policy for the trial of cases by the special court.<sup>83</sup> Similarly, in *Kartar Singh v State of Punjab*,<sup>84</sup> the Supreme Court upheld the provisions of the Terrorist and Disruptive Activities (Prevention) Act (‘TADA’) and the classification of offences under it for prosecution before special courts.<sup>85</sup> The Court, relying on the speeches of the ministers and Members of the Parliament,<sup>86</sup> raised concerns about terrorist activities and considered it as a compelling reason for the legislators to enact the TADA.<sup>87</sup> The Court held that the persons who are to be tried for offences specified under the provisions of TADA are a “distinct class of persons” and that the special procedure prescribed for trying them for offences of “aggravated and incensed nature” achieved the “meaningful purpose and object of the Act”.<sup>88</sup>

*Kartar Singh’s* judgment ignores the fact that the accused were treated as a “distinct class of persons” precisely because they were prosecuted under the special law.<sup>89</sup> Considering the overlap between the offences under the penal code and special laws (as observed in offences before the Special Court for ‘Naxalite Cases’ and the NIA Special Court), the accused could potentially have been prosecuted under ordinary criminal procedure before a regular court.<sup>90</sup> The judgment also loses sight of the concern that even in the context of national security laws, the classification adopted by the executive, that imposes special procedures curtailing the personal liberty of the accused, must be tested against the principles of fairness. The explicit opinion of Justice P.N. Bhagwati in *Maneka Gandhi v Union of India*<sup>91</sup> reminds us that the principle of reasonableness is an essential element of equality or non-arbitrariness that pervades Article 14, like a “brooding omnipresence”. His opinion also reminds us that the procedure contemplated by Article 21 must reflect the best of

<sup>81</sup> *Anwar Ali Sarkar* (n 9).

<sup>82</sup> AIR 1952 SC 123.

<sup>83</sup> MP Jain, ‘Administrative Discretion and Fundamental Rights in India’ (1959) 1(2) Journal of the Indian Law Institute 223.

<sup>84</sup> (1994) 3 SCC 569.

<sup>85</sup> Terrorist Affected Areas (Special Courts) Act 1984 was also challenged.

<sup>86</sup> *Kartar Singh* (n 84) [17]. The Court took notice of matters of common knowledge and authenticated report.

<sup>87</sup> *ibid* [14].

<sup>88</sup> *ibid* [142].

<sup>89</sup> Surabhi Chopra, ‘National Security Laws in India: The Unraveling of Constitutional Constraints’ (2015) 17(1) Oregon Review of International Law 1.

<sup>90</sup> *ibid*.

<sup>91</sup> (1978) 1 SCC 248 : AIR 1978 SC 597.

reasonableness in order to be in conformity with Article 14. The procedures must be “right and just and fair” to meet the requirement of Article 14.<sup>92</sup>

The equal protection of laws guaranteed by Article 14 cannot be merely reduced to the requirement that any legal classification of persons must be based on a reasonable relation with the objective of the law.<sup>93</sup> ‘Law’ is reasonable law and not any enacted piece.<sup>94</sup> The wisdom of the Parliament that enacted the law cannot be the sole standard of the validity and propriety of the classification. Instead, any procedure adopted by the executive to be reasonable should be a “right and just and fair” procedure and not merely a formal procedure.<sup>95</sup>

The following section is based on empirical case studies from the Bastar region and demonstrates that the classification of offences created by the Chhattisgarh state government under Section 22 not only violates Article 14 but also violates the essential right to “fair and just and right” procedures, due process of law, and access to justice under Article 21 of the Constitution.

### III. ACCESSING JUSTICE AND FAIR TRIAL IN BASTAR

#### A. Criminal Justice System in Bastar

The Bastar division is spread over a geographical area of about 39,112.25 square kilometres,<sup>96</sup> an area larger than many states in India. It comprises of seven administrative districts – Kanker, Kondagaon, Narayanpur, Bastar, Dantewada, Sukma, and Bijapur. The sparse population in the Bastar division is overwhelmingly tribal.<sup>97</sup> These people live in villages dotted in a forested landscape with few urban centres, low population density,<sup>98</sup> and road density.

<sup>92</sup> *ibid* [21].

<sup>93</sup> K Balagopal, ‘In Defence of India, Supreme Court and Terrorism’ (1994) *Economic & Political Weekly* 2054. Balagopal quotes PN Bhagwati, J. in *Maneka Gandhi*.

<sup>94</sup> *Maneka Gandhi* (n 91).

<sup>95</sup> *ibid*.

<sup>96</sup> ‘District Census Handbook: Bijapur’ (Directorate of Census Operations, Chhattisgarh); ‘District Census Handbook: Bastar’ (Directorate of Census Operations, Chhattisgarh); ‘District Census Handbook: Uttar Bastar Kanker’ (Directorate of Census Operations, Chhattisgarh); ‘District Census Handbook: Dakshin Bastar Dantewada’ (Directorate of Census Operations, Chhattisgarh); ‘District Census Handbook: Narayanpur’ (Directorate of Census Operations, Chhattisgarh) <<http://censusindia.gov.in/2011census/dchb/Chhattisgarh.html>> accessed 26 April 2020.

<sup>97</sup> Approximately 70% of total population constitute the *Adivasi* (Scheduled Tribe). See ‘Demography’ (*District Bastar*) <<https://bastar.gov.in/en/about-district/demography/>> accessed 26 April 2020.

<sup>98</sup> The Bastar division has an average population density of 72.8 per square kilometre. The Bastar division currently comprises of seven districts. But in 2011, it comprised of five districts- Bastar, Narayanpur, Bijapur, South Bastar Dantewada, and North Bastar Kanker

The average literacy rate in Bastar division is 51.25%, which is far lower in comparison to the state average of Chhattisgarh (70.28%) and the national average (74.04%).<sup>99</sup> Economically, the population is cash poor. 44.61% of the rural population in Chhattisgarh was reported to live below the poverty line, the highest amongst all states.<sup>100</sup>

As already mentioned, Bastar sees a large volume of cases involving LWE and it has an Additional District Judge's court designated as the Special Court for 'Naxalite Cases' in the District and Sessions Court of South Bastar at Dantewada. In dealing with the process of investigation, criminal trial, and defence, the language and distance from the courts act as a barrier for the undertrials, for those arrested, and for their kin and relatives.<sup>101</sup> A majority of those arrested are *Adivasis* who speak the local languages of Gondi, Halbi, Dorla, and speak little to no Hindi. The spoken and written language used by the police, lawyers, and the Court is formal Hindi. This Hindi is different from the way it is spoken colloquially, and common citizens find it hard to understand. The cost of transport, the distance, and the inaccessibility of the jails and courts from the villages, often prevent family members from meeting their incarcerated relatives. Most criminal trials are not conducted in the districts *in*

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disticts. The average population density of Bastar division has been calculated on the basis of the population density of the five distircts, as calculated by the Census Report in 2011. Population density of Bastar District is 135 per square kilometre. 'Bastar District: Census 2011-2020 Data' (*Census 2011*) <<https://www.census2011.co.in/census/district/499-bastar.html>> accessed 29 April 2020; Population density of Narayanpur District is 30 per square kilometre. 'Narayanpur District: Census 2011-2020 Data' (*Census 2011*) <<https://www.census2011.co.in/census/district/500-narayanpur.html>> accessed 29 April 2020; Population density of Bijapur District is 30 per square kilometre. 'Bijapur District: Census 2011-2020 Data' (*Census 2011*) <<https://www.census2011.co.in/census/district/502-bijapur.html>> accessed 29 April 2020; Population density of South Bastar Dantewada District is 64 per square kilometre. 'Dantewada (Dantewara) District: Census 2011-2020 Data' (*Census 2011*) <<https://www.census2011.co.in/census/district/501-dantewada.html>> accessed 29 April 2020; Population density of North Bastar Kanker District is 105 per square kilometre. 'Kanker (Uttar Bastar Kanker) District: Census 2011-2020 Data' (*Census 2011*) <<https://www.census2011.co.in/census/district/498-kanker.html>> accessed 29 April 2020.

<sup>99</sup> The average literacy rate of Bastar division has been calculated on the basis of the literacy rate of the five districts comprising the division. The average literacy rate has been calculated on the basis of the Census of India 2011 data. The literacy rate of Bastar District is 54.40%, of Narayanpur District is 48.62%, of South Bastar Dantewada District is 42.12%, of North Bastar Kanker District is 70.29%, and of Bijapur District is 40.86%. 'Districts in India- Census 2011' (*Census India*) <<https://www.censusindia.co.in/districts>> accessed 29 April 2020; 'Chhattisgarh Population 2011-2020 Census' (*Census 2011*) <<https://www.census2011.co.in/census/state/chhattisgarh.html>> accessed 29 April 2020; 'State of Literacy' (Office of the Registrar General & Census Commissioner, India) <[https://censusindia.gov.in/2011-prov-results/data\\_files/india/Final\\_PPT\\_2011\\_chapter6.pdf](https://censusindia.gov.in/2011-prov-results/data_files/india/Final_PPT_2011_chapter6.pdf)> accessed 29 April 2020.

<sup>100</sup> 'Handbook of Statistics on Indian Economy 2018-19' (Reserve Bank of India 2018) 237 <<https://rbi docs.rbi.org.in/docs/Publications/PDFs/0HB2018-19A91A298806164470A2BCEF300A4FE334.PDF>> accessed 26 April 2020.

<sup>101</sup> This information is based on the author's firsthand experience, gained during the course of legal practice, data collection, interviews with the litigants, local trial court lawyers, and cases represented by the Jagdalpur Legal Aid Group.

*situ* because the Government has not yet created an infrastructure for a District and Sessions Court in some of the administrative districts.<sup>102</sup> In one of the cases, the lawyers had to establish contact with the accused's family members so as to vouch for the accused as a surety. However, in this case, even after the grant of bail, it took them eight months to establish contact with the family members on account of the remoteness of the village.<sup>103</sup> The large distance between the courts and the jails also makes the production of the accused in the court irregular. This is due to a lack of enough police guards and vans to ferry all the accused to the court from the jails.<sup>104</sup> In a case currently pending at a preliminary stage before the NIA Special Court, there are more than a 100 accused, against whom charges have not been framed since 2017, due to the inability to produce all the accused before the Court.<sup>105</sup> With a staggeringly low rate of bail<sup>106</sup> and a high rate of acquittal,<sup>107</sup> delays in the disposal of cases due to administrative oversight in the implementation of the legal machinery is *a fortiori* a denial of justice.

<sup>102</sup> 'Distt & Sessions Court in Narayanpur soon, assures Raman' *The Pioneer* (Narayanpur, 15 May 2018). There are only four District and Sessions Courts for seven administrative districts. As of December 2019, the District and Sessions Court of South Bastar (located in Dantewada) has jurisdiction over Dantewada, Sukma, and Bijapur districts. Kondagaon District and Sessions Court (located at Kondagaon) has jurisdiction over Kondagaon and Narayanpur district. Bastar District and Sessions Court (located at Jagdalpur) and North Bastar District and Sessions Court (located at Kanker) are independent judicial districts.

<sup>103</sup> *State v Irpa Narayan* (1st ADJ Dantewada, 2014) – reported by Jagdalpur Legal Aid Group in the Eighth Update circulated in April 2014.

<sup>104</sup> Data on presentation of undertrials in court from Jagdalpur Central Jail, collected by the Jagdalpur Legal Aid Group for six months from July 2014 to December 2014, depicted that only 56% to 88% of the undertrials could get hearings. The data collected by the organization can be accessed from the author/erstwhile members of the Jagdalpur Legal Aid Group.

<sup>105</sup> Sessions Trial No. 55/2017, FIR No. 07/2017, Police Station Chintagufa, Sukma (trial of Burkawal Massacre case of 2017). There are 111 accused charge-sheeted for now and several others are recorded to be absconding.

<sup>106</sup> As per the findings of the Jagdalpur Legal Aid Group for the years 2010-2013, based on annual jail reports and NCRB data, every year approximately 75% of the undertrials who have been imprisoned are granted bail nationwide. However, of the prisoners in the Jagdalpur Circle Jails (including the Jagdalpur Central Jail and the two district jails in Kanker and Dantewada), only 30-40% of the undertrials applied for bail per annum, which is even lower in Dantewada District Jail in isolation, where it stands around a mere 20%. As per jail reports received under the RTI Act, from Dantewada District Jail: in annual year 2016-17, out of 1618 undertrials, total 1059 were released but only 4 were released on bail. In annual year 2017-18, out of 1512 undertrials, total 803 were released but only 8 were released on bail. Between 2016-17 in Sukma Sub-Jail while total undertrials released were 102, not a single accused was released on bail. The data can be accessed from the author/erstwhile members of the Jagdalpur Legal Aid Group.

<sup>107</sup> Data collected by the Jagdalpur Legal Aid Group. The average acquittal rate of data pooled over all years is 95.7%, which for individual years ranged from 91.5% to 98.7% (2005-2013). The data collected by the organization can be accessed from the author/erstwhile members of the Jagdalpur Legal Aid Group. The same trend can also be seen from Table No. 1 on the status of cases before the Special Court under the NIA Act.

## B. Special Court at Bastar

On May 19, 2015, the Chhattisgarh Government issued a notification<sup>108</sup> under Section 22 of the NIA Act designating the Additional Sessions Judge, Bastar at Jagdalpur, as the NIA Special Court “for the trial of Scheduled Offences”. It would have jurisdiction over the following civil districts: North Bastar (Kanker), Bastar (Jagdalpur), and South Bastar (Dantewada).<sup>109</sup> Consequently, all Scheduled Offences committed within the seven districts of the Bastar region now stand transferred to the NIA Special Court at Jagdalpur, to be tried under special provisions. From June 2015 to December 2019, a total of 527 cases have been instituted before the Special Court, out of which 214 are still pending disposal. See Table 1 for a compilation of the data relating to the number of cases pending and disposed of in the Special Court.

**Table 1: Cases Instituted Before the NIA Special Court in Bastar from 2015 to 2019**

Year	No. of Cases	Acquittal	Conviction	Pending Cases (Stage)						
				Prosecution Evidence	Charge	Waiting for Record	Presence of Accused	Statement of Accused	Accused Absconding	Total Pending
2015	183	169	2	9	3	0	0	0	0	12
2016	93	76	2	9	1	5	0	0	0	15
2017	63	36	0	17	6	1	3	0	0	27
2018	119	24	0	77	17	0	0	1	0	95
2019	69	4	0	30	34	0	0	0	1	65
<b>Total</b>	<b>527</b>	<b>309</b>	<b>4</b>	<b>142</b>	<b>61</b>	<b>6</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>214</b>

In the Bastar division, so far, there are only three cases that were investigated by the NIA.<sup>110</sup> With the transfer of all cases involving Scheduled Offences to Jagdalpur, there is a significant increase in the pendency of cases in that Court, antithetical to the very idea of creating a Special Court, which is meant for speedy disposal of cases. Further, there is also an increase in the number of prisoners brought to Jagdalpur Central Jail from other parent districts.<sup>111</sup> This creates an undue burden on the family of the prisoners, who

<sup>108</sup> Government of Chhattisgarh, Law and Legislative Affairs Department, Mantralaya Mahanadi Bhawan, ‘F. No. 4659/1292/XXI-B/C.G./2015’ (19 May 2015).

<sup>109</sup> While the Sessions Court Judge at Bilaspur retained jurisdiction over rest of the districts of Chhattisgarh.

<sup>110</sup> See n 31.

<sup>111</sup> PAIRVI (Public Advocacy Initiatives for Rights and Values in India), ‘Prisoners’ Rights and Prisoners’ Reforms in Chhattisgarh’ (Prison Statistics of Chhattisgarh, September 2019). The



have to navigate harsh terrains and undertake expensive journeys to meet their family members in jail. The distance between the Bastar Court at Jagdalpur and the local police stations investigating the case is often hundreds of kilometres. It is therefore not convenient for witnesses to appear in Court, which leads to further delays in the trials. In one of the cases before the NIA Special Court, over twenty-five opportunities were given to the prosecution to produce witnesses to be examined before the Court.<sup>112</sup>

The right to access to justice not only flows from providing adequate and competent legal aid, but also in creating a judicial infrastructure that promotes speedy disposal of cases, access to lawyers of choice, and access to courts as well. In *Anita Kushwaha v Pushap Sudan*,<sup>113</sup> the Supreme Court summarized four parameters that constitute the essence of access to justice, i.e., the effectiveness of the adjudicatory mechanism, its reasonable accessibility in terms of distance, speediness, and its affordability. The court system in Bastar demonstrates a systemic breakdown of all four facets of access to justice. The local courts are equally competent to deal with criminal cases. For instance, Dantewada already has a designated court for the prosecution of LWE-related cases within its jurisdiction and it also has a Fast Track Court. Therefore, a transfer of cases only imposes unnecessary delays in trial proceedings, and excessive hardship on the accused, their families, and the witnesses.

The next section narrates the story of one of the many victims of this judicial quagmire.

### **C. The Aftermath of the Special Law in Bastar: The Kafkaesque Case of Raju S/O Pugdu**

Raju, an *Adivasi* aged over 60 years, was arrested from his village Kilam in Narayanpur district in September 2016 and was accused of being a Naxalite.

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report records that in Chhattisgarh, Jagdalpur Central Jail has 177.56% overcrowding, while Kanker District Jail from Bastar area and Sukma Sub-Jail have 34.25% and 79.61% overcrowding respectively.

<sup>112</sup> *Padam Kashyap v State of Chhattisgarh* Criminal Appeal 1546 of 2019 (High Court of Chhattisgarh). The appellant was granted bail after almost 3.5 years on the grounds of delay. The author represented the accused for seeking bail and the details of delay were argued before the High Court of Chhattisgarh. Padam was arrested and charged as accused in two criminal cases. The first case did not attract a Scheduled Offence and was tried under ordinary criminal procedure before the District Judge, Kondagaon District and Sessions Court. Padam has been acquitted in that case on 16 November 2018 after examination of seventeen witnesses. The second case registered under the UAPA was transferred to the NIA Special Court at Jagdalpur. Despite the acquittal in the first case he was languishing in jail because of the delay in trial before the NIA Special Judge. In both the cases, at least five prosecution witnesses were the same.

<sup>113</sup> (2016) 8 SCC 509 : AIR 2016 SC 3506.

The case was registered under the UAPA, amongst other serious offences.<sup>114</sup> Raju's arrest was based on a permanent arrest warrant issued in 2007 which was still active as of 2016. A defence of mistaken identity was raised by the accused before the CJM, Kondagaon District Court. Raju had informed that his father's name was Pugdu while the arrest warrant mentioned another Raju s/o Vaddi Muriya. The case was then transferred to the NIA Special Court in Jagdalpur on December 6, 2016. The Trial Court's order sheet dated December 6, 2016 transferring the case stated: "In notification no. 858/DO-16-01/2013 Kondagaon dated 03/09/2015 issued by the office of District and Sessions Court Kondagaon, it has been ordered to transfer the cases under the UAPA for trial before the Special Judge (NIA), Jagdalpur, District Bastar."

Although the case was transferred to Jagdalpur, the case record was not. For over two-and-a-half years, the case record was untraceable, and despite repeated memorandums sent by the Special Judge, the record room in Kondagaon did not send the files. Raju remained in jail without even knowing the nature of his alleged crimes or the possible options for his defence.

Although the delay in his trial was entirely due to the administrative incompetence of transferring case records between two courts, Raju was not granted bail. His bail was rejected twice by the NIA Special Judge. Raju's family was left with only two options: either continue to wait indefinitely, or travel 400 kilometres to the High Court at Bilaspur and engage a private lawyer to appeal under Section 21(4) against the Special Judge's order dismissing the bail, within the available window of thirty days as per the NIA Act. In cases of this nature, given the tight constraints of time, the right of the accused to approach the High Court for bail is subject to the filing of the bail application by his trial court lawyer and the subsequent rejection of the bail by the Special Judge. If the lawyer is not inclined to apply for bail for his alleged Naxalite client or withdraws the bail application, the relatives of the accused are not left with any legal recourse - (apart from hiring a different trial court lawyer) - like approaching the High Court under Section 439 CrPC.

The files in Raju's case were traced only after the High Court of Chhattisgarh issued a notice to the state government on an appeal under Section 21(4) filed on his behalf.<sup>115</sup> From the record, it surfaced that the trial in

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<sup>114</sup> IPC, s 147, 148, 149, 452, 364 and 302; Arms Act, s 25; UAPA, s 23, 38(2) and 39(2).

<sup>115</sup> *Raju v State of Chhattisgarh* Criminal Appeal No. 93 of 2019 (High Court of Chhattisgarh). The author represented the accused Raju before the High Court of Chhattisgarh and the information is as per the proceedings and documents presented before the Court; Soibam Rocky Singh, 'Case Files Missing: HC Grants Bail to Adivasi Man' *The Hindu* (New Delhi, 22 March 2019); Aditya AK, 'Painting the Town Red? Chhattisgarh HC Expresses Shock as Adivasi Accused Languishes in Jail for Want of Trial Record' (*Bar and Bench News*, 16 March 2019) <<https://www.barandbench.com/news/painting-town-red-chhattisgarh-hc-accused-languishes-jail-trial-records>> accessed 23April 2020.

this same case had already been conducted three times against sixteen others who were arrested and acquitted in less than one year of the trial by the regular criminal court under ordinary criminal procedure. Raju was stated to be the absconding accused in all these trials. Raju was ultimately granted bail by the Division Bench of High Court of Chhattisgarh in February 2019 considering “these exceptional circumstances”.<sup>116</sup>

Raju’s arrest braided together with the procedural misuse of the NIA Act illustrates the contravention of all basic tenets of justice, due process, and fundamental rights. The alleged offences in this case were committed in 2007, even before the enactment of the NIA Act in 2008. The investigation of the case was neither conducted by the NIA under Sections 6(4) or (5), nor was it transferred to the Chhattisgarh state police by the NIA under Section 7(b). Despite lacking a statutory mandate, the Chhattisgarh Government proceeded to prosecute the case before the Special Court on the basis of the 2015 notification and this was done with retrospective effect. In stark contrast to this, the co-accused in the same case, who were prosecuted and acquitted of the same charges prior to the 2015 notification, were tried under ordinary criminal procedures before a regular court having territorial jurisdiction over the case. Raju’s case also highlights the fallacy of the classification of the offences created by the misuse of the Act. The prosecution of the offences under the UAPA, that otherwise resulted from an arbitrary and questionable arrest by the local police, was then subjected to the special provisions of the NIA Special Court. Thus, the purpose and operation of the NIA Act has been subverted to increase the hardships of the accused as well as the legal system that already has an objectionable track record.

This case study also underscores how the inequitable criminal justice machinery in a conflict setting is transformed into another tool for the harassment and persecution of marginalized communities. Whether this is a case of mistaken identity, illegal arrest, and persecution or not, is up for deliberation before the Special Judge. However, it is only the beginning of another process of injustice where the accused, now on bail, will have to travel from the Narayanpur District to Jagdalpur (over 130 kilometres) on every date of hearing – until the Court decides that he is not the Raju that the prosecution claims he is. For attending every hearing, Raju will have to spend Rs. 400 on his bus ticket to and from Jagdalpur, since the state has no public transport system. Similarly, the prosecution witnesses too will have to undertake the cumbersome travel to Jagdalpur. To get the witnesses to appear before the Court on every date of the hearing will be another trial in itself for the Special Court.

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<sup>116</sup> *ibid.*

#### IV. RECOMMENDATIONS FOR LEGAL REFORMS IN BASTAR

To address the problem discussed in this paper, reformative action should be geared towards the decentralization of the judicial infrastructure so as to provide access to courts at the localized, grassroots level. The jurisdiction of the NIA Special Court in Jagdalpur should be immediately defined to extend it to only those cases that are entrusted by the Central Government to the NIA, and thereafter are either investigated jointly by the NIA and the Chhattisgarh state government, or are transferred to the state investigating agency by the NIA. *Per contra*, if the need for a Special Court is echoed for the purpose of speedy trials, it would only be proper to conduct the trial of the cases on a fast-track mode under ordinary criminal procedure before the regular District and Sessions Courts of Chhattisgarh, including those in Bastar.

Similarly, to reduce the hardship of the litigants to approach the High Court for challenging the infraction of the fundamental rights, a bench of the High Court of Chhattisgarh must preside in South Chhattisgarh. With accessibility to the Court, a greater number of cases will come before the High Court for its scrutiny, which will maintain the High Court's scrupulous superintendence over the subordinate courts.<sup>117</sup> If the High Court is unable to extend its reach to the prospective litigants, it should devise a mechanism for justice to reach the people. For example, the High Court of Jammu and Kashmir, headed by Chief Justice J. Gita Mittal, amended the High Court Rules to facilitate filing of motions before the High Court by persons residing in any remote area in Jammu and Kashmir.<sup>118</sup> The notification prescribed the procedure for creating approved centres or post offices in remote areas for filing of the motions. It also prescribed the appointment of paralegal volunteers or panel lawyers appointed by the District State Legal Services Authority in every such centre, for drafting of the motions on behalf of the litigants residing in such areas.

In broad terms, the prosecution, which is equipped with a special legislation that infringes upon personal liberty, must be held to strict standards. The recognition of human rights through the lens of national security often besets the constitutional and statutory due process rights. As a result, despite the improbability and weakness of the evidence, the courts are reluctant to grant bail, and often rely on the accusation as *prima facie* true.<sup>119</sup> The investigations and prosecutions based on confessions/disclosures written in Hindi by the police should be strictly scrutinized. The adjudication of cases for seeking bail or discharge should not equate unsubstantiated accusations with public interest.

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<sup>117</sup> Constitution of India 1950, art 227.

<sup>118</sup> High Court of Jammu and Kashmir, Office of the Registrar General at Jammu, 'Notification No. 1615' (16 March 2019).

<sup>119</sup> UAPA, s 43D(5).

The credibility of the evidence should be the basis of independent judicial decision-making. Bail should be a norm and not an exception,<sup>120</sup> and the delay in trials aggravated by the non-availability of the witness or non-production of the accused from jails should be an important factor for the grant of bail.<sup>121</sup>

## V. CONCLUSION

The executive excess by the Chhattisgarh state government to prosecute all Scheduled Offences, that are investigated by the state investigating agency, before a Special Court constituted under the NIA Act, subverts the basic principles of liberal jurisprudence – a fair and speedy trial, effective legal aid, and protection against punitive detentions and arbitrary proceedings. The erroneous interpretation of Section 22 adopted by the Chhattisgarh Government leads to an inference that the provisions of the NIA Act, instead of the CrPC would get attracted once a Scheduled Offence is alleged, irrespective of whether or not the Central Government entrusted the case to the NIA under Sections 6(4) or (5) of the Act. As a result, the LWE offences in Chhattisgarh have been classified into two categories, i.e. *first*, the offences that are enumerated in the Schedule to the NIA Act (irrespective of the nature of investigating agency involved) and *second*, all the other offences either under special laws or the penal code. While the former category is prosecuted before the NIA Special Court under special criminal procedures that abridge essential procedural rights of the accused, the latter are prosecuted before ordinary criminal courts under the CrPC. This classification of offences fails to stand the two-fold test laid down in *Anwar Ali Sarkar*<sup>122</sup> which is guided by an examination of ‘intelligible differentia’ having a reasonable relation to the object sought to be achieved by the Act. The objective of the NIA Act is not to make Scheduled Offences triable, “invariably and exclusively” under the NIA Act or the Special Courts constituted under it. It is only when the offences are entrusted to an investigation to the NIA that they become triable by the Special Courts. The power of the state governments to investigate and prosecute offences under the NIA Act is only derived from Section 7(b) of the NIA Act. This accords the NIA the discretion to transfer the case to the state government only with the previous approval of the Central Government. Further, substantive laws enumerated in the Schedule, such as the UAPA or the Explosive Substances Act, do not oust the power of ordinary criminal courts to conduct the trial of the offences defined thereunder. Peculiarly, despite the admission by the NIA in *Jagdish Singh*,<sup>123</sup> that the aforesaid legal interpretation is the correct position of law, the state governments have continued to misuse the ambiguity in Section 22 to curtail the personal liberty of the accused. This illegality compounds

<sup>120</sup> *Sanjay Chandra v CBI* (2012) 1 SCC 40.

<sup>121</sup> *Jayanta Kumar Ghosh v National Investigation Agency* 2012 SCC OnLine Gau 591.

<sup>122</sup> *Anwar Ali Sarkar* (n 9).

<sup>123</sup> *Jagdish Singh* (n 62).

the institutional breakdown of the criminal justice system in remote areas like Bastar, which is underpinned by its geographic, linguistic, economic, and procedural inaccessibility. The fact that this illegality has been operating unnoticed since 2015 after the issuance of the notification, stands to the testimony of the marginalization of the Bastar region.

In Bastar, malicious prosecutions,<sup>124</sup> illegal detentions, unlawful incarcerations, and extra-judicial killings have become a way of life since the escalation of conflict in 2004.<sup>125</sup> The enforcement of anti-terrorism laws is often perceived as an extension of the counter-insurgency operation in the conflict setting. In the face of insurgency, the concerns regarding national security are invoked as a justification for adopting strategies that thwart the dispensation of justice. Any effort to seek criminal legal reforms must resolve this juxtaposition of the staggeringly high level of legal standards imposed on the indigenous *Adivasi* to prove innocence, and the shoddy standards of investigation and prosecution. A lenient approach in adherence to principles of criminal procedure and rules of evidence cannot be adopted irrespective of the nature of the case or the accusation.

In Bastar, the concern for unjust legal and juridical processes is not only limited to its infringement upon fundamental and human rights of the *Adivasis*. Politically, it also affects the dynamics of the Naxalite conflict and further alienates the *Adivasi* communities from the state and its agenda of welfare, development, and good governance. In the absence of initiatives undertaken by the Government, vibrant legal reforms through judicial interventions to guarantee free, fair, speedy, and convenient access to justice in the remote areas of Chhattisgarh can set an example for effective administration of justice, not only in India, but also for criminal justice systems globally.

Postscript: This paper is based on the information gathered during the documentation and litigation focused on access to justice and legal aid conducted by the author during the course of David W. Leebron Human Rights Fellowship, 2018 in Chhattisgarh. After the submission of this paper to the journal in September 2019, the legal validity of the Special Court constituted

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<sup>124</sup> Malini Subramaniam, 'Special Report: This Adivasi Man Would Have Been in Jail – Had Bastar Police Not Used Whitener Ink' (*Scroll.in*, 9 July 2019) <<https://scroll.in/article/926552/special-report-this-adviasi-man-would-have-been-in-jail-had-bastar-police-not-used-whitener-ink>> accessed 23 April 2020.

<sup>125</sup> Bela Bhatia, 'Three Bullets and Three Women: A 'Fake Encounter in Bastar'' (*The Wire*, 26 April 2019) <<https://thewire.in/rights/bastar-naxals-maoists-security-forces>> accessed 26 April 2020; Chitrangada Choudhury, 'The NCST's Report on Gangrapes and Assaults in Bastar says there is breakdown of discipline among security forces' *The Caravan* (12 May 2016) <<https://caravanmagazine.in/vantage/bastar-ncst-report-gangrapes-assaults-result-breakdown-discipline>> accessed 26 April 2020; Raksha Kumar, 'India's Adivasis Caught Between State and Guerilla Violence' (*Sojourners*, 8 May 2019) <<https://sojo.net/articles/indias-adviasis-caught-between-state-and-guerilla-violence>> accessed 26 April 2020.

under Section 22 NIA Act, 2008 vide the notification dated May 15, 2015, of the Chhattisgarh state government, has been challenged in a Public Interest Litigation (*Hari Degal v State of Chhattisgarh*, WPPIL No. 3 of 2020, High Court of Chhattisgarh). The petition has been admitted by the Hon'ble High Court of Chhattisgarh vide order dated February 13, 2020. The author is representing the Petitioner before the Court.

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