

## **Intelligence vs. Investigation, Or CBI vs. IB**

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This paper is based on hearsay and secondary sources, mainly newspaper reports and, therefore, the views expressed are subject to correction. This preamble does not pardon any major errors which might be made because statements are not based on known and verified facts, but nevertheless the public perception which has grown about a major confrontation between CBI and IB needs to be addressed.

The controversy which has been aired in the media emerges out of the Ishrat Jehan case of Gujarat in which the lady and her companions were shot dead by the Gujarat Police in what is claimed to be an encounter between a terrorist group of which Ishrat Jehan was a member, whose objective was to target the Chief Minister of Gujarat personally and the police which took counter measures. The source of 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 Ishrat Jehan and her companions with a Pakistan based L-e-T terrorist group was mentioned. CBI, actually the Delhi Special Police Establishment but referred to hereinafter as CBI (a nonexistent organisation) for the sake of convenience, is investigating the case on the direction of the Supreme Court. One of the suspects, whom CBI wants to interrogate, is the Special Director, Intelligence Bureau. The subject of investigation apart, let it be understood that CBI is exercising police powers in this case, whereas IB is governed by its own mandate which is to do counter espionage work within India, neutralise espionage by hostile powers within the country, obtain information about likely 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 harm to India. In performing police functions the CBI has to follow in substance and in practice the provisions of chapter XII, Cr.P.C. and for 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 behalf has to follow the rules of evidence, including relevance and admissibility of evidence and its credibility. Chapter XII, Cr.P.C. is very well drafted and any investigation carried out under its provisions is bound to be just and credible. If evidence is planted or falsely generated the rules of evidence would expose this and a trial court would reject the evidence. Therefore, CBI is a police force exercising the powers of investigation of the police when dealing with a criminal 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 theory 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 prosecute and, therefore, it has no interaction with courts. At the same time it has at its disposal agents who can obtain human intelligence, it has electronic devices for intelligence collection, it has friends and well wishers and, perhaps, double agents to obtain information and it has other sources, primary and secondary, 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 that which is of relevance for maintaining the security of India. There are many ways through which intelligence is collected. For example, in Britain SIS had a whole psychiatric and psychological division during Second World War, whose main objective was to

study the psychology of enemy leaders, including Hitler and thereon build a portrait which would enable the Allies to predict how Hitler and other leaders would react to a given situation. The psychological warfare division was then required to suggest counter measures which could psychologically neutralise the enemy. The work of an intelligence organisation, therefore, is to develop sources of information, quite often totally informal sources, collate and analyse the information and then suggest alternative 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 facts which 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, obtain a conviction. We now, therefore, have one world which is spooky and with blurred outlines, with a combination of fact, fiction and imagination and, through analysis, 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 must be kept resolutely and definitively apart. Investigation has to live in a glare of public scrutiny in order to prove its credibility, but intelligence must at all times be 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 options, but cannot ignore them, however outlandish. Every time a terrorist strike takes place, whether in Bombay on 8<sup>th</sup> November 2010, or in Chhattisgarh on 25<sup>th</sup> May 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. Should intelligence agencies, therefore, pass on every bit of unverified information and constantly cry wolf? Or does the agency restrict itself to passing on only that which is possible and most likely probable, inviting the criticism that for the time when verification was being done the intelligence agency held back 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, all intelligence 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 investigation. An intelligence agency by definition must remain in the dark, must not discuss its operations and must pass on information which can be acted upon. An intelligence agency works on the twin premise of “need to know” and “deniability”. This means that only those who need to know should be privy to information and at all times intelligence operatives and agencies should be in a position to credibly deny any statement attributed to them. Under no circumstance should an intelligence agency or an individual officer reveal sources because a compromised source in the world of intelligence is as good as 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 espionage. This is a part of the doctrine of deniability and it must be respected.

In the Ishrat Jehan case CBI is attempting to question the Special Director of IB, with a view to making him an accused, on account of some 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 respect this 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 amount to. 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 not

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 proved by evidence other than the intelligence report which has allegedly been made by the officer concerned. It is certainly not a public document as defined by section 74, Indian Evidence Act.

For me, personally, there are certain fundamental questions which are a cause of worry. The Intelligence Bureau is charged with ensuring that the security of the State and 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 penetrating anti national bodies and collecting intelligence on the basis of which they can be neutralised. It is acknowledged that because this intelligence does not meet the test of proof as laid down in the Indian Evidence Act, a great deal of it may be misinformation deliberately planted by the enemy, information which has an element of gossip and information which may be dated and, therefore, no longer relevant. The Intelligence Bureau of course has to sieve out all questionable information, but at no stage can it afford to ignore a source which may not prima facie to be credible. Information which can be acted upon 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 not very credible is ridiculous because any operational agency would be foolish if it paid no heed to intelligence reports. The report and the officer both must enjoy anonymity.

In the Ishrat Jehan case CBI is obviously under the twin pressure of a government hostile to Narendra Modi and the Supreme Court which pictures itself as St. George on a white charger out to slay the dragon of communalism in Gujarat. Therefore, CBI seems to have been swayed from the path of honest 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 has led to 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 completely defeats me 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 any police force. 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 very much in doubt. Because the CBI is a police force superintendence over it must vest in government and whereas it has to enjoy complete legal autonomy in investigation of offences, its accountability has to be to government, which must have the power to take action if such accountability is not properly 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 drafted by the Soli Sorabjee Committee 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. The exercise of superior powers by government has to be as per prescribed laws, rules and regulations and cannot be arbitrary, but the ultimate accountability has to 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 discharge it. It is because by various pronouncements the Supreme Court has made the concept of CBI's accountability somewhat hazy that CBI is running riot by acting 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. We must let the Intelligence Bureau perform its function without fear or favour and under no circumstances should we either jeopardise the source of information nor use this information to incriminate IB officers. This has to be made very clear to CBI because if it continues in its present attitude our intelligence 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. This intervention 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 Centre had very few 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 Resident. It had 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 executive force was the Provincial Police. Because the objective of government, Central and Provincial, was the same, the maintenance of imperial rule, there was mutual trust. Today there is no trust between the Centre and the States and, therefore, we have huge numbers of Central Armed Police Forces over whom the States have no control, with the State Police Force being deliberately allowed to run down and become ineffective. If they are partisan so, unfortunately, are the Central Forces, with one ethos being applied to Gujarat and another to Assam. The answer to mutual distrust is not more centralisation. It is meaningful 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 told a somewhat discomfited Mrs. Sonia Gandhi when Arjun Singh took him to meet her. Gaur said, "Rest easy, Madam. I have not come to in any way embarrass you, 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 police's impartiality becomes doubtful, so its capability declines, so the Centre inflates CBI and creates the National Investigation Agency (NIA). The CBI of today is not the 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 the Mindanao Deep look like a shallow trench. The same CBI which became Indira Gandhi's hatchet then turned on the Congress when Janata Dal came to power. I am witness to this because in 1978-79, when I headed the Delhi Development Authority, my permission was sought to prosecute, amongst others, Jagmohan, my predecessor, along with Sanjay Gandhi, for demolitions at Kapashera and Andheria Mod. The supervision note written by the S.P. concerned read, "The purpose of this investigation is to bring home offences under sections 427, 442, 448, 145, 147, 34 and 120B IPC against Sanjay Gandhi, Jagmohan, Ranbir Singh and others". B.R. Tamta, the Municipal Commissioner of Delhi at whose behest and as whose agent DDA had carried out demolitions, was spared because he had agreed to turn approver. This is not permitted to the police under chapter XII, Cr.P.C. Pardon can only be tendered by a Magistrate at the time of enquiry, investigation or trial, but only in a case triable by a court of session where the minimum sentence is seven years imprisonment. The maximum sentence under the sections with which the accused were charged in this case is three years and, therefore, Tamta could not have been 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 on me was that the Force has degenerated to an extent where it needs to be disbanded and then reconstituted to become an impartial, professional instrument for investigating complex crimes, but always in partnership with the State Police. Today the CBI is targeting Narendra Modi. Will Sonia be the victim tomorrow? 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 devastating body blows. Government can no longer remain a silent spectator. The time for action is now.

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