



# ORF ISSUE BRIEF

August 2009

ISSUE BRIEF # 20

## Legally Empowering the Sentinels of the Nation

Manish Tewari

The lawyer in me has always been intrigued by the legal architecture that empowers both our central law enforcement and intelligence services. In response to a series of questions during the recently concluded budget session of Parliament, the government provided answers that only underscore the ambivalence, procrastination and perhaps even the dilemma of successive governments to break out of the status quo mold and address this critical governance issue. The objective of this piece is to explore and navigate the legal underpinnings of the Central Bureau of Investigation, Serious Fraud Investigation office (SFIO), Intelligence Bureau and the Research and Analysis Wing. (R&AW).

The Central Bureau of Investigation was created by an executive order on the April 1, 1963. However, it was really born 22 years earlier as a Special Police Establishment in the Department of War in 1941. In 1943 it was constituted by an ordinance into an independent entity, namely the Special Police Establishment (War Department), in exercise of the Emergency powers conferred upon the then Viceroy

and Governor General of India Lord Linlithgow by the India and Burma (Emergency Provisions Act) 1940 passed on June 27, 1940 by the British Parliament.

The Emergency Provisions Act interminably extended the validity of ordinances promulgated by the Governor General invoking the powers available to him under Section 72 of the Ninth Schedule of the Government of India Act 1935 which otherwise mandated that the maximum validity of an ordinance could be six months.

With the Second World War coming to a close in 1945 the said act stood repealed by His Majesty's Order in Council, namely The India and Burma (Termination of Emergency) Order 1946, which declared the end of emergency with effect from April 1, 1946. The emergency had occasioned the passage of the Emergency Provisions Act in the first instance.

Fearing that all acts done under the Emergency Powers Act would either lapse with effect from

Observer Research Foundation is a public policy think-tank that aims to influence formulation of policies for building a strong and prosperous India. ORF pursues these goals by providing informed and productive inputs, in-depth research and stimulating discussions. The Foundation is supported in its mission by a cross-section of India's leading public figures, academics and business leaders.

October 1, 1946 or get extinguished as the validity period of an ordinance stood revived to six months as envisaged in Section 72 of the Ninth Schedule of the Government of India Act 1935 with effect from April 1 1946, the government of the day promulgated another ordinance on September 25, 1946 called the Delhi Special Police Establishment (War) Department ordinance. On October 1, 1946 in exercise of powers conferred by the said ordinance dated September 25, 1946 the then Federal government mutated the Special Police Establishment (War Department) into the Delhi Special Police Establishment.

However this apprehension was later proved to be unfounded as the Supreme Court of India in another matter challenging the legality and life of ordinances promulgated under the Emergency powers Act 1940 held that while the Act itself may have been repealed by the termination order of 1946; the ordinances promulgated under it are valid into perpetuity unless an ordinance itself had a self limiting time frame (*Hans Raj Moolji vs State of Bombay AIR 1957 SC 497*).

The ordinance of September 25, 1946 was also subsequently repealed by the Delhi Special Police Establishment Act that came into force in November 1946, even though the 1946 ordinance was to remain valid till March 1947.

In the discharge of its legal duties the CBI still functions as the Delhi Special Police Establishment ostensibly constituted before independence, on October 1, 1946. It is not quite clear as to whether a subsequent notification re-constituting the Delhi Special Police Establishment under the said act was ever issued as the 1946 ordinance only midwived and morphed the Special Police Establishment (War Department) into the Delhi Special Police Establishment. Jurists however may propound that the earlier transition is saved by the Provisions of the General Clauses Act 1897, which is also open to dispute as to whether constitution of a force is a substantive right saved by the provisions of the said Act.

Before you get lost in a legal jungle let me demystify

the legalese. The CBI has no independent standing in law. Simply put it is a piece of legal fiction whose underpinnings in law are tenuous to say the least It still draws all its powers of investigation and arrest from the antiquated 1946 act which essentially being a local act provides that each state through an executive order under Section 6 of the said Act has to give the Special Police Establishment, what is colloquially called the CBI, permission to investigate particular offences in that state. In other words the CBI can investigate a case only if requested by the concerned state government or directed by the High Court or Supreme Court, except if it is a matter that pertains to the Central government.

At various points of time in the past several states had revoked orders giving consent, that too with retrospective effect to the Special Police Establishment (read CBI) to investigate matters. The beneficiaries alas, were card carrying members of the much maligned political class. The Supreme Court finally put paid to this practice in *Kazi Lhendup Dorji v CBI 1994 Supp (2) SCC 116* by holding that state governments can not revoke consent given to the Special Police Establishment to investigate and prosecute any matter with retrospective effect.

It is also questionable whether the constitutional scheme provides for a Central police force. Entry I and 2 of the state list seventh schedule makes police a state subject.

The moot point is that when legislative powers are available to the Central government in terms of Entry 8 of list 1 of the seventh schedule—that speaks of a Central Bureau of intelligence and investigation—why does the government not enact a straight and simple law empowering the CBI rather than let it function on the basis of a dubious piece of legislation whose basic legality is open to question. Incidentally, the government has recently constituted the National Investigation Agency drawing upon these very legislative powers mentioned herein above.

Similar is the case of the Serious Fraud Investigation office (SFIO) that has investigated 36 cases and has filed 574 complaints for violation of various

provisions of the Companies act and the Indian Penal Code from May 2004 to July 2009. The SFIO again draws its powers from the investigative provisions of the Companies Act but has no independent locus or standing under the Companies Act. That is the reason why it had to approach the courts to gain accesses to the Satyam scam accused, something that should have been its inherent right given the nature of the Satyam scam. The irony is that the SFIO, despite existing and operating, does not even find mention in the Companies Bill 2009 introduced in Parliament on the August 3, 2009, what to speak of embedding it in a proper legal framework.

The case of our intelligence agencies is even more interesting. In response to a question pertaining to the legislative act or legal architecture from which the Intelligence Bureau draws its legal/statutory authority or right to function the government came up with a very quixotic response. “The Intelligence Bureau figures in Schedule 7 of the Constitution under the Union list”. When pressed that possibly this may not be an appropriate answer the government emphatically reiterated “The intelligence Bureau finds mention at S.No.8 in the Union list under the 7<sup>th</sup> Schedule of the Constitution of India”

Even an aspiring student of law knows that Article 246 (1) gives Parliament the exclusive right to make laws on matters enumerated in the Union list in the seventh schedule of the Constitution. In other words Entry 8 in the Union list enunciated in the government's response merely gives it the legislative power to enact a statute to bring a Central Bureau of Intelligence to be called by whatever name (IB or BI) into existence. A mere mention of a subject in the laundry list of legislative powers neither gives an organization life or legitimacy. Unfortunately no such law has ever been enacted by successive governments since the commencement of the Constitution.

Similar is the case of India's external intelligence service, the Research and Analysis Wing (R&AW). In response to a question about the law/statute which gives R&AW the powers/authority to discharge its

functions/mandate efficaciously and efficiently, the government did not try and hide behind any obfuscation but candidly admitted, “There is no separate/ specific statute governing the functions/mandate of the R&AW”. However, in 2000 following the report of the task force on Intelligence Apparatus which examined the entire intelligence system in the country, a formal charter listing the scope and mandate of the R&AW was formally approved by the government of India”.

Contrast this with the position in various other countries of the world. The Federal Bureau of Investigation of the US government draws its powers from Title 28 of the United States code. Title 28 (Judiciary and Judicial Procedure) is that portion of the United States Code (federal statutory law) that governs the federal judicial system.

The Serious Fraud office of the United Kingdom draws its legal authority and powers from the Criminal Justice Act 1987 (as amended). The impetus for introducing the Criminal Justice Act 1987 and creating the SFO was the Fraud Trials Committee Report, popularly known as 'the Roskill Report' published in 1986. Its main recommendation was the setting up of a new unified organization responsible for the detection, investigation and prosecution of serious fraud cases.

Similarly the Central Intelligence Agency (CIA) of the United States, created by the National Security Act of 1947, was specifically empowered by the Central Intelligence Agency Act of 1949 (CIA Act) to carry out the duties assigned to it by the 1947 Act. MI5, the domestic intelligence service of the United Kingdom, draws its legal authority from The Security Services Act 1989 and its sister organization, the James Bond Fame, MI6 or the SIS, from the 1994 Intelligence Services Act, thereby subjecting its activities to the scrutiny of the British Parliament's Intelligence and Security Committee.

The Foreign Intelligence Service of Russia draws its legal basis from the Law on Foreign Intelligence Organs 1996. The German Federal Intelligence Service, Bundesnachrichtendienst (BND), draws its legal sustenance from the Federal Intelligence

Service Law 1990. Its activities are supervised by the Parliamentary Control Commission (PKK) for intelligence services which in turn is empowered by the Law over the Parliamentary Control of Intelligence Activities 1978. Even in Japan the Public Security Intelligence Agency, that post its reorganization in 1996 started focusing upon foreign intelligence collection, is empowered by the Subversive Activities Prevention Law that came into force on July 21, 1952. PSIA is credited with collecting information on Russia, China and North Korea through their HUMINT networks.

Both from the national security and the civil liberties point of view, it is inappropriate to allow law enforcement and intelligence services to function without a sound and well defined legal basis. There can be no case that an equivocal or indeterminate legal mandate gives greater operational flexibility. In fact in an information and litigious age it has both, an inhibiting and, even worse, a debilitating impact.

It makes one shudder to think that when the spectre of multiple security challenges ranging from Jehadi terrorism, economic espionage to Naxalism threaten the sovereignty of India, the sentinels of the nation,

i.e. its principal law enforcement and investigative agencies, are bereft of the armor of legal sanction and protection. It is equally horrifying to even imagine that organizations that wield enormous powers of depriving people of both life and liberty do it in accordance with legality whose underpinnings are at best tentative if not completely non-existent, thereby undermining Article 21 which lies at the heart of the Indian Constitution.

It is imperative in a democracy that every organization of the government must draw its powers, privileges and authority from clearly defined legal statutes. The legal basis must not be fuzzy but sharply defined to obviate any obfuscation about both the intent of the legislature and the mandate it seeks to bestow. This ispo-facto addresses the issue of oversight and provides the structure of checks and balances that is critical for the healthy functioning of any constitutional system.

Maybe competing priorities edged out this critical issue from the 100-day radar of UPA II, but to put our democratic ethos on an even sounder footing it is imperative to provide our central law enforcement and intelligence structures with proper legal shields.

#### ABOUT THE AUTHOR

The author is a lawyer in the Supreme Court of India, Member of Parliament and the National Spokesperson of the Indian National Congress. The views expressed in this Paper are personal.



**Observer Research Foundation,**  
20, Rouse Avenue, New Delhi-110 002  
Phone: +91-11-43520020 Fax: +91-11-43520003  
www.orfonline.org email: orf@orfonline.org