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Intelligence vs. Investigation, Or CBI vs. IB?

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The controversy surrounding a major confrontation between India's premier investigating agency, the Central Bureau of Investigation (CBI), and the nation's internal intelligence agency, the Intelligence Bureau (IB), which has been aired in the media emerges out of the Ishrat Jehan case. In this case, the woman and her companions were shot dead by the Gujarat Police in what is claimed to be an encounter between a terrorist group and the police. Jehan was a member, whose objective was to target the Chief Minister of Gujarat personally and the police which took counter measures. The information on the basis of which action was taken is said to be an intelligence report prepared by an IB officer in which the connection between Jehan and her companions with a Pakistan based L-e-T terrorist group was mentioned.

CBI is investigating the case on the direction of the Supreme Court. One of the suspects, whom CBI wants to interrogate, is the Intelligence Bureau. The subject of investigation apart, let it be understood that CBI is exercising police powers in this case, whereas the IB has its own mandate which is to do counter espionage work within India, neutralise espionage by hostile powers within the country, obtain information on threats to law and order, internal security and the integrity of the country and to keep a watch on all anti national activity which can result in performing police functions, the CBI has to follow in substance and in practice the provisions of chapter XII, Criminal Procedure Code. In the purpose of proving a case, it has to function according to the provisions of the Indian Evidence Act. Anything that CBI does in this regard must follow the rules of evidence, including relevance and admissibility of evidence and its credibility. Chapter XII, Cr.P.C. is very well drafted and anything carried out under its provisions is bound to be just and credible. If evidence is planted or falsely generated, the rules of evidence would not be followed and the trial court would reject the evidence. Therefore, CBI is a police force exercising the powers of investigation of the police when dealing with this case. This governs the Ishrat Jehan case also. The only duty of the CBI is to arrive at the truth, not to try and mould evidence to fulfil a predetermined notion of who is guilty, in this case the Gujarat Police.

The Intelligence Bureau does not have a mandate to investigate offences. It is not governed by the rules of evidence as prescribed by the Indian Evidence Act, it does not have police powers and, therefore, does not have to follow the procedure laid down in chapter XII, Cr.P.C. It has no power to interact with courts. At the same time, it has at its disposal agents who can obtain human intelligence, it has electronic intelligence collection, it has friends and well wishers and, perhaps, double agents to obtain information and it has other sources, primary through which information is collected which might be of interest to India. It is the job of IB to sift through all this matter and then identify the relevance for maintaining the security of India. There are many ways through which intelligence is collected. For example, in Britain during Second World War, the psychiatric and psychological division, whose main objective was to study the psychology of enemy leaders, thereon build a portrait which would enable the Allies to predict how Hitler and other leaders would react to a given situation. The provision was then required to suggest counter measures which could psychologically neutralise the enemy. The work of an intelligence agency, therefore, is to develop sources of information, quite often totally informal sources, collate and analyse the information and then suggest methods of neutralising any adverse action against India which the information indicates.

The world of intelligence and espionage is grey, hazy and all outlines are blurred. The world of investigation is aimed at bringing into sharp focus what can be proved in a court of law, to create a realistic image of a criminal, bring the criminal to justice and by presenting proof of guilt, to ensure that the world of investigation is not a world of shadows. We now, therefore, have one world which is spooky and with blurred outlines, with a combination of fact, fiction and imagination and, on the other hand, a world of investigation which is clear and with a course of action which can neutralise all adverse influences and factors. This is so vastly different from the world of investigation that the two are kept resolutely and definitively apart. Investigation has to live in a glare of public scrutiny in order to prove its credibility, but intelligence is by its very nature anonymous and secretive.

Intelligence is a matter of probabilities based on such information inputs as are available. An intelligence agency has to sift the probable from the impossible, ignore the improbable, however outlandish. Every time a terrorist strike takes place, whether in Bombay on 8th November 2010, or in Chhattisgarh in 2013, whether a bomb blast takes place or Pakistani intrusions are there in border areas, the first cry is that there is an intelligence failure. Do the intelligence agencies, therefore, pass on every bit of unverified information and constantly cry wolf? Or does the agency restrict itself to the probable which is possible and most likely probable, inviting the criticism that for the time when verification was being done the intelligence information which, if it had been passed on in time, could have prevented an incident?

Because intelligence officers work in a grey area, because their identity and outline must be hazy so that individuals are not compromised, agencies work in the background and try and merge into it. The police and CBI seem to delight in discussing in public every stage of an intelligence agency by definition must remain in the dark, must not discuss its operations and must pass on information which can be used by the intelligence agency works on the twin premise of "need to know" and "deniability". This means that only those who need to know the information and at all times intelligence operatives and agencies should be in a position to credibly deny any statement attributed to them. In any circumstance should an intelligence agency or an individual officer reveal sources because a compromised source in the world of intelligence is a dead source. That is why no intelligence agency ever acknowledges as its own any of its agents who have been caught and charged with a crime. This is part of the doctrine of deniability and it must be respected.

In the Ishrat Jehan case, the CBI is attempting to question the Special Director of IB, with a view to making him an accused, on the basis of an intelligence report he is stated to have given. By its very nature an intelligence report has to be confidential and it is the job of IB and CBI to maintain confidentiality. Nor can such a report be used to incriminate an IB officer. This would be contrary to the provisions of Article 20 of the Constitution which prohibits an accused person to be compelled to be a witness against himself, which is what revelation of the contents of an intelligence report would be. Such a document is not a confessional statement. It is not a document in the public domain and it is not a confession and in fact it is a document which can be admitted as evidence at all under the Indian Evidence Act. If there is a case against the IB officer concerned it would have to be based on evidence other than the intelligence report which has allegedly been made by the officer concerned. It is certainly not a public document under section 74, Indian Evidence Act.

There are certain fundamental questions which are a cause of concern. The Intelligence Bureau is charged with ensuring that the security of the integrity of India is not jeopardised on account of the actions of anti national and anti social elements. This can only be done by the intelligence bodies and collecting intelligence on the basis of which they can be neutralised. It is acknowledged that because this intelligence test of proof as laid down in the Indian Evidence Act, a great deal of it may be misinformation deliberately planted by the enemy, informant or an element of gossip and information which may be dated and, therefore, no longer relevant. The Intelligence Bureau of course has to pass on questionable information, but at no stage can it afford to ignore a source which may not prima facie appear to be credible. Information must be passed on to operational agencies such as the police and these agencies are required to act, albeit with caution. Even over-reaction is better than no reaction or no information. To let the blame be on an IB officer because on verification the information turned out to be ridiculous because any operational agency would be foolish if it paid no heed to intelligence reports. The report and the officer both must be treated with caution.

In the Ishrat Jehan case, the CBI is obviously under the twin pressure of a government hostile to Narendra Modi and the Supreme Court as seen in the case of St. George on a white charger out to slay the dragon of communalism in Gujarat. Therefore, CBI seems to have been swayed from its primary duty of investigation as it is required to do under chapter XII, Cr.P.C. and has preferred to follow the trail of red herrings drawn across its path. This is a direct confrontation between CBI and IB, which does not bode well for the future of India's security.

How can the situation be remedied? The Supreme Court insists that government should have nothing to do with CBI. The logic of this comes from the fact that because whether the Supreme Court and the so-called activists like it or not, the CBI is a police force and is neither above nor below the law. In fact, in view of the Seventh Schedule of the Constitution, List 2 which makes police a State subject, even the existence of CBI as a legal entity is in doubt. Because the CBI is a police force, superintendence over it must vest in government and whereas it has to enjoy complete independence of investigation of offences, its accountability has to be to the government, which must have the power to take action if such accountability is not discharged. Superintendence can never be passed on to anyone other than to an executive authority. Under Article 227 of the Constitution, superintendence over all courts vests in the High Court and this superintendence cannot be diluted. Under the Indian Police Act and even the Model Police Act, superintendence vests in government. CBI cannot have a separate provision because it is, when all is said and done, a police force. The parameters of superintendence can be laid down and in fact that is exactly what the Soli Sorabjee Committee has suggested. Superior powers by government has to be as per prescribed laws, rules and regulations and cannot be arbitrary, but the ultimate accountability must be to government and government must be armed with powers to ensure that not only is there accountability but there is action for failure to account. Because by various pronouncements, the Supreme Court has made the concept of CBI's accountability somewhat hazy that CBI is running on the one hand as the hand maiden of the party in power and on the other hand by misusing its police powers to harass rather than investigate. The Intelligence Bureau perform its function without fear or favour and under no circumstances should we either jeopardise the source or use this information to incriminate IB officers. This has to be made very clear to CBI because if it continues in its present attitude, the credibility of the set up will be damaged. Let government step in immediately to protect IB and to remind CBI of how it must function as a police force. It must be effective and any officer who defies government must be immediately sacked, even if it be the Director, CBI himself.

The present anarchy that prevails in CBI functioning is very disturbing, especially in the context of federalism. In British days, the CBI was a force of policemen to call its own. It had the Agency Police in the Princely States to perform Railway Police functions and to enforce the writ of the Crown. Today, a couple of battalions of the Crown Representative's Police, the CRPF of today, to help the States to maintain order, but for the rest, the CBI is the Provincial Police. Because the objective of government, Central and Provincial, was the same, the maintenance of imperial rule, there was no conflict. Today there is no trust between the Centre and the States and, therefore, we have huge numbers of Central Armed Police Forces over the country which have no control, with the State Police Force being deliberately allowed to run down and become ineffective. If they are partisan, unfocused Central Forces, with one ethos being applied to Gujarat and another to Assam. The answer to mutual distrust is not more centralisation but a true Federalism in which both the Centre and the States feel part of a larger whole. It is what Babulal Gaur, then BJP Chief Minister of Madhya Pradesh, somewhat discomfited Mrs. Sonia Gandhi when Arjun Singh took him to meet her. Gaur said, "Rest easy, Madam. I have not come to in your place, but to remind you that Madhya Pradesh is part of India".

The tragedy is that gradually the Centre has taken over even forensic investigation and left the State Police high and dry. As the becomes doubtful, so its capability declines, so the Centre inflates CBI and creates the National Investigation Agency (NIA). The CBI Force of D.P. Kohli. The downfall of CBI was censured by D.Sen who, as Director during the Emergency, sank it to a depth which makes look like a shallow trench. The same CBI, which became Indira Gandhi's hatchet, then turned on the Congress when Janata Dal came to witness to this because in 1978-79, when I headed the Delhi Development Authority, my permission was sought to prosecute, amongst my predecessor, along with Sanjay Gandhi, for demolitions at Kapashera and Andheria Mod. The supervision note written by the S.P. for the purpose of this investigation is to bring home offences under sections 427, 442, 448, 145, 147, 34 and 120B IPC against Sanjay Gandhi Singh and others". B.R. Tamta, the Municipal Commissioner of Delhi at whose behest and as whose agent DDA had carried out demolitions because he had agreed to turn approver. This is not permitted to the police under chapter XII, Cr.P.C. Pardon can only be granted by a court of session where the minimum sentence is seven years and maximum sentence under the sections with which the accused were charged in this case is three years and, therefore, Tamta was pardoned. I, therefore, refused permission because the investigation was tainted and biased against Sanjay Gandhi and Jagmohan.

The CBI then, through its Special Director, R.D. Singh, tried to browbeat me, going to the extent of threatening me. The lasting impact of the CBI Force has degenerated to an extent where it needs to be disbanded and then reconstituted to become an impartial, professional instrument for complex crimes, but always in partnership with the State Police. Today the CBI is targeting Narendra Modi. Will Sonia Gandhi be the victim in the case against the Special Director, IB, is obviously only a means of reaching Modi. This is disgusting.

If IB starts hitting back, we may have a turf war in which both national security and control over heinous crime will suffer and the Government can no longer remain a silent spectator. The time for action is now.

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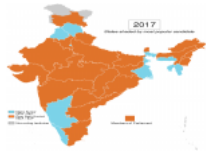


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