

## The Mess That Is CBI

■ Dr. M.N. Buch

Let me begin with a statement that there is no legal entity called the Central Bureau of Investigation. What we have is the Delhi Special Police Establishment which was set up by the British under the Delhi Special Police Establishment Act to deal with cases of corruption by Central Government employees. Entry 8 of List 1 of the Seventh Schedule of the Constitution empowers Parliament to enact laws for the setting up of a Central Bureau of Investigation and Intelligence Bureau. Unfortunately government has so far not moved Parliament for such legislation and nothing seems to be on the anvil. The Delhi Special Police Establishment, therefore, is continuing to function under an Act which has never designed to make it the premier investigating agency in India into all matters of crimes, many of which fall within the jurisdiction of the State police forces, in which either the State Government or the courts have entrusted investigation to the DSPE. This is a very unsatisfactory arrangement, especially because the whole question of superintendence and accountability has been left so vague that on the one hand CBI acts as a political handmaiden of the party in power and on the other it takes shelter behind some court orders to cover all its arbitrary actions. Now an extremely unseemly row has broken out between Intelligence Bureau and the DSPE in its CBI avatar in the Ishrat Jehan case.

What is the CBI? It is an executive arm of government, masquerading as a police force, but with no legal backing whatsoever. Under List 1 of the Seventh Schedule of the Constitution police is an exclusive subject within the competence of the State Legislature. The plethora of armed police forces collectively called central police organisations comes within the definition of other armed forces of the Union and when deployed under Entry 2A of List 1 of the Seventh Schedule in aid of civil power such forces may enjoy certain police powers but they are not a police force thereby. In enacting criminal law under List 3, Seventh Schedule Parliament may set up investigating agencies which may take cognisance of and investigate such offences as the law permits. Obviously these powers would have to be given to a new CBI by legislation for its setting up. It is about time that government and Parliament bring forth suitable legislation in this behalf so that a legal entity called CBI, together with its powers, accountability, etc., can be created. CBI's jurisdiction must begin only with there being a report of the commission of a cognisable offence. In other words, like the police the CBI should acquire jurisdiction in a matter only after a FIR is lodged and recorded. Certainly the administrative and executive decisions of any government officer must be beyond the competence of CBI, to whom such officers would not be accountable.

The job of the Intelligence Bureau is to collect, collate, analyse and disseminate information about matters which concern the security of the country. IB does not have the executive powers of the police and it cannot arrest or detain persons directly. At the same time both R&AW and IB have to be intelligence agencies which should never be asked to reveal their source of information and should be governed by the principle of both "need to know" and "deniability". The world of intelligence, espionage and counter espionage is grey and many areas are hazy and must remain so. At the same time officers of these two organisations are required to collect information which is not necessarily supported by evidence which would stand in a court of law. It is the job of any intelligence agency to caution the executive arm of

government that certain things might happen which are undesirable and that necessary precautions should be taken to counter them. On the basis of intelligence reports an organisation like DSPE or any other police force cannot start action against the intelligence officer by treating such information as evidence of incrimination. If a report of an IB officer is used to incriminate that officer we might as well wind up the entire intelligence apparatus of the State. This is what DSPE is trying to do in the Ishrat Jehan case.

In reconstituting CBI the following factors will have to be considered:

1. When investigating offences CBI will follow all the procedures laid down in chapter XII, Code of Criminal Procedure. In this CBI will be subject to the orders of competent courts and supervision by superior police officers acting under sections 36 and 158, Cr.P.C., but will not be answerable to any other authority.
2. CBI is an executive arm of government. It will, therefore, continue to be constituted by government and its head and its officers will be government servants whom government will appoint. CBI is not more important than the police.
3. The procedure for appointment of officers of CBI should be prescribed by law and whilst being absolutely above board, such legal prescription must ensure that there is no possibility of arbitrariness by government. All service matters relating to officers of CBI should be determined by law or rules, the executive should not be allowed to take arbitrary decisions, but ultimately the appointments will be by the Executive to one of its executive arms.
4. Like any of the police forces, the power of superintendence over CBI has to vest in government. However, the power of superintendence should be exercised in accordance with what the Soli Sorabjee Committee has recommended when the drafting a model Police Act. The words are, "Government shall exercise its superintendence of the police in such manner and to such an extent as to promote the professional efficiency of the police and ensure that its performance is at all times in accordance with the law. This shall be achieved through laying down policies and guidelines, setting standards for quality policing, facilitating their implementation and ensuring that the police performs its task in a professional manner with functional autonomy". Superintendence does not permit micro management of CBI.
5. CBI has to be accountable. If questions are raised in Parliament about certain acts of omission or commission, the minister incharge cannot plead that he has no authority to apply corrective measures. Parliament would be justified in demanding that in such a case the law should be amended and the Supreme Court cannot prevent this. Therefore, in preparing the legislation for CBI government must ensure that there is functional and legal autonomy in investigation, superintendence means general supervision and the framework of rules and regulations within which the organisation will operate and there is accountability which, without interfering with the functional autonomy, still ensures that CBI is answerable for every act, with swift action being taken in case of default.

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