

Indian Intelligence Agencies In Democratic Framework: An Analysis

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Introduction

The aim of Intelligence is to have prior knowledge of plans of enemy states. All-round intelligence of culture and mental approach of enemy is necessary to get hints and warnings of their intended attacks to prevent them before their occurrence. Many democratic countries have emphasised on the need of proper functioning of these agencies as per basic democratic principles, especially since 9/11 attacks on USA. It acted as a wakeup call for western countries to opt for strict policies to protect citizens and promote national security. For being effective, Intelligence agencies are bound to perform in a secretive manner and this leads to a conflict when they operate in a democratic state like India. On one hand, democratic regime asks for transparency and accountability, but on the other side, use of 'secret practices' run against these two principles i.e. transparency and accountability of such a governance. The belief that 'knowledge is power' prompts them to do anything for the sake of secrecy. But when an activity is to be protected from public inspection, like secret intelligence operations, it is necessary that parliament, especially the executive, should be watchful on them.

With the increase of danger to national security, a powerful and well equipped intelligence apparatus is the need of the hour, but without deviating from the basic democratic governing principles. Different supervisory mechanisms on intelligence operations can be found in the world, with their rigidity depending upon the kind of regimes. India's internal and external intelligence agencies- the Intelligence Bureau and the Research and Analysis Wing (R&AW) perform many activities of counterterrorism, to deal with separatist movements and to be prepared for anticipated attacks, but in the absence of any formal statutory charter that authorises them to do so. In addition to it, there is The National Technical Research Organisation (NTRO), created along the lines of USA's National Security Agency, which was established as an intelligence gathering agency in 2004, on the recommendations of a Joint Task Force headed by former Research & Analysis Wing Chief Girish Saxena. All three agencies are connected to different ministries- the Intelligence Bureau reports to the Home Minister, the Research & Analysis Wing to the Prime Minister and the National Technical Research Organisation reports to the National Security Adviser.

There have been failures- of efficiency, security and of privacy that clearly raises doubts on the present framework as an instrument of observance and control for the government. There must be four levels of an effective oversight mechanism, namely, internal, executive, parliament and external review bodies. In this context, due consideration should be given towards maintaining a balance between supervision and functioning of these agencies, so that oversight mechanisms don't hamper their speed and efficiency in operations.

Need for supervision in India

This necessity of legislative supervision is based on the grounds of efficiency and basic constitutional and administrative law. Our constitutional scheme permit the Union government to frame such a legislative mechanism, as Intelligence Bureau specifically is mentioned in Entry 8 of the Union List.

The Intelligence Bureau, which manages internal security, is one of the oldest intelligence institutions in the country that originated from the Imperial Intelligence Bureau of the British Raj. Until 1968, when Research and Analysis Wing was established, the IB also managed external intelligence. Its main focus is on China and Pakistan, but since its inception, the organisation has expanded itself and its influence is increasing globally. Its structure is not much known among masses, barring a report in 2000 from The Federation of American Scientist's which estimated the R&AW's strength at about 8-10 thousand agents with budget of \$145 million. In comparison to the procedure in the US or Britain, the Director of R&AW reports directly to the PM and not to the Ministry of Defence. The Director holds the position of Secretary (Research) in the Cabinet Secretariat, which is a part of the Prime Minister's Office (PMO).

The recommendations given by the Task Force led by former RAW Chief G.C. Saxena, recommended in the year 2000 to make IB fully accountable for all internal security issues. For this, a charter needs to be formulated under which the IB would function- and it is necessary for the R&AW too. The notion of an "intelligence community" about which the recommendations speak, can only be achieved when these agencies are managed through formal charters with proper cooperation and minimum overlapping.

Concerns of Privacy

The possibility of interference of intelligence operations into a citizen's privacy is a major concern. News in the Outlook magazine in the year 2010 disclosed unlawful phone tapping by the National Technical Research Organisation. Although calls on certain specific numbers only may be intercepted, but the authority should first justify the need for it. As the existing safeguards haven't been very effective, they always give way to illegal interception for the reasons of national security.

Whistle-Blower Protection

The whistleblower protection for whistleblowers is the need of the hour. The case of Maj Gen V.K. Singh is an example of it. After the launch of his book on corruption in the RAW, he was charged under the Official Secrets Act. In the absence of any legal framework for accountability, his allegations were not looked into and only official secrets act was enough to punish him. This shell of secrecy is becoming heavier day by day as the government has also changed the pension rules for officials serving in intelligence agencies. They now sign an oath of secrecy to not disclose anything even after retirement. In case of noncompliance, they can be deprived of their pension. Thus, the threat of prosecution stays in one form or the other, even after retirement. If legal immunity is given to them, they would be happy to provide the proof of illegalities.

Budgetary Autonomy

Oversight mechanism is also necessary to provide economic autonomy, as due to lack of a charter, it becomes very easy to decline basic requests of agencies or to trap them in the bureaucratic formalities, even when they are urgently required. As it happened, when the Finance Ministry declined the IB's request for computer trained personnel to create and maintain their Multi-Agency Centre (MAC). The funding for the Joint Task Force on Intelligence (JTFI) and associated training has also been curtailed. The difference is evident from the fact that the head of the US' FBI can allow the purchasing of even very costly intelligence equipment, but the Director of India's IB has no authority to purchase a new desktop computer for his secretary without the approval of Finance Ministry.

Perils of Politicisation

The absence of oversight mechanisms have led to the politicisation of intelligence matters. As found in many phone tapping cases, the major focus of agencies is on political surveillance and on gathering election-related data for the ruling government. There is a need to draw distinction between the security of the nation and the security of the government. The lack of a clear strategic guidance and responsibilities hamper the efficiency of the agencies.

Current scenario is full of loopholes. The RAW doesn't differentiate between those who perform secret tasks and those who cooperate with services like the Central Intelligence Agency (CIA) etc. This leads to the public exposure of people having sensitive information. Moreover, the internal surveillance group of RAW i.e. Counter-Intelligence Security Division (CISD) has been strongly opposed by its personnel as unnecessary harassment and in 1980; they went on strike against it. As intelligence gathering is an important activity to guide policy-makers for the fulfilment of interests, it necessitates the review of agencies by the people's representatives.

Ideal Framework of Accountability

In the beginning, three types of accountability may be identified: horizontal, vertical and third dimension. Horizontal accountability has the aim to encourage an environment of cooperation among state institutions. Vertical accountability denotes hierarchical relations between principals

and subordinates, including efforts of citizens, media and local organisations to compel public servants to perform their functions within permissible limits. Third dimension is the part played by international actors like foreign governments, inter-governmental organisations and international non-governmental organisations in making a state institutional actor responsible.

The four-tier framework

In a democracy, the supervision of the intelligence services is a joint responsibility of the executive, legislature and the judiciary. The process of checks and balances should also be there to stop the monopoly of one organ in the matter of supervision. Thus, the intelligence agencies themselves, Parliament, and external review bodies all have a role to play in it. The levels at which supervision mechanism is required, are:

- (i) Internal control by the agencies.
- (ii) Executive control.
- (iii) Parliamentary oversight.
- (iv) Oversight by independent external bodies.

i. Internal Control

As this is the first level to begin with supervision, the first requirement is of establishing a 'mandate'- for the functioning of agencies, to define the role of their Directors, and to frame procedural safeguards within the agencies.

The Mandate

The definition of mandate will depend on the kind of activities that should come within the scope of national security. It is necessary to demarcate, due to the large misuse of the agencies' machinery for entirely political and personal purposes. It's better to have a detailed legislation in place, which clearly defines the role and sphere of the agency for specifying the different features of national security rather than leaving the issues wide enough with the use of broad phrases as "protecting the security of the state". To provide for a clear definition of national security, the Australian Security Intelligence Organisation (ASIO) Act, 1979 can be looked into which imposes a strict check on a number of operations including espionage, sabotage, politically motivated violence, attacks on Australia's defence system and acts of foreign interference. The special powers given to agencies need check so that they do not violate the rule of law and intrude on civil liberties.

The Director

The appointment of Director in an agency, may be at the initiative of the executive (cabinet ministers), but there must be some scrutiny of it by an independent organ. In Belgium, the Director-General takes oath before the Chairman of the Permanent Committee for Supervision of the Intelligence and Security Services. In Australia, the Prime Minister must consult the leader of the opposition in the House of Representatives before making the appointment. In both of these

instances, the initiative to propose the name is of the executive, but the legislature has the right to agree or disagree.

At present in India, the consultation with the leader of the opposition in the appointment of the Director is not mandatory, which rather should be made mandatory. Now, only the Appointments Committee of the cabinet is responsible for the appointment of Director.

Safeguards against Abuse and Special Powers

Checks and balances within the agencies are required to develop a mechanism so that any kind of procedural illegality can be detected and the protection of the whistle-blowers can be ensured. The powers given to the agencies may violate the fundamental rights of the individual u/a 21- right to life and personal liberty and right to privacy. Any sort of infringement of these rights should only be based on some reasonableness and it is necessary to impose some strict legal conditions on its use. Arbitrary/discriminatory use of special powers is against human rights and rule of law. When human rights are to be curbed, the reasons for the restrictions must be mentioned and informed to the concerned person. The protection of an individual's personal data has become a cause of concern. Any sort of interference into the personal digital life of a person by any competent authority can only be allowed if it is as per the established law, has some nexus with the purpose for which the intrusion is made and is subject to control by an external independent authority. Phone tapping, surveillance of conversations and the use of undercover agents must be put under the ambit of law, so that aggrieved targets can challenge it in a court.

ii. Executive oversight

Parliamentary oversight and executive oversight should work in tandem, as their effective functioning is dependent on each other. Parliament can bank on ministers to answer for the acts of the agencies only if they have the real authority of to control them and are informed about the actions taken in their name.

Checks against Executive Abuse

India has been a witness of wide misuse of the intelligence machinery for both personal and political reasons. The expose of unlawful phone tapping by the NTRO is not the only instance. As per the report of the Girish Saxena Task Force, it is most probable that unnecessary secrecy can be used for cover-up purposes. The government may try to deny information on the pretext of "sensitive issue of national security" on the matters of public importance which are necessary to disclose as per the accountability rule. The safeguards should work at two stages here: first, to avoid such abuse from happening and, second, to save those who expose such abuse or say no to orders which they consider as illegal.

Another thing to keep in mind is to make sure that the instructions of executive are put in writing, as this has become a universal legislative rule. For instance, The Canadian Security Intelligence

Service Act, states that the Director of the agency concerned has charge and power of management under the direction of the Minister, but the directions of the Minister's must be in writing. The statute further provides for a copy of such directions to be forwarded to the Review Committee.

To maintain an unbiased approach, the provision in the Australian law could be looked at, where the Director-General is under obligation to inform the leader of the opposition, so that they don't feel like excluded from the operations of intelligence agencies. Last but not the least protective measure to prevent political misuse is that the agency should be given a liberty to say openly that it reject all those actions that are meant to promote the interests of any political party, as this has been implemented in the UK through legislation. The doors of the PM's residence are always open for the agency heads.

iii. Parliamentary Oversight

The supervision by parliament provides legitimacy and makes sure the accountability of the intelligence agencies. It can make certain that these agencies are protecting the state and constitution, rather than serving some narrow political interests. The proper use of public money by the agencies can also be ensured by it. Parliamentary oversight committees are functioning in the Argentina, Australia, Canada, United Kingdom, United States, New Zealand, Norway, Poland and South Africa. This is the indication that some countries realised the importance of such a mechanism in a democratic country. The composition of a Parliamentary oversight panel should represent a cross-section of political parties and ensure a clear demarcation between the body and the intelligence agencies that it aims to regulate.

The oversight body should have adequate access to information and documents from agencies, so that it can begin investigations. It should be conferred with the authority to consult external experts while preparing their annual reports. Whereas agencies should be allowed to make representations about some contents of the report, the final decision must lie with the Parliamentary committee. As the committee is 'owned' by parliament, it would be more appropriate for the committee to report directly to parliament instead of the government. The control of budget is equally important, so a transparent process of budget-making is must to ensure that agencies use funds only for the authorised purposes by the legislative branch.

iv. External Review Body

Whether it is the issue of agencies' likely abuse of surveillance powers or of security clearance, it is necessary that there be some redress mechanism for those whose civil liberties might get infringed. A conflict of interest is bound to happen, as the complainant will try to get evidence but the agency will try to conceal the information from becoming known to all, due to the secrecy attached with the intelligence operations. As stated earlier, the objective here should be to find a sense of balance between the global belief of individual freedom and fair process, on one side, and a practical understanding of security issues, on the other hand.

The judiciary is the centre point in the efforts to create a strong supervisory mechanism, giving rise to an intelligence apparatus which is efficient but is limited in powers, follows the rule of law and is answerable to common public through government, as should be appropriate in a democratic form of government like India.

If the judicial process is not consistent with the kind of balance that is necessary, then the solution will be to set up an independent tribunal. This provision has been made in the UK, where under the Intelligence Service Act, 1994, a tribunal presided by a Commissioner deal with all public complaints against the intelligence agencies. Another tribunal investigates interception of communications under a legislation enacted in 1985 for the purpose. Like in the UK, India may well establish a special tribunal to handle complaints either against a specific agency or grievances against abuse of powers. To help in gathering evidence in such cases, special counsels have been provided to complainants in Canada and the UK, whose duty is to counter security-related arguments of the agencies.

Conclusion

After considering everything, there shouldn't remain any doubt that what India needs today is a powerful, unarguably efficient intelligence setup that can confront the increasing terrorist threat to the state and also performs its functions in accordance with the established law. So by keeping this objective in mind, this paper has drawn attention to the urgent need for an efficient intelligence oversight mechanism for India's intelligence network- the IB and RAW especially. Though the legal aspect is of primary importance in framing legislation for intelligence agencies and its relation with other main organs- the executive, the legislature and the judiciary, there are other basic issues also of equal concern like: fundamental human rights; the right to dissent; protection of national security; and, the importance of justifying the non-disclosure of information to parliament and citizens and curtailing the rights and freedoms of citizens. The collaboration of all these things must ensue in tandem with legislation, if we really want to reunite the beliefs of democracy with the need for effective intelligence.

Endnotes

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