

WHAT IS THE CBI?

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So much controversy has been created over whether the Central Bureau of Investigation (CBI) should be under the Lokpal or not that it is time to reflect on what the CBI is. Under the Seventh Schedule of the Constitution, List 1, Entry 8 Parliament is competent to legislate on the creation, constitution and structure and working methodology of the Central Bureau of Investigation and Intelligence Bureau. Surprisingly neither agency has been brought under any form of legislation under this provision of the Constitution. In 1946 the Government of India enacted the Delhi Special Police Establishment Act, 1946 whereby a Special Police Force was established, called the Delhi Special Police Establishment (DSPE). This was a central force which came into being prior to the enactment of the Constitution and, therefore, notwithstanding Entry 2 of List 2 of the Constitution, which makes police a State subject, DSPE was recognised as a police because under the Government of India Act, 1935, this was permissible to the Central Government. When exercising jurisdiction outside the Union Territories and with the consent of the State Government concerned under section 6 of the DSPE Act, 1946, members of DSPE are empowered under section 5 of the Act to be deemed to be members of the police force of that area, to have the powers of an officer incharge of a police station and to function as if they were the members of the police which has jurisdiction in that area. The DSPE, therefore, is a legal entity enjoying police powers as per law and to the extent permitted by law.

In 1963 vide resolution number 4/31/61-T dated 1.4.1963 the Government of India constituted the CBI. In the matter of the investigation and anti-corruption division of the newly constituted CBI the force became a part of the Delhi Special Police Establishment. The only legally recognised constituent of the CBI is the DSPE and it is only as DSPE that CBI has any police function. The resolution setting up CBI is only an executive fiat and does not give CBI as such any legal powers. Therefore, as a legal entity legislated for under Entry 8, List 1 of the Seventh Schedule of the Constitution CBI does not exist. The technical, crime records and statistics, research, legal and general and administration divisions of CBI are totally and absolutely a part of an executive establishment created by government. They are like any subordinate organisation of government and by themselves are required to function as such. Every police organisation in this country has similar departmental set ups within the overall police organisation, but all of them, because they are a part of the police, are covered by the Police Act. The divisions of CBI are covered by no law. Therefore, it is essential that before we proceed any further on any discussion about CBI, Parliament must enact a law under Item 8, List 1 of the Seventh Schedule, so that CBI becomes a legally recognised and empowered agency and DSPE is subsumed in it.

No police force in India acquires any power to investigate an offence or follow a procedure other than normal, except under the provisions of the Code of Criminal Procedure. DSPE, the National Investigation Agency (NIA), the State Police all acquire jurisdiction in the matter of investigating a criminal offence, whether the offence be under the Indian Penal Code or under any other special Act, only through Chapter XII, Cr.P.C. Regardless of whether it is an IPC offence or it is an offence under any special law, the police (including DSPE) acquires jurisdiction only if the offence is cognizable. The police has no authority to intervene in a non-cognisable offence. For example, for any trial under the provisions of the Prevention of Corruption Act when the trial court takes cognizance of offence it has to ensure that the provisions of section 207 Cr.P.C are followed. Section 207 Cr.P.C. categorically states that an accused is entitled to, among other things, the FIR recorded under section 154 Cr.P.C. The right to investigate an offence by any police force commences with the FIR, which is the gate to investigation.

Thereafter, if under section 156 the police officer concerned decides to investigate a cognisable offence, then all the other provisions of Chapter XII Cr.P.C will apply. These provisions will also apply to any future legally constituted CBI. This would apply regardless of whether or not we have a Lokpal and whether or not he has a specialised investigating agency under him, which could include DSPE as such or in its new born avatar as a CBI constituted under law.

An officer investigating an offence under Chapter XII Cr.P.C. is legally totally immunised from any pressure, political, administrative or judicial. It is only under section 158 Cr.P.C. that a superior police officer may give suitable instructions and directions to the officer incharge of a police station or an investigating officer. Such powers vest in superior officers under section 36 Cr.P.C also. This immunity from intervention in investigation of criminal offences is a legal power vested in the police and it is irrelevant whether DSPE as CBI functions under the superintendence, direction and control of government, the Chief Vigilance Commissioner or the Lokpal. None of these authorities can give any direction to the police in the matter of investigation of an offence, Anna Hazare and his cohorts notwithstanding. This whole controversy about subordination of CBI, therefore, is unwarranted on two grounds: - (1) There is no legal entity called CBI (2) Any police force will work independently in the matter of investigation of offences because it is required to do so by law.

This brings us to a wider question of what exactly is any police force, including the legally non-existing CBI. The police is not the only agency which can investigate or prosecute offences, though it is the only agency which has the legal powers to investigate any offence under any law even if a specialised agency has been constituted under a Special Act for the purpose of investigating offences under that Act. For example, under the Forest Act officials of the Forest Department have the power to register a preliminary offence report (POR) in the matter of forest offences, to investigate such offences, arrest accused persons and either compound the case or prosecute it before a court of law. For the limited purpose of excise offences excise officers have similar powers of investigation and action. This, however, does not make them a police force. They are a part of the executive set up. The police, including DSPE, are also a part of the executive set up because they are not a part of the Legislature or the Judiciary. The power to create an executive agency, either by resolution as was done in the case of CBI or through legislation as was done in the case of NIA vests fairly and squarely in the Executive. For example, if tomorrow the Executive decides to abolish CBI it can do so by withdrawing the resolution which created the CBI, or by legislation which abolishes an agency created through legislation. For any police force, including DSPE, to claim autonomy from the Executive, therefore, is just not permissible.

This point needs elaboration. Suppose a police force, including CBI, does something which is palpably illegal, biased, corrupt or totally against the interest of an individual or a section of society. If questions are asked about such conduct in the Legislature can government turn around and say that one of the creatures created by it is totally out of its control and that government can take no action in this behalf? The uproar that would ensue would probably cause the government to fall. Therefore, creating mechanisms within the force or outside it as autonomous structures to oversee the police is fine, but in the ultimate analysis government cannot abdicate its function to call its creations to account and where it becomes necessary to take action, then to take action, including removal from service of the persons who are guilty of misconduct. The power of superintendence, therefore, can never be given up by government. It is axiomatic that an organisation which has the power to deprive a citizen of his liberty would be more prone to misuse this power than an agency which does not enjoy such authority. In a democracy it is the responsibility of government to ensure that citizens are protected from such misuse of power. Therefore, one is in total disagreement with the suggestion that the power of superintendence

of the Executive Government over any police force in India should be abolished. In the ultimate analysis the minister and government are accountable to the Legislature and the people, not to the Lokpal or any other autonomous bodies set up by government to oversee the police.

The other side of the coin is that government has a tendency to misuse the coercive arm of the State, the police, for political and other selfish ends. Such a situation is totally untenable and cannot be tolerated. This means that the police must be immunised from political and other pressure, exercised through arbitrary use of the power of discipline and transfer, which is all too common amongst politicians in India. Accountability, therefore, has to be as important as empowerment in the case of the police and the agency to which any force will be primarily accountable has to be local to the area or specific to the Force. This applies to CBI/DSPE also. It is legitimate to have a process of selection of the heads of police forces, including CBI, which is unbiased, transparent and credible. It is legitimate to give protection from arbitrary action to the person who heads the Force. It is not legitimate to make the process of calling the Force to account so diffused and weak that the wrongdoer virtually enjoys immunity from action. In the ultimate analysis executive authority has to be the main institution for calling investigating agencies to account. This power cannot be diluted and should not be diluted.

The Constitution of India recognises three pillars of the Indian State, the Executive, the Legislature and the Judiciary. Everything else is ancillary, including the Comptroller and Auditor General and the Chief Election Commissioner, both of whom are constitutionally recognised authorities. In the case of CAG he has complete security of tenure and his office is not subject to any government control. However, it is for government and the Legislature to accept or reject any audit report given by CAG. To that extent the CAG is not the ultimate authority for decision making, with the Executive enjoying the ultimate power to accept or reject the CAG's report. Similarly, the Election Commission enjoys complete powers in relation to elections, but the Election Commission is also an adjunct to the Executive because the process of holding elections falls within the ambit of executive action. In the ultimate analysis whereas the Lokpal's accountability will be to Parliament, he is still an adjunct of the Executive because in administrative matters the final decision will lie with that pillar of the Constitution which is the final arbiter, the Executive. The Lokpal cannot substitute for the Executive, he cannot paralyse the Executive and he has to be restricted to his legally mandated powers, which brings us back to all the arguments relating to CBI.

CBI is a police force which investigates criminal offences. Corruption is one such an offence. Murder is also an offence which the police investigates. Should the police not be under the superintendence of government? Is murder less heinous an offence than corruption? If the force investigating the most heinous of all offences, depriving a human being of his life, can be under the superintendence of government, why should CBI not be under its superintendence? Regardless of what Anna Hazare and his supporters say, regardless of the nature of the Lokpal Bill, every case of corruption has to be investigated by a police force and every case of corruption has to be tried by a court of law. The Lokpal cannot be investigator, prosecutor, jury and judge himself. The Lokpal agitation cannot be allowed to cause the Constitution of India to collapse or reduce in importance the Executive, Legislature and Judiciary. Anna Hazare is doing his damndest best to break the Constitution by placing the Lokpal above the three constituent wings of the State. The attempt to wrest control over CBI is a part of this attempt. If Parliamentary democracy is to survive in India, if the Executive is to fulfill its constitutionally mandated role of governing the country, then Anna Hazare must not be allowed to succeed. CBI must be converted into a legally constituted investigating agency which has complete operational autonomy as provided by Chapter XII Cr.P.C, whilst at the same time remaining accountable to government.