LAW campaign

Reforming intelligence services : Some issues

M. JASHIM ALI CHOWDHURY

THERE is an inherent dilemma between democracy, which requires accountability, and intelligence, which requires secrecy. In our country, the democratic accountability of the executive to the legislature seems to be entirely exempted for intelligence services. As a result, intelligence agencies cannot be subjected to the same rigors of public or parliamentary debate or the same scrutiny by the media as other government agencies. Yet they being institutions within democracy, are responsible not to themselves, but to the elected representatives of the people, and, ultimately, to the populace. This argument gets stronger foothold when the allegations of illegal detentions, forceful interrogations and custodial violence against the 'dissidents' by the members of intelligence services become so rampant as to entree in the public a feeling that these agencies have placed themselves above the rule of law. So the dilemma may well be reduced to the question: 'How much secrecy is necessary to preserve the efficiency of intelligence?

The intelligence apparatus of Bangladesh

The intelligence agencies operating to protect internal or national security in Bangladesh include National Security Intelligence (NSI), Directorate of General Forces Intelligence (DGFI), Special Branch (SB) of the Police, the Special Security Force (SSF), the Defence Intelligence Units, Criminal Investigation Division (CID) of the Police, Intelligence Cell of the NBR and Intelligence Cell of RAB. The NSI, DGFI and SSF are directly accountable to the Prime Minister. The NSI was created by a Cabinet decision in 1972 and hence lacks a statutory basis. The SB is a part of the Police and reports to the Home Ministry. Government almost secretly allocates money for intelligence services, without subjecting the allocation to parliamentary oversight during the passing of national budget. Functionally they enjoy almost unrestricted power of policing over any citizen severely affecting his constitutionally guaranteed human rights. As for example, the SSF is empowered to arrest any person without warrant or to cause him death if there is 'reason to believe' that his movement or presence is prejudicial to the physical security of a VIP (Section 8 of the Special Security Force Ordinance, 1986). This again is exacerbated by Section 11 which prevents prosecution for such acts without executive sanction.

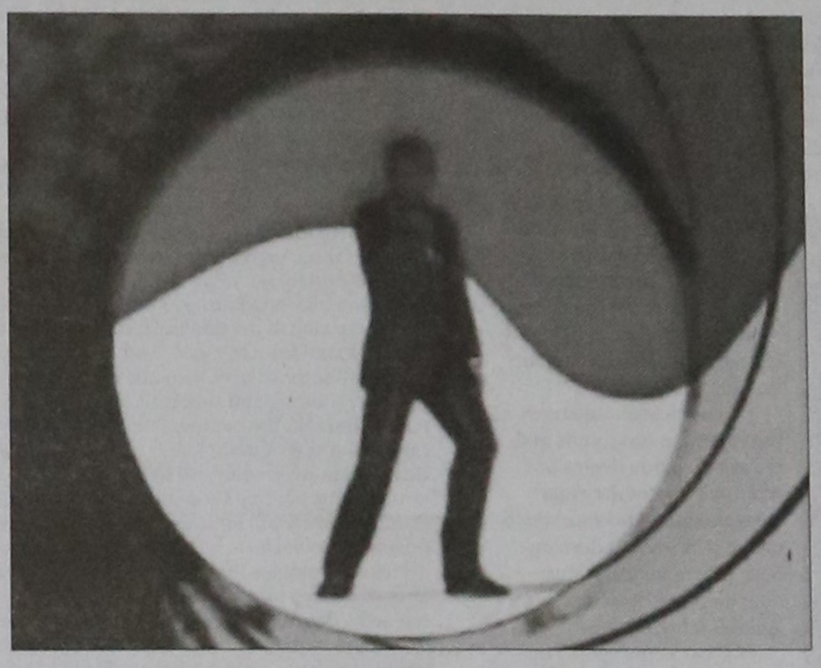
So the role of intelligence in a democratic society is too important to be left without any scrutiny or regulation. Though the very nature of the intelligence services emphasizes more on internal mechanisms of control than external ones, it is very dangerous to leave the oversight exclusively to them. Both internal and external (legislative and judicial) controls are necessary to ensure an effective oversight mechanism.

Parliamentary oversight

Though there are 38 Standing Committees of the Parliament on different Ministries including the Ministries of Defense and Home Affaires, there is none on the intelligence specifically. Creation of such a special committee may be a good choice. Although the exact reach of the committee may be debated, it must minimally and necessarily include the inspection of operations and activities, of sources and methods for obtaining information, and of the information produced by intelligence activities, including classified and especially sensitive information. Without these facilities, the parliamentary oversight is simply not going to be ineffective to detect and deter misconducts and illegalities. The 'secret budget' assigned to the intelligence agencies must see the light of the day in this committee. The lesson learnt from the US and UK is pertinent in this regard.

The US and UK model

In the United States, the two houses of Congress have independent oversight committees - the Select Committee of Intelligence in the Senate and the Permanent Select Committee on Intelligence in the House of Representatives. The committees have power of subpoena and can authorize appropriations for intelligence activities. The President is obliged by the General Congressional Oversight Provisions (50 U.S.C.A § 413) to ensure that they are kept fully and currently informed of the intelligence activities. Additionally the President



ensures that any illegal intelligence activity is reported promptly. Further, the Director of Central Intelligence keeps the committees fully and currently informed of all covert actions of any department or agency.

Care has been taken to the concern that some intelligence information is too sensitive to share publicly. In general, only the identity of sources and the details of technical operations are withheld from the intelligence committees. The Director's reporting requirements are subject to two exceptions: First, his reporting shall be 'consistent with the protection from unauthorized disclosure of classified information'. And Secondly, information may be limited if the President determines that 'it is essential to limit prior notice to meet extraordinary circumstances'.

In UK, the Intelligence and Security Committee established by the Intelligence Services Act 1994 takes the role. It comprises nine members taken either from the House of Commons or the House of Lords. Five of the Members belong to the ruling party. They are appointed by the Prime Minister in consultation with the Leader of the Opposition. The Intelligence and Security Committee holds regular weekly meetings while Parliament is in session to discuss issues pertaining to the work of the three intelligence services. The Committee examines the role, function and management of the services, their tasking and targets, financial matters, staffing and structure.

The powers to obtain evidence are set out in Schedule 3 to the 1994 Act. Information defined as 'sensitive' can be withheld from the Committee if the information may lead to the identification of sources, of operational information on any past, present, or future operations. Additionally, the government does not have an obligation to disclose information to the Committee that was not asked for and the Committee has no express power to obtain information from anyone other than the Heads of the Agencies.

Both the models show that complexity and secrecy of intelligence makes it inevitable for the proposed parliamentary committee to conceive some inabilities and restraints. But what is ensured is the constant analysis and scrutiny of the performance of the agencies.

Judicial control

Theoretically the intelligence agencies are subject to the judicial process when they commit a crime under the Penal Code (e.g., Chapter IX, Offences by or relating to Public Servants) or any other law. Constitutional provisions governing the Fundamental Rights apply to their activities as well. In practice, however, intelligence activities rarely reach the courts. They only do so when scandals or media intervention shed light over some specific episode. And then, generally it is too late to repair the damages already caused.

Conversely, the road to judicial control of the intelligence has at least two stumbling blocks first, the lack of special judicial arrangement to deal with delicate issues involved in intelligence activities and secondly, the culpability of the revelation of classified information by security or intelligence agents. Yet the following two devices might be able to balance the governmental need to protect intelligence information and the right to a fair trial in order to preserve constitutional due process guarantees.

A special intelligence tribunal

A Special Tribunal like one created under the U.S. Foreign Intelligence Surveillance Act 1966 may be considered. This is a Special Court to review in secret the applications filed by intelligence services to conduct electronic surveillance within the United States for foreign intelligence purpose. Applications are heard and either granted or denied by the court composing seven Federal District Court judges designated by the Chief Justice of the United States Supreme Court. The law also provides for a court of review to hear appeals of denials of applications.

To handle classified information some special procedures are prescribed. One such example is the United States' Classified Information Procedures Act, 1980. Under the Act, classified information can be reviewed under the regular criminal procedures for discovery and admissibility of evidence before the information is publicly disclosed. Judges are allowed to determine issues presented to them both in camera and ex parte. The defendant is allowed to discover classified information and to offer it as evidence to the extent it is necessary to a fair trial and allowed by normal criminal procedures. On the other hand, the government is allowed to minimize the classified information at risk of public disclosure by offering unclassified summaries or substitutions for the sensitive materials.

Involvement of the Attorney General's Office

Involvement of the Office of Attorney General in the oversight structure may also be considered. Under the President's Executive Order on Intelligence, the US Attorney General is required to be involved in the review of various aspects of intelligence, especially concerning the implementation by the agencies of the provisions of the Executive Orders setting forth the duties and responsibilities of intelligence agencies. Within the Department of Justice, the Office of Intelligence Policy assists the Attorney General in carrying out this review function. The Intelligence Oversight Board attached to the Office of the President refers apparent violations of law to the Attorney General. Here the Department of Justice works as a Scanning House which signals green on the possible questions of law arising from a particular operation.

Conclusion

Given the political realities and trauma of the recently past emergency, the kinds of measures discussed above would constitute way ahead towards a more productive, responsive and accountable intelligence system. It should be remembered, however, that having controlling bodies by itself does not necessarily imply a strengthening of accountability over secrecy. The oversight mechanisms, especially the judicial and parliamentary, are futile if the government is not willing to cooperate with them. Public opinion, and therefore the media, may act as an outside control element supporting the controlling bodies in controversial actions or limitations. There is still a long way to go and we need vast public debates in this area.

M. Jashim Ali Chowdhury is a Senior Lecturer in the Department of Law, Northern University Bangladesh (NUB), Dhaka.

HUMAN RIGHTS advocacy

US to adopt stronger laws for child farm workers

Proposed legislation would eliminate double standard in child labor laws

Children as young as 11 and 12 are working 10 or more hours a day in one of the country's most dangerous occupations. It's time to update antiquated laws and make sure that children harvesting food in the fields receive just as much protection as the teens serving that food at McDonald's. Zama Coursen-Neff Deputy Director, Children's Rights Division

THE US Congress should amend outdated labor laws that allow even young children to work in commercial US agriculture, Human Rights Watch said today. Legislation introduced today by Congresswoman Lucille Roybal-Allard of California would for the first time apply the same age and hour requirements to children working in agriculture as for children working in other occupations. Hundreds of thousands of children under age 18 work in US agriculture.

In states including Florida, Texas, North Carolina, and Michigan, Human Rights Watch has found that child farmworkers work longer hours, at younger ages, and under more hazardous conditions than other working youths. This summer, Human Rights Watch interviewed children hoeing cotton and sorghum in scorching heat, cutting collard greens and kale with sharp knives, hitching and driving tractors, and stooping for hours picking cucumbers.

Pay was, at best, minimum wage, but was often far lower. Many employers provided no drinking water or toilets. Children described smelling and, in a few instances, being sprayed with pesticides. Many left school in April or May, or were still working elsewhere when their schools started in August.

"Children as young as 11 and 12 are working 10 or more hours a day in one of the country's most dangerous occupations," said Zama Coursen-Neff, deputy director for the Children's Rights Division at Human Rights Watch. "It's time to update antiquated laws and make sure that children harvesting food in the fields receive just as much protection as the teens serving that food at McDonald's."

Agriculture is one of the most dangerous types of youth employment in the United States. In 2000, the Department of Labor reported that the risks of work-related fatalities for youth working in agriculture were four times as high as the average for all working youth.

The Roybal-Allard bill, the "Children's Act for Responsible Employment (CARE)" would amend the Fair Labor Standards Act to prohibit the employment of children ages 13 and younger in agriculture, except for those working on farms owned and operated by their parents. It would allow 14- and 15-year-olds to work only for limited hours, outside of school hours, and would raise the age for hazardous agricultural work to 18.

Currently, under the Fair Labor Standards Act, any agricultural employer can hire children ages 12 and 13 to work unlimited hours, outside of school hours with parental permission. On small farms, there is no minimum age for children who work outside of school hours with their parents' consent. In contrast, employers outside of agriculture are prohibited from hiring children below age 14, and can employ 14- and 15-year-olds for no more than 18 hours in a school week, and not more than 40 in a non-school week. No such restrictions apply to children working in agriculture.

"The long hours and low wages of child farmworkers undermine their education and perpetuate cycles of poverty," Coursen-Neff said. "US practices also violate international law."

In 1999, the US ratified the International Labour Organization's Worst Forms of Child Labor Convention, which prohibits work that is likely to harm the health, safety, or morals of children. The guidelines that accompany the convention recommend that prohibited forms of child labor include work with dangerous machinery, equipment or tools, and exposure to hazardous substances and temperatures.

In a letter sent on September 15, Human Rights Watch urged members of the House of Representative's Committee on Education and Labor to support the bill and act quickly to ensure its passage.

Roybal-Allard announced the introduction of the bill in advance of a September 16 US Department of Labor event focusing on the plight of migrant farmworker children. Labor Secretary Hilda Solis is the host.

Also available in:

Source: Human Rights Watch.

HUMAN RIGHTS monitor

Malaysia sentences under shariah law for drinking alcohol

AMNESTY International has repeated its call for Malaysia to stop using the penalty of caning altogether, after a court on Monday sentenced an Indonesian Muslim man to six strokes of the cane and a year in prison for drinking alcohol in a restaurant in Pahang state during August.

Nazarudin Kamaruddin, 46, has been remanded in prison since being charged with the offence on 2 September. He has been unable to post bail or pay a fine imposed by the court.

His sentence comes less than two months after the same Shariah High Court in Pahang sentenced a Muslim woman, Kartika Sari Dewi Shukarno, to six strokes of the cane and fined her RM5,000 (approximately US$ 1,400) after she pleaded guilty to consuming alcohol in a hotel bar in December 2007.

"These cases highlight the epidemic of caning in Malaysia," said Sam Zarifi, Amnesty International's Asia-Pacific director. "Since 2002, more than 35,000 people have been caned or flogged, most of them irregular migrants."

The same judge who presided in Nazarudin's case had also threatened to jail Kartika for three years if she did not pay the RM 5,000 fine, which she subsequently paid.

Initially Pahang authorities said that Kartika's sentence would be delayed until after Ramadan, around the 20 September.

The government then deferred the caning until the sentence is reviewed by the Shariah Court of Appeal in Pahang.

She has not appealed against her sentence. If the caning goes ahead, she will be the first woman in Malaysia to be punished in such a way.

In June 2009, the Malaysian government announced that they had sentenced 47,914 migrants to be caned for immigration offences since amendments to its Immigration Act came into force in 2002. At least 34,923 migrants have been caned between 2002 and 2008, according to the country's prison department records.

Amnesty International has also called for the government to repeal all laws providing for caning and all other forms of corporal punishment.

"Caning is a form of cruel, inhuman and degrading punishment and is prohibited under international human rights law," said Sam Zarifi. "The Malaysian government should do all it can to stop this inhumane punishment being used in any circumstance."

Caning is currently used as a supplementary punishment for at least 40 crimes in Malaysia, but Nazarudin's sentence is only the second time it has been used against anyone found guilty of violating the country's religious laws. The Shariah law applies only to Muslims, who make up 60 percent of the country's 28 million.

Source: Amnesty International.