LAW *opinion*

Law of emergency and the caretaker government

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WHEN the nation has been battling its way hard through three months of turbulent waters of political and legal chaos, proclamation of emergency has apparently secured some breathing space for all. Now the question is how and where do we move from here. The government that has been formed with Dr. Fakhruddin Ahmed as the Chief Adviser needs strong moral and legal standing for its success in ensuring free, fair and credible general elections in the country. New government's constitutional position, aims and objectives, procedures of work and duration ought to be clearly set and stated to invoke more support and confidence of the people.

Emergency provision was not in our original constitution. This notable exclusion was presumably the result of misuse of emergency provisions in our predecessor Pakistan's constitution. Even in more or less credible Indian democracy use of emergency provisions during Prime Minister Indira Gandhi's rule in mid seventies was not bona fide, and proved ill-fated. Insertion of emergency provisions in our constitution by way of amendment in 1973 was dictated by apprehension of rising instability resulting from fast deteriorating socio-political and economic conditions then prevailing in Bangladesh. However, proclamation of emergency in 1974 and then under different circumstances in 1981, 1987 and 1990 could not correct the situation for which they were proclaimed. Now emergency has been proclaimed under qualitatively different situation, and not by any ruling party or person.

When emergency provisions were inserted in our constitution and some amendments made to those provisions subsequently, there was no provision for non-party caretaker government. No emergency proclamation, therefore, could have been contemplated during the pendency of such a government. This has made the present proclamation of emergency somewhat unique and calls for investigation and analysis.

If law needs to be applied on correct appreciation of fact, there is no doubt emergency has been proclaimed on January 11 on sound constitutional foundation. For the first time in our memory proclamation of emergency and measures adopted thereunder have been so welcomed by the people at large and, with few exceptions, by the political parties as to characterise it as benevolent emergency. Bare facts which justified the proclamation were brought to light by political agitation accompanied by vigilant media and strong voice of the civil society.

There are instances in our subcontinent when extra-constitutional measures had been adopted to overcome political crisis, which were later justified and legalised by judiciary by the doctrine of state necessity and principle of efficacy, and in many cases they have been given constitutional protection by subsequent constitutional amendments. In most cases, it was usurpation of power, breach of democratic norms and rule of law, needing post-facto validation. In the present instance, doctrine of necessity itself is the underlying rationale for Art. 141A under which emergency was proclaimed. Extraordinary powers of the executive including the power to suspend some fundamental rights (Art. 141B) and enforcement of these rights (Art. 141C) by judiciary have been

provided for. However, while the express and implied powers of the executive during emergency are clear, the duration of exercise of these powers by the caretaker government is not as clear.

To repeat, emergency provisions in our constitution were not envisaged for a peculiar non-party caretaker government under Articles 58B, 58C, 58D and 58E. Under normal conditions, duration of emergency period under Art. 141A looks simple. It can extend upto 120 days unless further extended by the parliament. If emergency is proclaimed when parliament stands dissolved, or such dissolution takes place during emergency period, proclamation shall cease to operate thirty days after the reconstituted parliament first meets, unless, of course, further extended by the new parliament.

There is nothing to prevent the president from extending the limit of 120 days when parliament stands dissolved, except that he has the constitutional obligation to hold elections within 90 days, in which case emergency proclamation would automatically cease to operate at the expiration of thirty days of the reconstituted parliament, if not otherwise decided by the new parliament.

However, in case of caretaker government, a further question looms large that the constitution did not contemplate its duration beyond 90 days, and this impression is permeated in popular mind. But this duration has nowhere been specifically laid down, again except that elections have to be held within 90 days after which it shall hand over power to an elected government. This reverts us back to the issue of 90-day limit of holding general elections which was a burning constitutional controversy upto the time when emergency was proclaimed.

It appears now that proclamation of emergency has automatically resolved the 90-day controversy. In fact, anticipated grave consequences of likelihood of imposed general elections within 90-day limit on January 22 justified the proclamation of emergency. This vindicated the arguments of those who strongly advocated for rational interpretation of the Art. 123(3) that in case of act of God or otherwise arising of extraordinary circumstances, time could be extended beyond 90-day limit. They argued that, God forbids, if any flood, or cyclone or earthquake of hugely catastrophic severity strikes Bangladesh around the election time, would not the time be shifted? This time it was not the act of God, but of man, the possibility of impending catastrophe being no less. So the emergency and postponement of elections was truly justified, as general reaction of the citizens have shown. The constitutional inference from the proclamation of emergency and subsequent postponement and cancellation of elections is that doctrine of necessity can justify going beyond 90-day limit. This could also be done by a reference by the president to invoke advisory jurisdiction of the Supreme Court, in case proclamation of emergency was not opted for. This writer believes that under the circumstances proclamation of emergency was a better constitutional option, which was rightly chosen.

It is evident that the present caretaker government after the proclamation of emergency has not lost its caretaker character, nor it would lose such character after three months. It has constitutional validity and popular acceptability. While its duration is not constrained by time-limit, its acquired legitimacy would survive only on meticulously worked out schedule to provide for free, fair and credible elections within shortest possible time.

The Chief Adviser Dr. Fakhruddin Ahmed's address to the nation on January 21 sounded very positive indeed. Given the goodwill and hard-work of the caretaker government and its administrative personnel and cooperation of the people at large as well as the political parties, there is no reason why the constitutional obligation of holding free, fair and credible elections cannot be held in a prescribed time-frame. So far regular law-enforcing agencies with effective assistance from the military have been employed and engaged with considerable success. In any emergency military plays a pivotal role. So far as the present emergency is concerned, its role has been very encouraging. It is further encouraging that the military is not engaged as means to any extra-constitutional ends, rather its apparent support for constitutional institutions is felt by the people. This is good sign for a nascent democracy and rule of law.

Contrary to historical antecedents, the present proclamation of emergency with its popular support is potentially capable of providing some good opportunities for Bangladesh. Its first constitutional imperative is of course holding free, fair and credible general elections. This presupposes posting neutral and efficient personnel at election duties, credible reform of election commission and preparation of proper voter list, and as suggested by many, use of transparent ballot box and introduction of voter ID. It also presupposes eradication of many vices of election culture in Bangladesh, specially use of black money and muscle power. Role of law enforcing agencies in collaboration with the military has to be absolutely neutral. These issues were also mentioned by the Chief Adviser in his address to the nation.

It is expected that under the emergency provisions (Articles 141B and141C), it would not be necessary to suspend all the fundamental rights guaranteed in Articles 36-40and 42 and enforcement of these rights in all instances. Emergency powers can be selectively used only to apprehend the criminals and those who would impede caretaker government's efforts to reach its constitutional objective. Freedom of press and right to information may not be curtailed so far as it does not pose any hazard for honest running of the government.

While the caretaker government is mandated to carry out the routine functions of the government, it is not barred in the discharge of such functions from making policy decisions, in case of necessity (Art. 58D/1). Separation of judiciary from executive; commissioning the Ombudsman Act 1980; establishment of a national human rights commission; reforming the anti-corruption commission; and autonomy for state owned radio and television are some of the vital issues which can be taken up by the caretaker government for smooth and healthy functioning of the government machinery. In fact, separation of judiciary issue has already been taken up by the present government. It has not been possible for political governments for years to positively address these issues. It is widely believed that the moment is opportune for the new caretaker government to address these issues in greater interest of the nation. This opportunity may not be lost. These works along with the task of holding credible elections may require more time, but definitely not going beyond a reasonable limit.

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CRIME & *Punishment*

NOIDA SERIAL KILLING

Need for Narco analysis test

M SHAMSUR RABB KHAN

NARCO analysis is in the limelight in the context of infamous Nithari village (Noida) serial killings. The two main accused in the Nithari serial killings Mohinder Singh Pandher and Surendra Kohli have undergone narco analysis tests in Gandhinagar in Gujarat. What exactly is this and how does it help investigators? And more importantly are the results of these tests admissible in court? Let us have a look at it.

Epistemologically, the term narco analysis is derived from the Greek word narkç meaning "anaesthesia" or "torpor" and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly Barbiturates, which act as central nervous system (CNS) depressants, and by virtue of this they produce a wide spectrum of effects, from mild sedation to anesthesia. Synthesized first in 1903, Barbiturates were very popular in the first half of the 20th century, albeit are among the oldest of modern drugs. Three of the most popular Barbiturates, which have been in use in narco analysis are: Sodium Amytal, Pentothal Sodium and Seconbarbital.

In recent times, the police in India have turned to narco analysis in eliciting confession from accused under the influence of drugs, which are supposed to relax a person's defence to the point that he or she reveals the facts or truth that he/she has been trying to conceal in normal circumstances. The person is not in a position to speak up on his own but can answer specific but simple questions. The answers are believed to be spontaneous as a semi-conscious person is unable to manipulate the answers.

Historical perspective

In History of the Criminal Law of England 1883, Sir James Stephens, the English jurist, commented on a grisly example of 'third degree' practised by Indian police, "It is far pleasanter to sit comfortably in the shade, rubbing red pepper in a poor devil's eyes than to go about in the sun hunting up evidence."

In 1922, Robert House, an obstetrician from Texas, experimented the use of narco analysis in the interrogation of suspected criminals. He arranged to interrogate two prisoners in the Dallas county jail by using scopolamine, whose guilt was almost confirmed. Under the influence of drug, both prisoners denied the crimes for which they had been detained, and upon trial were found not guilty. After the successful experimentation, House concluded that an accused under the influence of drugs cannot lie. The word "Truth Serum" is believed to have appeared first, in the news report of Robert House's experiment, and there, he came to be known as the "Father of Truth Serum."

However, in the mid-1930s, narco analysis became popular as a result of the discovery of quickly acting barbiturates with short-term effects. The term analysis is used in Pierre Janet's sense of a process that, by means of a partial dissolution of consciousness, undoes the complex syntheses of waking mental life and accesses mental content that is more automatic. Other terms have also been used, such as "narco-synthesis," "chemical psychoanalysis" and "psychosomatic narco analysis etc."

In the narco analysis test, the person's imagination is neutralised by making him semi-conscious. In this state, it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of. When the brain recognises a person or a sound, it generates a particular type of electric wave, which is called P300. Sensors are attached to the head of a person undergoing a P300 test and the subject is seated before a computer monitor. The accused is then shown certain images or made to hear certain sounds. The sensors monitor electrical activity in the brain and register P300 waves, which are generated only if the subject has some connection with the stimulus, in this case pictures or sounds. The dose depends on the age, sex, health and mental state of the person, as these drugs produce a state of intoxication that is remarkably similar to alcohol intoxiation. The procedure was mainly intended for neurotic and psychosomatic patients. However, a wrong dose can result in a person going into a coma, or even death.

Admissibility in the court

Lawyers are divided on whether the results of narco analysis and P300 tests are admissible as evidence in courts, as they claim that confessions made by a semi-conscious person is not admissible in court. A narco analysis test report has some validity but is not totally admissible in court, which considers the circumstances under which it was obtained and assess its admissibility. Results of such tests can be used to get admissible evidence, can be collaborated with other evidence or to support other evidence. But if the result of this test is not admitted in a court, it cannot be used to support any other evidence obtained the course of routine investigation.

In India, narco-analysis was first used in 2002 in the Godhra carnage case. It was also in the news after the famous Arun Bhatt kidnapping case in Gujarat wherein the accused had appeared before NHRC and the Supreme Court of India against undergoing the narco-analysis. It was again in the news in the Telgi stamp paper scam when Abdul Karim Telgi was taken to the test in December 2003.

But doubts have been cast on its reliability and legal validity i.e. admissibility in the court of law. The application of narco-analysis test involves the fundamental question pertaining to judicial matters and human rights. However, the legal position of applying this technique as an investigative aid arises genuine issues like encroachment of an individual's rights, liberties and freedom. Subjecting the accused to undergo the test, as has been done by the investigative agencies in India, is considered by many as a blatant violation of Article 20(3), which says, "No person accused of any offence shall be compelled to be witness against himself."

Though in the case of Telgi, immense amount of information was yielded, but doubts were raised about its value as evidence. The Bombay High Court, in a significant verdict in the case of Ramchandra Reddy and Others v State of Maharashtra, upheld the legality of the use of P300 or Brain Mapping and narco analysis test. The court also said that evidence procured under the effect of narco analysis test is also admissible. However, defence lawyers and human rights activists viewed that narco analysis test was a very primitive form of investigation and third degree treatment, and there were legal lapses in interrogation with the aid of drugs.

With crimes going hi-tech and criminals becoming highly trained professionals, the use of narco analysis by the investigating officials can be very useful, because whereas the conscious mind does not speak out the truth, unconscious may reveal the information, which could provide vital lead in.

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Mohinder Singh and Surendra Kohli have undergone Narco analysis test