

“A Study of CBI’s Constitutional Status and its Nexus with its Controversies”

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ABSTRACT

In a very bold decision of Guwahati High Court, it was held that the very process of setting up the CBI was invalid and unconstitutional. This 2013 judgement was stayed by the Supreme Court and is yet to be decided finally. In an order passed on March 29 2019, the Calcutta High Court had framed certain questions regarding the CBI’s legal status for the consideration of a larger bench.

So, was the Guwahati HC’s decision valid in first place? And did SC’s stay lead to the Calcutta HC taking up this issue?

Then the article tries to find nexus between controversies and ultra-vires status of CBI and finally analyses its problems and tries to find out possible solutions.

INTRODUCTION

The Central Bureau of Investigation is an extra constitutional body and a non-statutory as well. It derives its power from the Delhi Special Police Establishment Act, 1946. The agency comprises of the Director, who must be a member of the Indian Police Service, as its head. Then there is a Special Director or an Additional Director to assist the Director in his works. The Supreme Court in 2003 gave recommendations and on the basis of which the appointment of the Director was made transparent than before.¹

In 1963, the Ministry of Home Affairs changed the name of Special Police Establishment to Central Bureau of Investigation i.e. CBI through a resolution. Its founder director was DP Kohli. He served from 1963 to 1968. In later years, apart from economic offenses, investigation of other crimes also started being given to the CBI on special request. CBI was also entrusted with the investigation of high-profile cases of fraud and crime. In order to enable the CBI to function efficiently and effectively, its two branches were formed in 1987. One branch was the Anti-Corruption Division and the other was the Special Crime Division.²

¹ Anando Bhakto, The CBI Story, Frontline, Nov 23, 2018.

² Learn the history and unheard-of CBI, Oct 26 2018, <https://navbharattimes.indiatimes.com/education/gk-update/know-the-history-and-unknown-facts-about-central-bureau-of-investigation/articleshow/66374714.cms>

In a very bold decision of Guwahati High Court, it has been held that the very process of setting up the Central Bureau of Investigation (CBI) was invalid and unconstitutional. Although almost all have criticized this decision of Guwahati High Court yet it is neither absurd nor an uncalled one. The 2013 judgement was stayed by the Supreme Court and is yet to be decided finally.

In an order passed on March 29 2019, the Calcutta High Court had framed certain questions regarding the CBI's legal status for the consideration of a larger bench.

HISTORY

The Central Bureau of Investigation traces its origin to the Special Police Establishment (SPE) which was set up in 1941 by the Government of India. The functions of the SPE then were to investigate cases of bribery and corruption in transactions with the War & Supply Dept. of India during World War II. Superintendence of the S.P.E. was vested with the War Department. Even after the end of the War, the need for a Central Government agency to investigate cases of bribery and corruption by Central Government employees was felt. The Delhi Special Police Establishment Act was therefore brought into force in 1946. This Act transferred the superintendence of the SPE to the Home Department and its functions were enlarged to cover all departments of the Govt. of India. The jurisdiction of the SPE extended to all the Union Territories and could be extended also to the States with the consent of the State Government concerned.

The DSPE acquired its popular current name, Central Bureau of Investigation (CBI), through a Home Ministry resolution dated 1.4.1963. Initially the offences that were notified by the Central Government related only to corruption by Central Govt. servants. In due course, with the setting up of a large number of public sector undertakings, the employees of these undertakings were also brought under CBI purview. Similarly, with the nationalisation of the banks in 1969, the Public Sector Banks and their employees also came within the ambit of the CBI.³

Now 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.

UNCONSTITUTIONAL STATUS OF CBI

Navendra Kumar vs The Union of India & Ors, 2013⁴

There was challenge to vires of CBI before Supreme Court heard a Special Leave Petition in 1986. Former Law Minister P R Kumara Mangalam argued before a division bench of Justices K Ramaswamy and N Venkatachala, who dismissed the matter in limine, leaving the

³ A Brief History of CBI, Central Bureau of Investigation, (July 15, 2018, 11:25AM), <http://cbi.gov.in/history.php>.

⁴ SCC Gau 305 2013

substantive questions of law unanswered. Those were answered while confirming doubts about illegality of CBI when Guwahati High Court nullified 1963 resolution constituting CBI and declaring it ultra vires. Justices I.A. Ansari and Indira Shah held “...while we decline to hold and declare that the DSPE Act, 1946, is not a valid piece of legislation, we do hold that the CBI is neither an organ nor a part of the DSPE and the CBI cannot be treated as a ‘police force’ constituted under the DSPE Act, 1946. We hereby also set aside and quash the impugned resolution, dated 01.04.1963, whereby CBI has been constituted...” It further said that home ministry resolution was neither the decision of the Union Cabinet nor were these executive instructions assented to by the President. Therefore, the impugned Resolution can, at best, be regarded as departmental instructions, which cannot be termed as “law”.

The Centre rushed to apex court urging to revive CBI, contending the high court erred in quashing the Resolution and failed to appreciate absence of illegality or unconstitutionality for not having received assent from the President because it had been issued under the Government of India (Transaction of Business) Rules. Supreme Court Bench heard at the residence of CJI on November 9, 2013, and P. Sathasivam CJI and Ranjana Desai, J, stayed the order of Guwahati HC.⁵

It was argued by the Centre that the apex court in series of decisions has held that the CBI is constituted under the DSPE Act, 1946. In these circumstances the High Court could not have as a matter of judicial discipline and propriety traversed beyond the said decisions and upset the binding nature of the judgements of this Court (Supreme Court) and come to a conclusion that “the CBI was not constituted under the DSPE Act, 1946”.

Asian Resurfacing of Road Agency Private Limited & Anr v Central Bureau of Investigation, 2018⁶

The serious questions raised by Guwahati HC are still pending. A three Judge bench of Supreme Court of Justice R F Nariman, Justice AK Goel and Justice Navin Sinha on 28th March 2018 in *Asian Resurfacing of Road Agency Private Limited & Anr v Central Bureau of Investigation* (Criminal Appeal Number 1375-1376 OF 2013) has restricted the validity of stay in both criminal as well as civil trials to a period of six months. This lifeline for CBI expired after six months from date of above judgment, i.e., on 28th October 2018. The Centre did not expedite the petition showing any extraordinary situation to continue ‘stay’. The CBI cannot survive legally, unless SC validates it in final order. In other words, the 2013 judgement was stayed by the Supreme Court and is yet to be decided finally.⁷

⁵ Madabhushi Sridhar, Is CBI Unconstitutional Organization, The Hans India, (Apr. 23, 2019, 1:30 AM), <https://www.thehansindia.com/hans/opinion/news-analysis/is-cbi-unconstitutional-organisation-523288?>

⁶ 16 SCC 340 2018

⁷ Manish Tiwari, Is CBI a legal entity?, The Asian Age, (Oct. 28, 2018, 5:04 AM), <https://www.asianage.com/opinion/columnists/281018/is-cbi-a-legal-entity.html>.

Calcutta High Court

The Calcutta High Court is considering the constitutional and statutory validity of the Central Bureau of Investigation. In an order passed on March 29, the court framed certain questions regarding the CBI's legal status for the consideration of a larger bench. The Calcutta High Court's March 29 order took note of 2013 SC's stay on Guwahati HC judgement, and has framed questions regarding the effect of such a stay and whether this means that the Supreme Court has declared any law on this matter.⁸

CONTROVERSIES SURROUNDING CBI

Hawala Scandal

1991 arrest of militants in Kashmir led to a raid on hawala brokers, revealing evidence of large-scale payments to national politicians. The Jain hawala case included former Union ministers Ajit Kumar Panja and P. Shiv Shankar, former Uttar Pradesh governor Motilal Vora, Bharatiya Janata Party leader Yashwant Sinha. The 20 defendants were discharged by Special Judge V. B. Gupta in the ₹650-million case which was heard in New Delhi. The judge reasoned that there was no *prima facie* evidence against the accused which could be converted into legal evidence. Those freed were Bharatiya Janata Party president L. K. Advani; former Union ministers V. C. Shukla, Arjun Singh, Madhavrao Scindia, N. D. Tiwari and R. K. Dhawan, and former Delhi chief minister Madan Lal Khurana.

In 1997 a ruling by late Chief Justice of India J. S. Verma listed about two dozen guidelines which, if followed, would have ensured the independence of CBI. Sixteen years later, successive governments continue to circumvent the guidelines and treat the CBI as another wing of the government. Although the prosecution was prompted by a PIL, the cases concluded with no convictions. In *Vineet Narain & Others v Union of India AIR 1996 SC 3386*, the Supreme Court ruled that the Central Vigilance Commission must have a supervisory role over the CBI.

Indian coal allocation scam

This was a political scandal concerning the Indian government's allocation of the nation's coal deposits to private companies by the then Prime Minister Manmohan Singh, which allegedly cost the government ₹10,673.03 billion (US\$150 billion). CBI director Ranjit Sinha submitted an affidavit in the Supreme Court that the coal-scam status report prepared by the CBI was shared with Congress Party law minister Ashwani Kumar "as desired by him" and with secretary-level officers from the prime minister's office (PMO) and the coal ministry before presenting it to the court.

⁸ Kevin James, It's complicated: Calcutta High Court's questions about CBI's legal status need urgent attention, (Apr. 09, 2019, 8:00 AM), <https://scroll.in/article/918736/calcutta-high-court-has-served-an-urgent-reminder-that-cbis-status-remains-complicated>.

2G spectrum case

The UPA government had been accused of allocating 2G spectrum to corporations at very low prices through corrupt and illegal means. The Supreme Court warned the CBI many times for its tardiness in the investigations; only after the court began monitoring its investigations were high-profile arrests made.

Sohrabuddin case

The CBI had been accused of supporting the ruling Congress Party against its opposition, the BJP. The CBI was investigating the Sohrabuddin case in Gujarat; Geeta Johri, who was also investigating the case, claimed that the CBI pressurized her to falsely implicate former Gujarat minister Amit Shah.

Recent Conflicts

- The CBI has been most of the time surrounded over by the controversies because of the influence that the political party in power exert over it. The most recent one was the conflict that arose between the Director and Additional Director of CBI. The dispute started when the name of Rakesh Asthana came up for the post of Additional Director, and the then Director of CBI, Alok Verma opposed it citing that the former has the alleged connection with the Sterling Biotech bribery case. The tussle between the two came out in open when the CBI replied to a query of Central Vigilance Commission that Rakesh Asthana did not have the right to represent agency director Alok Verma. Later, on 4th October, a case was filed against Asthana and deputy superintendent of police-rank CBI officer, Devendra Kumar following a complaint based on that they had taken a hefty amount from a Hyderabad based businessman Sana Satish. In the meantime, Asthana wrote a letter to CVC where he alleged that Verma has taken a bribe of Rs 2 crore from Satish Sana in order to save the businessman from the charges of tax-evasion, money laundering, etc. Then, a FIR was lodged by Sana against Asthana accusing him of extorting money from him to protect him in the Qureshi case. In the FIR Sana has claimed that he has paid Rs 3 crore to Asthana.⁹ On October 24, both the director and additional director were sent on leave as they were tarnishing the reputation of the CBI. After this incident, a PIL was filed by NGO Common Cause represented by Prashant Bhushan who sought an urgent hearing on this matter as some sensitive issues were involved in this case. Both Alok Verma and Rakesh Asthana challenged the order of the central government divesting them of their powers.¹⁰ After hearing the case, the court finally on 8th January, the Chief Justice ordered the reinstatement of Alok Verma as the CBI director.¹¹

⁹ EXPLAINED: CBI war between Rakesh Asthana and Alok Verma, (Oct. 24, 2018, 08:25 AM),

<https://www.rediff.com/news/report/explained-cbi-war-between-rakesh-asthana-and-alok-verma/20181024.htm>

¹⁰ Chennabasaveshwar P, CBI vs CBI case: Timeline of premier investigating agency, One India, (Jan. 8, 2019, 11:23 AM), <https://www.oneindia.com/india/cbi-vs-cbi-case-timeline-of-feud-in-premier-investigation-agency-2833541.html>.

¹¹ Alok Verma v. Union of India, WP(C) NO. 1309 OF 2018

- Just when the above controversy was side-lined, another controversy came up and this time it was CBI versus a state. This all began when CBI officers went to the Kolkata Police commissioner Rajeev Kumar to meet him in order to question him about the progress of investigations in the Saradha and Rose Valley ponzi schemes that have cheated thousands of investors but they were stopped and forcibly taken to the police station by Kolkata police personnel. Later in an attempt to take revenge, the Kolkata Police surrounded the CBI office but soon left it after paramilitary force took control over the place. After this, the blame game of the government at state and centre began, accusing each other of destroying the ideal of democracy enshrined under Constitution of India. Finally, after a month of fight between the state of West Bengal and CBI, the Supreme Court interfered and passed a judgment where it stated that Rajeev Kumar, Commissioner of Kolkata Police could not be arrested for the time being.

If we look at the above controversies, we can deduce that CBI is directly or indirectly controlled or influenced by the government at the centre and the primary reason being there is no dedicated law to govern it and prevent its misuse by the centre thereby adding to its ultra-vires status and which is also a fine example of it. The agency is used as a medium by the party in power against the opposition leaders in centre as well as in state. There have been several cases which has led the public to question the credibility of the CBI. If we look at the timing and the manner of how the action was taken against Lalu Prasad Yadav in a 10-year-old case it was a clear sign of CBI working at the behest of government at the centre as the motive was to coerce Bihar CM to break the ties with former Union Railway Minister.

Another such instance was when former Chief Minister of Karnataka, B.S. Yeddyurappa, was charged for illegal sanctioning of the contracts to the miners in return of the donations made to him. The court let him off and gave rise to several unanswered questions.¹²

THE PROBLEMS

1. A 2013 judgment by the Guwahati High Court raised questions regarding the CBI's legal status itself. The CBI was established by a Central government resolution in 1963, and operates as per the Delhi Special Police Establishment Act, 1946. The 2013 judgment held that the establishment of the CBI by the Centre in this manner was unconstitutional, and that the CBI cannot be considered a statutory body either as it was not set up by or under the Delhi Special Police Establishment Act. This judgment was stayed by the Supreme Court and is yet to be decided finally. The Calcutta High Court's March 29 order took note of this, and has framed questions regarding the effect of such a stay and whether this means that the Supreme Court has declared any law on this matter.¹³

¹² The CBI has to be placed under an independent body to investigate cases without government interference, Is CBI the handmaiden of the government?, (Aug. 20, 2017, 11:47 AM), <https://www.thehindu.com/opinion/op-ed/is-cbi-the-handmaiden-of-the-government/article19272931.ece>.

¹³ Supra at 8

2. In addition to this fundamental issue, there are critical problems regarding the CBI's functioning as well. As per the Delhi Special Police Establishment Act, the CBI can investigate offences in the states only if the concerned state government gives its consent. This is in keeping with the existing constitutional scheme, where although criminal law and procedure are subjects on the Concurrent List of the Indian Constitution, public order and police are State List subjects. This means that normally, both central and state criminal laws are enforced by the state police.
3. There have been several instances in the past where Opposition-ruled states have denied consent for CBI investigations, usually over political considerations. For instance, in November, Andhra Pradesh and West Bengal withdrew their "general consent" for CBI investigations.

In some of these cases, the Supreme Court and High Courts have intervened and directed the states to transfer investigations to the CBI, effectively superseding state consent. This overall uncertainty in the existing state of affairs is deeply concerning, as it leads to Centre-state friction and also impedes the CBI's operation in important cases, causing avoidable delays. Further, the present constitutional and statutory framework does not provide any guidance regarding the kinds of cases which the CBI ought to prioritise and investigate.

SOLUTIONS

To address these issues, the CBI first needs a dedicated and separate law that can provide it with unequivocal statutory backing. While the primary purpose of this law would be to resolve concerns regarding the CBI's legal status, it should help in dealing with other contentious issues as well.

For instance, it can specify the CBI's organisational structure, a charter of functions, the types of offences it can investigate, and the nature of its superintendence and oversight. This will help in consolidating the CBI's legal framework, which is presently scattered across other statutes like the Central Vigilance Commission and Lokpal Acts, reflecting the piecemeal nature of previous reform measures.

To harmonise the relationship between the CBI and state police, CBI reform must also deal with the problems surrounding state consent. For this, through a constitutional amendment, "federal offences" should be included in the Union List of the Seventh Schedule of the Constitution.

This will enable the CBI law to designate certain crimes as federal offences, subject to statutorily defined criteria. These criteria could include, whether the offence has international, national, or inter-state implications, whether it relates to the activities of the central government, or to corruption in the All India Services.¹⁴

¹⁴ Id

The law should allow the state police and the CBI to exercise concurrent jurisdiction over investigation of federal offences, with the CBI having precedence over the police. This would mean that state consent would not be required for the CBI to investigate such offences. However, if the CBI chooses to not intervene, the state police can proceed with the investigation.

It is essential that the criteria used for identifying federal offences is framed carefully, to ensure that the CBI's jurisdiction does not become too broad or overarching. For non-federal offences, the present mechanism of requiring state consent should be retained, with the police having primary jurisdiction. This would establish a clear demarcation between the respective roles of the CBI and the state police, while preserving the federal balance between the Centre and the states. It would also guide the CBI regarding the kinds of cases that it should investigate, leading to more principle-based and transparent interventions.

It is crucial that India's premier investigative agency has a well-defined mandate, in addition to appropriate statutory and constitutional backing. The above proposal should enable the CBI to perform its role efficiently and within the federal constitutional framework. If the CBI is not reformed at the earliest questions will continue to be raised in the future.

CONCLUSION

Firstly, the apex court in series of decisions has held that the CBI is constituted under the DSPE Act, 1946 so, the 2013 Guwahati HC judgement which says exactly opposite does not follow the principle of stare decisis and therefore is bad in law.

Secondly, instead of staying the HC judgement the Honourable SC should have quashed the decision by writ of certiorari. Had it done so the Calcutta HC would not have gone into the constitutional and statutory validity of the Central Bureau of Investigation.

So, the present scenario would have been different had either the Guwahati HC given a proper order or the SC quashed the former order.

Another solution to this is a dedicated and separate law that can provide it with unequivocal statutory backing to address the issue of its unconstitutionality. Further, the CBI's legal framework is presently scattered across other statutes like the Central Vigilance Commission and Lokpal Acts. A legislation the primary purpose of which would be to resolve concerns regarding the CBI's legal status could also help in dealing with other contentious issues like the latter.