

10 Points Legal Framework For Law Enforcement And Intelligence Agencies In India¹

(1) Need Of Legal Framework Under Consideration: Legal framework is the backbone for any crucial function of the government. This is more so where the law enforcement and intelligence activities of the State are involved. Law enforcement and intelligence activities and functions touch the most basic aspects of a person's life. That is why we have strong Human Rights and Constitutional protections that safeguard the life and liberties of such persons.

(2) Consequences Of Lack Of Legal Framework: It would be both ironical as well as violation of basic Human Rights and Fundamental Rights if the law enforcement and intelligence activities are conducted in an illegal, unreasonable and improper manner. The duties, functions, liabilities and rights of these law enforcement and intelligence agencies must be specified in an unambiguous and proper manner. There is no scope for any sort of ambiguity in these functions of the State.

(3) Position In UK: For instance, the British Security Service is one of three intelligence services or "Agencies". These include the Secret Intelligence Service (SIS), commonly known as MI6, the Governmental Communications Headquarters (GCHQ), and the Security Service (MI-5).

(4) Position In US: While there are significant differences between the British and US legal structures for law enforcement and intelligence services, MI6 is most like the Central Intelligence Agency (CIA), GCHQ resembles the National Security Agency (NSA), and the Security Service most closely resembles the Federal Bureau Of Investigation (FBI). All of them are constituted under duly enacted legislative frameworks.

(5) Position In India: Surprisingly, India has taken a very strange approach in this regard. The Central Bureau of Investigation (CBI), the Intelligence Bureau (IB) and the Research and Analysis Wing (RAW) in India represent a case in which there is almost no law to look at. Further, there is no legally tenable mechanism that can keep an eye upon these agencies and their functioning.

Even there are no safeguards that can prevent "Political Interventions" from disturbing and influencing the investigation undertaken by these central agencies. The history of India is witness of such interferences by many Governments in the functioning of these agencies.

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With the enactment of National Investigation Agency Act, 2008 (NIA 2008), some steps have been taken for constituting a legally formulated centralised agency. However, the viability and “Constitutionality” of this Act is yet to be checked. When the Center encroaches upon the powers of the States, Constitutional crisis and disputes are bound to arise. So what exactly is the legal status of the CBI, IB and RAW in India?

(6) Central Bureau Of Investigation (CBI)

The CBI was created by an executive order in April 1963. However, its actual and statutory origin can be traced to the pre-independence authority named Special Police Establishment operating in the Department of War in 1941. In 1943, it was converted into an independent entity by an ordinance, namely the Special Police Establishment (War Department).

Interestingly, even after independence and for all practical legal purposes, it still functions as the Delhi Special Police Establishment ostensibly constituted before independence on October 1, 1946. The ordinance was repealed by the Delhi Special Police Establishment Act that came into force in November 1946 but the executive order in April 1963 gave it a fresh life span. The entire history and constitution of CBI is very uncertain and requires clear cut legislation as soon as possible.

In short, the CBI has no independent standing in law. It still draws all its powers of investigation and arrest from the antiquated 1946 Act, under which it was probably never formally re-constituted. Its greatest limitation is that each State, through an executive order under Section 6 of the Act, has to give the Special Police Establishment consent to investigate and prosecute a matter in the State.

Thus, the CBI can only investigate a case if specifically requested by the State Government concerned or directed by the High Court or the Supreme Court, except if it is a matter that pertains to the Central Government.

In the past, several States tried to revoke orders giving consent with retrospective effect to the Special Police Establishment/ CBI to investigate matters. The Supreme Court, however, ruled that State Governments cannot revoke consent given to the Special Police Establishment/CBI to investigate and prosecute any matter with retrospective effect.

(7) Intelligence Bureau (IB) and the Research and Analysis Wing (RAW)

RAW had been carved out of the IB in September 1968 and given the primary functions of collecting external intelligence related to counter-terrorism and conducting covert operations. Till then, the IB had handled both internal and external intelligence.

There is no separate/specific statute governing the functions/mandate of the RAW. However, in 2000, a formal charter listing the scope and mandate of the RAW was formally approved by the Government of India.

(8) National Investigation Agency Act, 2008

The crimes having an interstate or international dimension are difficult for a law enforcement body to prevent or investigate if it has limited jurisdiction. To meet this objective, a national body that can coordinate and oversee the investigation and enforcement of criminal activities that have national or cross-border repercussions is essential. Further, in order to prevent such offences from occurring in the first place, substantial information sharing and comprehensive intelligence gathering across many jurisdictions has to take place.

The task has become even more difficult with the use of Information and Communication Technologies (ICT) by Terrorists, Cyber Criminals and Organised Criminals. This necessitates the establishment of a “Central Agency” that can take care of the criminal activities in a “holistic manner”. Presently, when a national policing agency, like the CBI, is required to investigate a cross-jurisdictional crime it can only do so at the request or with the consent of the State concerned.

By contrast, the newly created National Investigation Agency (NIA) can assume jurisdiction over a Scheduled Offence *suo moto*. Further, by virtue of the expanded definition of what constitutes a “terrorist act” in the recently amended Unlawful Activities (Prevention) Act, 1967 (in 2008), the concern remains that the NIA may investigate all kinds of activities that until now were in the exclusive jurisdiction of the States.

The scope of what the NIA will investigate is paradoxically insufficient and potentially too broad. NIA is not empowered to investigate a number of interstate and trans-national crimes that require a national response. For example, human trafficking, drug trafficking, cyber crime and organised crime are not included in the Schedule of Offences to the NIA Act. Whether these crimes have a direct link to terrorism or not, the fact is that the prevention and investigation of these offences are best served by a national response. These crimes, like terrorism, are by their very nature, national or international in scope and design. In addition, they can often have overt or covert links to terrorism. An NIA that is most effective is one that looks at all national crimes and is able to make the necessary linkages.

On the other hand, it can be argued that given the presence of the political discretions and the breadth of activities now covered by the amended Unlawful Activities (Prevention) Act, the possible scope and functioning of the new agency is much too broad and intrusive for comfort.

(9) Constitutional Validity

Both from the national security and civil liberties point of view, it is inappropriate to allow law enforcement and intelligence services to function without a well-defined legal basis. It is imperative in a democracy that every organisation of the government must draw its powers, privileges and authority from clearly defined legal statutes.

It is obvious that “Police” is a State subject and its functions cannot by a Parliamentary Law be conferred on an existing or new Central Police Force except under Article 249 or 252 of the Constitution. It is also questionable whether the Constitutional scheme provides for a central police force. Entries 1 and 2 of the State List, Seventh Schedule make the police a state subject.

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. Entry 8 in the Union List gives it the legislative power to enact a statute to bring a Central Bureau of Intelligence into existence. Unfortunately, no such law has ever been enacted.

Even the Constitutional basis for the creation of the NIA remains a matter of debate. The areas of policing and public order lie within the exclusive legislative competence of the States and not with the Centre. States would be extremely chary of accepting or cooperating with any agency that encroached on that power. Earlier committees, tasked with examining a possible national investigation agency, have repeatedly pointed out that “it should be clearly understood that the aim of creating such an agency, by whatever name called, cannot be to usurp the powers of the State, but on the other hand, it should be an agency meant to assist them in the nation’s fight against terrorism and inter-State or trans-national organised crime which jeopardise national security.”

It is clear that the Center requires a very strong case to justify the establishment and operation of a “Centralised Agency” like NIA. The “Constitutional Validity” of NIA has not yet been tested and if the same is brought before the High Court(s) or Supreme Court of India, some disturbing news may be heard by the Central Government.

(10) The Roads Ahead

The winter session of the Parliament is approaching soon and a holistic and sensible approach in this crucial direction would go a long way in providing a durable law enforcement and intelligence agencies legal framework in India. The “Constitutional Scheme” must be adequately understood and properly applied to prevent the laws like NIAA 2008 from being declared as “Unconstitutional”. Besides, sufficient measures must be undertaken so that there is a free, immediate and effective sharing of law enforcement and intelligence information and details among various authorities. With the advent of ICT these tasks have become a “nightmare” for the law enforcement and intelligence agencies. Only a “Holistic Approach” and “Collective Expertise” may help the Central Government to escape the quandary of these multiple authorities and unregulated situation.